

police department received an anonymous telephone call in late 2003. That call led to follow-up calls and a meeting with an attorney, John Leonard, who was representing a woman in a divorce case. The woman was Dawn Phillips, the defendant's then-estranged wife. She provided information to the police that the defendant had been in the dance apparel store on the date of the murder. At the grand jury proceedings, it was revealed that Dawn told the police that on the date of the murder, the defendant left the home in the morning with a small handgun and came home that night with a large amount of blood or something that looked like blood on his pants. The next day, the defendant told her that he discovered the store clerk's dead body after he came back to return merchandise that he had purchased earlier that same afternoon. The defendant was charged with one count of first-degree murder on December 23, 2003. A warrant was issued for his arrest and was served upon him on that same date. Bail for this first-degree murder charge was set at \$1 million. The indictment was filed on January 16, 2004, and contained one count of first-degree murder, alleging that the defendant shot Amy in the head with a firearm without lawful justification and with the intent to kill or to do her great bodily harm.

¶ 4 At the time that the defendant was indicted for first-degree murder, he was in custody in Brown County, Illinois, on other charges. On December 19, 2003, the defendant was charged with perjury, burglary, and three counts of unlawful violation of an order of protection in Brown County. On December 31, 2003, the defendant was charged with obstructing justice. On March 29, 2004, the defendant was charged with another count of burglary in Brown County. On March 31, 2004, Brown County authorities charged the defendant with another count of unlawful violation of an order of protection. Ultimately, the State dismissed two of the counts of unlawful violation of an order of protection on May 12, 2004. The case was tried before a jury, and the defendant was found guilty of all of the other charges. The defendant was sentenced on the Brown County convictions on June 24, 2004.

He received a 4-year prison sentence on the perjury conviction, a 3-year sentence on the first burglary charge, 185 days in jail on the first violation of an order of protection conviction, a 1-year prison sentence on the obstructing justice conviction, a 3-year sentence on the second burglary charge, and 364 days in jail on the other conviction of unlawful violation of an order of protection.

¶ 5 The defendant was arraigned in St. Clair County on this murder charge on September 2, 2004. He was determined to be indigent, and an attorney was appointed for him. The State indicated that they would not be seeking the death penalty but that they intended to seek an enhanced sentence of natural-life imprisonment due to the allegation that the victim was murdered in the course of another felony–attempted aggravated criminal sexual assault.

¶ 6 Testimony and Evidence at Trial

¶ 7 Kenneth and Susan Blumberg. Kenneth and Susan were the parents of the victim, Amy Jennifer Blumberg. Amy was working in the dance store owned by her aunt and uncle on December 31, 1999, while she was home on break from her college courses at Eastern Illinois University. She was 20 years old.

¶ 8 At about 6 p.m. on December 31, 1999, Kenneth and Susan Blumberg began receiving phone calls from her friends wondering where Amy was. Amy had plans to spend the evening with some of these friends to celebrate the new year. Susan made multiple calls trying to locate Amy without success. They assumed that Amy must have stopped off somewhere on her way home. But, after some time had passed, they became concerned and decided to drive to the store. On the way to the store, they received a call from the manager of a pizza restaurant nearby in O'Fallon. That manager, Bob Uhrig, was a dear friend to Amy. Bob sent an employee down to the store to check on Amy. That person reported that the door was not locked, that the lights were on inside the store, that Amy's car was in the parking lot, but that Amy was not inside the store. The Blumbergs arrived at the store at

about 9 p.m. After entering the store, Amy's parents saw blood on the doorjamb of the entryway to the hall in the back of the store. Kenneth Blumberg encountered a "tremendous amount of blood" in the hallway. Susan Blumberg called 9-1-1 to report the finding of blood and to request an ambulance. Kenneth came back to the front part of the store and told Susan that they were "too late." They waited outside the store at the direction of the 9-1-1 operator until police arrived at the scene.

¶ 9 Stipulation of Maureen Blumberg. The parties agreed to a stipulation regarding a couple of things that Maureen Blumberg, Amy's aunt, would testify to if she had testified at trial. Maureen Blumberg was a co-owner of the store. Maureen told Amy that she could close up the store at 2 p.m. The last recorded sale at the store was at 2:25 p.m. This was a cash purchase for a child's black leotard.

¶ 10 Andrew Whitehair. Andrew Whitehair testified that on December 31, 1999, he was a driver for Pizza World, an O'Fallon restaurant. Andrew's manager at Pizza World, Bob Uhrig, asked him to go to the store to check on Amy. The time of this request was approximately 8 p.m. Andrew drove past and saw a car on the parking lot. Upon return to the Pizza World location, he called Bob and told him about the car that he saw on the parking lot. Bob confirmed that this was Amy's car and asked Andrew to return to the store to see if she was there. He returned. He exited his car and knocked on the doors to all of the businesses in the building. The store still had the lights on. Andrew tried the door, which was unlocked. He walked in. He saw nothing amiss. He called out Amy's name a couple of times with no response. He did not go further than the front part of the store. He left the store and returned to Pizza World. He called Bob again to tell him that Amy did not seem to be there, although her car was there, the lights were on, and the front door was unlocked.

¶ 11 Officer John Stover. O'Fallon officer John Stover testified at trial that he arrived at the scene shortly after 9 p.m. on December 31, 1999. Sergeant Schaefer arrived at the same

time. He and Sergeant Schaefer entered the store together. The store itself looked normal. However, the officers saw a trail of blood as well as blood splattering on the floor of the hallway that was on the left side of the store behind a door. Down the hall, the first unlocked door was the door to the men's bathroom. The officers noticed a pool of blood as well as blood splattering on the floor of the bathroom. The hallway continued with a right turn where they saw the blood trail continue with additional splattering. That hallway ended at another door which led into the women's bathroom. Inside the bathroom, the officers found the body of a white female on the ground with her head lying in a large pool of blood. Officer Schaefer confirmed that the woman was dead. The officers checked an adjacent store and then left the building.

¶ 12 Alva Busch. Alva Busch, a crime scene technician, testified that he arrived at the scene of the murder at 9:35 p.m. on December 31, 1999. He testified that he saw a purse and keys on top of the counter in the store and that the cash register in the store appeared to be undisturbed. He noticed what appeared to be blood on the door frame—about one foot off of the floor—leading to the hallway. He testified about the blood in the hallway, which he believed to have been caused by someone being dragged across the carpet towards the men's bathroom. In the men's bathroom, he located a pair of nylon pants, underwear, socks, and tennis shoes. To the left of the urinal on the floor, he found a tampon. The blood trail led from the men's restroom to the women's restroom. He indicated that the victim's body was lying on the ground with her legs widely separated. The victim was nude from the waist down, with part of her bra exposed on the left side. He was not then able to determine a cause of her death. In testimony upon his recall to the stand later in the State's case, Alva Busch testified about the various pieces of forensic evidence he collected in the forms of hair and fibers.

¶ 13 Officer Kevin McGinnis. Kevin McGinnis, a police officer from Mascoutah who is

a member of the major case squad, was called upon to assist in the investigation of this case. He and Alva Busch went to the store to conduct their investigation on January 1, 2000. Kevin discovered what appeared to be a bullet fragment in the store next door. Looking then at the opposite wall in the store, they found a bullet hole in the wall in the front part of the store.

¶ 14 Lieutenant Kurt Eversman. Lieutenant Kurt Eversman was a St. Clair County sheriff's deputy at the time of this crime. On January 6, 2000, he was asked to examine a shell casing at the store where the crime occurred. While there, he searched for gunpowder residue on items in the store. He used an ion track vapor tracer. He found three indications of some gunpowder residue. The gunpowder residue was found on the cash register (which was the strongest alert of the three), in the hallway, and on a light switch in one of the bathrooms.

¶ 15 Officer Kerry Andrews. Officer Kerry Andrews was an O'Fallon police detective on call the evening of December 31, 1999. He videotaped the entire crime scene that night and returned to the scene the following day to do additional taping. He presented the video to the jury at trial, explaining what was on the tape.

¶ 16 On December 17, 2003, Detective Andrews was still a member of the O'Fallon police force. He participated in a search of the defendant's home in Mt. Sterling, Illinois, pursuant to the verbal and written consent of the defendant's ex-wife Dawn. Detective Andrews, Detective Cavins, and the defendant's ex-wife, Dawn Ritchey, were present during the search. Found at the residence was an empty gun box located in the attic above the garage. No guns were located in this search. Dawn Ritchey acknowledged that the gun box was for a .38-caliber gun that they owned.

¶ 17 Raj Nanduri, M.D. An autopsy was performed on the victim by Dr. Raj Nanduri on January 1, 2000. Dr. Nanduri testified that before conducting the examination, she was unable to tell what caused Amy's death just by visual examination. Dr. Nanduri described

bruises and scrapes on various parts of her body—an impact bruise on her left knee, a pattern bruise on her left hip, a large bruise on the front of her left upper arm, and a small bruise on her right breast—all of which the doctor believed occurred before death. Amy was shot at close or intermediate range one time with the entry wound to the back of her left ear and an exit wound in front of her right ear. In Dr. Nanduri's opinion, the bullet wound would have caused a rapid death.

¶ 18 Forensic Evidence Stipulations. The parties stipulated to various items of forensic evidence. The stipulations were read to the jury. The red substance on the carpet in front of the cash register was human blood matching Amy's DNA. Blood and debris was found on a dress on a rack in the front of the store. The substance on the hallway door frame was human blood. The defendant's finger and/or palm prints were not discovered anywhere in the store. No semen was found on the underwear found in the men's bathroom. Hairs on the nylon pants were consistent with the victim. One hair on the pants was not consistent with the defendant or with the victim. One hair on the victim's wrist was not that of the defendant or of the victim. Hair found on the victim's stomach did not belong to the victim or to the defendant. Semen was not found on any sample that was a part of the sexual assault kit collected from the victim's body. A hair collected from the victim's right ankle was consistent with the defendant's DNA profile.

¶ 19 James Hall. Forensic testimony was provided by James Hall who testified that the bullet recovered from the scene was a .38-caliber bullet with six lands and grooves with a right twist. The caliber term was explained as the diameter or size of the bullet. A .38-caliber bullet can be loaded into a different size of cartridge case—like a .38-caliber cartridge case. This particular bullet was from the .38-caliber class of bullets, and upon closer examination, James Hall testified that given the bullet's weight, design, and bearing surface, this bullet was consistent with a .38-auto-caliber bullet. He further testified that the bullet

could have been fired by a Bryco Arms .38-caliber handgun, as well as by approximately 140 different weapons.

¶ 20 Without the actual gun used in the murder, which could be compared with the bullet fragment recovered from the crime scene, there is no forensic way to confirm that the defendant's .38-caliber Bryco Arms gun was the gun used in the crime.

¶ 21 Thomas Gamboe. Thomas Gamboe was a forensic scientist at the Illinois State Police Metro-East Forensic Science Laboratory in Fairview Heights. He provided testimony about the potential candidates for firing the projectile recovered in this case. He testified that there were 16 possible .38-caliber guns. In the .38 Special categories there were 23 possibilities. Between the .38-caliber revolvers and the .38 Special derringers, there were 49 different possibilities. When asked how many actual weapons would have been in circulation of these 49 different possibilities on December 31, 1999, Thomas stated that it was impossible for him to say, but he guessed that the number would be in the millions of guns.

¶ 22 Dennis Aubuchon. Dennis Aubuchon was a forensic biologist at the Illinois State Police Metro-East Forensic Science Laboratory in Fairview Heights. He tested the tampon that was recovered from the crime scene. No seminal fluid was found. He did not test to determine if the blood on the tampon was menstrual blood.

¶ 23 Donna Rees. Donna Rees was a forensic scientist at the Illinois State Police Metro-East Forensic Science Laboratory in Fairview Heights. She primarily does DNA testing. She tested the string of the tampon but only found the DNA of Amy. She was not asked to see if there was any DNA evidence on the shoes or on any clothing.

¶ 24 Leroy Yaeger. Leroy Yaeger of Lebanon testified at the trial on behalf of the State. He and his daughter arrived at the On Stage store at about 12:30 p.m. on December 31, 1999. The purpose of the visit was to exchange a leotard purchased for his daughter that was too small. At 12:30 p.m., the store was closed with a sign indicating that the clerk would return

after lunch. Leroy and his daughter went to lunch. Upon return to the store, the store was open. When they walked in, Leroy noticed a man, who he estimated to be in his forties, looking through the clothing racks. Leroy's daughter proceeded to try various leotards on, until she found the proper size. While doing so, Leroy spoke with Amy and learned a bit about her educational background and career plans. Leroy's daughter overheard the man ask Amy if they sold dance shoes in the store. Before they completed their purchases, the man who had been looking through the racks left the store. Leroy and his daughter left. Later that evening when he learned that Amy had been found dead in the store, he contacted the O'Fallon police, ultimately working with a sketch artist to create a likeness of the man he saw in the store. Leroy testified that the man was wearing a pair of washed-out jeans with a dark-colored jacket. He recalled that the jacket reminded him of a ski coat. He also testified that there were two vehicles in the parking lot while they were there—a black car and a maroon car. There were no pickup trucks in the parking lot.

¶ 25 John Toumbs. A man by the name of John Toumbs who lives in Mt. Sterling, Illinois, testified at trial. He owns a repair store. Prior to January 8, 1992, John purchased a .38-caliber semiautomatic pistol that was manufactured by Jennings Bryco from a gun store called Merkels in Quincy, Illinois. Sometime before January 8, 1992, John Toumbs told a few people that he wanted to sell the gun. One of the people he told was Scott Bemis. He believes that Scott Bemis told the defendant that the gun was available. On January 8, 1992, the defendant came to his store. John testified that the defendant was an occasional customer of his store. He also knew the defendant from drag racing events, which was an interest that he and the defendant shared. The defendant said that he wanted to buy the gun. John Toumbs prepared a paper including the serial number, he confirmed that the defendant had a Firearm Owner's Identification card and included that number on the receipt, and he and the defendant both signed the sales receipt. John identified this original document, which

was admitted into evidence. The gun he sold the defendant was in a blue box. On December 19, 2003, he turned the receipt over to the O'Fallon police department following a visit from an officer earlier that day. John testified that somehow he came to the police department's attention because they learned that he had owned a .38-caliber pistol at one time.

