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2011 IL App (3d) 090500-U

Order filed September 27, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3--09--0500
v.)	No. 06--CF--536
)	
CORRIE WALLACE,)	
)	Honorable Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgement of the court.
Presiding Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* Defendant failed to establish he is entitled to relief under plain-error review for various issues he failed to preserve for review; the State established a proper chain of custody for the gunshot residue kit; the evidence was sufficient to convict; the court properly denied defendant the opportunity to present hearsay evidence; it was not error to introduce phone conversations defendant made from

custody; the sentence was proper.

¶ 2 The State charged defendant, Corrie Wallace, with first degree murder and aggravated battery with a firearm. At the conclusion of the trial, the jury found him guilty of both charges. The judge sentenced defendant to consecutive sentences of 70 years for the murder and 18 years for the aggravated battery. Defendant appeals his conviction and sentence.

¶ 3 Defendant raises nine issues in his appeal:

1. The State's use of bloodhound evidence was plain error, and his counsel's failure to object to it was ineffective assistance of counsel;
2. The State did not present a proper chain of custody regarding the gunshot residue test;
3. The evidence was not sufficient to sustain his conviction;
4. The court denied him the opportunity to present evidence of a third party's apology for the crime and the same party's declaration against penal interest that he committed the crime; this denied defendant his constitutional rights to put on a defense and to confront witnesses;
5. The court allowed the State to present extensive phone conversations involving defendant while he was in custody. These were inadmissible because of foundational flaws, lack of relevancy and hearsay issues;
6. Multiple instances of hearsay evidence concerning the offender's identity denied defendant a fair trial;

7. The court denied him a fair trial by allowing improper evidence of his interest, or possession of guns;

8. The State improperly argued impeachment evidence; and

9. The sentence was improper due to double-enhancement, the taint of improper factors, the imposition of a consecutive sentence and the court's failure to consider rehabilitation.

¶ 4 For the following reasons, we affirm the decision of the trial court.

¶ 5 **FACTS**

¶ 6 Hallie Parrish and three friends sat in a car parked on the side of the road. Parrish sat in the driver's seat; Joe Williams sat in the front passenger seat. Before the shooting started, Parrish and Williams were resting their heads on the head rests, looking at each other and laughing about something. Charles McAfee sat in the rear driver-side seat; Bishop Turner sat in the rear passenger-side seat.

¶ 7 A shooter quickly approached the passenger-side of the car, leaned through the open passenger window and fired multiple rounds. Parrish died of bullet wounds. Williams, in the front seat, did not see the shooter coming. After the shooting started, he threw an arm up in the air and received a gunshot wound in that arm, which required surgery.

¶ 8 Turner did not see the shooter approach. He leaned down to pick up his hat and when he sat up, all he saw was the barrel of the gun. McAfee saw that the shooter wore a black ski mask and used a chrome gun.

¶ 9 Tonya Dandridge testified that at the time of the shooting, she was standing in front of her house. She saw the car parked on the side of the road. She watched the shooter run up to the car, lean in the passenger side, and then she heard six gunshots. Dandridge testified that the shooter was tall and wore a long-sleeve black shirt, skull cap, dark jeans and a mask.

¶ 10 Immediately after the shooting, Dandridge went to the house of her friend Amanda Winters; Zatella Bridges was visiting Winters. Dandridge told them that someone just got shot in a car. About five minutes later, she saw someone wearing the same clothes as the shooter minus the mask. Dandridge testified that she told them the person wearing the same clothes "looked like the guy" or "that's the guy." Dandridge said that Bridges responded, "that's [Wallace]." Dandridge identified the defendant in a photographic lineup and in court.

Dandridge testified that while speaking with a defense investigator, she told him she was only 50% confident of her identification. Dandridge explained that she lied to the investigator to get the interview over quickly. She indicated she was 100% sure of her identification at trial.

¶ 11 Dandridge testified to being nearsighted and needing prescription glasses to see distances. She was not wearing her glasses at the time of the shooting. She also never saw the shooter's face. She testified that even without her glasses, she was able to see the defendant.

¶ 12 Bishop Turner testified that he did not see the shooter approach the car. He did not see the gun or shooter until after the shooting started. He testified that the shooter was wearing light-blue jeans, a mask, skull cap and a black jacket. He confirmed that on the day of the shooting, he told the police that the shooter left the car in the same way he approached, which

was the same way Dandridge explained the shooter's path.

¶ 13 Zatella Bridges testified she was recovering from a stroke and that her memory was returning; she also has cataracts. Bridges went onto the porch when Dandridge arrived at Winters' house. Bridges testified that she asked who got shot and Dandridge pointed and responded, "[i]t's [Wallace]." She saw a masked man on a far away island wearing a skull cap, hoodie and mask that were all black. She saw this man approach the car, lean into the passenger window, open both front doors and say "who bad now," followed by an obscenity. She saw the shooter remove his mask, and she saw the shooter's face. Bridges testified that she walked to the car to see what had happened. Once the ambulance arrived, she followed the path the shooter took to make sure the person she saw take off the mask was the defendant. She testified that she saw the defendant again and was sure he was the shooter. Bridges selected two people from a lineup. She said they both looked similar. At trial, she identified defendant as one of the two men she picked out of the lineup.

