

NOTICE
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2013 IL App (4th) 120873-U
NO. 4-12-0873
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 4, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JEFFREY RALPH BUCHANAN,)	No. 12CF109
Defendant-Appellant.)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967) and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On February 15, 2012, a grand jury returned an indictment against defendant, Jeffrey Ralph Buchanan, charging him with harassment by telephone (720 ILCS 135/1-1 (West 2010), a Class 4 felony (720 ILCS 135/2(b)(4) (West 2010), alleging between February 4, 2012,

and February 6, 2012, defendant "knowingly made a telephone call to Paul Oliphant, with the intent to abuse, threaten or harass any person at the called number and, in the course of the offense, the defendant threatened to kill Paul Oliphant or any member of his household".

¶ 5 In June 2012, defendant filed a motion *in limine* seeking exclusion of defendant's prior criminal record in the event he chose to testify at trial. At the commencement of the June 2012 jury trial, defendant's motion *in limine* was argued. The State indicated it intended to use defendant's 2010 conviction of delivery of a controlled substance as impeachment if defendant chose to testify. Defendant argued the conviction had no weight as to his credibility and it was more prejudicial than probative. The State maintained the conviction was a felony committed within the previous 10 years and was not overly prejudicial since the current prosecution was not for delivery of a controlled substance. The trial court denied defendant's motion.

¶ 6 Defendant also argued for exclusion of any voice mail messages not included in the indictment. Specifically, defendant argued messages left for Paul Oliphant not containing threats to kill and messages left for Oliphant's girlfriend, Jennifer Allen, on a different phone number were "just piling on testimony not required for the charge" and should be excluded. The State argued all the messages, including those to Allen, corroborated or tended to establish defendant's motive, intent, and lack of mistake. The trial court determined similarly themed messages left on Oliphant's phone number over the course of several days, some of which contained threats to kill, were admissible on the question of defendant's intent to abuse, threaten, or harass Oliphant and would be allowed into evidence. Those messages left on Allen's phone would not be allowed.

¶ 7 Oliphant testified he and defendant were both recovering alcoholics whose friendship had been "up and down" over the last 15 years. Oliphant admitted he was convicted of

possession of a controlled substance in 2003 and 2008 and was arrested for forgery the Friday before he testified. He was testifying pursuant to a subpoena and not in exchange for any promises relating to the forgery charge.

¶ 8 Oliphant testified he had lived in a rental house with Allen since December 2011 or January 2012, for which the Bloomington Township paid rent since he and Allen were in school. In February 2012, defendant had no place to stay so Oliphant offered defendant a place to store his belongings, cook, bathe, and sleep, in exchange for \$250 a month. Defendant did not have a key; he was a guest at the house.

¶ 9 At the beginning of February 2012, while defendant was at Oliphant's house, he started "tussling on the floor" with Natasha Phelps, and things went "a little haywire." Phelps called 9-1-1, and the police arrived at the house at the same time Oliphant's landlady, Serita Mendiolas, pulled up. While the police were looking for defendant, they detained Mendiolas. Mendiolas told Oliphant she wanted him and Allen to look for another place; she wanted them out of the house. Oliphant testified if he and Allen could not live in the house, neither could defendant. Oliphant told defendant he had to find another place to stay and not to come back. Defendant said he understood and walked away calmly. No mention was made of the \$250 until defendant realized he had nowhere else to go. Oliphant assured Mendiolas this was not going to be an ongoing thing. Oliphant and Allen were allowed to stay in the house.