¶ 26 Lieutenant Eric VanHook. On December 17, 2003, an O'Fallon police department officer, Lieutenant Eric VanHook, along with Officer John Spanley, approached the defendant on the parking lot of his place of work, the Western Illinois Correctional Center, to ask if they could speak with him about a case. The defendant said that he would need to first speak with his attorney. The officers had a warrant to search the defendant's vehicle, although that fact was not immediately disclosed to the defendant. The officers did not read the defendant his constitutional rights pursuant to *Miranda v. Arizona* while on the parking lot. After speaking with his attorney, the defendant and the officers got into a vehicle and began traveling to the Mt. Sterling police department for the interview. Along the way, the defendant's attorney called and asked if the location of the interview could be changed from the police department to his law office. The officers agreed. During this ride, the defendant was not handcuffed and sat in the front seat. An officer drove the vehicle, and two other officers rode in the backseat. The defendant was not questioned during this commute. He was allowed two stops to use a restroom, and an officer purchased the defendant a soda to drink. Upon arrival at the defendant's attorney's office, the defendant and his attorney had a private conversation. Thereafter, the defendant requested immunity in exchange for agreeing to give the statement. Although the immunity request was denied, the defendant ultimately agreed to give a statement to the police, so long as the statement was recorded and done in the presence of his attorney. *Miranda* rights were read to the defendant before he gave his statement. The defendant acknowledged his understanding of those rights. The defendant's recorded statement lasted approximately 50 minutes. The officers offered the

defendant a ride back home, but he declined that offer. During the defendant's interview, the police executed the search warrant for the defendant's vehicle.

¶ 27 Stipulation Regarding the Defendant's Truck Search. At trial, the parties stipulated that nothing of evidentiary value was found during the search of the defendant's truck on December 17, 2003.

¶ 28 The Defendant's Taped December 17, 2003, Interview. The defendant prefaced his interview with a statement to the effect that he had wanted to contact the police before this interview in order to tell them what he knew, but he had not done so due to advice he received from his wife and his father-in-law. During the videotaped statement, the defendant acknowledged that he was in the O'Fallon store on the date that the victim was murdered. On that date, the defendant traveled to the area to go to an auto parts swap show in Collinsville. However, he never found the show and ended up in the Fairview Heights/O'Fallon area. He traveled back onto eastbound Interstate 64 intending to go home but realized that he was going in the wrong direction. He exited the interstate in O'Fallon. He saw the dance store and thought that he could stop in there and purchase a black leotard for his daughter. He went into the store, made a purchase, and returned to the interstate. After several minutes, he began having second thoughts about his purchase—concern that the leotard would not fit. Because he did not live in that area, he would not likely be back to return or exchange the leotard. He then turned around and returned to O'Fallon with the intent of returning the item.

¶ 29 Upon parking his truck on the parking lot, he saw a young man in what he described as a track suit walk from the dance store towards his truck. He assumed that the man was going to talk to him, but instead, the man quickly passed by his truck. The defendant entered the store. He did not see the employee. He found some blood near a clothing rack, and out of concern for the employee, he began calling out to her and looking throughout the store.

Upon entering a room in the store, he discovered her body. The defendant stated that when he found her body that there was nothing distinctive about the way in which the employee was dressed. He acknowledged touching her thigh and checking her body for a pulse. He determined that she was deceased. Fearing for his own safety, he fled the store and the O'Fallon area. He claimed that he did not know what to do. He did not have a mobile phone.

¶ 30 When he got home, he told his wife what happened, and the two of them tried to determine what he should do with this information. The defendant's father-in-law also was told about his experiences, and his father-in-law advised him to stay out the situation—essentially to say nothing.

¶ 31 The defendant testified about various threats that were made by Dawn relative to their pending divorce. The divorce had become combative, as the defendant stated that he had proof that Dawn committed child abuse. Dawn left him telephone messages advising him that if he did not act in a nicer manner towards her that she would have to go to the law enforcement authorities to tell them what the defendant knew about the murder and had not disclosed. Dawn allegedly told him that she would be contacting the O'Fallon police. The defendant stated that he had not spoken to any other members of law enforcement about the events of December 31, 1999, until this interview.

¶ 32 Emily Hea Buss's Videotaped Deposition Testimony. During her deposition, Emily explained her medical condition. Emily was due soon to give birth, and she did not feel safe traveling to St. Clair County to testify at the trial. She was previously married to Joe Hea, with whom she had two children. They were neighbors of the defendant and Dawn for some time. The Heas moved away to a different home in Mt. Sterling in 2002. In 2003, she was aware that Dawn and the defendant were going through a divorce. The defendant stored some of his personal belongs in their home at this time.

¶ 33 Sometime in August 2003, the defendant spoke to Emily in her garage about the

events of December 31, 1999. He prefaced his story to Emily as one that would "freak [her] out." He told her that he had been in O'Fallon and had stopped to buy his daughter a leotard at a dance store. He returned to the dance store after deciding that the leotard may not fit his daughter, but upon his return, he could not find the store clerk. He waited a considerable length of time and ultimately decided to look for the clerk. He saw blood on the floor in an area by the cash register. The defendant searched through the store, ultimately finding the girl's body. He got scared and fled the scene. He had blood on his clothing and hands. He went to a convenience store where he washed his hands and threw away the leotard. He drove home and lied to Dawn about the source of blood on his clothing, telling her that he struck an animal with his car. He also told Emily that he believed Dawn planned to blackmail him about his failure to go to the police.

¶ 34 Emily testified that she asked him what he planned to do about what he had witnessed and told him that he should talk to someone and clear his name.

¶ 35 The next day, Emily searched the Internet without success for information about the murder.

¶ 36 Later in October 2003, just before Emily and her husband were to testify on his behalf at hearings about his divorce, the defendant told her that he had an appointment to meet with O'Fallon police and his attorney. On October 10, 2003, right after Emily and her husband Joe testified for the defendant, he told them that the night before he and his attorney met with O'Fallon police officers in his attorney's office and that he had been cleared. Having no reason to doubt this statement, Emily did not contact the police.

¶ 37 After this conversation, but before December 15, 2003, something happened that changed the nature of their friendship with the defendant. Emily testified that after the divorce hearing, some things the defendant told them did not match up with certain events. As a result, she and Joe determined that his items needed to be removed from their home.

Emily stated that they quietly severed ties with the defendant. When pressed, Emily testified that she "disagreed with how he handled some things."

¶ 38 On December 15, 2003, the police contacted her. Ultimately, Emily gave four interviews to the O'Fallon police about these conversations. Upon cross-examination, Emily admitted that she had conversed with her then-husband Joe about the situation, but never about any substantive fact of the defendant's story. Instead, she characterized her conversations with her husband as being in the realm of shock that someone they knew had been involved in this type of situation.

¶ 39 Joseph Hea. Joseph Hea, the defendant's former neighbor and friend, and the ex-husband of Emily Buss, testified at trial. Sometime in 2000, he and the defendant had a conversation in which the defendant told Joseph that he had met a girl named Amy who looked a lot like Joseph's then wife, Emily.

¶ 40 In August 2003, the defendant called Joseph and asked to meet him at a bar. The defendant told his story of purchasing the leotard on December 31, 1999, and then deciding to return the leotard and finding the store clerk dead. Joseph testified that the defendant traveled to O'Fallon for a swap meet but earlier had told police in an interview that he thought that the swap meet was a gun swap meet. The defendant explained to Joseph that upon determining that the dance store employee was dead, he panicked and fled the scene. The defendant told him that he went to a convenience store to wash his hands in order to get the blood off of his hands and arms. The defendant threw the bag containing the dance leotard in the convenience store trash can. The defendant told Joseph that at some point after fleeing the dance store crime scene, he threw a gun that he was carrying that day out the window of the truck. He got rid of the gun because he was in this state of panic.

¶ 41 At some point during this conversation in the bar, the topic of the weapon and the caliber of the weapon came up. The defendant stated that the weapon was a "throw-away"

one. Joseph asked the defendant if it was a .45-caliber gun, and the defendant said that it was. The defendant told Joseph that the caliber of the gun he threw away on his way home matched the caliber of the gun used by Amy's murderer.

¶ 42 The defendant told Joseph that he drove home and told his wife that he had hit an animal resulting in the blood on his clothing.

¶ 43 The defendant told Joseph that Dawn was "blackmailing" him in the course of their divorce proceedings with the knowledge that the defendant had not gone to the authorities with the information he had.

¶ 44 Joseph testified that at this bar, after the defendant told his story, Joseph advised him to go to the authorities to tell them what he saw. Joseph testified that approximately one week later, the defendant told him that he and his attorney had gone down to St. Clair County to file a report. The defendant told Joseph that the authorities were not terribly interested in the information he had about the crime.

¶ 45 Thereafter, the defendant and Joseph had a falling out in which Joseph and his wife Emily distanced themselves from the defendant relative to allegations apparently made by the defendant to third parties that Emily was having an extramarital affair.

¶ 46 Sometime in December 2003, Joseph had a conversation with Dawn about what he knew of the defendant's involvement at the O'Fallon crime scene. Dawn told Joseph that she was going to let the authorities know that the defendant also told Joseph about what happened. Approximately three days later, Joseph was contacted by the police on December 15, 2003, to inquire about the conversations he had with the defendant about the O'Fallon crime. By the time of the interviews, Joseph was no longer friendly with the defendant.

¶ 47 Joseph testified that the defendant and Dawn were both into guns—that buying and shooting guns was their hobby.

¶ 48 John Hackman. John Hackman, Emily Buss's father, also testified at the trial. He

resides in Jacksonville. He met the defendant in 1999 when Emily and her husband Joe became neighbors with him. As time passed, he became friendly with the defendant due to shared interests. When the defendant was diagnosed with cancer, John drove him numerous times down to the St. Peters, Missouri, location of Barnes Hospital for chemotherapy. He also accompanied the defendant on a trip to Wisconsin to obtain a drag racing engine.

¶ 49 In the fall of 2003, when the defendant and Dawn began the divorce process, the defendant began spending more time with John—frequently spending nights with John in his home. During one of these visits, the defendant told him about the O'Fallon crime scene he encountered. During this conversation, the defendant told John that he was fearful that Dawn was going to tell the authorities what she knew.

¶ 50 The defendant told John that he went down to the area on December 31, 1999, to go a swap meet gun show. Unable to find the swap meet, he ended up in a store at which he purchased an article of clothing for one of his daughters. He told John that he decided to return the item and upon arrival back at the store saw a man running out of the store wearing a coat and a stocking cap. He discovered the store clerk's body in the store. The defendant told John that he rolled the girl's body over in order to check for a pulse. He told John that the girl had been shot in the head. The defendant fled the scene. He told John that the reason he ran was because he had an unregistered handgun with him, and he was afraid to be caught with it. Somewhere on the way home from O'Fallon, he got rid of the gun. When he got home, he told Dawn that he hit a deer. When she began to try to get the stain out of the pants and noticed that there was more blood there than what she would have expected, Dawn was able to get the defendant to tell her the full story.

¶ 51 John testified that for two to four weeks, he tried to get the defendant to contact police. Finally in October 2003, when John and the defendant were at a race track, the defendant told John that he and his attorney had an appointment with O'Fallon detectives.

The day after the alleged meeting, John contacted the defendant to find out how it went. The defendant told him that the meeting was fine and that the detectives advised him that he was uninvolved in the case.

¶ 52 Eventually that fall of 2003, the friendship between John and the defendant began to wane. After the divorce, John went to Dawn's home to apologize to Dawn for taking the defendant's side during the divorce proceedings. The topic turned to the events of December 31, 1999. While at Dawn's home, Dawn told John what the defendant had told her about his involvement in the case. Dawn told John that the defendant bought the gun that he threw away at a swap meet. The defendant allegedly told Dawn that he took the gun with him to the swap meet because he was carrying \$300 in cash.

¶ 53 Ultimately, the police interviewed John in December 2003 and again in January 2004 due to technical difficulties with the recording in December 2003.

¶ 54 In John's testimony, he stated that while he spoke with Dawn about the defendant's story prior to the police interview, nothing that he would have told the police officers changed because the stories that the defendant told him and told Dawn matched. John acknowledged reading newspaper articles about the crime. John also acknowledged that he and his daughter Emily and son-in-law Joseph talked about the defendant from time to time, but not exclusively about this case because there were many things going on with the defendant at the time.

¶ 55 James Ritchey. James Ritchey is Dawn Ritchey's father. He testified that his daughter had been married to the defendant for approximately 10 years. He socialized with the defendant during his daughter's marriage. He confirmed that the defendant and his daughter both enjoyed owning and using guns. He testified that the defendant bought his daughter an inexpensive .38-caliber pistol and that the defendant possibly had another .38-caliber gun as well.

¶ 56 In early January 2000, the defendant and Dawn came to speak with him in his home in Macomb. The defendant proceeded to tell the story of what he witnessed on December 31, 1999. The defendant told James that the victim had been shot in the head. James Ritchey denied ever telling the defendant to stay out of the case or to not get involved. To the contrary, James told the defendant that he needed to get in contact with the O'Fallon police detectives to tell them what he saw. He also confirmed that his daughter Dawn did not ever, in his presence, tell the defendant to stay out of the matter and/or to tell no one of what he witnessed.

¶ 57 At some point in the fall of 2003, after the divorce process had begun, O'Fallon detectives were in contact with him. At their request, he did participate in a taped phone call to the defendant in an effort to get his acknowledgment that he did at one time buy Dawn a .38-caliber handgun. The defendant denied doing so and told James that he bought her a .22-caliber gun.

¶ 58 James denied ever reading newspaper articles about the crime.

¶ 59 Dawn Ritchey. Dawn Ritchey testified that she married the defendant in 1993, and two daughters were born during the marriage. The children were five and three in December 1999. Dawn has been employed with the Illinois Department of Corrections throughout her career. Currently, Dawn is a parole agent. Prior to that, she was a correctional counselor within the Western Illinois Correctional Center. The defendant was a maintenance equipment operator for the Department of Corrections and drove a truck delivering meat to all of the State's prisons. Dawn testified that both she and the defendant were firearms enthusiasts.

¶ 60 On the morning of December 31, 1999, the defendant left the home wearing a dark brown leather bomber jacket she gave to him that Christmas as a present. He was also carrying a small black triangular-shaped case in which they kept a small gun—a .38-caliber.

Dawn explained that she knew that the defendant was carrying the .38 that date because it was the only gun that they owned that would fit into that case. Dawn testified that the defendant bought the gun for her. Her understanding was that the gun was purchased at a gun show in 1996 or 1997.

¶ 61 Later that night, the defendant came home at somewhere between 5 and 6:30 p.m. Dawn testified that the defendant came in and walked straight upstairs. He was not wearing his leather bomber jacket. She noticed that there was something on his jeans from the knees on down. She described the substance as being more than a mere splatter but less than being soaked. Dawn testified that she asked the defendant what that was on his pants. The defendant told her that it was blood from an animal that he had to drag off of the road. Later, Dawn saw the pants again—in the trash can in their bathroom.

¶ 62 That night, the defendant had to work because it was the New Year's Eve of the year 2000, and officials were concerned that there could be Y2K outages, necessitating the delivery of things to the prisons within the system. He got home at around 2 a.m.