¶ 14 Winters testified that she was on the porch with Dandridge and Bridges when Dandridge pointed to the person whom she had seen kill Parrish. Winters then said, "[t]hat's [Wallace]," identifying him by name for the first time.

¶ 15 Williams, the front seat passenger, was not allowed to testify to out-of-court statements that defendant was not the person who shot him and that the actual shooter, whom Williams would not name, apologized to him for shooting him in the arm.

¶ 16 Darnisha Parrish saw the shooting from her porch. The victim's car was parked in her

front yard. She testified that the shooter came from the side of her building so fast, she could not identify him. She did see that he was wearing black clothing and a black mask.

¶ 17 Officer Stubler testified that at 12:25 p.m., dispatch notified him of shots fired; he arrived on the scene within two minutes. When he arrived, a group of approximately 50 people had gathered in a 1½-block area around the car. Stubler testified that he overheard people in the crowd say that defendant was the shooter. Stubler spotted defendant with another man, David Woods, in a crowd of people; defendant wore black pants and a black shirt. Stubler approached defendant and detained him. Another officer transported defendant to the police station where Detective Jackson took swabs to test for gunshot residue on the webs of defendant's hands. A gunshot residue expert testified that he tested the swabs and found the presence of gunshot residue.

¶ 18 Officer Prochaska from the canine unit testified that he used a dog to follow the defendant's trail. The dog traveled from the deceased's car and ended between 822 and 824 Rosalind Street.

¶ 19 An evidence technician and a forensic scientist both testified that they attempted to find fingerprint evidence connecting defendant to the car and to the fired rounds. They did not find the defendant's fingerprints.

¶ 20 Robert Berk, a trace evidence analyst for the Illinois State Police, gave expert testimony about his analysis of the gunshot residue test of defendant. When he received the kit, it was sealed and indicated it was taken from defendant. After analyzing the gunshot residue kit, he

determined that defendant had either fired a weapon, been present when someone else fired a weapon, or come into contact with the gunshot residue after someone else fired the weapon.

¶ 21 The defendant possessed a key to Tamisha Davenport's house when he was detained. Officer Fronek testified that during a consensual search of Davenport's house, a black face mask was found in a kitchen drawer. They also found .45-caliber ammunition and a magazine loaded with .45-caliber ammunition under a couch cushion. In a closet, they found a 9-millimeter magazine and a blue bag containing around 150 rounds of 9-millimeter ammunition. The search also recovered a receipt from a store named "The Gunshot Shop." The receipt did not indicate who had made the purchase. Fingerprint analysis of the bag and magazines provided only seven prints suitable for analysis, none of them were from defendant.

¶ 22 A firearms examiner testified that she examined the empty shell casings and fired rounds found at the scene and some of the ammunition found at Davenport's home. She testified that at least one of the unfired cartridges found there had been in the same gun that was used to kill Parrish.

¶ 23 A DNA examiner tested the mask found at the Davenport residence. She found 13 areas on the mask that contained defendant's DNA. The examiner also found DNA samples of at least two other people on the mask.

¶ 24 The defendant possessed a cellular phone when he was detained. Detective Fazio testified to his examination of that phone. It contained two numbers in an address book entry titled "Toy Store." Over defense objection, the court took judicial notice that one of the phone

numbers in the "Toy Store" listing was for a gun shop located in Plainfield. The other number was for Mega Sports. Detective Jackson testified that Mega Sports sold handguns and sporting goods.

¶ 25 David Woods testified that on the day of the shooting, he visited Tamisha Davenport with defendant and Ricky Johnson. He testified that defendant was right next to him on the corner of Rosalind and Englewood during and after the shooting.

¶ 26 Woods admitted that more than two years after the shooting, he wrote a letter to the State offering to make a deal. He explained that he had agreed to make a video explaining that defendant was the shooter. At trial, he testified that he could not lie under oath to implicate defendant. He then said that his original testimony exonerating defendant was the truth.

¶ 27 The State then presented the video made by Woods, along with testimony from various officers who testified to Woods' statements that defendant was the shooter. The video showed that the State asked Woods at the time he made the video, how they could corroborate what he was telling them. Woods then told them to check defendant's phone records; he said they would show defendant received a phone call from Conley Ratcliffe telling him that the victim was in the area. Phone records entered into evidence corroborated this phone call.

¶ 28 The State also presented numerous phone conversations that occurred between defendant and his family while he was in pretrial custody. They will be addressed in greater detail below.

¶ 29 Kynlita Redmond testified for the defense. She testified that she saw the shooting. She said that the shooter wore a black, white and gray mask. She testified that he was 5' 5" or 5' 6,"

shorter than defendant. Defendant arrived at the car with the crowd 30 to 40 seconds after the shooting; he approached from the opposite direction the shooter had left. Redmond said defendant was not wearing the same clothes as the shooter.

¶ 30 Tamisha Davenport testified that she frequently entertained in her home and that people other than defendant had a key to the house. She said that defendant stored a black face-protector at her house; numerous people used the protector when riding something like a dirt bike around the neighborhood. Davenport said she had never seen the defendant with a gun in her house.

¶ 31 The State impeached Davenport with a previous statement she made that she had seen defendant with a handgun in her house and if defendant had left a gun in her house, he would have left it under a cushion on a couch where officers found the magazine loaded with the same type of ammunition as that used to kill Parrish. She denied making this statement.

