2015 IL App (2d) 120403-U
No. 2-12-0403
Order filed May 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSHUA L. MATTHEWS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 04-CF-2868 Honorable Robert G. Kleeman, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's request to withdraw his waiver of counsel and it properly denied two motions to suppress. Affirmed.

¶ 2 Following a jury trial during which he appeared *pro se*, defendant, Joshua L. Matthews, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) and sentenced to 100 years' imprisonment (55 years for murder and 45 additional years for personal discharge of a firearm). Defendant appeals, arguing that the trial court erred in denying: (1) his request to withdraw his waiver of counsel; and (2) his motions to suppress his confession, alleging his confession was involuntary where (a) he did not re-initiate further discussions with the police

after previously invoking his right to counsel, and (b) he was induced by an interrogation calculated to convince him that he would receive leniency if he confessed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 12, 2004, at about 11:45 p.m., defendant, age 19, was arrested on a parole-violation warrant by the Du Page Major Crimes Task Force. He was taken to the Warrenville police station to be questioned about Sade Glover's shooting death. Sade's body had been found outside her home in Warrenville in the early morning of October 10, 2004. Three months before the murder, Sade had filed a battery complaint against defendant.

¶ 5 At the police department, defendant was interrogated for several hours on the evening of October 13, 2004, and then requested counsel. The interrogation stopped. Afterwards (the duration of which is disputed), he made a re-initiation video stating that he wished to speak to the police again. The interrogation resumed, and, after several hours, defendant agreed to make a videotaped confession, which was subsequently played at trial.

¶ 6 Originally, defendant was represented by the public defender's office. However, on July 14, 2006, after about 18 months of representation, he waived his right to counsel and proceeded *pro se*.

¶ 7 A. Motions to Suppress Statements

¶ 8 Defendant filed at least six *pro se* motions to suppress. As relevant to this appeal, he alleged that: (1) after he invoked counsel, law enforcement, not defendant himself, re-initiated the interrogation; and (2) his confession was involuntary because it was the result of promises of leniency made by law enforcement. Three evidentiary hearings were held on these motions.

¶ 9 1. First Suppression Motion – Re-initiation

¶ 10 On September 28, 2006, defendant filed a *pro se* motion to suppress his statements, alleging that the detectives re-initiated the interrogation after defendant had requested counsel and further alleging that his subsequent statements were not given voluntarily. On November 20, 2006, a hearing began on defendant's motion.

¶ 11 Defendant testified that he asked to speak to an attorney during his videotaped interrogation on the evening of October 13, 2004, but that the detectives tried to get him to continue speaking with them. When he refused to make any more statements, they turned off the video, and left the room. Two or three minutes after the video was turned off, officers Duane Wheeler and Warren[1] Cobos from the Maywood police department entered the room with a man whom defendant later learned was assistant State's Attorney Jeff Kendall. Kendall said to defendant, "I called these guys because I believed you would be more comfortable speaking with them." Kendall then left defendant with the two detectives.

¶ 12 Defendant explained that he knew Wheeler and Cobos from Maywood, where defendant lived. According to defendant, the detectives stated, "we don't give a sh[*]t about DuPage County, we're from Maywood, we're all from Maywood, we came out here to help you." They told defendant that they would make sure he walked out. Defendant testified that, at first, he refused to speak to them and that they continued speaking with him for 30 to 45 minutes.

¶ 13 Defendant testified that, during the conversation, Wheeler and Cobos told him that he was going to be charged with murder anyway, and:

> "the only way I was going to leave is if I spoke with them. But they could not help me unless I told the State's Attorney that I wanted to speak with them. They gave me cigarettes; they gave me food, they gave me drink.

[1] Elsewhere in the record, Cobos's first name is listed as Weldon.

> They told me, we don't, excuse my language, they told me, Detective Wheeler and Detective Cobos, we don't give a sh[*]t about DuPage County, we're from Maywood, we're all from Maywood, we came out here to help you. Our only reason for being out here is because of you, to speak to you."

¶ 14 According to defendant, he agreed to appear on videotape and state that he wanted to speak to the detectives (*i.e.*, the re-initiation video) because they convinced him that, if he did so, they would help him. After a camera was set up, he appeared in a 17-second video, introducing Wheeler and Cobos and stating that he wanted to speak to them. At the hearing, defendant testified that he "never said he wanted to speak with them, and I never knew I was waiving my rights to an attorney. No one ever said that to me, period, point blank. And that's my testimony." Defendant stated that the Maywood officers told him that, if he wanted to leave, he had to tell Kendall that he wanted to speak with them. After he made the re-initiation video, defendant believed that he was going to leave. After he was not let go, defendant "believed they were there to help me. The entire time they were there, for some reason I was a zombie, and I thought these men were helping me." They convinced defendant he was "already convicted." They promised that, if defendant followed their instructions, he would "go home." When questioned about his (later) statement in his videotaped confession that no promises were made, the following colloquy ensued:

> "[State]: Now, the video with Mr. Kendall, Mr. Kendall specifically asked you, were there any promises; correct?
>
> [Defendant]: I believe so, yes?
>
> [State]: And you said no?