¶ 63 The next day, the defendant slept in. Dawn described this as unusual as the defendant always got up early in the morning. At around 1 p.m., she carried lunch into the bedroom for the defendant. Dawn stated that she could tell that there was something wrong, and she asked the defendant. The defendant proceeded to tell his story. He told Dawn that he had witnessed something that really bothered him and that he could not get the images out of his mind when he tried to sleep. He told Dawn that he had intended to go to the gun show on December 31, 1999, but that he was unable to locate the show. He returned to a convenience store where he had seen the flyer with the plans of rereading the flyer, only to discover that the flyer was now gone. As he returned to his car, he saw a dance clothing store and decided to go over to purchase an outfit for their daughter. Dawn testified that this would have been unusual because Dawn bought not only all dance apparel for their daughter, but she

purchased all clothing for both daughters. She could not recall any instance where the defendant bought clothing for their daughters. Shortly after the purchase, the defendant returned to the store with the intention of returning the outfit. He then encountered a man running from the store. This man had a duffel bag and was wearing a track suit. The defendant told Dawn that he thought that the man was coming straight towards him, and so the defendant reached for the gun that he had with him. However, when the defendant looked up, the man was gone. The defendant then entered the store with the outfit. He saw no one. He called out but got no response. The defendant told Dawn that he saw blood behind the counter and followed a trail that led to a back room in the store where he found the girl's body. The defendant knelt down to check the girl's pulse in her neck. He explained to Dawn that this is how he got blood on his pants. He told Dawn that the girl's pants were pulled down. Dawn was unable to remember if the defendant told her that the pants were pulled down to her knees or to her ankles. The defendant told Dawn that upon determining that the girl was dead, he got scared and left the store, stating that he feared that he had left prints on the door.

¶ 64 A couple of days later, she and the defendant went to Quincy to look in newspapers to see if there was a description of the man the defendant said he saw leaving the store. Dawn recalled that in a St. Louis Post-Dispatch article (that she believed was dated sometime between January 1 through January 4, 2000), the police investigators were looking for a six-foot-tall blond man.

¶ 65 Shortly after looking in the newspapers, Dawn and the defendant went to her dad's home. The defendant told her dad the same story, also explaining that the reason he did not call anyone was because he was afraid that they would think that he committed the crime. Dawn testified that her dad told the defendant that he should call the police anyway. Dawn also encouraged the defendant to do so, telling the defendant that at a minimum he should

call the CrimeStoppers hotline with his tip. Her dad never told the defendant to stay out of the case. Dawn testified that she never told the defendant to stay out of the case. Dawn testified that she continued to encourage his reporting, but due to life circumstances in their own home, Dawn testified that, sadly, she somewhat forgot about the murder.

¶ 66 In 2002, the defendant was diagnosed with colon cancer. He had surgery and six to eight months of chemotherapy. Dawn testified that they all focused on the defendant's recovery.

¶ 67 Dawn testified that she never thought that the defendant was lying to her or that he was in any way involved in the murder of Amy.

¶ 68 At the end of July in 2003, the defendant accused Dawn of having an affair with a man in the area where they lived. She moved out of the home, taking the two girls with her, and filed for divorce. Dawn described the divorce process as not amicable. Dawn acknowledged that after the defendant began an attempt to obtain sole custody of their daughters, she called him and left a voicemail to the effect that if he continued to do these things, she would have no choice but to tell the court about the crime he failed to report. The morning after she left this voicemail, Dawn was visited at work by the defendant and his mother to discuss the divorce.

¶ 69 A prison employee who worked with Dawn and whom Dawn had told about her husband's story located the St. Clair County sheriff's department website and read the information about the unsolved crime. Dawn's friend felt that what she read was important and asked Dawn to look at the information. On the website, there were two composite drawings. Dawn agreed with her coworker that one of the drawings, coupled with the description of the man that the O'Fallon police were looking for, matched the defendant. Her friend advised that if Dawn would not call the police, then she would. Dawn then went to see her divorce attorney and told him the full story. Prior to that time, she had only told her

attorney that she had information that the defendant failed to report a crime. Dawn had not previously told her attorney the specifics of the incident. Her attorney called the O'Fallon police department on September 19, 2003.

¶ 70 On September 20, 2003, Officer Spanley drove to the home of Dawn's divorce attorney to interview her. Dawn testified that she, the attorney, and the officer did not discuss the facts of the case before she gave her recorded statement.

¶ 71 The court entered a dissolution of the Phillips' marriage on December 15, 2003, reserving all decisions relative to child custody, visitation, and property distribution.

¶ 72 On December 17, 2003, the police returned to Mt. Sterling and stopped at her home to ask if they could search the premises. Dawn signed a consent for the search and then showed the officers around. One of the places that the officers searched was in the attic. Dawn testified that while the parties were by then divorced, not all of the defendant's things had been removed from the home. She testified that the attic space had essentially been divided with her things on one side and the defendant's things on the other side. The officers searched through the defendant's items and located a cardboard box for a .38-caliber handgun. Dawn testified that she did not remember ever seeing this box before. On cross-examination, she explained that the .38-caliber handgun was a gift from the defendant to her, and when he gave it to her, it was not in a cardboard box.

¶ 73 Dawn testified that the .38-caliber gun was never registered.

¶ 74 She claimed that when she left that phone message for the defendant that she was not attempting to get the upper hand in the divorce proceedings. At trial, the defendant's attorneys played Dawn a tape-recorded message that they contended was her threat to the defendant. Dawn testified that she really did not believe that this was her voice on the tape. The voice did not sound like her voice, and the speaker on the tape used words in the message that Dawn would never use.

¶ 75 Dawn testified that the defendant had visitation with his children until he was arrested on December 16, 2003. Ultimately, she was awarded custody of their two girls and was awarded the house in the property settlement.

¶ 76 Dawn testified that she and the defendant had been down in the metro-east area of St. Louis several times before December 31, 1999.

¶ 77 When asked why she never called the police herself after she learned what the defendant witnessed, she testified that she believed her husband. However, Dawn testified that after looking online at the composite drawing and accompanying description, coupled with the defendant's behavior after she filed for divorce, she felt compelled to provide the information that she had.

¶ 78 Dawn acknowledged that someone told her that there was a \$20,000 reward for information about Amy's murder, but this person also reminded Dawn that as employees of the Department of Corrections, they were ineligible for an award.

¶ 79 Doris Lehne. The defendant's mother, Doris Lehne, testified at trial. She was a tax accountant and had lived in Mt. Sterling, Illinois, since 1964. She testified that the defendant had worn facial hair—a moustache and goatee—from approximately 1997 through 2003. After the divorce proceedings began, she suggested to the defendant that he shave his facial hair because he was going to be making court appearances. Doris testified that the defendant and Dawn had many mutual hobbies, including guns. She testified that the defendant was unaware that Dawn was going to leave him and got home on that particular day to find that most of her personal possessions had been removed. She described the marriage as a good one up until that point, and she testified that the defendant adored his two daughters.

¶ 80 Vehicle Sightings Testimony at Trial. All of the witnesses provided information about vehicles that they saw in the vicinity of the store and/or on the parking lot of the store on December 31, 1999.

¶ 81 David Delano testified that he saw a 1980s Dodge Chrysler vehicle driving at a high rate of speed at 4:25 p.m.

¶ 82 Paul Levins testified that at 4 p.m., and later at 4:50 p.m., he saw three vehicles on the parking lot—a dark maroon sedan, a 1970s muscle car, and a third vehicle that he could not remember.

¶ 83 Janet Channel testified that between 5:10 and 5:20 p.m., a 1950s or 1960s dark-colored vehicle with rust on it cut her off as she was driving on Highway 50 near the store.

¶ 84 Lisa Krius testified that between 3 and 5 p.m., she saw a black Chevrolet Cavalier, a white car, and a pickup truck on the parking lot.

¶ 85 Victoria Dickerson testified that between 3:30 and 4 p.m., she saw an older, boxy gray car drive away from the area. At about the same time she saw a man standing on the parking lot.

¶ 86 Marilyn Cox testified that at about 4:15 p.m. and at 5:15 p.m., she saw an old, rusted car on the parking lot. She believed that the car was an old 1960s powder blue Thunderbird.

¶ 87 A stipulation was read that James Miller would testify that between 6:30 and 6:45 p.m., he saw a black Chevy S-10 pickup truck parked on the parking lot.

¶ 88 Other Possible Suspects Presented in the Defendant's Case at Trial.

¶ 89 A man by the name of Thomas Boger testified that on December 31, 1999, at around 1:30 p.m., a car drove up behind him flashing its lights and driving erratically. Thomas stopped. The driver—a young white male with blond hair—wanted directions to the Sports Authority store in Fairview Heights. Later at about 3 p.m., he saw the same man in his car on the parking lot of the Sports Authority, and he had a revolver in his hands.

¶ 90 Officer Spanley was with the O'Fallon police department at the time of this crime and during its investigation. He testified to the various leads and suspects received by law enforcement agencies about this crime.

¶ 91 They obtained fingerprints from many different people, including Amy's boyfriend, Jody Woods. When the detectives from the major case squad arrived at the apartment where Jody lived, he was found hiding in a closet. Jody drives a Chevy S-10 pickup truck.

¶ 92 A man by the name of John Sprous was seriously considered as a suspect. The information leading to John Sprous was overheard by a fellow inmate of Sprous who wanted a transfer to another jail. This inmate is John Little. John Little and his cellmate were in fact transferred to the prison of choice. Officer Spanley's investigation revealed that John Sprous was out on parole on December 31, 1999. At the time that he became a suspect, he was in prison in Missouri for robbing and killing a store clerk. They cross-checked his fingerprints against what was recovered at the scene and there were no matches. Officer Spanley confirmed that all St. Louis media, which heavily covered this murder and the investigation, was carried into the Potosi, Missouri, correctional facility where John Little was then housed. Although there were five other inmates involved in the conversation overheard by John Little through an air vent, none of these five inmates were interviewed.

¶ 93 John Little testified at trial that he was serving a life sentence in Missouri. Little heard the conversation on January 19, 2002. Little testified that the men were looking at a magazine and that Sprous allegedly stated that the photo of a woman in the magazine looked like a girl he had killed in Illinois. Sprous allegedly claimed that he got off the interstate and went to a service station. He saw the victim through the window of a store. His alleged plan was to rape the woman, but then because he saw a taxi cab or a police car out the front door of the store, he determined that it was necessary to kill the woman. He allegedly claimed to have moved her body to another area of the store before returning to St. Louis.

¶ 94 Defense Expert, Brent Turvey. Brent Turvey is a forensic scientist and criminal profiler. He is an adjunct professor of criminality at Oklahoma City University. He was asked to review materials related to this case. He reviewed an FBI profile prepared in this

case, the crime scene and autopsy photographs, the crime scene video, crime scene sketches, several crime scene reports, the coroner's report, the O'Fallon police department investigative reports and evidence logs, the St. Louis Major Case Squad investigative reports, and the Illinois State Police forensic reports and evidence logs that involved biology, firearms, and latent prints. He prepared a written report for the defense dated December 6, 2006, based upon his review of these documents along with his expertise.

¶ 95 In his review, he found several deficiencies in the processing of the crime scene. He testified to what he characterized as a very limited effort on the part of the investigators to document, collect, or search for evidence outside of the building. No attempt to determine the point of entry or exit from the building was done. He took issue with the fact that a police vehicle was parked by the front door of the store. By parking the official vehicle there, Brent Turvey testified that critical evidence could have been contaminated or destroyed. He testified that the police vehicle could have been parked on top of evidence that could have pointed to the criminal offender's point(s) of entry and exit. On the subject of entry to and exit from the store, Brent Turvey testified that the investigation did not seem to include a search for bloodstains or blood trails outside of the store. He felt that the police should have processed Amy's vehicle for any sort of evidence relative to the crime. Brent Turvey also testified that the police investigation was deficient because there was no attempt to locate the high-velocity bloodstain pattern typically associated with a gunshot wound, which could provide detail as to exactly where Amy was when she was shot.

¶ 96 Brent Turvey rendered additional opinions at trial about the evidence in addition to those detailed opinions as to deficiencies in the processing of the crime scene. Although Amy's body sustained bruising consistent with a struggle, he felt that she was not in a lengthy struggle because her fingernails were not broken. He also testified to his opinion that the crime scene was staged to look like a sexual assault. He defined staging as something a

criminal offender might do to mislead the investigation by altering the crime scene in order to make it appear to be something other than what occurred. He further explained this by testifying that Amy's body was dragged into the bathroom, and her legs were spread apart, but the evidence failed to support any effort on the part of the offender to attain sexual gratification. He testified that had any sexual activity transpired, blood would have been transferred to the genital area. As there was no blood in that area of her body, Brent Turvey testified that in his opinion, the crime scene was staged to look like a sexual assault. On cross-examination, he admitted that he could not rule out a sexual motivation for the crime in this case.

¶ 97

Jury Deliberations

¶ 98 The jury began deliberating at 1 p.m. on April 11, 2007.

¶ 99 At 1:30 p.m., the jurors asked if they could watch the defendant's videotaped statement. The defendant objected to this because the defendant referred to an order of protection during the interview. The defendant's objection was overruled, and the jury was allowed to watch the statement a second time.

¶ 100 At about 9 p.m. on April 11, 2007, the defendant's attorneys went to the court with the information that the videotape of Emily Hea Buss had been heard being played in the juror deliberation room. The defendant was under the belief that this tape was not going back with the jury. The defendant had agreed to this exhibit being allowed to go back with the jury, but the defendant's argument was that this was not merely an exhibit, but was testimony. On that basis, the defendant asked for a mistrial. The court denied the mistrial request.

¶ 101 At 10:37 p.m., the jurors sent out a note seeking a night recess. The defendant asked for the jury to be sequestered. The court denied the request.

¶ 102 On April 12, 2007, at 2:52 p.m., the jury sent out a note indicating that the jurors were at an impasse. The court sent back a note asking the jurors to continue their deliberations.

The jury then requested and received transcripts of the testimony of Dawn Ritchey, Joe Hea, John Hackman, and James Ritchey.

¶ 103 On April 13, 2007, at 5 p.m., the jury returned with its guilty verdict.

¶ 104 Posttrial Motions

¶ 105 The defendant filed a motion for a new trial on May 14, 2007, as well as other related motions. At the hearing on May 29, 2007, testimony was heard. The trial court denied this motion on that same date.

¶ 106 Sentence

¶ 107 On May 29, 2007, the defendant was sentenced to 55 years of imprisonment.

¶ 108 ISSUES, LAW, AND ANALYSIS

¶ 109 Right to Speedy Trial

¶ 110 The defendant initially contends that the trial court erred in denying his motion to dismiss the charges on speedy trial grounds.

¶ 111 A defendant will be discharged from custody and have his charges dismissed, if his rights to a speedy trial are violated. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2006).

¶ 112 Speedy trial rights are fundamentally guaranteed to all defendants pursuant to both the sixth and fourteenth amendments of the federal constitution. U.S. Const., amends. VI, XIV. The Illinois Constitution also guarantees speedy trial rights. Ill. Const. 1970, art. I, § 8. The constitutional right to a speedy trial is not tied to a specific time frame in which an accused must be brought to trial. *People v. Love*, 39 Ill. 2d 436, 442, 235 N.E.2d 819, 823 (1968).