¶ 32 The jury found defendant guilty of first degree murder and aggravated battery with a firearm. The court imposed a 70-year sentence for first degree murder and a 17-year sentence for the aggravated battery to run consecutively.

¶ 33 Additional facts required to understand each issue raised by defendant will be included below.

¶ 34 ANALYSIS

¶ 35 I. Plain Error

¶ 36 Defendant raises a number of issues that were not properly preserved for review on

appeal. These issues are reviewable, if at all, for plain error.

¶ 37 A. Bloodhound Evidence

¶ 38 Defendant argues that the State's use of bloodhound evidence to show the path he took before being taken into custody was plain error. He also argues that trial counsel's failure to object to the use of the bloodhound evidence violated the *Strickland* standard for ineffective assistance of counsel. He is limited to plain-error review of these arguments due to a failure to object at trial, or in his posttrial motion.

¶ 39 In criminal cases, the courts can review forfeited issues that appear on the record and deny defendant " 'substantial means of enjoying a fair and impartial trial.' " *People v. Herron*, 215 Ill. 2d 167, 177 (2005). "Fairness, in short, is the foundation of our plain-error jurisprudence." *Id.* at 177. The burden of proof is on the defendant. *People v. Thompson*, 238 Ill. 2d 598 (2010). He must "show that the error caused a *severe* threat to the fairness" of the trial. (Emphasis in original.) *People v. Hopp*, 209 Ill. 2d 1, 12 (2004).

¶ 40 Plain error can be found when: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 41 Plain-error analysis can only be applied when an error occurred. In this case, it is

obvious that error occurred; "bloodhound evidence is inadmissible to establish any factual proposition in a criminal proceeding in Illinois." *People v. Cruz*, 162 Ill. 2d 314, 369-70 (1994). Having established an error occurred, we now evaluate this error under both prongs of the analysis discussed above.

¶ 42 The evidence in this case is not so close that the bloodhound evidence likely tipped the scales against defendant. Within minutes of the shooting, Dandridge identified defendant as the shooter. She also identified defendant as the shooter during a photo lineup and in court. Bridges and Winters corroborated Dandridge's identification of defendant. The State also provided a sizeable amount of circumstantial evidence that showed defendant could have committed the crime. This evidence included: DNA analysis, gunshot residue evidence, firearms analysis and evidence that defendant had access to ammunition that had been in the gun used in this crime.

¶ 43 The evidence against defendant was contested. Most important is the testimony of the eyewitness Redmond; she testified that defendant was not the shooter. Defendant identifies additional evidence in his favor. Dandridge was not wearing her glasses at the time of the shooting; she told the defense investigator that she was only 50% sure. Her testimony that the shooter was nearly 6' conflicted with testimony that the shooter was closer to 5' 6". Dandridge's and Bridges' testimony were in conflict regarding the time between the shooter fleeing and defendant arriving on the scene. Defendant points out that all of the State's circumstantial evidence did not prove that defendant committed the crime. After considering the evidence and arguments, we find that this was not a closely balanced case where the outcome was likely

determined by the erroneous admission of bloodhound evidence.

¶ 44 The admission of bloodhound evidence is not a structural error that requires reversal of a defendant's conviction in every circumstance. *People v. McDonald*, 322 Ill. App. 3d 244, 250 (2001). The presentation of bloodhound evidence in this case was not such a serious error that it satisfies the fundamental-error prong of plain-error review. In this case, the State used bloodhound evidence to show the path that defendant traveled prior to being detained by the police. The evidence was used neither to identify defendant nor to place him in contact with the gun used in the crime.

¶ 45 We now address defendant's claim that he received ineffective assistance of counsel. In *People v. Albanese*, 104 Ill. 2d 504, 526 (1984), the Illinois Supreme Court adopted the ineffective assistance of counsel test from *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 46 A petitioner shows ineffective assistance of counsel when he shows first "that counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" *People v. Albanese*, 104 Ill. 2d at 525. The petitioner must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotations marks omitted.) *People v. Albanese*, 104 Ill. 2d at 525.

¶ 47 The analysis can proceed in any order. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course

should be followed." (Internal quotation marks omitted.) *People v. Albanese*, 104 Ill. 2d at 527.

¶ 48 Trial counsel's failure to object to the bloodhound evidence was not objectively reasonable. *People v. Lefler*, 294 Ill. App. 3d 305, 310-11 (1998). However, defendant still must show a reasonable probability that the outcome of the trial would have been different if trial counsel had provided effective assistance. In this case, the analysis required is identical to the analysis under the closely-balanced prong of plain-error review. Defendant has not shown a reasonable probability that had the State been prevented from introducing the bloodhound evidence, the outcome of the trial would have been different. See discussion of plain error *supra* p. 11-12.

¶ 49 The admission of bloodhound evidence is not reversible due to plain error or ineffective assistance of counsel. Defendant has not shown that the bloodhound evidence likely changed the outcome of the trial. To the extent that the bloodhound evidence tied defendant to Davenport's apartment, the evidence is cumulative. Defendant was also tied to the apartment through testimony of several witnesses and by his DNA that was found on a mask in the apartment; he also had a key to the apartment when he was taken into custody.