> [Defendant]: Yes. At the time I didn't think they would – I didn't see it as a promise. I believed they were trying to help me. What part are you not understanding? I believed these men were there to help me."

¶ 15 After making the re-initiation video, the two detectives spoke to defendant. About two hours later, defendant agreed to be videotaped, confessing to Sade's murder. (About two hours and 15 minutes after the re-initiation video was made, Kendall returned to the police station to take the videotaped confession.) Wheeler and Cobos were present with Kendall during the taping.

¶ 16 Sergeant Wheeler testified that, on October 13, 2004, he arrived at the Warrenville police department at about 11:45 p.m. He was accompanied by Cobos. They were familiar with defendant and came to assist in the homicide investigation. According to Wheeler, when they arrived at the station, they walked toward a coffee room. On the way, they saw defendant in an interview room with others. Defendant looked in Wheeler's direction, pointed, and stated, "I want to talk to Office Wheeler." Wheeler then walked toward defendant, met with Kendall, and told him that defendant wanted to speak with him. Wheeler testified that, up to that point, he knew nothing about the case.

¶ 17 Wheeler further testified that Kendall informed him that defendant would first have to be recorded stating that he wanted to speak to the officers, and Wheeler told Kendall that defendant would have to be videotaped. Wheeler denied having any conversation with defendant at the Warrenville police department before that. On cross-examination, Wheeler testified that he had known defendant for a long time.

¶ 18 Officer Cobos testified that he arrived with Wheeler at the Warrenville police department at about 11:40 p.m. on October 13, 2004. Unlike Wheeler's testimony, Cobos testified that they

came to assist in a homicide case, but not this case; Cobos testified that he had not come to speak with defendant, but, rather, with someone else whom Wheeler knew. (The trial court commented that it was satisfied that Cobos came to Warrenville because of defendant, not someone else.) Similar to Wheeler's testimony, Cobos testified that they walked toward a coffee room when defendant waved to them from inside a glassed area.

¶ 19 Detective Jeff Jacobson of the Warrenville police department testified that, at about midnight on October 13 to 14, 2004, he had just returned to the station to attend a briefing on the investigation. At the briefing, he learned that detectives Frank Giammerese and Sean Grovner had interviewed defendant until he asked for an attorney. After the briefing, as Jacobson walked back to his desk, he saw defendant waving his arms and knocking on the window of the interview room, "so I went over to see if he was okay or if he needed anything." According to Jacobson, defendant "wanted to talk to Frank." (Defendant denied that he ever knocked on the glass and denied asking to speak to Frank Giammarese.) Jacobson testified that he told defendant that he would let him know about speaking to Frank. He shut the door, leaving defendant in the interview room. Jacobson then went and found Giammarese and told him that defendant wanted to speak to him again.

¶ 20 Kendall instructed Jacobson to get a re-initiation form, which he did, and the three of them (Jacobson, Giammarese, and Kendall) returned to the interview room, where defendant had been waiting since requesting an attorney. Jacobson further testified that, as he was setting up the video camera in the interview room, defendant spotted Wheeler and Cobos in the hallway and stated that he wanted to speak to them.

¶ 21 Commander Frank Giammarese of the Bloomingdale police department testified that he was a team leader for the Du Page County Major Crimes Task Force. On October 13, 2004, he interrogated defendant concerning Sade's death.

¶ 22 At about 7:30 p.m., Giammarese began a new interrogation session with defendant in an interview room accompanied by special agent Shaun Grovner of the Illinois State Police. *Miranda* warnings were verbally given at 7:35 p.m., but defendant would not sign a waiver form. The session was videotaped. The interview was terminated and the video turned off at about 11:50 or 11:55 p.m. when defendant asked to speak with an attorney.

¶ 23 A few minutes later, at about midnight, a briefing was held on the investigation. Giammarese told the others that defendant had requested an attorney. Jacobson approached Giammarese and told him that defendant wanted to speak with him again. Kendall, who was also present at the briefing, asked Jacobson to obtain a re-initiation form. Kendall, Giammarese, and Jacobson then returned to the interview room to speak with defendant.

¶ 24 Giammarese testified that he told defendant that, if he wanted to speak with police again, he would have to sign the form or be videotaped consenting. Defendant refused to sign the form, but "still wanted to obtain the ability to speak with us." Kendall, who had been waiting outside the door, entered the room and spoke with defendant. Defendant agreed to be videotaped consenting to speak with the police again.

¶ 25 (The videotape of defendant consenting to re-initiate the interrogation was shown at the suppression hearing. When it starts, defendant is seen standing and holding a lit cigarette. He asks someone what he should say on the video. A voice tells him to say that he wants to talk to them. Defendant then speaks to the camera, introduces himself, Wheeler, and Cobos, and states that he wants to speak with them.)