¶ 113 The constitutional guarantee to a speedy trial has three commonly construed purposes—to prevent an oppressive incarceration before trial, to minimize a defendant's anxiety and concern that necessarily attaches to a public accusation, and to prevent undue interference with the defendant's ability to defend himself. *Smith v. Hooey*, 393 U.S. 374,

377-78 (1969); *People v. Tetter*, 42 Ill. 2d 569, 572, 250 N.E.2d 433, 435 (1969). To analyze and determine if a defendant's constitutional speedy trial rights have been violated, the court should consider four factors: (1) the length of the delay, (2) the reasons for the delay—whether delay is attributable to the defendant or to the government, (3) the defendant's assertion of his speedy trial rights, and (4) the prejudice to the defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Doggett v. United States*, 505 U.S. 647, 651 (1992); *People v. Bazzell*, 68 Ill. 2d 177, 182-83, 369 N.E.2d 48, 50 (1977).

¶ 114 In Illinois, there is an additional statutory speedy trial right pursuant to which an accused must be brought to trial within 120 days from the date on which the accused was taken into custody unless the delay is attributable to the accused. 725 ILCS 5/103-5(a) (West 2002). Because the statutory and constitutional rights are not considered the same right, we must consider the defendant's claim that both his statutory and constitutional speedy trial rights were violated. Both arguments require *de novo* review. *People v. Crane*, 195 Ill. 2d 42, 52, 743 N.E.2d 555, 562 (2001) (constitutional rights); *People v. Cordell*, 223 Ill. 2d 380, 389, 860 N.E.2d 323, 330 (2006) (citing *In re Estate of Dierkes*, 191 Ill. 2d 326, 330, 730 N.E.2d 1101, 1103 (2000)) (statutory rights).

¶ 115 State Statutory Speedy Trial Rights. We first address the statutory speedy trial argument. The defendant filed his demand for a speedy trial on August 24, 2004. The trial did not begin for almost three years after that date—well in excess of the 120-day statutory mandate.

¶ 116 The speedy trial period will be suspended during any delay that is construed as being brought about by the defendant. *People v. Peco*, 345 Ill. App. 3d 724, 731, 803 N.E.2d 561, 567 (2004). A delay is caused by, or is attributable to, the defendant if the defendant causes or contributes to the delay that results in the postponement of trial. *Peco*, 345 Ill. App. 3d at 731, 803 N.E.2d at 567. The defendant bears the burden to affirmatively prove that any

delay was not caused by or attributable to him. *Peco*, 345 Ill. App. 3d at 731, 803 N.E.2d at 567. In Illinois, if the defendant fails to specifically object to a delay of the trial setting—either in writing or orally on the record—then all delay is considered to be delay to which the defendant agreed. 725 ILCS 5/103-5(a) (West 2002). All speedy trial demands must be stated in unambiguous language on the record. *Peco*, 345 Ill. App. 3d at 734, 803 N.E.2d at 569 (citing *People v. Coleman*, 50 Ill. App. 3d 40, 42, 365 N.E.2d 246, 248 (1977)).

¶ 117 On review of a speedy trial issue, the court must examine the transcript and the common law proceedings thoroughly in order to do justice to the State and to the defendant. *Peco*, 345 Ill. App. 3d at 732, 803 N.E.2d at 567 (citing *People v. Mayo*, 198 Ill. 2d 530, 536, 764 N.E.2d 525, 529 (2002)).

¶ 118 This case does not present the typical speedy trial calculation accompanied with analysis of assessment of trial delay. The defendant was charged by complaint and was served with an arrest warrant on December 23, 2003, but was not formally indicted until January 16, 2004. From the record, it is clear that the defendant did not file a written speedy trial demand until August 24, 2004. Two weeks later, on September 2, 2004, the defendant was brought into St. Clair County circuit court for his arraignment. Upon conferring with his attorney, the defendant withdrew his speedy trial demand.

¶ 119 On January 9, 2007, the defendant filed his motion to dismiss on the basis of this speedy trial argument. The motion was called for hearing on January 11, 2007, was taken under advisement, and was denied that same date in a written order. The defendant's attorneys claimed that the defendant's federal and state constitutional rights, as well as his state statutory rights, had been violated by the delay in bringing the defendant's case to trial. Specifically, the defendant took issue with the fact that he had been charged with first-degree murder on December 23, 2003, but not brought before the St. Clair County circuit court until

September 2, 2004—almost nine months later. The defendant filed a written speedy trial demand in St. Clair County circuit court upon learning that there were murder charges pending there against him. That demand was filed *pro se* on August 24, 2004. That motion stated that he was requesting "a speedy trial in this cause" pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2002)). But, the defendant voluntarily withdrew this speedy trial demand just two weeks later. In his motion to dismiss the charges, the defendant contended that his filing and withdrawal of his speedy trial demand were not relevant to the issue. He claims that his speedy trial rights were violated because the State failed to bring his case to trial within 120 days of the date the State charged him with murder—within 120 days of December 23, 2003.

¶ 120 In denying the defendant's motion without analysis, the trial court simply stated, "Defendant's motion to dismiss based upon Constitutional arguments for demand of speedy trial is hereby denied."

¶ 121 The defendant again raised the speedy trial issue in his motion for a new trial. After a hearing with testimony on this motion, the trial court denied the motion without stated reasoning.

¶ 122 We address the merits of the defendant's statutory speedy trial claim. In calculating the 120-day statutory period, we must determine when the time began to run. The defendant urges us to conclude that the period began immediately—as soon as the defendant was taken into custody relative to the St. Clair County charges—without the necessity of a written formal speedy trial demand, citing *People v. Workman*, 368 Ill. App. 3d 778, 784, 858 N.E.2d 886, 891-92 (2006), and *People v. Peco*, 345 Ill. App. 3d 724, 730, 803 N.E.2d 561, 566-67 (2004). The court in *People v. Peco* concluded that the plain and ordinary language utilized by the legislature in the speedy trial statute intended "that the 120-day speedy-trial period run automatically, without a formal demand for trial, from the day a defendant is taken into

custody." *Peco*, 345 Ill. App. 3d at 731, 803 N.E.2d at 566. Accordingly, the defendant asks us to calculate the 120-day period starting from the date the defendant was served with the arrest warrant—December 23, 2003.

¶ 123 The cases cited by the defendant are distinguishable from the facts of this case in a very significant respect. The defendants in *People v. Workman* and *People v. Peco* were not in custody on other charges, and so the only custodial event at issue was the one involving the charges in those cases. Here, the defendant was already in custody for charges filed against him in Brown County. Those charges preceded the murder charges in St. Clair County. The Brown County officials prosecuted these charges to conviction, and ultimately, the defendant was sentenced to a term of imprisonment for those crimes. A different set of rules apply in a case where a defendant has charges concurrently pending in more than one jurisdiction. The defendant's situation is therefore governed by the requirements of the Intrastate Detainers Act (730 ILCS 5/3-8-10 (West 2002)).

¶ 124 Pursuant to statute, persons who are "committed to any institution or facility or program of the Illinois Department of Corrections" with charges pending in another county of the state are entitled to application of the general rules of the statutory speedy trial section (725 ILCS 5/103-5 (West 2002)). 725 ILCS 5/3-8-10 (West 2002). In a speedy trial demand pursuant to the Intrastate Detainers Act, the defendant must include the following in his demand:

"a statement of the place of present commitment, the term, and length of the remaining term, the charges pending against him or her to be tried and the county of the charges, and the demand shall be addressed to the state's attorney of the county where he or she is charged with a copy to the clerk of that court and a copy to the chief administrative officer of the Department of Corrections institution or facility to which he or she is committed." 730 ILCS 5/3-8-10 (West 2002).

As stated earlier, the defendant's demand in St. Clair County merely requested trial pursuant to the speedy trial statutory section. That demand contained none of the statutory requirements of the Intrastate Detainers Act.

¶ 125 The State asks us to consider *People v. Wiseman*, 195 Ill. App. 3d 1062, 553 N.E.2d 46 (1990), as authoritative on this matter. In *People v. Wiseman*, this court held that the defendant, who was awaiting trial in one county while charges were pending against him in a second county, was not deemed to be in custody on the charges pending in the second county "until such time as the proceedings against him in the first county are terminated and he then is either returned to or held in custody for the second county." *People v. Wiseman*, 195 Ill. App. 3d 1062, 1064, 553 N.E.2d 46, 48 (1990). In July 1987, the defendant Wiseman was being housed in the Perry County jail awaiting the outcome of Perry County charges. *Id.* at 1063, 553 N.E.2d at 47. Because of maintenance within the Perry County jail, the defendant was transferred to the Randolph County jail. *Id.* While in the Randolph County jail, the defendant got into an physical altercation resulting in the filing of Randolph County charges for aggravated assault. *Id.* The defendant was charged, bond was set, and probable cause was found at a preliminary hearing in Randolph County. *Id.* One week after the preliminary hearing, the defendant was transferred back to Perry County to continue the criminal process in that county. *Id.* The Perry County charges were ultimately dismissed, but his probation was revoked, and he was sentenced to a term of imprisonment and transferred to a Department of Corrections prison. *Id.* Approximately 11 months after the Randolph County preliminary hearing, the defendant was transferred to Randolph County. *Id.* The defendant filed a speedy trial motion to dismiss the Randolph County charges on the basis that because he was never free to leave jail on those charges, he remained in Randolph County custody for 191 days. *Id.* at 1063-64, 553 N.E.2d at 47. The defendant argued that upon termination of the Perry County proceedings, his Randolph County speedy trial time

limit began running. *Id.* at 1064, 553 N.E.2d at 48. The Randolph County circuit court denied his motion on the basis that the defendant failed to invoke the provisions of the Intrastate Detainers Act. *Id.* The appellate court explained that upon termination of the Perry County proceedings, the defendant was transferred to the penitentiary and was neither returned to nor held by Randolph County—and therefore did not enter into Randolph County custody. *Id.* at 1065, 553 N.E.2d at 48. Upon being transferred to the penitentiary, "it was incumbent upon [the defendant] to invoke the provisions of the Intrastate Detainers Act to trigger his speedy trial rights." *Id.*

¶ 126 Applying the legal reasoning of *People v. Wiseman*, we find that the defendant's speedy trial rights did not automatically start as he argues and that because he was not in St. Clair County custody despite the charges pending against him in St. Clair County, he was required to invoke his rights very specifically pursuant to the Intrastate Detainers Act. Furthermore, the defendant's written speedy trial demand did not meet the dictates of the statute, and consequently did not start the speedy trial time. We note that Judge Fiss made a comment to the effect that the defendant was in custody in both jurisdictions; however, that statement was erroneous and does not in some way modify the law on custody.

¶ 127 Alternatively, the defendant argues that officials in the two counties conspired against him to thwart his speedy trial rights by keeping him in jail in Brown County, which provided St. Clair County officials with extra time to prepare his arrest warrant for the more serious St. Clair County charges. Specifically, the bond set in Brown County initially was quite high—\$2.5 million—and the defendant's theory is that the amount of that bond was artificially high, given the crime charged. By setting such a high bond, there was no ability to make bond—a fact that he presumes was known by officials of both counties and served as a means to further the conspiracy. Ultimately, the bond in Brown County was lowered to \$100,000. The defendant was still unable to make bond.

¶ 128 The defendant offers no proof that such a conspiracy transpired. While he alleges that officials of both counties spoke to one another, we would not find that fact to be alarming or even relevant to the argument he raises. Without proof of a contrary intent, there are obvious reasons the parties could have communicated without the purpose of the contacts being connected to conspiracy.

¶ 129 Additionally, we note that the matter of the bond set in Brown County is simply not before us, and we do not have a way of knowing, based upon the record in this case, why the Brown County judge initially concluded that the bail needed to be set at \$2.5 million. The testimony of the Brown County State's Attorney at the defendant's posttrial motion provided some background about the amount of the bond but failed to establish or even infer the conspiracy alleged. He acknowledged that the bond amount was high and stated that the Brown County trial judge was aware of the St. Clair County investigation. However, the Brown County State's Attorney believed that the high bond was connected to the facts of the Brown County crime with which the defendant was charged—specifically the fact that the defendant's ex-wife had an order of protection in effect and that the defendant had broken into and was discovered hiding in her home. The State's Attorney did not testify to any wrongdoing relative to the Brown County charges or bond amount despite intense cross-examination. The defendant's Brown County charges resulted in a conviction. For that conviction, the defendant was sentenced to a prison term of four years. There is no evidence alleged, nor argument made, that this initial arrest and subsequent prosecution and conviction in Brown County was in some way without merit.

¶ 130 Having reviewed the record in this case and after consideration of applicable legal standards, we conclude that the defendant's statutory speedy trial rights were not violated in this case. The defendant's blanket assertion that the delay was presumptively prejudicial is insufficient in this case. Furthermore, there is no proof of official collusion as alleged by the

defendant, and we will not presume an undue interference with the defendant's rights.

¶ 131 Constitutional Speedy Trial Rights. We next turn to the defendant's constitutional speedy trial argument, which is based upon his being arrested for the St. Clair County charges while he was in custody outside of St. Clair County for the Brown County charges.

¶ 132 While the defendant was in Brown County awaiting trial, 254 days passed from the date the defendant was charged with the St. Clair County crime until he was arraigned in St. Clair County. Counsel on the St. Clair County charge was appointed on the date of his first court appearance on September 2, 2004. The defendant argues that the nine-month passage of time from December 23, 2003, until September 2, 2004, demonstrated the State's failure to make a diligent good-faith effort to provide him with a speedy trial. The defendant argues that this passage of time was presumptively prejudicial and that upon consideration of the remaining three *Barker v. Wingo* factors (attribution of delay, assertion of his speedy trial rights, and prejudice), we must conclude that his constitutional rights were violated. *Barker*, 407 U.S. at 530.

¶ 133 We review the trial court's legal conclusion that the defendant's constitutional rights were not violated on a *de novo* basis. *Crane*, 195 Ill. 2d at 52, 743 N.E.2d at 562. If continuances of a trial setting are requested by or agreed to by the defendant, the speedy trial clock is tolled. *People v. Klinier*, 185 Ill. 2d 81, 114, 705 N.E.2d 850, 868 (1998).

¶ 134 In arguing this issue, the defendant points out the 39-month gap from the date on which the warrant for his arrest for the crime of first-degree murder was served and the date his trial began. He argues that this extensive delay denied him his constitutional right to a speedy trial. Generally speaking, delays beyond one year are construed to be presumptively prejudicial. *Doggett*, 505 U.S. at 652 n.1.