¶ 10 Oliphant did not see defendant again. Instead, defendant started calling Oliphant's cellular phone. On one occasion when the calls first started, Oliphant answered the phone and talked to defendant. Defendant demanded his \$250 "right now." Oliphant told defendant he did not have it to give to him at that time. Defendant thought Oliphant was lying, thinking Oliphant

could get the money from Mendiolas. But Oliphant had not given the money to Mendiolas because he was not paying the rent. According to Oliphant, the "tirade was so strong, there was no communicating with this man. *** He wasn't listening." Over the course of a two- or three-day period, defendant left more than 20 voice mail messages. In the messages, defendant kept screaming he wanted the money right then. As time went by, defendant began to threaten bodily harm to Oliphant, Allen, and Mendiolas. In three to five of the messages, defendant said, "I will kill you." Oliphant testified he was not afraid of defendant but he was "[h]urt, threatened."

¶ 11 Oliphant eventually called the police. When the police came to his home, Oliphant explained what had been happening. He allowed the police to record the voice mail messages. Oliphant identified People's exhibit No. 1 as the digital versatile disc (DVD) containing a recording of the voice mail messages left on his phone. He stated he had listened to the recording, and it fairly and accurately depicted the messages he received from defendant between February 4 and 6, 2012. Oliphant identified People's exhibit No. 1A as a transcript of the voice mail messages on the DVD which fairly and accurately depicted and represented the content of the voice mail messages.

¶ 12 Defendant objected to the admission of People's exhibit No. 1 for inadequate foundation, specifically arguing no evidence showed how the calls actually made it onto the DVD. The State countered the technological details of how the recording was made or how the voice mail messages made their way onto the DVD were not necessary. Instead, evidence already established Oliphant had listened to the DVD, which he testified was an accurate depiction of the actual voice mail messages. Further, evidence showed Oliphant allowed the police to record the voice mail messages in his presence. The trial court admitted the exhibit into

evidence and played it to the jury with the assistance of the transcript.

¶ 13 Among the recorded messages were the following:

"[DEFENDANT]: (unintelligible.) Motherfucker. Think I'm playin'. This ain't no goddamn joke. Now you don't take a goddamn thing from me. *I'm a tear that bitch up.*

[DEFENDANT]: Give me my motherfuckin' money, Diddy. I'm not playin' with you motherfucker. This is not a goddamn joke and there ain't no motherfuckin' fun in it. Give me my motherfuckin' money. I get back here, I'm goin' to Chicago with him. With, uh, uh, RJ. I got my money when I get that bitch. Y'all better be gone or *I'm a make you gone.*

[DEFENDANT]: You think I'm playin' with your bitch ass. Nigga I don't give a fuck what RJ says, bitch. You're gonna give me \$250 or *I'll kill your bitch ass.* Nigga (unintelligible) ... Fuck you and Jennifer.

[DEFENDANT]: Let me tell you somethin', motherfucker. You and your goddamn, uh, landlord and that bitch you fuck with. Ya'll gonna hear from my lawyer on that bitch that own that house. You gonna give me my motherfuckin' money. I don't give a fuck how

you get it. You better give me my motherfuckin' money, bitch. I'm not playin' with you. Don't fuck with me, Diddy. *I'll kill you, nigga.*

[DEFENDANT]: I really don't think you punkin' me, nigga. You're gonna give my motherfuckin' money. Guess what? Me and my lawyer come over to that bitch—Serena—Serena—whatever the fuck that ho's name i00s—you're gonna give me my money, nigga. Show me my money. We're gonna have a fuckin' problem. *I'll tear that bitch up.* On my mama. Give me my motherfuckin' money, nigga." (Emphasis added.)

Oliphant testified "Diddy" was his nickname.

¶ 14 Bloomington police officer Luke Maurer testified he responded to a dispatch at Oliphant's home. There he spoke with Oliphant and Allen regarding threatening voice mail messages. Maurer listened to the messages and recorded them. Maurer determined probable cause existed for defendant's arrest. When Maurer found defendant at 11:15 a.m., he was "grossly intoxicated," to the extent the jail refused to take him.

¶ 15 Defendant testified he received Social Security Income (SSI) and also did odd jobs. He admitted he had been convicted of delivery of a controlled substance in 2010.