¶ 26 Kendall testified that a briefing for the officers involved in the investigation was held at 11:55 p.m. at the Warrenville police station. A little before midnight, Giammarese came into the conference room and informed the other officers that defendant had requested an attorney and that the interview had been terminated. Shortly after that, Jacobson entered the briefing room and told Giammarese (in Kendall's presence) that defendant had stopped him by knocking on the window and stated he wanted to speak with him again. Kendall testified that he informed the officers that defendant would first have to sign a re-initiation-and-waiver-of-counsel form, and he sent Jacobson to get one.

¶ 27 Kendall, Giammarese, and Jacobson returned to the interview room with the form. Kendall waited outside listening while Giammarese explained the process. When Kendall heard defendant state that he wanted to talk but would not sign the form, Kendall walked into the room, introduced himself, and explained that they would have to document defendant's consent to re-initiate the interrogation. While Kendall explained this, defendant gestured toward the room's window to the hallway, which he was facing, and said, "I want to talk to Wheeler." Kendall turned around and saw two police officers walking down the hallway toward the coffee area. Kendall told defendant that it did not matter which officer he wanted to talk to; he still had to document his consent to speak to police without an attorney.

¶ 28 Kendall asked Jacobson to get a video camera, and he went out into the hallway to introduce himself to the two officers (Wheeler and Cobos), who had not been there previously. He told them that defendant wanted to speak with them. They told Kendall that they knew Matthews and that they would be happy to speak with him. Kendall told them that defendant had asked for an attorney and stopped talking to police around 20 minutes before.

¶ 29 Kendall brought Wheeler and Cobos into the interview room and continued his discussion with defendant about documenting his consent. Defendant agreed to document it via video. Kendall testified that he was in the room with defendant for about one-half hour. After defendant made the video with Wheeler and Cobos, Kendall spoke briefly with some other officers and left the station at about 12:45 a.m.

¶ 30 At about 2 a.m., Kendall received a phone call at home from Jacobson, telling him that defendant wanted to make a videotaped statement with a prosecutor about his involvement in Sade's shooting. Kendall returned to the station at about 2:40 a.m. and met with Wheeler and Cobos. Shortly before 3 a.m., Kendall went into the interview room with defendant, who asked him questions about punishments.

> "[Defendant] asked me if this was a hundred, if this would require a hundred percent. I took that to mean does he have to do, does he get no time credit. I think that's the fact he meant. And I explained to him that I didn't know enough about what occurred. All I had heard he had a ten second f[**]k-up and I said it depends on whether you get one hundred percent. If it's first degree murder or second degree murder or some other crime. But I didn't know enough to be able to tell him one way or the other because I hadn't heard what he had to say at this point in time."

¶ 31 The videotaped confession began at about 2:57 a.m., with defendant seen waiving his *Miranda* rights.

¶ 32 At the conclusion of the hearing, defendant argued that his statements must be suppressed because it was not he who re-initiated the interrogation after he had requested an attorney. He denied waiving to Wheeler and Cobos. The State argued that defendant did re-initiate the

interrogation by knocking on the window and telling Jacobson that he wanted to speak to "Frank" and then by stating that he wanted to speak to Wheeler.

¶ 33 On January 23, 2007, the trial court denied defendant's motion to suppress. The court commented first that it determined that Cobos and Wheeler were at the Warrenville police department specifically to speak to defendant and not, for example, by accident. It also acknowledged that there were inconsistencies in the police officers' testimony, but noted that it expected as much and, otherwise, would be inclined to believe that the witnesses had rehearsed. Next, the court found that defendant expressed an interest in speaking with the officers again, noting Jacobson's testimony that defendant asked to speak to Frank and noting that Wheeler and Cobos testified that defendant waived to them while they walked down the hallway at the station (evincing an interest, perhaps, in speaking to them). The trial court found that, in the video, defendant was spoke intelligently, did not appear to be under the influence of either drugs or alcohol or under any mental or physical impairment, and appeared alert.

¶ 34 Next, the court addressed the 17-second videotape wherein defendant appears and states that he wants to speak to the Maywood officers. It notes that defendant is smoking, talking, and moving his arms. Defendant was "speaking almost in a jocular fashion at times." Viewed in context, the court found, the video depicts a conversation about a re-initiation of the interrogation, not a discussion about "the weather and sports." Further, the later video depicts defendant waiving his *Miranda* rights, which, the court found, was consistent with its finding. "So I do find that [defendant] re-initiated both initially by his verbal and oral actions and that from the totality of the circumstances that that re-initiation was knowing and intelligent within the meaning of the case law." The court subsequently denied defendant's motion to reconsider.

¶ 35 2. Second Suppression Motion – Promises of Leniency

¶ 36 On September 10, 2007, defendant filed another motion to suppress, arguing that his confession was the product of promises and coercion by the Maywood police officers. A hearing on the motion began on September 17, 2007.

¶ 37 Wheeler testified that, on October 14, 2004, he and Cobos interviewed defendant at the Warrenville police department for about two hours after midnight. The conversation was not recorded. However, Wheeler testified that neither he nor Cobos made any promises, threats, or used mental coercion to defendant during their discussion. He denied promising defendant that, if defendant spoke with Wheeler and Cobos, he would "get out" or that defendant was going to be charged anyway. Wheeler also denied telling defendant that he came to Warrenville to help him or that he and Cobos were going to help him.