¶ 135 We have already determined that the defendant failed to properly assert his speedy trial rights. Assertion of speedy trial rights is necessary before a court can reach the

conclusion that a defendant's constitutional speedy trial rights have been violated. *Barker*, 407 U.S. at 530; *Doggett*, 505 U.S. at 651. However, even if we were to presume that the defendant properly asserted his speedy trial rights, there is the matter of the delay and who occasioned the delay. Once the defendant was actually taken into custody for this charged crime, at his St. Clair County arraignment date of September 2, 2004, a significant majority of the delays after that date and before trial were the result of requests by the defendant's attorneys or were agreements to delay by his attorneys,¹ with an additional delay being

¹On September 2, 2004, the parties agreed to reset the case for a pretrial conference on September 8, 2004 (6 days). On September 8, 2004, the defendant withdrew his earlier *pro se* speedy trial demand. On September 16, 2004, at the agreement of the parties, trial was set for February 28, 2005. On October 26, 2004, the parties agreed to reset the case for a pretrial conference on November 22, 2004 (27 days). On November 22, 2004, the parties agreed to change the trial setting from February 28, 2005, until September 19, 2005 (203 days). The parties agreed to move a pretrial conference from June 26, 2005, until June 30, 2005. On June 30, 2005, the parties agreed to modify the trial setting from September 19, 2005, until October 31, 2005 (42 days). On September 6, 2005, the defendant's appointed public defender, Randall Kelley, was allowed to withdraw as counsel, and a new attorney, Richard Sturgeon, was appointed in his place, with the agreement of both sides that the trial setting of October 31, 2005, would be continued until April 3, 2006 (154 days). By the defendant's own motion on February 21, 2006, the case was continued from the April 3, 2006, setting until August 7, 2006 (126 days). By agreement of the parties, on May 16, 2006, the parties continued the trial setting of August 7, 2006, until October 30, 2006 (84 days). On July 18, 2006, the court allowed the defendant's motion to substitute attorneys, after which attorneys Andrew Sosnowski and David Akemann would replace attorney Richard Sturgeon, and also on the defendant's motion, continued the trial setting from October 30,

ordered by the court as a discovery sanction to the defendant.² Based upon the fact that he either asked for or agreed to the majority of the delays sought, we fail to see how the defendant can now argue that he was prejudiced by the delay.

¶ 136 Accordingly, we find that there was no constitutional violation of the defendant's speedy trial rights.

¶ 137 Other Claimed Constitutional Violations Following Arrest Occasioned by the Delay

¶ 138 The defendant next contends that his constitutional rights were violated by the delay in his presentation before a St. Clair County judge in this case (254 days). The defendant argues that he did not receive an explanation of the charges against him, that counsel was not appointed for him, and that his right to be admitted to a reasonable bail was denied—that the \$10 million set by the trial judge was excessive.

¶ 139 An accused is guaranteed the right to counsel when charged with a crime by both the sixth and fourteenth amendments to the United States Constitution with similar requirements in our Illinois Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. In Illinois, a person who has been arrested must be presented to a judge "without unnecessary delay." 725 ILCS 5/109-1(a) (West 2002). While presentment is required without "unnecessary delay," that term is not defined and is therefore subject to the individual facts and circumstances of each case.

¶ 140 In this case, there is no question as to the relevant facts. The defendant was in jail pending trial on other charges in Brown County at the time that he was served with a copy of the St. Clair County arrest warrant on December 23, 2003. He was not brought before a

2006, until January 22, 2007 (84 days).

²The court ordered the continuance on January 17, 2007, as a sanction and attributed the delay to the defendant. The trial was continued from January 22, 2007, until March 26, 2007.

St. Clair County judge until September 2, 2004. No counsel was appointed to represent him in these St. Clair County charges until he was brought to St. Clair County. The delay at issue was 254 days.

¶ 141 Section 109-1 of the Code of Criminal Procedure of 1963 (the Code) requires that any person who is placed under arrest either with or without a warrant must be taken without necessary delay to the most accessible judge, where the judge will inform the defendant of the charge and present a copy of the charge, advise of the right to counsel including appointed counsel, schedule a preliminary hearing, and admit the defendant to bail. 725 ILCS 5/109-1 (West 2002).

¶ 142 Aside from the fact that the defendant raises violation of this section for the first time on appeal, the defendant fails to prove any prejudice resulting from the delay in this case, in light of the fact that he was in jail awaiting trial in another county on other charges at the time that he was charged and indicted in St. Clair County. The defendant provides no evidence about what transpired in the Brown County court when his appearance was made in that forum. Furthermore, the cases cited by the defendant in support of his claim are inapposite as all of them involve actions within one county and issues with the defendant being held without access to a judge, or an attorney, while a confession or statement is procured by law enforcement. See, e.g., *People v. Willis*, 215 Ill. 2d 517, 535, 831 N.E.2d 531, 542 (2005) (confession made during 87 hours of a warrantless arrest was inadmissible); *People v. House*, 141 Ill. 2d 323, 380, 566 N.E.2d 259, 284-85 (1990) (the defendant's confession made at 37 hours of a 64-hour hold before being presented to a magistrate was determined to be admissible because the defendant was unable to establish prejudice); *People v. Dove*, 147 Ill. App. 3d 659, 667, 498 N.E.2d 279, 284 (1986) (a four-day delay between the defendant's arrest and arraignment did not impact the voluntariness of the defendant's confession).

¶ 143 The defendant raises the fact that no preliminary hearing was scheduled, but because he was indicted so close in time to issuance of the arrest warrant, we are unable to glean the prejudice the defendant could have suffered. Because of the indictment, any preliminary hearing would have been pointless.

¶ 144 The defendant also argues that his St. Clair County bail amount was excessive. He compares his murder charge with other defendants in St. Clair County charged with murder—which were lower than his. He cites no case law holding that a high amount of bail equates to a violation of section 109-1 of the Code. We agree with the State's position that consideration of this issue is irrelevant, because the amount of bail in St. Clair County would only have become an issue if he had been able to make bail in Brown County. The bond amount was lowered in Brown County and yet the defendant still did not post bond. He was unable to establish that he could have made bail in Brown County. He provided no proof that he had attempted to post bond in Brown County. The outcome of the Brown County charges was a term of incarceration. Therefore, upon that event, whether or not his bail in St. Clair County was too high was not relevant. Furthermore, we find no proof—nor argument on this point—that the defendant was prejudiced in any way by the amount of bail set in St. Clair County.

¶ 145 The remedy sought by the defendant for the State's alleged violations of section 109-1 of the Code is discharge and dismissal of the charges against him. He seeks this remedy pursuant to section 12 of article I of the Illinois Constitution (Ill. Const. 1970, art. I, § 12). The defendant cites no authority for the proposition that violations of section 109-1 are entitled to the constitutional remedy sought. Section 12 of article I of the Illinois Constitution has been explained by our Illinois Supreme Court as being simply " ' an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form." ' " *Segers v. Industrial Comm'n*, 191 Ill. 2d 421, 435, 732 N.E.2d 488, 497

(2000) (quoting *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 72, 588 N.E.2d 1139, 1145 (1992) (quoting *Sullivan v. Midlothian Park District*, 51 Ill. 2d 274, 277, 281 N.E.2d 659, 662 (1972))).

¶ 146 For the reasons stated, we do not find that the defendant established a constitutional violation or prejudice that would warrant discharge and dismissal of the charges.

¶ 147 Failure to Provide Funds for Expert Witnesses and Investigative Services

¶ 148 Indigence. In Illinois, an indigent person charged with a capital offense is allowed to request expert witness fees. The statute provides that in capital cases, if the court determines that the defendant is indigent the court may order the county to pay necessary expert witnesses for a defendant's reasonable compensation not to exceed \$250. 725 ILCS 5/113-3(d) (West 2002). The Illinois Supreme Court extended application of this section to noncapital felonies. *People v. Watson*, 36 Ill. 2d 228, 235, 221 N.E.2d 645, 649 (1966). However, there must first be a showing that the expert's services are necessary to prove a crucial issue in the case, and also that the lack of funds would prejudice the defendant. *People v. Glover*, 49 Ill. 2d 78, 83, 273 N.E.2d 367, 370 (1971), *overruled on other grounds by People v. Lopez*, 207 Ill. 2d 449, 800 N.E.2d 1211 (2003). In 1983, our Illinois Supreme Court ruled that courts could exceed the statutory limit of \$250 and that in certain situations the entitlement to assistance of investigators and experts could extend to private counsel. *People v. Kinion*, 97 Ill. 2d 322, 335-36, 454 N.E.2d 625, 631 (1983). When a trial court refuses a defendant's request for expert witness fees, we review that decision to determine if the trial court abused its discretion. *People v. Wilson*, 117 Ill. App. 3d 744, 749, 453 N.E.2d 949, 952 (1983).

¶ 149 In this case, the defendant filed a *pro se* request for appointment of counsel on August 24, 2004. On September 2, 2004, the defendant informed the court that he was without funds to employ private counsel. In response to this statement, the court declared that the

defendant was indigent and appointed an attorney to represent him. The court also appointed a special investigator on the defendant's behalf. Despite his claims of poverty, private attorneys at various times entered appearances on the defendant's behalf. On July 18, 2006, private counsel filed a motion seeking the appointment of experts and the continued appointment of the special investigator. No specifics about the expert witnesses that were needed were included in the motion. That motion was taken under advisement on August 29, 2006. The State responded that the appointment of experts was not supported in cases where the defendant had privately retained attorneys. On October 24, 2006, the trial court determined that the defendant was no longer indigent, as the defendant then had private counsel.

¶ 150 The State argues that despite the fact that the defendant originally claimed that he was indigent, his private attorneys never represented to the trial court that they were representing the defendant on a *pro bono* basis. The State suggests that the defendant's attorneys could have been funded by a third party, but acknowledges that although Illinois has not specifically ruled on this issue, other federal and state courts that have ruled upon this issue have overwhelmingly held that indigency is a personal matter such that third-party contributions to a defense do not transform an indigent defense into a nonindigent defense. See *Fullan v. Commissioner of Corrections*, 891 F.2d 1007, 1011 (2d Cir. 1989); *State v. Vaughn*, 279 S.W.3d 584, 600-01 (Tenn. Ct. App. 2008); *Hill v. State*, 304 Ark. 348, 350-51, 802 S.W.2d 144, 145 (1991) (*per curiam*); *Ex parte Sanders*, 612 So.2d 1199, 1201 (Ala. 1993); *State v. Jones*, 707 So.2d 975, 977-78 (La. 1998); *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. Ct. App. 1996); *Widdis v. Second Judicial District Court*, 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998); *State v. Burns*, 2000 UT 56, ¶¶ 25-32, 4 P.3d 795, 800-02; *State ex rel. Rojas v. Wilkes*, 193 W.Va. 206, 208, 455 S.E.2d 575, 577 (1995).

¶ 151 From our review of the record it is clear that the defendant's attorneys represented to

the court that he was indigent. This representation was in a formal offer of proof on October 4, 2006, during which his attorneys pointed out the fact that he had not been employed for the previous four years due to incarceration and that he did not own any property. While the attorneys may not have formally told the court that they were representing the defendant on a *pro se* basis, we do not find this discrepancy to be relevant. By formally advising the court of the defendant's personal indigence, we find, as have many other courts, that indigence is a status that is personal to the defendant and that therefore whether or not the fees of the defendant's attorneys were paid by a third party or parties is not relevant.

¶ 152 Expert Witnesses. Because we find that the defendant was indigent, we turn to the next part of the analysis. Were the expert witnesses for which defense counsel sought funding crucial to his defense? The defendant's attorneys note the difficulty of this question due to the fact that the matter was not discussed or argued at the trial court level. Without more, the court has no way to determine whether the necessity of expert witnesses was crucial to his defense. On July 18, 2006, the defendant filed his motion for appointment of experts and for the continued appointment of a special investigator. In this motion, the defendant represented that he "may be in need of assistance from expert witnesses." In his memorandum accompanying this motion, the defendant referenced the State's expert witness plan and simply indicated that he required funding in order to have the State's evidence reviewed and to provide him with a meaningful defense. The defendant did not specify any critical issue for which expert testimony was required in his defense.

¶ 153 We find that the facts of this case are similar to those in *People v. McCoy*, 281 Ill. App. 3d 576, 666 N.E.2d 805 (1996). The defendant in *McCoy* was facing first-degree murder charges and sought funding in order to retain an expert for his defense. *Id.* at 583, 666 N.E.2d at 810. His motion specified that the expert would be for the purpose of exploring the possible affirmative defense of voluntary intoxication. *Id.* After being

examined by an entity called the Psychiatric Institute, whose report the defendant successfully barred from usage at his trial, the defendant renewed his motion for funding, stating that he was indigent and that his family could not afford to procure such an expert. *Id.* The defendant did not make a pretrial offer of proof establishing a factual need for obtaining the services of this type of expert witness. *Id.* In light of this failure, the court concluded that the defendant's constitutional rights were not violated because funds were not provided to him because the defendant failed to make a threshold showing "that expert testimony would be crucial to his defense." *Id.*

¶ 154 In this case, the defendant never outlined what his needs were relative to expert witnesses, and he certainly never made an offer of proof of those needs when seeking funding. The record indicates that the defendant ultimately secured his own expert on DNA issues in order to respond to forensic crime scene evidence offered by the State, and the results of this expert involvement was utilized by his attorneys at trial. We will not engage in speculation about the purpose for any expert witnesses the defendant may have wanted to retain in order to defend his case. We hold that the defendant failed to establish a critical need for expert witnesses in the defense of his case, and we further conclude that the defendant's constitutional rights were not violated. The trial court's ruling denying funding for expert witnesses does not amount to an abuse of discretion.

¶ 155 Investigative Services. With respect to the investigative services the defendant sought in this case, there is no statutory provision about investigators as there is for expert witnesses. Investigation is clearly different in scope than expert testimony, as the very nature of an expert witness involves a specific focus of expertise on a topic. However, an indigent defendant may make a threshold showing that an investigator is necessary to prove a crucial issue and that the defendant's indigence would result in severe prejudice. *People v. Veal*, 110 Ill. App. 3d 919, 926, 443 N.E.2d 605, 610 (1982).

¶ 156 Again, we confirm that the trial court's determination that the defendant was not indigent was erroneous, but we conclude that the defendant's claim fails on the same basis as it did on the matter of expert witness funding. The defendant wholly fails to establish need on a crucial issue. When the defendant first sought the services of the requested investigator, he merely stated that he was in need of continued investigative assistance. Later he renewed this request but again failed to specify any crucial issue. While the defendant stated that the first appointed investigator developed a number of leads that necessitated follow-up, he provided no specifics about these leads to the court. Therefore, the defendant failed to establish that follow-up on leads, in the generic sense, amounted to a crucial issue.

¶ 157 The defendant claims that he was prejudiced by the court's denial of his request for funding, but does not establish on appeal how, in fact, he was prejudiced by this refusal to fund additional investigative services.

¶ 158 The court's order denying funding for additional investigative services was not erroneous. The defendant failed to establish the level of need required in order to receive such funding. Accordingly, we do not find that the trial court's ruling amounted to an abuse of discretion.

¶ 159 Failure to Grant the Defendant's Motion for a Bill of Particulars

¶ 160 The State filed a notice of intent with the court on September 2, 2004. That notice indicated that the State planned to submit a felony murder instruction which would indicate that the felony at issue was attempted aggravated criminal sexual assault pursuant to sections 12-14 and 12-13 of the Criminal Code of 1961 (720 ILCS 5/12-14, 12-13 (West 2002)). As the State explained to the trial court at the hearing on the request, there was only one murder charge, but the State was notifying the defendant of its intent to instruct the jury on different theories of that one murder charge—one of which being the felony murder at issue. If the State was successful and obtained a conviction, the State also intended to use the same felony

as an aggravating factor under which they would pursue a sentence of natural-life imprisonment.