¶ 16 In December 2011, defendant's living situation was uncertain due in part to his alcohol and substance abuse problems. Defendant contacted Oliphant about needing a place to stay and offered to pay him \$250 rent to stay at his house for a month, to which Oliphant agreed. Because defendant still did not have a place to stay in February, he and Oliphant agreed he could

stay for another month for another \$250. Defendant maintained he was renting from Oliphant, not just coming to the house from time to time to wash his face. He had even signed a rental agreement.

¶ 17 Oliphant asked defendant to move out on February 1, 2012, after defendant had given Oliphant the second \$250. Defendant talked to Oliphant on the phone about getting back his money. Oliphant told defendant as soon as he got in touch with Mendiolas he would return the money to defendant. Defendant left town for a couple of days. When he returned, he went to Oliphant's residence and knocked on the door. He also called Oliphant's phone while he was standing on the porch. Oliphant would not answer the door or the phone. Defendant left.

¶ 18 Defendant testified he was diabetic, and Oliphant had his medicine. Defendant had used alcohol to get his blood sugar down in the past. He started drinking alcohol to get his blood sugar down and to calm him. Defendant had no idea how much he drank but admitted he was a chronic alcoholic and drank a lot.

¶ 19 Defendant testified he heard the recording of the voice mails. When asked if he recognized himself on those voice mails, defendant responded, "That was not me. That was the alcohol in me, I guess." When asked if he remembered making the calls, defendant answered, "I don't remember nothing, I don't remember being arrested, I don't remember saying nothing. I remember calling when I could remember. Nothing like that come out." Defendant said he did not even recognize his voice but did say he believed it was him on the recording. Defendant maintained he did nothing wrong. He was only trying to get back his money, and he was being ignored. He admitted the calls started off nice but ended up rough.

¶ 20 During the jury instruction conference, defendant objected to admission of People's

instruction No. 10 as submitted, arguing it should state defendant "knowingly" made a telephone call since "knowingly" was contained in the charging indictment. The State responded "knowingly" does not appear in the relevant statute or the relevant section of the Illinois Pattern Jury Instructions (I.P.I.). Since the indictment existed to inform defendant of the charges and allow him to prepare a defense, the State maintained, notwithstanding the added word "knowingly," the indictment served its purpose. The trial court agreed with the State and allowed the instruction over defendant's objection.

¶ 21 During deliberations, the jury asked, "May we have a definition of 'harass,' " and "Please define 'intent' from a legal perspective as it related to third proposition." The jury was informed, "The definition of harassment: knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the victim." The jury was given a definition of "intent" as, "A person acts with intent to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct." The jury found defendant guilty of harassment by telephone.

¶ 22 In his July 10, 2012, motion for new trial, defendant alleged the trial court erred in (1) denying defendant's motion to exclude his prior conviction; (2) denying the motion to exclude evidence of phone messages that fell "outside the parameters of the State's indictment"; (3) allowing a DVD of phone messages to be entered into evidence without proper foundation; (4) denying defendant's motion for directed verdict; (5) giving the State's jury instruction Nos. 10 and 11 without adding "knowingly" as used in the charging instruction over defendant's objection; and (6) failing to prove defendant guilty beyond a reasonable doubt where the State

failed to prove defendant had the requisite intent to make the threat at the time he placed the call. On August 16, 2012, the trial court denied the motion.

¶ 23 At the August 16, 2012, sentencing hearing, the trial court considered the presentence investigation report (PSI). That report reflected a pending petition to revoke probation on defendant's 2010 possession with intent to deliver a controlled substance conviction, a 2011 aggravated driving under the influence (DUI) conviction, and the current telephone harassment conviction. The PSI also contained five pages of prior criminal offenses in Illinois, Texas, and Louisiana, including numerous traffic offenses, criminal damage to property, DUIs, assault (bodily injury), possession of a controlled substance, and resisting arrest. The trial court also considered defendant's statement in allocution and arguments of counsel. On the telephone harassment conviction, defendant was sentenced to one year in the Illinois Department of Corrections (DOC), to be served consecutive to the sentence imposed on the 2011 aggravated DUI conviction. He was given credit for time served between February 6, 2012, and August 15, 2012.