¶ 38 Wheeler testified that, when defendant started telling him what happened the night of Sade's death, Wheeler stopped the conversation and contacted the State's Attorney's office. During the 40 minutes it took for someone from that office to arrive, Wheeler and Cobos made "[s]mall talk about Maywood" with defendant and gave him food, drink, and cigarettes. After Kendall arrived, he had a brief conversation with defendant and defendant made the videotaped confession, which was played at the suppression hearing and later at trial.

¶ 39 On cross-examination, Wheeler acknowledged discussing punishment for this kind of crime, but stated that he also told defendant that the punishment would be up to a judge. He also acknowledged telling defendant that, normally, people who show remorse and take responsibility for a crime receive less harsh sentences than people who do not, but that it would be up to a judge to decide. Wheeler did not believe defendant's denials of guilt. "We talked about what the truth would do, the leniency."

¶ 40 The following colloquy ensued:

"[Defendant]: Is this a true summary: You came in, I told you nobody is listening to me, I don't want to say anymore because no one is listening to me. You said, we are not here to violate your rights; we'll listen to you. What do you want to say? I said, I didn't do it. I didn't do it, I didn't do it, I didn't do it. For two hours I told you that. For two hours, you told me, if you take responsibility, the Court will show more leniency. And, basically, that's all you admitted to telling me. And then I agreed to give a statement.

Is that a true summary of what happened?

[Wheeler]: I would say yes, your Honor."

¶ 41 Cobos testified that, during the interrogation, neither he nor Wheeler discussed with defendant the different degrees of murder or mentioned that individuals who take responsibility for the crimes with which they are charged are shown leniency. Between 12:03 a.m. and 2:57 a.m. (the time the videotape started), they did not make any promises of leniency or threaten defendant. Cobos also denied that he or Wheeler used mental coercion on defendant during this time. However, they did discuss sentencing (but not potential sentences for murder; they discussed "weed") and being truthful; the officers told him that it was up to the judge. According to Cobos, defendant appeared alert, did not complain of being tired, and did not complain about the length of the interview. He was allowed to smoke, and the officers gave him food, water, and soda. When Kendall arrived, defendant asked him specifically about sentencing and Kendall replied that it would be up to a judge.

¶ 42 Defendant testified that he spoke with Wheeler and Cobos after making the re-initiation video. For two hours, he denied committing the crime. The officers, however, persuaded him that he was going to be charged no matter what and that no one would believe that he did not

commit the crime. Defendant stated that the officers told him that, if he gave a statement taking responsibility for the murder, he would be treated more leniently. Defendant believed that the officers would testify as to his background and character, conveying that defendant was "not a bad guy," or troublemaker. The officers, according to defendant, gave him examples of second-degree murder (such as when a person is drunk and accidentally kills someone) and told him that, if he were charged with second-degree murder, he could be home in 10 years, which was better than spending his life in prison:

> "Detective Wheeler was discussing an individual that I know named Pat Obrowski (phonetic) who according to him, which was probably a lie, got charged with a murder and he helped him get second-degree murder and Pat Obrowski came home in nine years.
>
> Detective Wheeler relayed to me that if I got charged with second-degree murder instead of first-degree murder, there was a chance that I would come home in no more – in no less than [15] years. He said it was a chance I would be home in [10] years. And they convinced me that this was better than spending my life in jail. And I mean anyone can figure that [10] years is better than life."

¶ 43 Defendant further testified that he was told that if he continued to deny committing the crime, he "would probably get the most harshest sentence for it." (On the confession videotape, which runs from 2:57 a.m. to 3:21 a.m., defendant states that no promises or threats were made to him.)

¶ 44 On October 9, 2007, the trial court denied defendant's motion. It found that there was no improper inducement. The court specifically found that the totality of the circumstances reflected that defendant is intelligent, appeared alert, and was not tired or under the influence of

drugs or alcohol. Noting that Cobos's demeanor on the witness stand was "difficult," the court placed more weight on Wheeler's testimony. Wheeler testified that he told defendant that, in his experience, "things may go better" for people who take responsibility for their actions. The court found that defendant's statement was given freely, voluntarily, and without any improper inducements, threats, or violations of his rights.

¶ 45 3. Third Motion – Time of Wheeler and Cobos's Arrival

¶ 46 In July 2009, defendant filed another motion to suppress his statements, arguing that Wheeler spoke to him for about *one hour* before defendant agreed to the re-initiation video. According to defendant, Wheeler and Cobos arrived at the Warrenville police station much earlier than they had stated in their earlier testimony and it was during this extra time that they *persuaded/coerced* defendant to re-initiate the interrogation without an attorney (*i.e.,* a "secret" interrogation). Thus, his subsequent videotaped confession should have been suppressed because it was not defendant who re-initiated the interrogation.