¶ 50 B. Testimony Excluded as Hearsay

¶ 51 The trial court excluded as hearsay, testimony by Joe Williams that an unidentified person confessed to Williams that he was the shooter. Defendant argues that this was admissible as a statement against penal interest. The State argues that defendant has waived this issue by failing to raise it in a posttrial motion. In his reply brief, defendant claims that this issue was

raised in the ninth paragraph of his posttrial motion. Paragraph nine of his posttrial motion contains one sentence: "The trial court erred in granting the State's motions[.]" This is utterly insufficient to preserve this issue. "Ordinarily, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review. [Citation.] If a defendant fails to satisfy either prong of this test, his challenge is considered waived on appeal." *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 52 Defendant forfeited this issue by failing to specifically raise it in his posttrial motion. He has also not asked this court to review the issue for plain error. When a defendant fails to argue plain error on appeal he forfeits plain-error review. See *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000).

¶ 53 C. Hearsay Concerning the Shooter's Identity

¶ 54 Defendant alleges that his identity as the shooter was established by multiple instances of hearsay. The State responds that defendant forfeited this argument by failing to either object at trial or raise the issue in a postconviction motion. Defendant argues that he did object to the hearsay and bring it up in a posttrial motion.

¶ 55 We need not look at more than the posttrial motion. The defendant argues he preserved this issue for appeal by arguing it in his posttrial motion. He specifically points to the fourth point of that motion. The extent of his argument on this point totals one sentence. It reads, "the trial court erred when it overruled objections made by defendant's counsel to questions asked by the State." This is utterly insufficient to preserve this issue on appeal. Such a general statement

did not provide sufficient information to the trial court to allow it to review any particular error.

This issue is forfeited.

¶ 56 The defendant argued that this could be reviewed as plain error in his reply brief. He states that plain error was argued in the alternative on page 81 of his initial brief. We have searched page 81 in great depth and find nothing regarding plain error. As indicated previously, a failure to argue plain error to this court results in forfeiture of that issue. See *Nieves*, 192 Ill. 2d at 502-03; *People v. Felella*, 131 Ill. 2d 525, 540 (1989); *People v. Sanchez*, 169 Ill. 2d 472, 499-500 (1996).

¶ 57 D. Evidence of Collateral Crimes

¶ 58 Defendant argues that the State presented evidence of a collateral crime: that he illegally possessed a firearm. The evidence at issue is that an address book entry in the phone found on defendant after the shooting, titled "Toy Store," contained numbers for two gun stores. One of those stores ("The Gunshot Shop") was the store issuing the receipt found in Davenport's home. Defendant did object at trial to the admission of this evidence, however, he did not raise this issue in his posttrial motion. Defendant argues that it is reviewable as plain error.

¶ 59 This was not evidence of a collateral crime; it established a connection between defendant and the ammunition used to commit the crimes. A receipt in the house was from "The Gunshot Shop." Evidence that the phone defendant was carrying contained an entry in the phone book for the same store establishes a connection, although tenuous, between the ammunition used to commit the crime and defendant. The fact that evidence that defendant used a gun to kill

the victim in this case may also be evidence of his illegal possession of a firearm does not make it collateral or inadmissible. The Illinois Supreme Court held in *People v. Lehman*, 5 Ill. 2d 337, 342-43 (1955), that where such evidence "is independently relevant it is admissible ***." Defendant fails to establish the admission of this evidence was error, therefore, our plain-error analysis is complete with regard to this issue.

¶ 60 E. Impeachment Evidence

¶ 61 Defendant asserts that the State substantively argued impeachment evidence that Davenport either denied or could not recall making. Prior inconsistent statements used to impeach a witness are inadmissible unless:

"(a) the statement is inconsistent with his testimony

at the hearing or trial, and

(b) the witness is subject to cross-examination

concerning the statement, and

(c) the statement - -

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal

knowledge, and

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding ***." 725 ILCS 5/115-10.1 (West 2008).

When a witness is impeached with prior inconsistent statements and does not acknowledge making those statements, and they are not proved in another manner, the statements are not admissible as evidence. *People v. Grano*, 286 Ill. App. 3d 278, 294-95 (1996). It is error to argue them substantively to the jury. See *People v. Weaver*, 92 Ill. 2d 545, 564-65 (1982); *People v. McMurtry*, 279 Ill. App. 3d 865, 873 (1996).

¶ 62 Defendant asserts that the State argued prior inconsistent statements, used to impeach Davenport, as substantive evidence in its closing. No objection was made during the trial so this issue is only reviewable as plain error by this court. The State admits that the requirements of section 115-10.1 of the Code of Civil Procedure were not met, but they argue that the statements were used to explain inconsistencies in Davenport's testimony, not as substantive evidence.

¶ 63 During direct examination, Davenport testified that she had never seen defendant with a gun and defendant had never left a gun at her house. The State cross-examined her with prior inconsistent statements made to Detective Jackson that she had seen defendant with a gun previously; that defendant places his gun under the cushions of the couch when he leaves it at

her house; and that on the day of the shooting, she called defendant since she knew that if the police were around he had probably done something. Davenport either denied making or testified that she could not remember making those prior inconsistent statements. The State later perfected its impeachment of her by offering testimony of Detective Jackson.