¶ 161 In response, the defendant sought a bill of particulars (725 ILCS 5/114-2 (West 2002)), asking the court to order the State to provide the following information regarding the charged offense as well as the qualifying felony:

1. The exact time and date that the occurrences allegedly took place and all of the events listed;
2. The exact street address and physical description of the location where the occurrences allegedly took place;
3. Whether the defendant was being charged as a principal or one who was merely accountable;
4. The specific acts allegedly committed by the defendant which would constitute the offense of first-degree murder; and
5. The particular acts allegedly committed by the defendant which would constitute the alleged attempted aggravated criminal sexual assault.

The defendant took issue with the attempted aggravated criminal sexual assault aspect of this case—that this crime was not originally mentioned in the indictment.

¶ 162 A bill of particulars must be filed before or within a reasonable time after the arraignment and "shall specify the particulars of the offense necessary to enable the defendant to prepare his defense." 725 ILCS 5/114-2(a) (West 2002). The trial court has broad discretion on whether to grant or deny a request for a bill of particulars, and unless the trial court's denial constitutes an abuse of discretion, that denial does not deprive the defendant of his right to a fair trial. *People v. O'Connell*, 84 Ill. App. 2d 184, 193, 228 N.E.2d 154, 158 (1967). In order for the denial of a bill of particulars to amount to reversible error, the defendant must show some evidence of prejudice. *People v. Ward*, 302 Ill. App.

3d 550, 559, 707 N.E.2d 130, 137 (1998).

¶ 163 In deciding the necessity for a bill of particulars, the trial court may consider the discovery that the State has tendered to the defendant. *People v. Smith*, 259 Ill. App. 3d 492, 497, 631 N.E.2d 738, 742 (1994). A defendant is not allowed to utilize the vehicle of a bill of particulars in order to obtain a general disclosure of the State's evidence. *Ward*, 302 Ill. App. 3d at 559, 707 N.E.2d at 137.

¶ 164 In this case, at the time when the request for a bill of particulars was filed in September 2006, the State had provided defense counsel with approximately 7,000 pages of discovery, which the State contended adequately indicated what evidence would be used to prove an attempted aggravated criminal sexual assault. The prosecutor explained that the specific items sought by the defendant in its requested bill of particulars—the date, time, and place, amongst others—were already in the indictment. The felony murder instruction would simply present a different theory of first-degree murder to the jury for consideration. Even so, the prosecutor informed the trial court that the grand jury proceedings were very specific as to the State's theory of the case. The defendant correctly points out that the grand jury proceedings do not appear to be an official part of the common law record in this case at the time that the request was filed, but the record supports that the transcript was prepared and given to the defendant's counsel by court order dated September 8, 2004. So, while the transcript of the grand jury proceedings is not included in the record, defense counsel received a copy of the transcript.

¶ 165 The trial court denied the defendant's request for a bill of particulars. The record is unclear of the basis for the trial court's denial. On appeal, the defendant does not argue how the court's decision amounted to an abuse of discretion. Accordingly, we do not see any basis upon which we could conclude that the denial of the bill of particulars request amounted to an abuse of discretion.

¶ 166 Even if we concluded that the denial amounted to an abuse of discretion, the defendant would still need to establish prejudice. We know that the State pointed specifically to the grand jury proceedings as the foundation for the felony murder instruction request. In order to analyze whether or not the defendant was prejudiced, we examine the relevant evidence introduced at the grand jury proceeding.

¶ 167 Amy's body was discovered in the women's restroom of the business where she was working on the date of her murder. She was partially nude from the waist down, and her shirt and bra were in a state of disarray. Her pants, underwear, and tennis shoes were in the men's restroom. Amy's tampon had been removed from her body. She died from a gunshot wound to the head. A sexual assault kit was collected but there was no evidence of semen found in her vagina, while the rectal swab was inconclusive.

¶ 168 The defendant's ex-wife, Dawn Ritchey, provided information that was included in the grand jury proceedings. On the date of the murder, the defendant came home with a large amount of blood or something that looked like blood on his pants. He was no longer wearing the jacket that he had been wearing earlier that day when he left the marital home. Upon arriving home, the defendant went to his bedroom to watch pornographic movies. Dawn Ritchey also informed police officials that the defendant no longer was sexually interested in her and that she had found a listing for the defendant accompanied by his photograph in a swinger's magazine. The subsequent police search of the Phillips home resulted in the seizure of two bags containing pornographic material, including a swinger's magazine.

¶ 169 In light of the information provided in the grand jury hearing, we agree with the State's position that there was little mystery about the approach the State planned relative to establishing the attempted sexual assault in order to utilize the felony murder instruction. While 7,000 pages of discovery documents would be a daunting amount to review, given the specific direction by the prosecutor that information related to the attempted sexual assault

was in the grand jury proceedings, and given the specifics of that testimony and evidence, we conclude that there was no prejudice to the defendant by the court's denial of his request for a bill of particulars.

¶ 170 Failure to Grant the Defendant's Motion for Additional Discovery

¶ 171 In addition to the information sought in the bill of particulars, the defendant also asked the court for a list of witnesses that the State intended to call, along with the witnesses' contact information. He asked for the same information about expert witnesses and also copies of their reports and any opinions they could be expected to deliver. The defendant sought lists of all physical evidence the State intended to use at his trial and the name of the current custodian of each piece of evidence. He asked the State to provide any information in its possession that would indicate a different perpetrator of the crime—whether any witness had identified anyone else as the perpetrator.

¶ 172 While the motion was filed, we have thoroughly reviewed the transcript of the court's hearing on multiple motions on August 29, 2006, and conclude that the trial court did not rule upon this motion. Therefore, this issue is not properly before us.

¶ 173 Motion to Suppress the Defendant's Videotaped Statement

¶ 174 The defendant argues that the trial court erred in denying his motion to suppress. The motion advanced two arguments. The defendant argues that his wife was the source of information which led to this interview, and the information she provided was privileged, and that therefore the interview was the fruit of that poisoned tree. Secondly, he argues that the statement should be suppressed because he was not read *Miranda* warnings at an even earlier time prior to the beginning of the recorded interview—at the moment he was stopped on the parking lot of his place of employment.

¶ 175 Marital Privilege. One spouse cannot testify in criminal proceedings against the other spouse about communications or admissions during the marriage. 725 ILCS 5/115-16 (West

2002). The purpose of a marital privilege is grounded in the preservation of family and marital harmony. *People v. Hall*, 194 Ill. 2d 305, 336, 743 N.E.2d 521, 539 (2000); *People v. Evans*, 277 Ill. App. 3d 36, 44, 660 N.E.2d 240, 246 (1996). There is a presumption that all interspousal communications are intended to be confidential. *People v. Murphy*, 241 Ill. App. 3d 918, 924, 609 N.E.2d 755, 760 (1992). In Illinois, the marital privilege can protect statements of a person's spouse in criminal proceedings whether or not an objection to the statements is lodged. *People v. Sanders*, 111 Ill. App. 3d 1, 8-9, 443 N.E.2d 687, 692-93 (1982), *rev'd on other grounds*, 99 Ill. 2d 262, 457 N.E.2d 1241 (1983).

¶ 176 The defendant's argument on appeal is that because the original warrants were based upon the receipt of privileged communications between he and his then wife, Dawn, the December 17, 2003, statement must be suppressed as fruit of the poisonous tree.

¶ 177 The State correctly points out that the defendant raises this argument for the first time on appeal and that therefore the argument is properly considered to be waived. *People v. Johnson*, 250 Ill. App. 3d 882, 892, 620 N.E.2d 506, 511 (1993).

¶ 178 However, even if the issue was not waived by the defendant's failure to raise the marital privilege in his motion to suppress, the defendant's argument fails. While the defendant is correct that a marital privilege exists in Illinois, that privilege does not exist in all circumstances. The marital privilege applies to testimony of one spouse against another spouse. 725 ILCS 5/115-16 (West 2002). The privilege provides that "[n]either [spouse] may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage." *Id.* Wording of statutes must be given their plain meaning. *People v. Cordell*, 223 Ill. 2d 380, 389, 860 N.E.2d 323, 330 (2006).

¶ 179 The defendant's wife did not testify about conversations she had with the defendant. She was interviewed about these conversations, but the statute—and therefore, the privilege—extends only to testimony under oath. Therefore, the information Dawn Phillips

provided to the police was not protected from use by the marital privilege. Because we do not conclude that Dawn's conversation with the police officers contained privileged information, we decline to hold that the resulting interview of the defendant should have been barred from use as fruit of the poisonous tree.

¶ 180 Miranda and Custody. The defendant asked the trial court to suppress his recorded statement on the basis that it was coerced due to the surrounding factual circumstances. He claims that the police officers descended upon him in the parking lot of his place of employment on December 17, 2003, and that he was compelled by coercion to speak to the officers. He argues that he was not going to be allowed to depart the area, nor to use his vehicle. He also claims that because he was employed by the State of Illinois, and because the officers had already communicated with his supervisor, he felt compelled to give an interview or risk losing his job. In essence, the defendant argues that he was not free to leave from the moment that he was approached by the officers on the parking lot, and that he was under arrest.

¶ 181 The trial court's findings of fact and credibility determinations are given great deference upon review of a court's ruling on a motion to suppress. *In re Christopher K.*, 217 Ill. 2d 348, 373, 841 N.E.2d 945, 960 (2005). We will not overturn a ruling suppressing evidence unless the order is manifestly erroneous. *People v. Slater*, 228 Ill. 2d 137, 149, 886 N.E.2d 986, 994 (2008).

¶ 182 In ruling upon a motion to suppress a confession, the court must first determine whether the accused was "in custody" during the interview process. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The *Miranda* warnings are only required when an accused is in custody. *Id.*; *People v. Lucas*, 132 Ill. 2d 399, 417, 548 N.E.2d 1003, 1009 (1989). The custodial interrogation that triggers the need to provide the warnings occurs after the person "has been taken into custody or otherwise deprived of his freedom of action in any significant

way." *Miranda*, 384 U.S. at 444. The safeguards provided by the *Miranda* warnings become applicable when the person's freedom is curtailed on the level of a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

¶ 183 In ruling upon a motion to suppress a confession, the court must first determine whether the defendant was "in custody" while he was being interviewed. *Miranda*, 384 U.S. at 444. The determination of whether or not the suspect is in "custody" is tested by an objective standard—what a reasonable person in the suspect's situation would perceive. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). To conclude that the statement was or was not given in a custodial setting, the court must look to all circumstances of the questioning and then analyze those circumstances from an objective basis—whether "a reasonable person would have believed that he was not free to leave." *Id.*

¶ 184 In accordance with *Mendenhall*, the Illinois Supreme Court in *People v. Bolden*, 197 Ill. 2d 166, 181, 756 N.E.2d 812, 820 (2001), listed police conduct determinative of seizure. The *Bolden* court stated:

"Among the circumstances a court may consider in determining whether a person has been seized for fourth amendment purposes are the presence of multiple officers, the display of weapons by an officer, the touching of the person by the officers, the officers' use of language suggesting that the person is compelled to obey, and the occurrence of practices that normally accompany an arrest, such as searching, handcuffing, and fingerprinting." *Bolden*, 197 Ill. 2d at 181, 756 N.E.2d at 820.

¶ 185 In *Yarborough v. Alvarado*, the United States Supreme Court reaffirmed that to start, the circumstances surrounding the suspect's questioning must be considered and that given those circumstances, the court must determine whether a reasonable person felt that "he or she was not at liberty to terminate the interrogation and leave." *Yarborough v. Alvarado*,

541 U.S. 652, 663 (2004) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). The objective nature of the "in custody" test does not involve the individual idiosyncracies of the person—like the age or prior experience with police. *Yarborough*, 541 U.S. at 666-67. The *Yarborough* Court reaffirmed that the circumstances surrounding the suspect's questioning must be considered first and that, given those circumstances, the court must determine whether a reasonable person felt that " 'he or she was not at liberty to terminate the interrogation and leave.'" *Yarborough*, 541 U.S. at 663 (quoting *Thompson*, 516 U.S. at 112. In a case involving a 17-year-old suspect, the *Yarborough* Court found that the objective nature of the "in custody" test does not involve individual idiosyncrasies—such as age or prior experience with police. *Yarborough*, 541 U.S. at 666-67. The Supreme Court clarified the objectivity required:

" [T]he clarity of [*Miranda's*] rule' [citation] *** ensur[es] that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect' [citation]. ***

*** [T]he objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect ***. ***

*** In most cases, the police officers will not know a suspect's interrogation history. [Citation.] Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative." *Yarborough*, 541 U.S. at 667-68 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984)).

¶ 186 In *People v. Slater*, the Illinois Supreme Court listed an expanded version of the factors to be considered in determining if a suspect is "in custody":

"(1) the location, time, length, mood, and mode of the questioning; (2) the number of

police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused." *Slater*, 228 Ill. 2d at 150, 886 N.E.2d at 995.

¶ 187 We turn to the facts of this case. We have reviewed the testimony of the officers and have reviewed the entirety of the videotaped interview of the defendant. While there were six officers involved with the investigation that morning, only two officers approached the defendant on the parking lot of his place of employment. No weapons were displayed or drawn. The officers did not use force or threaten any use of force. The defendant is correct that he would not have been allowed to use his own vehicle. At that point, the officers already had a search warrant that allowed them to search the defendant's vehicle. But the defendant was unaware at that time that the officers had the warrant. In response to the officers' request to ask the defendant some questions, he stated that he first needed to speak with his attorney. He did so. Following this conversation, the defendant agreed to be transported in order to participate in this interview. The defendant was not handcuffed. The defendant sat in the front seat of the police vehicle. There were three officers in the vehicle with him. The officers did not ask him any questions while driving. On the way to the Mt. Sterling police department, the defendant's attorney called the defendant, and ultimately, the location of the interview changed to his office. En route to the attorney's office, the officers stopped the vehicle twice to allow the defendant to use the restroom. When the defendant wanted a beverage, the officers purchased him a soda. The defendant does not contend that he was told that he could not leave, or that he was threatened, or that the officers made him any promises. The defendant was allowed to consult with his attorney before the interview,

and was allowed to sit next to his attorney during the interview, which was taped at his attorney's request.

¶ 188 From our review of the videotape, we note that the officers present in the interview were dressed professionally, but not in uniform. No guns were evident. The interview was cordial. The videotape reflected that the defendant was very much at ease. He was clearly under no duress. He was Mirandized at the beginning of the hearing and confidently stated that he understood those warnings.