¶ 47 A hearing on defendant's motion began on September 10, 2009. Defendant testified that a surveillance video of the Warrenville police station parking lot on October 13, 2004, depicted the arrival of only one black Crown Victoria (presumably driven by Wheeler and Cobos). The time stamp showed its arrival time as 11:12 p.m. The State did not object, and the court accepted the representation of what the video depicted.

¶ 48 Detective Wheeler testified that he and Cobos arrived at the Warrenville police station in a black Crown Victoria, but he stated that their arrival time was about 11:45 p.m. They arrived at the interview room about five to seven minutes later. He and Cobos went to Warrenville to learn more about the investigation and because they had learned that defendant was in custody as a suspect. According to Wheeler, after he and Cobos arrived at the police station and spoke to

Kendall, they went into the interrogation room to speak to defendant, asking if he would appear on videotape agreeing to speak to them; this was the first time they spoke to defendant at the Warrenville police station. Wheeler testified that defendant stated during their post-re-initiation conversation that he did not want to say any more because no one was listening to him.

¶ 49 Joshua Wittenberg of the Warrenville police department testified that the police station was monitored by video cameras showing the date and time, but that the time was not accurate. He stated that the station had more than one system and that they were not synchronized. "[I]t has always been common knowledge that those times were off."

¶ 50 Giammarese testified that only about 15 minutes elapsed from the time that defendant asked for an attorney (at 11:55 p.m.) and the time Giammarese was contacted and returned to the interrogation room and put defendant on videotape to consent to speak to the Maywood officers. During this period, the Maywood officers did not speak to defendant. By Giammarese's estimate, the officers were not yet in the building.

¶ 51 The parties stipulated that there was a 14-minute discrepancy between two of the station's time systems, but they did not stipulate that either system showed the correct time.

¶ 52 Defendant alleged that the "secret" interrogation occurred between about 11:05 p.m. and 12:20 a.m. After he had asked for an attorney, the interrogation ended and Giammarese and Grovner left the room. About 5 or 10 minutes later, the Maywood officers entered the room and began the "secret" 45-minute interrogation. Defendant testified that "something happened to me immensely when I started smoking cigarettes [the detectives had given him] and listening to them. I calmed down, and I started believing what they were saying to me." Afterwards, he appeared on the videotape agreeing to speak to the police.

¶ 53 The trial court denied defendant's suppression motion, finding that, although he was "troubled by the timing," he did not fully understand it. The court noted that it was unable to determine exactly what time defendant invoked his right to counsel or exactly what time Wheeler and Cobos arrived. The surveillance video and testimony showed that they appear to have arrived at about 11:26 p.m. That arrival time, the court found, was not far off from the officers' testimony (that they arrived at about 11:45 p.m.); thus, the court could not find that there had been a conspiracy among the State's witnesses to manipulate the times. Despite the discrepancies, the court determined that the sequence of events described by the State's witnesses was credible.

¶ 54 The trial court rejected the assertion that there was a conspiracy by police to manipulate the videotape. The court determined that the conversation was secret only to the extent that it was not taped. The subsequent tape did not reflect that defendant was under coercion or duress. His overall demeanor, according to the court, did not reflect any coercion. As to defendant's assertions that he repeatedly told Wheeler and Cobos that he did not want to speak anymore, the court found that it was not an invocation of rights, but a statement that defendant was tired of repeating himself. This was borne out by his later statement to Kendall that he was not coerced or threatened.

¶ 55 B. Waiver of Counsel

¶ 56 Two judges presided over this case in the trial court: Judge Perry R. Thompson, who retired during the proceedings, and Judge Robert G. Kleeman, who began presiding over the case on August 10, 2010.

¶ 57 Initially, the public defender's office represented defendant. On July 14, 2006, after about 18 months of representation, defendant decided to proceed *pro se*. Prior to his decision,

Judge Thompson admonished defendant regarding his decision. He also gave defendant several weeks to contemplate his decision and to speak to his family about it. Defendant inquired if he could have standby counsel available, and the court replied that he would not.[2]

¶ 58 After choosing to proceed *pro se*, defendant represented himself for the next 4 1/2 years. He filed numerous motions, including at least six motions to suppress. Beginning in September 2006, defendant was given investigative services through the public defender's office. Defendant reaffirmed, on September 10, 2007, his decision to proceed *pro se* ("That's my choice.").

¶ 59 At a July 30, 2009, hearing, a representative from the public defender's office notified the court that defendant had spoken to its investigators 20 times per week and that the office had put in about 100 hours of manpower on defendant's case. On October 9, 2009, Judge Thompson set a trial date of March 1, 2010, and later moved it to February 22, 2010. After defendant filed several new motions, the trial date was stricken, and Judge Thompson subsequently retired.

¶ 60 On August 24, 2010, Judge Kleeman re-admonished defendant about his right to counsel and defendant re-affirmed that he wanted to continue representing himself.

¶ 61 On September 7, 2010, Judge Kleeman noted that, as part of the waiver procedure, he had neglected to admonish defendant about possible penalties; thus, he admonished him about them. Defendant again confirmed that he wished to continue to represent himself: "Well, today I represent myself *pro se*, and I have for years now, so it's to the point where I'm so deep it doesn't – it's illogical for me to turn back now."