¶ 24 In September 2012, defendant filed a notice of appeal, and OSAD was appointed to represent defendant. In July 2013, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by September 2, 2013, but defendant has not done so.

¶ 25 II. ANALYSIS

¶ 26 OSAD contends the record shows no meritorious issues can be raised on appeal. Specifically, OSAD asserts the following: (1) the indictment stated an offense, (2) defendant was

proved guilty beyond a reasonable doubt, (3) the trial court properly denied defendant's motion for a new trial, and (4) defendant's one-year prison sentence was not an abuse of discretion.

¶ 27 A. The Indictment Stated an Offense

¶ 28 OSAD first contends no colorable argument can be made the indictment failed to state an offense. We agree.

¶ 29 The standard of review for a challenge to the sufficiency of an indictment for the first time on appeal is whether the indictment apprised defendant of the precise offense charged and did so with sufficient specificity to enable defendant to prepare his defense and, if convicted, to plead the conviction as a bar to future prosecution arising out of the same conduct. *People v. Gilmore*, 63 Ill. 2d 23, 29, 344 N.E.2d 456, 460 (1976).

¶ 30 Section 111-3 of the Code of Criminal Procedure of 1963 specifies the pleading requirements for a criminal charge. 725 ILCS 5/111-3 (West 2010). Section 111-3(a) requires the following:

"A charge shall be in writing and allege the commission of an offense

by:

- (1) Stating the name of the offense;
- (2) Citing the statutory provision alleged to have been violated;
- (3) Setting forth the nature and elements of the offense charged;
- (4) Stating the date and county of the offense as definitely as can be done; and

(5) Stating the name of the accused, if known,

***." 725 ILCS 5/111-3(a) (West 2010).

¶ 31 To commit harassment by telephone, a defendant uses "telephone communication for any of the following purposes: *** (2) Making a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number." 720 ILCS 135/1-1(2) (West 2010).

¶ 32 Here, the indictment against defendant alleged:

"COUNT 1: The GRAND JURY OF McLean County, Illinois, charges that JEFFREY RALPH BUCHANAN on or about the 4th day of February, 2012[,] through the 6th day of February, 2012[,] at BLOOMINGTON, in the County of McLean, State of Illinois, committed the offense of HARASSMENT BY TELEPHONE IN THAT HE KNOWINGLY MADE A TELEPHONE CALL TO PAUL OLIPHANT, WITH THE INTENT TO ABUSE, THREATEN OR HARASS ANY PERSON AT THE CALLED NUMBER AND, IN THE COURSE OF THE OFFENSE, THE DEFENDANT THREATENED TO KILL PAUL OLIPHANT OR ANY MEMBER OF HIS HOUSEHOLD, in violation of 720 ILCS 135/1-1, A Class 4 Felony."

¶ 33 In accordance with pleading requirements, the indictment contained the name of the offense, the statutory provision violated, the nature and elements of the offense, the date and county of the offense, and the name of the accused. Consequently, the indictment apprised

defendant of the precise offense charged and did so with sufficient specificity to enable him to prepare his defense and to plead the conviction as a bar to future prosecution arising out of the same conduct. Thus, no colorable argument can be made the indictment failed to state an offense.

¶ 34 B. Defendant Was Proved Guilty Beyond a Reasonable Doubt

¶ 35 OSAD next concludes no colorable argument can be made defendant was not proved guilty beyond a reasonable doubt. We agree.

¶ 36 When considering the sufficiency of the evidence for a criminal conviction, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). The jury, as the trier of fact, is in the best position to judge the credibility of the witnesses and, therefore, due consideration should be given to the fact it was the jury that saw and heard the witnesses. *Wheeler*, 226 Ill. 2d at 114-15, 871 N.E.2d at 740.