¶ 189 Considering the totality of the circumstances, there simply is no basis to conclude that the trial court's order denying the defendant's motion to suppress the interview was manifestly erroneous. The parking lot encounter did not amount to a custodial setting and no *Miranda* warnings were necessary. The defendant's freedom was not curtailed on a level that equated to an inability to leave, and we conclude that based upon the totality of these circumstances, a reasonable person would have felt free to leave.

¶ 190 Violation of Motion *in limine* and Denial of Request for Mistrial

¶ 191 The defendant next argues that the trial court erred in denying his request for a mistrial on the basis that the jurors heard reference to an order of protection—about which there had been a pretrial motion *in limine* to protect the defendant from such references. The defendant contends that denial of his mistrial requests resulted in denial of his right to a fair trial.

¶ 192 On April 26, 2005, the defendant filed a motion *in limine* for an order which would exclude any evidence at trial that the defendant had been previously charged with and/or convicted of any criminal offenses or had "otherwise been involved in other crimes, wrongs or acts." On January 13, 2006, he filed a virtually identical request with the trial court. On November 9, 2006, the motions were argued. At issue was whether the State could use certified copies of the defendant's convictions for perjury, burglary, and obstruction of justice if the defendant took the stand at trial to testify on his own behalf. The State's Attorney at

this hearing stated on the record that they were not attempting to impeach or otherwise use evidence of the defendant's two convictions for unlawful violation of an order of protection. The written order denied the defendant's request to keep out the convictions for perjury, burglary, and obstruction of justice, but granted the motion as to all other bases.

¶ 193 The defendant also filed a motion for redaction of the December 17, 2003, videotaped statement relative to the defendant's use of the term "order of protection." Defense counsel raised this issue again on the day before the trial began.

¶ 194 During the trial, the State played the videotaped interview for the jury. Without redaction, the jury heard, "She got an order of protection against me, basically an attack on her." Immediately, counsel for the defendant asked for a mistrial on the basis that this violated the motion *in limine*. The trial court denied the motion for a mistrial on the basis that the failure to redact that phrase in the taped interview was inadvertent.

¶ 195 The jury also heard the testimony of the father of a State witness, Emily Hea Buss. On direct examination, this witness testified, "The only time I spoke with Dawn was when the order of protection, or whatever, went bad and things started turning out that come up that I couldn't put up with Ed." Defense counsel again sought a mistrial. The trial court denied the request. The trial court also refused to hold the witness in contempt of court. The State represented that it had admonished the witness before he took the stand.

¶ 196 A mistrial should only be granted if an error is so grave that it impacted the fundamental fairness of the trial, such that continuing the trial would defeat the ends of justice. *People v. Sims*, 167 Ill. 2d 483, 505, 658 N.E.2d 413, 423 (1995). We will not disturb the trial court's ruling unless that decision amounted to an abuse of discretion. *Id.*

¶ 197 The violation of a motion *in limine* can serve as the reason for a mistrial—but only if the defendant was fundamentally denied his right to a fair trial. *People v. Hall*, 194 Ill. 2d 305, 342, 743 N.E.2d 521, 542 (2000).

¶ 198 Mention of Order of Protection on December 17, 2003, Taped Interview. With respect to the videotaped interview, from our review of the record, there was no specific court ruling relative to the contents of that taped interview. The defendant did ask the trial court to redact the tape—but made absolutely no reference in his motion to the "order of protection" reference made by the defendant. Instead, the defendant focused on his assertion of his fifth amendment privilege against self-incrimination and on his request that his lawyer be present during this interview. The defendant's counsel asked the court at the hearing to redact "any other statements that were made [by the defendant] that correspond with your previous rulings, any nature of the—anything else that was asked of him that violates your previous orders." As the State points out, however, the only "prior ruling" to which defense counsel could have been referring was the order that the defendant could not be impeached by convictions for order of protection violations if he took the stand to testify at trial. An agreement not to impeach the defendant with convictions for order of protection violations is a far cry from a reference to his ex-wife seeking an order of protection. We agree with the State's position that it is a stretch of an argument to assume that the defendant wanted that reference redacted from the tape. Furthermore, the parties agreed to advise all witnesses to make no references to an order of protection. It would seem then that the parties were not contemplating the order of protection reference on the tape when agreeing to counsel witnesses prior to live testimony before the jury. When faced with the mistrial motion, the prosecutor stated on the record that he did not think that the parties' agreement regarding advising all witnesses to avoid that reference would extend to the videotaped interview of the defendant himself.

¶ 199 We conclude that the mention of an "order of protection" on the videotape did not warrant a mistrial when considered with the facts that the defendant did not seek to have that statement redacted from that tape even though he knew that the statement was on the

videotape, and that the defendant did not object to the tape being admitted into evidence. The jury heard no details about the order of protection other than the defendant's reference. There was no reference on the tape to the fact that the defendant was ultimately convicted of violations of that order of protection. Even the context of the reference on the tape was telling. The reference on the tape was not a question by the police officers, but was brought up by the defendant as a means to explain to the officers that his wife, Dawn, was threatening him in his divorce proceeding relative to the information he knew about this murder. He used this order of protection as a means by which he could establish his position as a victim in his own situation—that he would not have come to the officers' attention but for the fact that his wife was threatening him, and in fact made good on her promises. We note also that the defendant did not ask that the jury be instructed to disregard any mention of an order of protection. Such an instruction would typically be considered a sufficient remedy for an inadvertent mention, as a jury is presumed to follow a court's instructions. *People v. El*, 83 Ill. App. 3d 31, 41, 403 N.E.2d 547, 555 (1980).

¶ 200 The trial court's order denying the mistrial did not amount to an abuse of the court's discretion.

¶ 201 Reference by Witness to Order of Protection. From our review of the transcript of John Hackman's testimony, it is clear that the State did not elicit this reference to an "order of protection." The State represented to the court that it did, in fact, admonish Mr. Hackman, but apparently in the stress of testifying in court, the words were uttered by mistake. The witness was being asked if he had spoken to the defendant's ex-wife, Dawn, a number of times. He testified that he had not spoken to Dawn on a number of occasions and furthermore that the only time he had done so was "when the order of protection *** went bad."

¶ 202 We agree with the trial court's assessment that this error on the part of the witness was

not of a significant magnitude such that the defendant's right to a fair trial was prejudiced. The reference was fleeting, without any additional substantive details. The order of protection itself had no relationship to the victim, but involved only the defendant's wife. There was no reference to violations and convictions of an order of protection. Additionally, the defendant did not ask the court to instruct the jury to disregard the reference, although he could have done so. We find no basis to conclude that the trial court's denial of the request for a mistrial amounted to an abuse of discretion.

¶ 203 Testimony of Witness Emily Hea Buss by Videotaped Deposition

¶ 204 The defendant argues that his constitutional right to confront the witnesses against him was violated by the court's allowance of Emily Buss's videotaped deposition. U.S. Const., amend. VI.

¶ 205 On March 23, 2007, the State sought a continuance of the March 26, 2007, trial setting on the basis that a material witness, Emily Hea Buss, would not be available to testify at the impending trial due to medical issues related to her pregnancy. The State proposed a new setting of May 7, 2007. The defendant objected. At the hearing, the State explained that Emily was pregnant with her fourth child and that the baby's due date was April 17, 2007, but that Emily had not carried a baby past the thirty-seventh week in any of her previous three pregnancies. She had been rushed to the hospital on March 18, 2007, because she was in preterm labor. Physicians were able to stop the labor process, but the contractions continued. On March 23, 2007, Emily spoke with the assistant State's Attorney to advise that her obstetrician explained that she was 20% dilated and 50% effaced. Emily indicated that she was now not able to testify on March 26, 2007, but that she would testify after the baby was born.

¶ 206 The State then made an offer of proof to the trial court relative to the reason for need of Emily's testimony. Essentially, Emily would testify that she had a conversation with the

defendant in the fall of 2003, in which he told her about how he happened upon the murder scene in O'Fallon and what actions he took immediately thereafter. What Emily would testify to differed from the statement the defendant himself gave to investigators on December 17, 2003. Additionally, the defendant allegedly told Emily that he lied to his wife on December 31, 1999, about the source of blood on his pants. Finally, Emily was expected to testify that the defendant told her on or about October 9, 2003, that he had spoken to O'Fallon investigators about what he witnessed. In objecting to this continuance request, defense counsel argued about the timing of the motion, about whether Emily Hea Buss was a material witness, and that her medical situation, without expert testimony, should not prevent her attendance at trial. Defense counsel offered to agree to the continuance if the State would allow the defendant's release on bond. The State offered a stipulation to the key parts of Emily's testimony, if the defendant would agree, in which case there would be no reason to continue the case.

¶ 207 The trial judge stated that he was inclined to grant the continuance, unless some sort of stipulation could be achieved. Ultimately, the parties agreed to take Emily's deposition which could be used at trial.

¶ 208 In order for videotaped depositions of this type to be deemed admissible evidence in a trial, there are certain mandatory requirements. First, the witness must be unavailable, and the defendant must have had a prior opportunity for a meaningful cross-examination of the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

¶ 209 The trial court did not directly rule on the issue of Emily's unavailability. However, it is presumed that the trial court knows the law. *People v. Phillips*, 392 Ill. App. 3d 243, 911 N.E.2d 462 (2009). Whether or not the unavailability of the witness was ruled upon, we find the defendant's argument entirely unconvincing on this issue. The State sought a very short continuance of the trial setting in order to allow Emily's baby to be born. The defendant

objected. The court indicated that it was inclined to grant the motion for a continuance in light of the circumstances, but suggested that the parties might be able to come up with a stipulation or another alternative to the continuance. Ultimately, defense counsel proposed the possibility of a videotaped deposition. The State agreed. The trial court found this option acceptable. On the record, the defendant waived his right to be present and confront this witness during her deposition.

¶ 210 A judge was brought to the hotel where the deposition was taken for the express purpose of swearing in this witness. From our review of the videotape, it is clear that the defendant had a full and complete opportunity to cross-examine Emily during this deposition. The defendant's attorneys did vigorously cross-examine Emily.

¶ 211 The tape was played to the jury. At no time before, during, or after the playing of the tape did the defendant object to the tape or its contents. Consequently, on that basis alone, the defendant's argument is waived. *People v. Lewis*, 234 Ill. 2d 32, 40, 912 N.E.2d 1220, 1225 (2009).

¶ 212 Beyond the waiver, we also note that a defendant cannot acquiesce to proceed in a certain manner and then complain about the procedure taken on appeal. *People v. McKinney*, 260 Ill. App. 3d 539, 542, 631 N.E.2d 1281, 1286 (1994).

¶ 213 We find no error in the trial court's allowance of Emily Hea Buss's videotaped deposition during the trial.

¶ 214 Granting the State's Motion *in limine*

¶ 215 The defendant next contends that the trial court improperly granted a motion *in limine* filed midtrial which precluded the defendant from referencing or from using two other videotaped conversations the defendant had with police—on January 13, 2004, and July 29, 2004. He also claims that the trial court erred in disallowing any efforts to utilize these videotaped statements as a means to impeach certain law enforcement witnesses about an

ongoing investigation into whether Dawn Ritchey lied to police and whether she should be charged with obstruction of justice.

¶ 216 Initially, we note that the record on appeal only contains one of the two statements in question—the interview from January 13, 2004.

¶ 217 The decision to admit or deny admission of evidence that is the subject of a motion *in limine* is discretionary, and we review the trial court's discretionary ruling for abuse. *People v. Botsis*, 388 Ill. App. 3d 422, 443, 902 N.E.2d 1092, 1108 (2009). We will only conclude that a trial court's evidentiary ruling constitutes an abuse of its discretion if the decision was arbitrary, fanciful, or if no reasonable person would adopt the position taken by the court. *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

¶ 218 On appeal, the defendant explains his intentions relative to these two other statements. He claims that because the State argued that the actions of the defendant were inconsistent with innocence, he should be allowed to show his protestations of innocence in these two later tapes. This argument is problematic. First of all, the defendant argues that the State's theory of actions "inconsistent with innocence" are tied to the videotaped statement conducted on December 17, 2003, and played for the jury. We have carefully reviewed the record and find that this is not the State's argument. The State consistently argued at trial that the defendant's actions upon finding Amy's lifeless body were inconsistent with innocence, as well as his actions in not telling authorities what he discovered. The State's inconsistent-with-innocence argument was not centered on his first videotaped statement. Secondly, any protestations of innocence (which the defendant acknowledges as the content of the second and third videotapes) would be considered inadmissible hearsay. *People v. Young*, 206 Ill. App. 3d 789, 811, 564 N.E.2d 1254, 1269 (1990). A defendant is not allowed to introduce prior out-of-court exculpatory statements. *Id.* Out-of-court claims of innocence are hearsay because they would be offered to prove the truth of his claims of innocence. Clearly, this is

exactly what the defendant wanted to do with these other two videotaped statements, as on appeal he states that he wanted to use those statements to both combat the State's theory that the defendant's actions were inconsistent with innocence and to show that the defendant was not as nervous in his second and third recordings. This is hearsay, and as such the trial court properly excluded use of and/or reference to the two videotaped statements.

¶ 219 The defendant also argues that two statements should have been allowed to be discussed and/or played for the jury on the theory that the second and third tapes present the completion of the conversation, pursuant to the rule of completeness. However, the defendant misconstrues this rule. The rule requires that if one party introduces part of a conversation into evidence, the opposing party may introduce the remainder of the conversation so that the entirety of the conversation is put in the proper context. *People v. Williams*, 109 Ill. 2d 327, 334, 487 N.E.2d 613, 616 (1985). The doctrine is not applicable where the statements are not considered contemporaneous—where the statements are not made "on the same subject at the same time." *People v. Nicholls*, 236 Ill. App. 3d 275, 281, 603 N.E.2d 696, 700 (1992); *People v. Hudson*, 198 Ill. App. 3d 915, 924-25, 556 N.E.2d 640, 647 (1990). These two additional videotaped statements are apparently strikingly similar in content to the original one. We are not able to comment on the third videotape, but concur with the defendant's statement that the second statement is similar in content to the first videotaped statement. So, while the defendant may be correct that the tapes deal with the same subject matter, they very clearly did not take place at the same time, and so the rule of completeness is inapplicable.

¶ 220 The defendant also argues that he should have been allowed to use the videotapes to impeach State witnesses. The only example provided in the defendant's brief on appeal is in Officer VanHook's testimony. He indicated that he wanted to be able to use the defendant's videotaped statements to impeach Officer VanHook if Officer VanHook denied

that he felt Dawn Ritchey lied to the police and that they were investigating her for obstruction of justice. The defendant does not explain how he would use his own statements to impeach Officer VanHook, as nothing in the January 13, 2004, videotape bears on that subject. However, analysis of this argument is not required because the defendant waived this argument by failing to ask Officer VanHook these types of questions at trial. Error was not preserved and cannot be raised on appeal. We will not speculate on how else the defendant could have used this videotape for impeachment.

¶ 221 Accordingly, we find that the trial court did not abuse its discretion in granting the State's motion *in limine* precluding the defendant from referencing or using his second and third videotaped statements during trial.