¶ 62 On September 29, 2010, the trial court set a January 11, 2011, jury trial date. By prior order of Judge Thompson, dated June 15, 2010, defendant had been communicating with

[2] Defendant does not contest this determination on appeal.

potential witnesses by using the jail telephone. The order provided that defendant's calls were routed to the public defender's office, and it allowed defendant to use the telephone "as needed during regular business hours of 8:30 a.m. to 4:30 p.m. Monday through Friday when the office is open."[3]

¶ 63 At an October 7, 2010, hearing, the court expressed concern over the use of the public defender's resources, where they were not a party to this case. "I think it puts [the public defender's] office in an unworkable position where they're forced to … automatically forward phone calls without any ability to weigh in or exercise [its] considerable judgment as to whether or not it's a proper use of [the] office's resources." The court determined that Judge Thompson's order was "an inappropriate use of the public defender's resources."

¶ 64 The State suggested that defendant be allowed instead "a $28 phone card, which is equivalent of one hour[']s worth of phone calls on a somewhat regular basis to make his phone calls." Defendant objected, denying that he had abused the phone arrangement and arguing:

> "Two, just to give you an example of my situation, I was looking for my alibi witness, Harold Williams. I had no information on him besides his previous address. From that I had to get his sister's information, then she gave me someone else's information, to call that person, and then call the another [*sic*] person to get Harold. And just to get to Keyla Williams alone, Harold's sister, I had to call three different numbers. Those numbers didn't even work. It was just by luck that she called Jason Harvey [the public defender's chief investigator] back, and I was able to call her.

[3] The record does not reflect that any restrictions were placed on this access.

> This is what I'm going through. It's not like I'm just going to make one phone call and everything is going to be fine. I have to actually find people. It's not possible to do this with a calling card. It's just not."

¶ 65 The trial court vacated the earlier order, ordered a phone card, and appointed an investigator from the public defender's office to assist defendant in obtaining a needed phone number. At the same hearing, defendant asked for standby counsel to assist him, and the trial court denied his request.[4] "I find that that created many issues, and perhaps, more than it solves."

¶ 66 Defendant stated, "it's suicide for me to proceed without being able to catch my witness. It's suicide. I purposefully, intentionally did not overuse this. Every number I called is marked down. They know who I'm calling." The court commented that it was concerned with ordering an "independent body to exert [*sic*] their resources for your benefit when they have no say-so in how those resources are being used." The court noted that Harvey "seems to be on top of this" and "will do whatever is reasonable within his power to do to assist you." After discussion of other matters, the court commented:

> "Mr. Matthews, I understand that your position is that this isn't going to be workable. I'm not persuaded, although I have an open mind. I'll listen to you and Mr. Harvey on the 19th, but I'm going to direct you to give him the list of witnesses you believe you cannot reach with a calling card. I'll hear from both of you in 12 days."

¶ 67 Defendant asked to be represented by counsel (not standby counsel). The court denied the request:

> "I advised you specifically, and I've got the transcripts to prove it, that if you

[4] Defendant does not challenge this ruling on appeal.

> decided to proceed *pro se*, I would not have you decide that you wanted to have an attorney and that you wanted to not have an attorney because if – the law doesn't provide for that. If it did, you could decide to proceed *pro se* and on the eve of trial say, I want an attorney. If I was obligated to go back and forth like that, I would abdicate my ability [*sic*] to control the proceedings here.
>
> I went through this at length with you on two separate court dates about your decision to proceed *pro se*. If your decision is because you don't believe you're going to be able to properly investigate your case to prepare, I'm telling you right now, Mr. Harvey is going to do what he can to assist you. You're going to have to use your best efforts. Is it difficult? Yes. But you wanted to act as your attorney and I can tell you that acting as an attorney, whether you're a licensed attorney or not, preparing for trial is difficult work, it's frustrating, and it requires dedication and attention. I think you're experiencing that. And there are stumbling blocks that you're going to have to overcome. But at this point in time, I'll hear from you on the 19th, I am not inclined to go back and forth on that issue regarding your decision to proceed *pro se*."

Defendant responded, "Judge, no back and forth. I feel like my hands are being tied, and I'm being put in the ring. I got to fight for everything." The court stated, "That's right."

¶ 68 Over one week later, on October 17, 2010, defendant moved to re-instate Judge Thompson's telephone order, arguing that he was unable to represent himself without being able to adequately communicate with witnesses. Alternatively, he again requested appointment of counsel. At an October 19, 2010, hearing, the State argued that allowing defendant to use the telephone one hour per week was "more than fair" and that jail personnel had reported to it that they had, pursuant to routine security measures, listened in on one of defendant's phone

conversations and that it had "nothing to do with this case." Defendant responded that he could not go forward with only one hour per week of phone time. The trial court denied defendant's request, but agreed to consider allowing extra telephone time and noted that Harvey could assist with contacting potential witnesses.