¶ 37 Defendant was charged with harassment by telephone in that he "made a telephone call to Paul Oliphant, with the intent to abuse, threaten or harass any person at the called number and, in the course of the offense, the defendant threatened to kill Paul Oliphant or any member of his household" in violation of section 1-1 of the Harassing and Obscene Communications Act (Act) (720 ILCS 135/1-1(2) (West 2010)). The State was required to prove defendant's intent to abuse, threaten or harass Oliphant, and it did so prove.

¶ 38 The caller's intent is measured at the time the telephone call is placed. *People v. Jones*, 334 Ill. App. 3d 420, 424, 778 N.E.2d 234, 238 (2002). The act of making the call with

the requisite intent is what is prohibited, not the mere threat that ensues. *Jones*, 334 Ill. App. 3d at 423-24, 778 N.E.2d at 237. "A person acts intentionally when his conscious objective or purpose is to accomplish the result or engage in the conduct proscribed." *Jones*, 334 Ill. App. 3d at 424, 778 N.E.2d at 238. The jury, as the trier of fact, determines the question of intent, and that determination should not be reversed on appeal unless it is inherently impossible or unreasonable. *Id.* A threat is "[a] communicated intent to inflict harm or loss on another or on another's property, especially one that might diminish a person's freedom to act voluntarily or with lawful consent." Black's Law Dictionary 1519 (8th ed. 1999).

¶ 39 In this case, Oliphant testified defendant left over 20 voice mail messages on his cellular phone. These messages contained abusive language and threats of bodily harm and death. The jury heard the actual voice mail messages. Oliphant testified he was "hurt" and felt "threatened" by the messages. This evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Regardless of the fact defendant maintained, "I didn't do anything but try to get my money back. That's all I was trying to do, and I kept being ignored," the jury could still find him guilty of harassment by telephone. See *Jones*, 334 Ill. App. 3d at 424, 778 N.E.2d at 238 (even if defendant "may have also had a legitimate purpose in calling to complain ***, that does not foreclose the possibility that there was also an unlawful intent ***. The statute does not require that the telephone call be made 'solely' for the purpose of threatening or harassing" the person being called).

¶ 40 Considering the evidence in the light most favorable to the prosecution, sufficient evidence was presented for the jury to find defendant had the requisite intent to threaten Oliphant and others in his household. Defendant left more than 20 voice mail messages on Oliphant's

phone. Defendant's tone of voice was loud, irate, combative, confrontational, and threatening. He threatened to kill or cause bodily harm to Oliphant, Allen, and Mendiolas. Among the recorded messages he used the words, "I'm a tear that bitch up," "I'm a make you gone," "I'll kill your bitch ass," "I'll kill you, nigga," and "I'll tear that bitch up." Thus, no colorable argument can be made the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 41 C. The Trial Court Did Not Err in Denying Defendant's Motion for a New Trial

¶ 42 OSAD next concludes no colorable argument can be made the trial court erred in denying defendant's motion for a new trial. We agree.

¶ 43 Defendant filed a motion for a new trial alleging the trial court erred in (1) allowing defendant's prior conviction into evidence, (2) denying defendant's motion to exclude evidence of phone messages that fell "outside the parameters of the State's indictment," (3) allowing People's exhibit No. 1 into evidence without proper foundation, (4) giving the State's jury instruction Nos. 10 and 11 without adding the word "knowingly" as used in the charging indictment, and (5) failing to prove defendant guilty beyond a reasonable doubt where the State did not prove defendant had the requisite intent to make a threat at the time he made the call. The court denied the motion.

¶ 44 We review a trial court's denial of a motion for a new trial for abuse of discretion. *People v. Abdullah*, 336 Ill. App. 3d 940, 949, 785 N.E.2d 863, 871 (2002).