¶ 222 Inappropriate Contact Between Jury and Court Personnel During Deliberations

¶ 223 The defendant argues that he was deprived of his right to trial by an impartial jury because a court employee had inappropriate contact with the jury during deliberations and the court failed to act upon being notified of this issue. The court employee is a deputy circuit clerk. The alleged inappropriate contact involved going into the jury room during deliberations, reporting to the attorneys which juror was the foreman, reporting to the attorneys and court that one of the jurors felt like she had been followed home one day after the trial proceedings, asking for drinks or ice for the jurors pursuant to juror request, and stating that the jurors did not wish to speak with defense counsel at the end of trial. The defendant's attorney testified to these observations at the posttrial motion hearing. Attorney Andrew J. Sosnowski, one of the defendant's attorneys, claimed that he brought these issues to the court's attention when they occurred, and the court took no action.

¶ 224 A criminal defendant is entitled to a jury trial where the jurors have not been biased in any way by inappropriate communications. *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005). The defendant must have suffered prejudice by the alleged inappropriate

communication. *People v. Hobley*, 182 Ill. 2d 404, 458, 696 N.E.2d 313, 339 (1998).

¶ 225 In this case, the defendant is asking us to remand the case for a hearing on the issue of whether or not the court employee engaged in inappropriate communication with the jury. We decline to remand for this hearing.

¶ 226 The record is clear. The defendant never formally requested that the court take action about the contact this court employee was having with the jury. In fact, the alleged discussion with the trial court—to bring this contact to the court's attention—was not conducted on the record. Without deciding whether the actions and conduct of the deputy clerk amounted to inappropriate contact between the jury and the court employee, we note that the defendant fails to argue specific prejudice resulting from the contact. Therefore, we find no prejudice.

¶ 227 We affirm the trial court's denial of the defendant's request for a more formal hearing on the matter of this issue.

¶ 228 Use of the Defendant's Unredacted Videotaped Statement

¶ 229 For the same reasons stated earlier in this order, we find that the use of the unredacted videotape statement was not improper. The defendant never sought to have his statement redacted by way of motion. He objected to the jury hearing the videotape because the defendant himself made a passing reference to an order of protection. The jury was given no specific information about the order of protection—whether an order of protection did or did not exist and whether there had been any violations of an order of protection. The statement of the defendant was an exhibit at trial. The motion *in limine* related to witness testimony at trial. The trial court made the decision to allow the jury to watch the videotaped statement again because the tape was an exhibit. The redacted version of the tape was not allowed by the court because the court agreed with the State's argument that changing the exhibit the jury originally saw was inappropriate, and the redacted section would put extra

focus on that aspect of the defendant's statement. We conclude that the defendant was not denied a fair trial because the exhibit was sent back to the jury during its deliberations.

¶ 230 Failure to Send Transcripts of Defense Witnesses Back With the Jury

¶ 231 After some deliberation, the jury sent out a note requesting transcripts of various witnesses who testified during the trial. All of these witnesses were State witnesses. At the end of a day of deliberations, the jury sent out a note requesting the transcript testimony of Dawn Phillips and Joe Hea. A second note sent out by the jury about 45 minutes later requested the transcripts of James Ritchey and John Hackman. The jury did not ask for transcripts of any defense witness.

¶ 232 We have reviewed the transcript of the court proceedings and note that the idea for creation of witness transcripts in this case originated with the defendant's attorney Sosnowski. He suggested that the court ask the jury whose transcripts of testimony the jury would like to take back in the jury room. The State did not object to this approach but contended that inviting the jury to request transcripts was not necessary. The court agreed. No invitation was sent back to the jury about transcripts, and later the jury asked for transcripts of select State witnesses.

¶ 233 We also note from our review of the transcript of the court proceedings that the defendant did not object to the jury's request for transcripts of the various State witnesses.

¶ 234 Additionally, the defendant never asked for transcripts of defense witnesses to be sent to the jury for deliberations.

¶ 235 We find that there was no error by the court in failing to *sua sponte* have transcripts of defense witnesses prepared and sent to the jury.

¶ 236 Court's Reference to the Case as High Profile

¶ 237 The defendant claims that the trial court made numerous references to this case during *voir dire* as being "high profile." The defendant cites to no part of the record in which the

trial court did this, and so the issue is waived for failure to cite to appropriate sections of the record. *Campos v. Campos*, 342 Ill. App. 3d 1053, 1057, 796 N.E.2d 1101, 1112 (2003).

¶ 238 The defendant concedes also that he neglected to object to any such use of the term "high profile" in description of this case. The defendant contends that we should consider this issue as a matter of plain error because he was prejudiced by the pressure on the jury to come to a quick verdict, in light of the case being "high profile." We find the defendant's contentions that the alleged use of the term pressured the jury to a verdict to be speculative. In light of the failure with respect to record citations, coupled with the defendant's failure to object to the claimed references, we will not address this issue.

¶ 239 Cumulative Effect of Rulings Denying a Fair Trial

¶ 240 The defendant argues that we should look at the cumulative effect of all issues raised on appeal—assuming that we have declined to agree with his arguments individually.

¶ 241 For the reasons set forth in each issue decided in this order, we do not find that the defendant's rights to a fair trial were violated.

¶ 242 Proof of Guilt Beyond a Reasonable Doubt

¶ 243 The defendant claims that the State failed to prove his guilt beyond a reasonable doubt and that, therefore, his conviction must be overturned. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 276-77 (1985); *People v. Pollock*, 202 Ill. 2d 189, 217, 780 N.E.2d 669, 685 (2002). On appeal, the reviewing court defers to the trier of fact on all issues related to the weight of the evidence and/or the credibility of the witnesses. *People v. Castillo*, 372 Ill. App. 3d 11, 20, 865 N.E.2d 208, 217 (2007).

¶ 244 In this case, the evidence against the defendant was circumstantial in nature. Circumstantial evidence is "proof of certain facts and circumstances from which the factfinder may infer other connected facts which usually and reasonably follow from the human experience and is not limited to facts that may reasonably have alternative, innocent

explanations." *People v. Diaz*, 377 Ill. App. 3d 339, 345, 878 N.E.2d 1211, 1216-17 (2007). Circumstantial evidence can be sufficient so long as the evidence satisfies the defendant's guilt beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). In considering circumstantial evidence, it is sufficient if all of the evidence taken as a whole satisfies the trier of fact beyond a reasonable doubt. *Id.* The jury should not disregard inferences which flow from the circumstantial evidence and also does not need to think of all potential explanations consistent with innocence. *Id.*

¶ 245 The length of a jury's deliberations is not a barometer of the closeness of the evidence. *People v. Edwards*, 27 Ill. App. 3d 237, 244, 395 N.E.2d 1095, 1099 (1979).

¶ 246 The defendant's theory in his defense of the crime charged was that his ex-wife Dawn Ritchey had "it in for him" and that she used this information to gain an upper hand in their divorce proceedings relative to custody and the property division. The reality is that Dawn may well have strategically chosen this time to report her knowledge of the crime, as the defendant was threatening her in the context of the divorce case relative to child custody. But, by going to police without an immunity agreement, Dawn opened herself up to certain criminal charges for failing to report her own knowledge sooner than she did.

¶ 247 We find that the defendant's argument focusing solely upon Dawn and her testimony is seriously flawed. All that Dawn did was accuse the defendant of failing to report a crime scene. She did not accuse him of murdering Amy. Dawn's story cannot be easily discounted as that of an angry ex-wife given the fact that with a few variations, the defendant told the very same story to Dawn's father, James Ritchey, Joseph Hea, Emily Hea Buss, and John Hackman. From their testimony, it is clear that Joseph Hea and Emily Hea Buss are not friends of Dawn and in fact testified on the defendant's behalf against Dawn in divorce proceedings. It defies logic that every one of these witnesses, all of whom relay essentially the same story, have motivations to falsify evidence and to harm the defendant. Bearing this

in mind, we turn to the evidence heard and seen by this jury relative to the defendant's involvement in the case, in order to determine if the State's evidence established the defendant's guilt beyond a reasonable doubt.

¶ 248 The defendant acknowledges that he went to the store and interacted with Amy in order to buy a leotard for his daughter apparently mere minutes before her murder. He places himself at the scene of the crime. He acknowledges being in the presence of her body after she was murdered, touching her body, getting blood on his clothing, subsequently fleeing the scene of the crime, not reporting the crime to any law enforcement authorities, and destroying all clothing he was wearing at the time that could tie him to the murder scene.

¶ 249 The defendant told his then-wife Dawn as well as his friends Joseph Hea and John Hackman that he had traveled to the metro-east area on December 31, 1999, in order to go to a gun show. Dawn testified that the defendant left the home wearing a leather bomber jacket she had just given him a few days before and carrying a small gun case in which they stored a .38-caliber pistol. Upon his return to the home, the defendant was not wearing his jacket any longer and had blood all over his pants legs. Dawn never saw the .38-caliber gun again. The defendant admitted to all of the witnesses, except the police, that when he arrived home on December 31, 1999, he lied to Dawn about the source of the blood—telling all witnesses that he told Dawn he had got blood on his pants when moving a dead animal to the side of the road. Later when he gave his statement to the police, the defendant told a different story that he immediately told his wife what had happened that day. The defendant claims that he did not come forward with the evidence for a variety of reasons. Initially, he claims to have been frightened and thought that the killer could be coming after him. Later, he told John Hackman that he fled the scene because he feared that police would determine that the handgun he had with him was unregistered. He told Joseph Hea that the gun he had been carrying that date matched the caliber of the weapon used to kill Amy as reported in

news articles. He told Joseph Hea and John Hackman that he threw the gun away on the drive home that date. He told the witnesses that he also threw the leotard away at a convenience store where he had stopped to wash the blood from his hands and arms. Although the police investigators and the forensic pathologist were unable to determine Amy's cause of death by just looking at her, the defendant told John Hackman and James Ritchey that Amy had been shot in the head.

¶ 250 All of these witnesses testified that they told the defendant to go to the authorities with what he had seen. In his statement, the defendant claimed that Dawn and his father-in-law both told him not to go to the police authorities with the information. Dawn and her father Jim Ritchey emphatically denied to the jury that they had ever told the defendant to "stay out of it." These witnesses continued to tell the defendant that he needed to speak with the authorities. Eventually, in the fall of 2003, the defendant told Emily Hea Buss, Joseph Hea, and John Hackman that he had met with O'Fallon police detectives to tell them what he knew and that he had been cleared. The jury learned that this was a lie. The defendant did not talk to the police prior to being picked up by them on December 17, 2003.

¶ 251 The jury heard Dawn Ritchey testify that she found it unusual that the defendant purchased a leotard for one of their daughters, and that she could never remember a time when the defendant purchased any clothing for their children.

¶ 252 The jury was able to watch the defendant in his interview with police. In that interview, the defendant was able to remember very precise details about the man he claimed he saw exiting the store just before he entered and discovered Amy's body. In that same interview, the defendant claimed not to remember if any of Amy's clothing had been removed. Yet, the defendant talked about touching Amy's ankle and thigh in an effort to determine if she was still alive. This detail is also in contrast to what he told his wife on January 1, 2000, about Amy's state of dress when he discovered her body. The defendant

told Dawn that Amy's pants had been pulled down. Dawn could not specifically recall if the defendant told her that Amy's pants had been pulled down to her knees or to her ankles.

¶ 253 The jury heard evidence about the guns that the defendant and Dawn Ritchey owned. They heard a taped conversation between Jim Ritchey and the defendant in which the defendant denied ownership of a .38. But, the jury also heard from witness John Toumbs, who knows the defendant as a business acquaintance and who sold the defendant a .38 in 1992. John Toumbs identified the blue Bryco Arms box that police found in the attic of the Phillips home in an area where the defendant's items were kept. The bullet fragment recovered from the scene could have come from a .38, but without the gun with which the forensic scientist could compare, there is no way to definitively say. Dawn Ritchey testified that on the morning of December 31, 1999, the defendant came downstairs carrying the case in which they kept this .38-caliber gun. She never saw the gun again.

¶ 254 Before the jury members began their deliberations, they were instructed by the trial judge that they "should consider all the evidence in the light of [their] own observations and experience in life." The jury then was allowed to ponder the actions the defendant took on December 31, 1999, and thereafter. The jury saw photographs and a videotape of this crime scene. The jury could have easily concluded that an innocent man would not flee this crime scene. The jury could certainly have found that disposal of a gun on the way home from discovering the murder scene was not consistent with innocence. According to witness testimony, while the defendant claimed to have concern that he would be linked to the crime if found with a gun, the jury could have wondered why the defendant, an admitted gun enthusiast, would have taken that action when ballistics could have easily ruled out usage of his gun if he had only retained it. The jury certainly must have wondered why an innocent man would never contact authorities, particularly when he claimed to have seen a suspicious man fleeing the scene just before the defendant discovered Amy's dead body. An innocent

man would want to share this information with the police so that they could find the true murderer. The jury could have wondered why when the defendant was finally confronted by authorities, he constructed certain lies. Perhaps the jury wondered why the defendant lied to so many people about meeting with O'Fallon police authorities. The jury could have concluded that these behaviors were inconsistent with innocence. The jury could have also concluded that despite the defendant's contention that Dawn contacted authorities for a revenge-based motive, not all of the witnesses would have been lying about the stories the defendant told them.

¶ 255 Overall, we are reminded of the fact that the jury members, as the triers of fact, were able to watch each witness testify. The jury was best able to assess the demeanor of each witness and to make credibility determinations. On appeal, we will not substitute this court's judgment for that of the trier of fact. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009). Based upon our thorough review of the record, along with our deference to the judgment of the jury, we find that the evidence was sufficient to find the defendant guilty of first-degree murder beyond a reasonable doubt.

¶ 256 Violation of the Defendant's Statutory Rights to a DNA Database Search

¶ 257 After his trial, the defendant asked the court to order additional DNA testing. The State argued that the motion was untimely—as it should have been brought up before trial. The defendant wanted the forensic evidence found at the scene of the crime to be checked against the DNA profile of the Missouri inmate who was a suspect early on in the investigation, John Sprous.

¶ 258 Motions for a DNA database search are allowed pursuant to statute. Section 116-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-5(a) (West 2006)) provides that "[u]pon motion by a defendant charged with any offense where DNA evidence may be material to the defense investigation or relevant at trial, a court may order a DNA database

search by the Department of State Police." By the wording of the statute, the decision to grant or deny a DNA database search is discretionary with the trial court. *Id.*

¶ 259 We find that the trial court's order denying the defendant's posttrial motion was correct. The plain language of this section allows for discretionary testing before trial—not after trial.

¶ 260 For whatever reason, the defendant did not seek this database search during the time before trial. We express no opinion about the pretrial viability of this particular DNA database request. The statute at issue became effective on November 19, 2003, a date just before the date when the defendant was charged with this crime. There was ample time before trial for this motion to have been filed. After the defendant has been convicted is too late for a request pursuant to this statute. We affirm the trial court's denial of this motion.

¶ 261 **CONCLUSION**

¶ 262 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 263 Affirmed.