¶ 69 At this point, defendant stated "Judge Kleeman, I wish to withdraw." After more discussion concerning the contacting of witnesses, defendant stated again, "Sir, I wish to withdraw." The court responded, "I understand, but we went over this when I admonished you as to your rights to proceed *pro se*." Defendant replied, "Absolutely, and I agreed with everything at that time, knowing I would have communication." The trial court assured defendant that he would be able to communicate with witnesses. The following colloquy ensued:

> "[Defendant]: My trial is within 90 days. I don't have time to keep going back and forth with the Court. I don't have time to keep arguing with the jail. I don't have time for it. If this is the situation, I want an attorney.
>
> [Trial Court]: I understand, but we have gone over this. And I told you at the time that I am not going to continue to go back and forth with respect to your attorney – your decision to represent yourself.
>
> What I intend to do is to do everything in my power to fashion a solution that honors both the sheriff's concerns, which I think are warranted about communication and running the jail, your concerns about communication and the need to be able to represent yourself, which you have elected to do, and that decision I am not going to continue to go back and forth about that. I went over it. You have had more than enough time to think about it. And part of the problems we addressed when I took your waiver of right to be

represented, and I want to make it clear, at this point in time, the trial date 90 days away, the solution to any problems that arise is not going to be, as you couch it, withdrawing from the case or having an attorney appointed. We're going to have to address how to make communication work."

¶ 70 The court questioned Harvey, who assured it that he and his fellow investigators were communicating with defendant and acting upon his requests and would be willing to contact persons if defendant gave them a list. Defendant objected:

"[Defendant]: The problem is, Judge, I don't have the time. I don't have the time to keep going back and forth like this. This is going to consume a lot of my time.

[Trial Court]: Right. That is what trial preparation is.

[Defendant]: Absolutely. But the way you're suggesting and the way it is being put, Judge, once again, on the record, if this is the situation, I wish to withdraw.

[Trial Court]: I understand.

[Defendant]: I cannot do it.

[Trial Court]: And I believe that you can. I believe it is arduous. Your motion to withdraw I am taking as your request to have an attorney appointed and I am denying that.

If there is means of communication that we need to address, I am not closing the door and continuing to look at this, but I guess what I don't understand is if you have somebody who you got contacts, you're looking for a particular individual, you give that information to Mr. Harvey and give him a reasonable period of time, what Mr. Harvey, I believe, does is he finds the name, number, contacts the person and he tells you they are willing to talk to you or not willing to talk to you. That is what an investigator does in

helping you prepare for trial."

¶ 71 The trial court directed the sheriff's office to expand defendant's calling card from 60 to 90 minutes. The court determined that, along with the assistance of the public defender's investigators, defendant had the ability to communicate. The court also set a status date to "keep a handle on the communication issues."

¶ 72 At a November 1, 2010, hearing, the court again asked defendant if he wanted to be heard further on the phone call issue or if defendant had a list to provide the court. Defendant replied, "I have nothing further." The court then noted to defendant that it had to balance the jail's security needs with "defendant's right to represent himself and to have reasonable means with which to represent himself." The court further noted that it had made the public defender's office available and that it had not heard any evidence that the office had not complied with any of defendant's requests.

> "And I am indicating to both sides that, if Mr. Matthews indicates that there is a need for a specific outside line to a specific individual, I would consider that on a case-by-case request-by-request basis. But for a whole host of reasons, I stand by my previous ruling that a 9:00-to-5:00 outgoing phone line is not reasonable and is not going to be ordered."

¶ 73 Defendant complained that he would not have chosen to proceed *pro se* "knowing that I wouldn't have communication."[5] He asked to withdraw. The trial court found that defendant did have reasonable communication. It again asked defendant to provide specific information concerning any non-responsiveness from the public defender's office. The court informed

[5] The record does not reflect any communication-related orders by the trial court (or requests for such by defendant) in 2006 when defendant first waived his right to counsel.

defendant that, if there was anyone he wished to call that he could not call via Harvey or his phone card, to let the court know. "I will consider making arrangements for you to have an outside line to a specific number for a specific purpose." The court continued:

"For that reason, I take exception with your characterization that you are unable to communicate. I think you are able to communicate. I don't think you like the restrictions that have been put on you. But you are an inmate in the county jail, pending a murder trial. There are security concerns that I have to be mindful of.

And again, if you want to keep going back to it, we will. The fact that you used the phone privileges to contact a food service provider for the jail ends this discussion for me. That is not what was contemplated by that order. Whether you intended to abuse it or not is not before me. I am not really concerned about it. I don't know that you meant to be abusing it with that phone call. But that's not acceptable.

***

In the meantime, I will not allow you to make a record here without my responding to it that you are unable to communicate. I believe that to be patently false. I think I have done everything I can to make sure that you can communicate. I will continue to do that on a weekly basis, if need be. But I will not allow a record to be made by you that you are unable to communicate.

The only thing you can't do is call anybody you want any time you want 9:00 to 5:00, five days week. The answer to that is that's correct. You cannot any longer.