¶ 64 In closing, the State made the following statements.

"PROSECUTOR: That magazine that was recovered from under the couch. The same area in which Tamisha Davenport told Detective Jackson that the defendant places his gun when he puts it in the residence. *** Her statement clearly helped us.

She told Detective Jackson that she called [defendant] because if she knew the police were around her residence that they had done something, that [defendant] had done something."

¶ 65 After reviewing this statement, we cannot agree with the State that these statements were not argued substantively to the jury, especially when the State made the comment in closing that "[h]er statement clearly helped us." This was error. However, since no objection was made, we review it for plain error. Defendant did not present an argument that this was a fundamental error that required a new trial. His entire argument for plain error here is "multiple errors considered together constitute plain error." He cites to *People v. McMurtry*, 279 Ill. App. 3d 865, 871 (1996), as support for this proposition. What that case actually says is: "multiple errors

not properly preserved for appellate review can amount to plain error and require reversal for a new trial if these errors, when considered together, undermined the fundamental fairness of the trial." (Internal quotation marks omitted.) *Id.* Defendant makes no argument how these errors considered with other errors presented undermine the fundamental fairness of the trial. We do not believe this case is so closely balanced that this error, even coupled with others, likely altered the outcome of the trial, or that the combined errors denied defendant a fair trial.

¶ 66

II. Evidentiary Issues

¶ 67

A. Gunshot Residue Test, Chain of Custody

¶ 68 Defendant argues that the court should not have allowed the State to present gunshot residue analysis evidence due to an improper chain of custody. The State does not need to present evidence from every person involved in the chain of custody, nor is it required to exclude all possibilities of tampering. *People v. Woods*, 214 Ill. 2d 455, 467 (2005). The State's burden is to show it is improbable that the evidence has been exchanged, contaminated, or tampered with. *People v. Winters*, 97 Ill. App. 3d 288, 289-90 (1981). In the absence of actual evidence of tampering or substitution, after the State has established the probability that the evidence is not compromised, gaps or deficiencies in the chain of custody go only to the weight of the evidence. *Woods*, 214 Ill. 2d at 467; *People v. Williams*, 238 Ill. 2d 125, 150 (2010).

¶ 69 The defendant relies heavily on the holding in *People v. Howard*, 387 Ill. App. 3d 997 (2009), that an officer's name and badge number on the evidence is not sufficient to show a proper chain of custody. Defendant's reliance is misplaced. In *Howard*, the evidence consisted

of bags of cocaine purchased from a dealer on the street. *Id.* at 998. The *Howard* court held that because there was no evidence that the officers collecting the evidence and putting it into evidence bags were not in possession of multiple bags of cocaine purchased on the street, it was not improbable that they had mislabeled the evidence. *Id.* at 1005. We find the facts in this case are distinguishable from those in *Howard*. Detective Jackson opened a sealed gunshot residue test kit and used the contents to complete the test of defendant's hands. The kit included a card, which he filled out and later recognized. All of the materials were placed back inside the kit's container and it was immediately sealed. It is improbable that Jackson somehow swapped the contents of the kit and the card he filled out with a second kit. The technician who tested the kit identified it as the kit he tested in connection with this case and testified that "it is identified as being recovered from [defendant]." Even though the kit lacked an evidence number, it was still uniquely identifiable. *Howard* simply is not controlling in this instance.

¶ 70 Defendant also argues that the chain of custody is flawed due to gaps in the chain of custody. The State presented evidence sufficient to establish the chain of custody. After sealing the kit, Detective Jackson placed it in his locked desk drawer. Two days later, on March 3, it was transferred from the desk drawer to a temporary evidence locker in the evidence room and, later the same day, it was moved from the temporary locker to the police evidence vault. The kit was then taken from the vault and sent to the state police crime lab in Chicago where it stayed until tested. The technician who tested it testified he received it in a sealed condition. It is of no consequence that it spent over a week in the evidence vault and over a year in the crime lab.

¶ 71 The State presented *prima facie* evidence of a proper chain of custody. Defendant did not present any evidence of tampering; the court did not abuse its discretion by admitting the gunshot residue test evidence.

¶ 72 B. Sufficiency of the Evidence

¶ 73 We review a sufficiency of the evidence claim by looking at the evidence in the light most favorable to the prosecution. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we will affirm. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact is responsible to resolve any conflicts in the testimony and to weigh the evidence. *People v. Howery*, 178 Ill. 2d 1, 38 (1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will only reverse a conviction if the evidence is so unreasonable, unsatisfactory, or improbable as to create a reasonable doubt. *People v. Hall*, 114 Ill. 2d 376, 410 (1986).

¶ 74 In this case, there was conflicting testimony concerning whether or not the defendant was the shooter. This does not require a reversal. The jury obviously decided that the testimony implicating defendant was more credible than the testimony that he was not the shooter.

¶ 75 A review of the evidence available to the jury shows that the State presented sufficient evidence from which the jury could find the defendant guilty beyond a reasonable doubt. Foremost, Tonya Dandridge testified that: she saw the shooting take place; she saw the shooter leave; and she saw the defendant return to the car without a mask. When she saw the defendant return to the car, she recognized him as the shooter. The fact that she did not know his name

does not render her identification of him ineffective.