¶ 45 1. *The Trial Court Did Not Err in Allowing Defendant's Prior Conviction*

¶ 46 Whether evidence of a prior conviction is admissible for impeachment purposes is at the discretion of the trial court. *People v. Montgomery*, 47 Ill. 2d 510, 515, 268 N.E.2d 695, 698 (1971). In *Montgomery*, the supreme court provided that, for the purpose of attacking a

witness's credibility, evidence of a prior conviction is admissible only if (1) the crime was punishable by death or imprisonment in excess of one year; or (2) the crime involved dishonesty or false statements regardless of the punishment. In either case, however, the evidence is inadmissible if the judge determines the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Id.* at 516, 268 N.E.2d at 698. In addition, evidence of a conviction under this rule is admissible only if a period of less than 10 years has elapsed since the date of conviction or release of the witness from confinement, whichever is later. *Id.* Further, absent a compelling reason to defer its ruling on admitting other crimes evidence for impeachment purposes, the trial court should conduct the *Montgomery* balancing test prior to the defendant testifying. *People v. Patrick*, 233 Ill. 2d 62, 73, 908 N.E.2d 1, 7-8 (2009).

¶ 47 Here, the trial court ruled on defendant's motion *in limine* prior to commencement of the jury trial. The State argued defendant's 2010 felony conviction for delivery of a controlled substance was within the 10-year threshold period, the current prosecution was not for the same type of offense, and its admission was not overly prejudicial to defendant if he chose to testify. The court conducted the *Montgomery* balancing test, agreed with the State's argument, and denied the motion. We find no colorable argument can be made the trial court abused its discretion in denying defendant's motion *in limine* and allowing his prior conviction for impeachment purposes.

¶ 48 *2. The Trial Court Did Not Err in Allowing Admission of All the Voice Mail Messages Defendant Left on Oliphant's Cellular Phone During the Relevant Time Period*

¶ 49 Evidence of other crimes is admissible if it is relevant for any purpose other than to

show the defendant's propensity to commit crimes. *People v. Lovejoy*, 235 Ill. 2d 97, 135, 919 N.E.2d 843, 864 (2009). Other-crimes evidence may be admissible to prove intent, *modus operandi*, identity, motive, and absence of mistake. *People v. Robinson*, 167 Ill. 2d 53, 62-63, 656 N.E.2d 1090, 1094 (1995). However, if the prejudicial effect of the evidence substantially outweighs its probative value, such evidence should not be admitted. *Lovejoy*, 235 Ill. 2d at 135, 919 N.E.2d at 864. The admissibility of other-crimes evidence is within the sound discretion of the trial court, and the trial court's judgment will not be disturbed absent a clear abuse of discretion. *Lovejoy*, 235 Ill. 2d at 135-36, 919 N.E.2d at 864.

¶ 50 In the case *sub judice*, the State sought to admit evidence of all the voice mail messages defendant left not only on Oliphant's cellular phone but also on Allen's cellular phone. The trial court allowed only the voice mail messages left on Oliphant's phone, reasoning as follows:

"The charge to be proved, the State has to prove intent to abuse, threaten or harass, and the [c]ourt believes that the telephone calls to Mr. Oliphant that follow, apparently, a number of them over several days with the same theme, at least one of which, maybe several, include a threat to kill, but those are admissible on the question of the [d]efendant's intent to abuse, threaten, or harass Mr. Oliphant.

The [c]ourt will decline to allow the use of separate phone calls to Miss Allen. I think that goes a little beyond the line, so that will be the [c]ourt's ruling."

¶ 51 In this case, the trial court appropriately determined admission of the other messages defendant left on Oliphant's phone constituted the "same theme" as the charged offense and went to defendant's intent to abuse, threaten, or harass Oliphant. Thus, no colorable argument can be made the trial court erred in admitting the other-crimes evidence.