¶ 76 Zatella Bridges testified that after the shooting, defendant approached the vehicle, leaned into the car and said, "who bad now?" David Woods presented conflicting statements. Near the time of the trial, he said the defendant was not the shooter. Later, in exchange for leniency by the State, he testified that defendant was the shooter. He provided details that were corroborated by the phone taken from the defendant when he was detained. At trial, he admitted to making the previous statement, but he recanted and testified that he would not lie under oath and that defendant was not the shooter.

¶ 77 Additionally, the State presented evidence that defendant had access to ammunition; that at one time had been in the same gun as the rounds fired by the shooter; the defendant's DNA was found on a black mask like the one worn by the shooter; and defendant's hands tested positive for gunshot residue.

¶ 78 We find that the State presented ample evidence from which the jury could find the defendant guilty beyond a reasonable doubt.

¶ 79 C. Evidence of Defendant's Phone Conversations While in Custody

¶ 80 The court allowed the State to present 20 recordings of conversations involving the defendant. The conversations occurred during the two years the defendant was in custody awaiting trial. The State also presented transcripts of the recordings to aid the jury. The defense objected to the recordings on four grounds: (1) the State failed to lay the required foundation; (2) the recordings were not relevant and were based on hearsay; (3) the recordings violated the best

evidence rule; and (4) the probative value did not outweigh the prejudice to defendant. We address each contention in turn.

¶ 81

1. Improper Foundation

¶ 82 We review the court's determinations concerning the admission of evidence for an abuse of discretion. *People v. Vaden*, 336 Ill. App. 3d 893, 896 (2003). A proper foundation for an audiotape is established when evidence is presented showing: (1) the capability of the recording device; (2) competency of the operator; (3) proper operation of the device; (4) preservation of the recording with no changes; and (5) identification of the speakers. *Vaden*, 336 Ill. App. 3d at 899 (citing *People v. Smith*, 321 Ill. App. 3d 669, 675 (2001); *People ex. rel City of Leland Grove v. City of Springfield*, 193 Ill. App. 3d 1022, 1041 (1990)).

¶ 83 John Pastrick testified about the required foundational elements of the recording equipment. Pastrick oversaw the installation and currently maintains the telephone recording system. He testified that the entire system either works or it does not, so it is impossible for the system to only record part of a call. It is all or nothing: either calls are being recorded, or no calls are taking place. At present, the system moves calls from the primary hard drive to a larger, archival hard drive automatically when the primary hard drive reaches 90% of capacity. Prior to the current system, when the primary hard drive became 70% full, an operator transferred the calls to a tape backup system. The tapes used to backup the calls were stored in a secure location within the jail. Pastrick testified that he trained and observed the operator who performed the backup to the tape system; she properly operated the system. The recordings used

in this trial were recorded using both systems.

¶ 84 Pastrick explained that under either system, it was not possible to access the recorded conversations in order to alter them. He identified People's exhibit No. 70, a CD containing excerpts from the system. Pastrick testified that he compared the audio on the CD to the recordings maintained at the jail. He said they were true and accurate copies of the original recordings, and that the transcripts provided were word-for-word translations.

¶ 85 The defendant stipulated that the identity of the speakers in all but three of the recordings were the defendant and his mother. In the other recordings, Detective Filipiak testified that defendant's stepbrother, Taurus Sanders, was a speaker in the recording. The defendant argues that Filipiak had only one encounter with Sanders which occurred 2½ years prior to his testimony. While this was a distant meeting, we cannot say that the court abused its discretion in determining the State established a proper foundation for the recordings.

¶ 86 2. Relevance of the Recordings

¶ 87 We will not overturn the trial court's evidentiary decisions absent an abuse of discretion. *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 105 (2004). "A trial court's decision is considered an abuse of discretion only when the decision is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hammonds*, 1-08-0194, slip op. at 30 (Ill. App. May 6, 2011). Defendant argues that the recordings are in no way relevant to the issue of guilt, or of any attempt by the defendant to influence the testimony of other individuals. He also argues that they contained inadmissible

hearsay.

¶ 88 The recordings contained statements such as these made by defendant:

"Make an appointment, tell him I need him to say Ma, I don't want him to say who did it. He already know it's on me, I need him to describe the person who did it, so that it won't be me. You know, he know dude had braids and blue jeans and all that type of stuff, I just need him to describe the person that not me. You can describe a person with being' with a mask on. But describe it as not being me.

You can't get up there, ma, and say he didn't see who did it. I-I am gonna need more than that, cause, these people tryin' to book me. They don't really got notin' in my favor. So I need him to say that. So call him see if the talked to him yet. Or if they gonna talk to him, tell him you need him to say that."

¶ 89 The statements were admitted to show that defendant was trying to get his mother to help him obtain perjured testimony. It is an indication of his consciousness of guilt, which is relevant. The court did not abuse its discretion in determining that the recordings were relevant to the issues in the trial. "[E]vidence that a defendant has asked a witness to provide false alibi testimony is relevant ***." *People v. Hansen*, 327 Ill. App. 3d 1012, 1019 (2002); see *People v. Smith*, 154 Ill. App. 3d 837, 848 (1987).

¶ 90 3. The Best Evidence Rule

¶ 91 Defendant argues that the recordings violated the best evidence rule. However, "[t]he best evidence rule applies only when the contents or terms of a writing are in issue ***."

Continental Illinois National Bank & Trust v. Eastern Illinois Water Co., 31 Ill. App. 3d 148, 159 (1975); see *Jones v. Consolidation Coal Co.*, 174 Ill. App. 3d 38, 42 (1988). As this is not concerning a writing, the rule is not relevant.

¶ 92 Defendant next argues that the use of the transcript was improper because the State failed to establish how the transcripts were created. He provides no authority for this proposition.

Defendant does, however, cite to *People v. Criss*, 307 Ill. App. 3d 888 (1999). *Criss* holds that it is proper to allow a jury to use transcripts of conversations to aid them while listening to the recording. *Id.* at 899.

¶ 93 4. Prejudice to the Defendant

¶ 94 We discussed the relevancy of the recordings above. *Supra* (II) (B) (2). We find nothing that persuades us that the probative value of these recordings is outweighed by the prejudice to defendant. The recordings were neither so confusing nor vulgar that they would have unduly prejudiced the jury against defendant. And, they contain defendant's own words.

¶ 95 5. Hearsay

¶ 96 Defendant also argues that the recordings were inadmissible on hearsay grounds.

"Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted therein and dependent for its value on the credibility of the out-of-court declarant." *Chapman*, 351 Ill. App. 3d at 106. The State did not present the recording to prove the truth of what was

asserted in the tapes, but rather to show the defendant's guilty state of mind as well as his desire to influence the testimony of witnesses. The court did not abuse its discretion in allowing the State to present the recordings.

¶ 97

III. Sentencing

¶ 98 The trial judge sentenced defendant to 70 years for the murder conviction and 18 years for the aggravated battery conviction, sentences to be served consecutively for a total sentence of 88 years. Defendant argues that the sentence is improper for four reasons: (1) the court applied the mandatory 25-year add-on to the sentence for murder twice; (2) the trial judge considered unreliable testimony in determining the sentence; (3) ordering the sentences to be served consecutively was an abuse of discretion; and (4) the trial judge did not consider defendant's potential for rehabilitation.

¶ 99 We review the trial court's sentencing decision for an abuse of discretion. *People v. Reed*, 376 Ill. App. 3d 121, 127 (2007). The trial court's sentence is entitled to great deference because the trial court is in a much better position than this court to determine the correct sentence. *Id.* We presume the sentence is correct. *Id.* at 128. The defendant must provide an affirmative showing of error to obtain relief. *Id.*

¶ 100 The sentencing range for murder is 20 to 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). The jury determined that defendant personally discharged the weapon that caused the victims death, making him subject to a mandatory 25-year to life addition to his sentence. 730 ILCS 5/5-8-(a)(1)(d)(iii) (West 2008). The trial judge sentenced defendant to 45 years for the

murder conviction, which was then subject to the 25-year add-on resulting in a 70-year sentence on the murder charge. Defendant argues that the trial court applied the 25-year add-on to a minimum sentence of 20 years resulting in a sentence of 45 years, and then applied the same 25-year add-on again to reach the 70-year sentence imposed by the court. After reviewing the transcript of the sentencing hearing, we find there is no indication that the court applied the 25-year add-on twice. Defendant has the burden of an affirmative showing of error. He has not met this burden.

¶ 101 Defendant's next argument is that the trial court considered unreliable evidence in determining defendant's sentence. His argument is that at the sentencing hearing, the State presented evidence by calling police officers to testify about the results of prior investigations involving defendant. Their testimony included testimony about investigations by other officers, and statements made to those officers, double-hearsay.

¶ 102 We presume that a "sentencing court only considers relevant and admissible evidence." *People v. Harris*, 129 Ill. 2d 123, 164 (1989). Defendant cites to *People v. Foster*, 119 Ill. 2d 69, 98 (1987), for the proposition that double-hearsay is seldom admissible in a sentencing hearing unless it is at least partially corroborated. The *Foster* court was discussing sentencing in death penalty cases; we are not convinced that this necessarily applies in the case, nevertheless we have reviewed the sentencing hearing and find that the testimony presented by the State was sufficiently corroborated by forensic evidence and photo lineups to ensure its reliability.

¶ 103 We now address the issue of consecutive sentencing. In this case, the trial judge could

only order the sentences be served consecutively "If, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4 (c) (1) (West 2008). The court did find as required by statute, and that finding is supported by the record. The imposition of consecutive sentences was not error.

¶ 104 Finally, defendant argues that the court did not consider rehabilitation. The court need not list every factor it considered in sentencing. *People v. McGhee*, 238 Ill. App. 3d 864, 882 (1992). It is presumed "that a trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors." *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010). "The absence of specific findings will not result in a remand where the sentence is justified by the record." *People v. Pinkonsly*, 331 Ill. App. 3d 984, 991 (2002). "Furthermore, where, as here, the sentencing court examines the presentence report, it is presumed that the court took into account the defendant's potential for rehabilitation." *People v. Madura*, 257 Ill. App. 3d 735, 741 (1994).

¶ 105 The fact that the trial judge did not specifically mention rehabilitation does not establish that he did not consider it. He did specifically ask both parties if there were any modifications to the presentence report he had at the sentencing hearing. The trial judge did discuss defendant's long criminal record and that he felt this murder was aptly described as an

assassination. There is no reversible error in defendant's sentence.