¶ 52 3. *The Trial Court Did Not Err in Admitting People's Exhibit No. 1 Because the Proper Foundation Was Laid*

¶ 53 Admission of trial evidence rests in the discretion of the trial court and will not be reversed on review absent a clear abuse of that discretion. *People v. Montes*, 2013 IL App (2d) 111132, ¶ 61, 992 N.E.2d 565. "[S]ound recordings are admissible if they are otherwise competent, material and relevant and where a proper foundation is laid. [Citation] An adequate foundation for admission of a sound recording into evidence exists if a witness to the recorded conversation testifies that the recording accurately portrays the conversation in question. [Citation]" *Id.*

¶ 54 Here, the State offered the following foundation for admission of People's exhibit No. 1:

"Q. Mr. Oliphant, I'm handing you what's been labeled for identification as People's Exhibit 1? Do you recognize what that is?

A. Yes, it is, sir.

Q. And what is that?

A. This is a recording of the voicemails [*sic*] that were left on my phone.

Q. All right, and after we got done listening to the voicemail

[sic] messages—well, let me back up.

Do the voicemail [sic] messages that are contained on that DVD fairly and accurately depict the messages that you received in the beginning, the 4th, 5th, and 6th of the month, from this [d]efendant?

A. Yes, sir.

Q. All right.

A. It's his voice."

After hearing arguments of counsel, the trial court questioned Oliphant as follows:

"THE COURT: Is that what you said, sir[,] that what's on that DVD is an accurate recording of what's on your cell phone, the voicemails [sic] on your cell phone?

THE WITNESS: Yes, that's the ones that the officers recorded."

¶ 55 A proper foundation was laid for the admission of the sound recording into evidence. Oliphant testified he allowed the police to make the recording, the recording was made in his presence, and the recording accurately portrayed the voice mail messages left on his phone by defendant. Thus, no colorable argument can be made the trial court abused its discretion in admitting People's exhibit No. 1 into evidence.

¶ 56 4. *The Trial Court Did Not Err in Giving Jury Instruction Nos. 10 and 11*

¶ 57 Jury instructions are intended to convey to the jurors the correct principles of law applicable to the facts so they can arrive at a correct conclusion according to the law and the

evidence. *People v. Fuller*, 205 Ill. 2d 308, 343, 793 N.E.2d 526, 549 (2002). The trial court must give correct instructions on the elements of the offense in order to insure a fair determination of a case by a jury. *Fuller*, 205 Ill. 2d at 344, 793 N.E.2d at 549. The decision on whether to give a jury instruction is at the discretion of the trial court, and the trial court abuses its discretion if the jury instructions are so unclear as to mislead the jury. *People v. Mohr*, 228 Ill. 2d 53, 65-66, 885 N.E.2d 1019, 1026 (2008).

¶ 58 Section 1-1 of the Act states:

"Harassment by telephone is use of telephone communication for any of the following purposes:

(2) Making a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number." 720 ILCS 135/1-1(b) (West 2010).

¶ 59 In the case *sub judice*, defendant was charged with harassment by telephone in that he "*knowingly* made a telephone call to Paul Oliphant, with the intent to abuse, threaten or harass any person at the called number and, in the course of the offense, the defendant threatened to kill Paul Oliphant or any member of his household." (Emphasis added.) Because the indictment charged defendant "*knowingly*" made a telephone call, he maintained the trial court erred by allowing the definition and issues instructions to be given without adding the word "*knowingly*" thereto.

¶ 60 The State tendered modified I.P.I. Criminal 4th No. 19.09 (2000), reading as follows:

"A person commits the offense of harassment by telephone when he makes a telephone call, whether or not conversation ensues, with the intent to abuse, threaten, or harass any person at the called number, *and in the course of the offense the offender threatened to kill the victim or any member of the victim's family or household.*"

(Emphasis added indicating modification.)