¶ 106

CONCLUSION

¶ 107 For the foregoing reasons, the judgement of the circuit court of Will County is affirmed.

¶ 108 Affirmed.

¶ 109 ¶ 109 JUSTICE McDADE, dissenting:

¶ 110 Here, the majority has affirmed defendant's convictions for murder and aggravated battery with a firearm. In doing so, the majority has concluded that defendant did not establish that the trial court abused its discretion by admitting selected portions of recordings and transcripts of telephone conversations that defendant had while in jail, because they were, among other things, relevant as proof of defendant's consciousness of his own guilt. Because I do not believe that evidence that allegedly supports the prosecution's theory that a defendant is conscious of his own guilt is properly admissible, but is both irrelevant and more prejudicial than probative, I would reverse defendant's convictions and remand this cause for a new trial.

¶ 111 Proffered evidence must be legally relevant to be admissible; that is, the evidence must tend "to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Peoples*, 155 Ill. 2d 422, 455-56 (1993). Nonetheless, the trial court may exclude evidence if its probative value is outweighed by prejudicial effect to the defendant. *People v. Illgen*, 145 Ill. 2d 353 (1991). In general, matters concerning the admission of evidence are within the discretion of the trial court. *People v.*

Hayes, 139 Ill. 2d 89 (1990). Thus, a reviewing court may not disturb the evidentiary determination of a trial court absent an abuse of this discretion. *Hayes*, 139 Ill. 2d 89. A court abuses its discretion when it admits irrelevant evidence. See *People v. Miller*, 311 Ill. App. 3d 772 (2000).

¶ 112 In this case, the State admitted portions of various telephone conversations in which defendant participated while he was awaiting trial in jail. In doing so, the State admitted that the prosecutor used the recordings to argue "inferences arising therefrom *** to establish defendant's guilty knowledge." Here, the State has not pointed this court to any evidence in support of its subjective "inferences" from defendant's ambiguous and partial telephone conversations. I believe that failure to be fatal because a reasonable inference within the purview of the law must have a chain of factual evidentiary antecedents. *People v. Davis*, 278 Ill. App. 3d 532 (1996). Therefore, because the State has failed to point to any chain of factual antecedents to explain its inferences about the meaning of defendant's conversations, I would conclude that this evidence is irrelevant, and unduly prejudicial, and therefore, inadmissible.

¶ 113 Second, and more troubling to me, I do not believe that this court should accept the State's argument that defendant's "consciousness of guilt" allegedly shown in the telephone conversations was evidence that may be adduced at trial to prove defendant's guilt. Specifically, evidence offered for the purpose of establishing defendant's alleged consciousness of his own guilt leaves the door open for the use of evidence which presumes guilt to prove guilt. Thus, this evidence impermissibly shifts the burden to defendant to prove his innocence, and runs contrary

to the presumption of innocence that remains with every criminal defendant until the State proves his guilt with competent evidence beyond a reasonable doubt. See *People v. Pasch*, 152 Ill. 2d 133, 174 (1992) (the court noted that "the defendant [was] presumed innocent, *** this presumption remain[ed] until the jury [was] convinced beyond a reasonable doubt that defendant [was] guilty, *** the State ha[d] the burden of proving the defendant's guilt beyond a reasonable doubt, and *** this burden remain[ed] on the State throughout the case."). Absent the ability to make the "consciousness of guilt" argument, these conversations are not relevant, and are more prejudicial than probative.

¶ 114 I acknowledge that in other instances, our supreme court has held that certain evidence is relevant and admissible to show a consciousness of guilt. See *People v. Hart*, 214 Ill. 2d 490 (2005). However, I have found no binding authority that forbids the conclusion that an amorphous, so-called "consciousness of guilt" is itself irrelevant and inadmissible to prove guilt. As I have stated, because this argument permits the State to use evidence that presumes guilt to prove guilt, and because it impermissibly shifts the burden to prove his innocence to defendant, I would disallow the State from admitting it at trial.

¶ 115 Essentially, the trial court erroneously permitted the jury to attempt to glean relevance from partial conversations lifted out of context. While it is the province of the jury to make reasonable inferences from the evidence (*People v. Wheeler*, 401 Ill. App. 3d 304, 311 (2010) ("the weight to be given to a witness's testimony, the witness's credibility, and the reasonable inferences to be drawn from the evidence are all the responsibility of the fact finder")), the

relevance of what the jury might infer from those words is a threshold question for the court prior to admitting the words. If the jury could not properly infer a material fact from the words, the words are inadmissible. See *People v. Decaluwe*, 405 Ill. App. 3d 256 (2010) (court found photographs inadmissible because the State did not offer a reasonable basis of how this evidence was relevant to the charged offenses). Here, because any alleged "consciousness of guilt" was not a material element of the offenses charged, and because it effectively shifted the burden to defendant to prove his innocence, the trial court should not have admitted the conversations and permitted the jurors to assign relevance to them.

¶ 116 For the foregoing reasons, I dissent from the majority's conclusion that trial court did not err when it admitted the recordings of defendant's telephone conversations. Thus, I would reverse his convictions and remand the cause for a new trial.