The State also tendered modified I.P.I. Criminal 4th 19.10 (2000), reading as follows:

"To sustain the charge of harassment by telephone, the State must prove the following propositions:

First Proposition: That the defendant used a telephone; and

Second Proposition: That the defendant did so for the purpose of making a telephone call, whether or not conversation ensued; and

Third Proposition: That the defendant did so intending to abuse, threaten, or harass any person at the called number; and

Fourth Proposition: That in the course of the offense, the defendant threatened to kill Paul Oliphant or any member of Paul Oliphant's family or household.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that

any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

(Emphasis added indicating modification.)

¶ 61 Under the requirements of the relevant section of the Act, the State was not required to prove defendant acted knowingly. The tendered jury instructions accurately stated the law and what the State was required to prove. See *People v. Long*, 39 Ill. 2d 40, 45-46, 233 N.E.2d 389, 392-93 (1968) (finding the trial court did not err in instructing the jury in the language of the statute, but not in the language of the indictment). Thus, no colorable argument can be made the trial court abused its discretion in giving People's instruction Nos. 10 and 11 as tendered, over defendant's objection.

¶ 62 D. The Trial Court's Sentence Was Not an Abuse of Discretion

¶ 63 OSAD next contends no colorable argument can be made the trial court abused its discretion in sentencing defendant to one year in DOC, consecutive to the sentence imposed in case No. 11-CF-1026 (the 2011 aggravated DUI conviction). We agree.

¶ 64 "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference [citation]. The trial court is granted such deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.]" *People v.*

Stacey, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 629 (2000).

Further, a reviewing court should not disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. *Stacey*, 193 Ill. 2d at 209-10, 737 N.E.2d at 629.

¶ 65 Here, the trial court had before it the PSI reflecting two other pending matters for sentencing (a petition to revoke probation regarding a 2010 possession with intent to deliver a controlled substance conviction and a 2011 aggravated DUI conviction (11-CF-1026)) as well as five pages of prior convictions. The court also heard defendant's statement in allocution and arguments of counsel. The court stated:

"The [c]ourt has considered the evidence presented at trial in this matter, the evidence presented today at sentencing, the Presentence Report, the statutory factors in aggravation and mitigation and the recommendations of counsel, the statement in allocution of the [d]efendant."

¶ 66 Normally, if no aggravating circumstances are present and it is a first offense, harassment by telephone is a Class B misdemeanor, punishable by no more than six months' imprisonment. 720 ILCS 135/2(a); 730 ILCS 5/5-4.5-60(a) (West 2010). However, under section 2(b)(4) of the Act, harassment by telephone becomes a Class 4 felony if, in the course of the offense, the offender threatened to kill the victim or any member of the victim's family or household. 720 ILCS 135/2(b)(4) (West 2010). The nonextended term of imprisonment for a Class 4 felony is not less than one year and not more than three years. 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 67 Section 5-8-4(d) of the Unified Code of Corrections states:

"The court shall impose consecutive sentences in each of the following circumstances:

* * *

(8) If a person charged with a felony commits a separate felony while on pretrial release or in pretrial detention in a county jail facility or county detention facility, then the sentences imposed upon conviction of these felonies shall be served consecutively regardless of the order in which the judgments of conviction are entered." 730 ILCS 5/5-8-4(d)(8) (West 2010).

¶ 68 Here, after considering the appropriate factors, the trial court sentenced defendant to one year in DOC, the minimum available to the court under the circumstances of the case. The court's sentence was not an abuse of discretion. Further, the court was required to order the sentence to run consecutive to defendant's conviction in case No. 11-CF-1026. On November 17, 2011, defendant had been charged with a felony in case No. 11-CF-1026. He committed the present offense between February 4 and 6, 2012, while on pretrial release in case No. 11-CF-1026. Consequently, the court had no choice but to make the one-year sentence in the instant case consecutive to the sentence in case No. 11-CF-1026. Thus, no colorable argument can be made the sentence imposed was an abuse of discretion.

¶ 69 III. CONCLUSION

¶ 70 After reviewing the record consistent with our responsibilities under *Anders*, we agree with OSAD no meritorious issues can be raised on appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 71 Affirmed.