You can make phone calls if they are for witnesses. Tell me who it is. Tell me why the calling card won't work. And I will get you an outside line. That's it. We are not talking about that order any longer."

¶ 74 Subsequently, defendant was allowed a one-hour call to each witness he had subpoenaed, and it would have been further expanded if he believed he needed more time. By December 23, 2010, defendant had spoken to "almost all" of his witnesses.

¶ 75 At a January 3, 2011, hearing, defendant sought a continuance. In phrasing his request, he asserted that the trial court had taken "the phone from me." The court responded:

> "Two things I want to say. I take umbrage with your representation that I quote, took the phone from you, closed quote. We had a motion that was addressed regarding your phone privileges when you called a food service provider for the jail complaining about the food. I didn't take the phone from you. I limited your phone calls to 90 minutes. I take great exception with that characterization. The second thing[ ] is I repeatedly asked you to take advantage of Mr. Harvey who at the time was far less busy. Not that he's not always busy, but far less busy then than he is now. I asked you Mr. Harvey [*sic*] or anyone else told me that if you made a request of the public defender['s] officer to assist you to notify me. I have never been made aware of any request you made of the public defender investigators that has not been honored in a reasonable period of time.
>
> Now, you tell me that you want to continue the matter because these problems wouldn't be happening. I don't know what problems you're referring to. It seems to me that every witness you've asked for to be subpoenaed has either been subpoenaed or we are tracking it down. The only witness you're not able to call is a witness who's been stricken because, not because you weren't able to have a phone [but] because you either forgot or chose not to comply with Supreme Court Rules. Your motion to continue is denied."

¶ 76 The trial court *sua sponte* appointed a private process server to serve the last four subpoenas for defendant. Next, there was a discussion about clothes that were brought to the public defender's office for defendant and that an order needed to be entered to ensure that they were delivered to him. Defendant renewed his request to withdraw. "I asked for counsel when he first came on this case, sir." The trial court responded:

> [Trial Court]: "That is absolutely not true. I remember this vividly. I asked you if you wanted to represent yourself. You were adamant that you did. I admonished you on successive dates. You persisted in your desire to represent yourself. I told you once you waived your right to appointed counsel, we set a trial date, I would not move that trial date and I would not appoint counsel which would surely result in a continuance of a six-year old trial. That representation to my recollection is plainly false. You wanted to have counsel appointed once the trial date was set, and I'm not playing that game any more. Six-years is long enough. We are going to trial on Tuesday. Good day, Mr. Matthews.
>
> [Defendant]: Good day.
>
> [Trial court]: That's all."

¶ 77 C. Trial

¶ 78 On January 11, 2011, one day prior to trial, defendant included in his witness list the name of an individual who would testify that Pierce Cole, Sade's boyfriend, pulled Sade out of a car and dragged her on the ground the day before she was killed. The trial court ruled that, without further proffer, defendant was barred from making any references to a third-party perpetrator.

¶ 79 On January 12, 2011, after the jury was assembled, defendant appeared in court (out of the jury's presence) in an orange jumpsuit. He explained that the clothes his family had brought

for him to wear at trial no longer fit him after spending so many years in jail. The trial court noted that the case had been set for trial since August or September and that the jury had been assembled. Thus, the court was reluctant to hold up the trial any further and would not allow defendant to "hijack" the trial. It also noted that defendant had been allowed to make two phone calls to arrange for clothing to be brought to him. The court ordered defendant to either go downstairs and put on the clothing he had or proceed in the orange jumpsuit. Defendant chose to wear the casual clothing he had worn the prior day. The court stated:

> "[Trial Court]: All right.
>
> You have – you – and [i]f I hear from the deputy that you are delaying this in any way, I'm gonna direct them to drag you back up [ ] here and you are going in orange. I do not care. I want to make that clear.
>
> If any deputy reports to me that you're delaying the process in the slightest, I am gonna issue a drag order, you're coming back up and you'll proceed with the trial in orange.
>
> Deputy, please take him away. You better get moving, Mr. Matthews or you're going to trial in orange.
>
> [Defendant]: What's gonna happen when I start flipping tables and sh[*]t, Judge? I'm not gonna keep doing this.
>
> I'm the only one trying – I'm the only one trying to be reasonable about the whole f[**]king situation, man."

¶ 80 The deputy removed defendant from the courtroom. The prosecutor commented that he had no issue with defendant obtaining clothes and that it was not, in his view, an unnecessary

delay. The court agreed, but also noted that defendant was "making commotion in the hallway" and that it wanted to avoid "more histrionics" during the proceedings.

"We were talking about this for weeks. I've offered the public defender clothes. He refused that. He wanted to have his own clothes. He wanted to have them tailored properly.

I've allowed phone calls and now at 9:30 when the jury, I understand, is assembled, he can't get dressed and I'm not going to have him hijack the courtroom."

¶ 81 The court also noted that it considered the prejudicial impact to defendant, but noted it was unfair to the State to allow defendant to "dictate the terms of the trial." It issued a drag order and noted that it had instructed the sheriff's office to make any necessary security arrangements.

¶ 82 Defendant returned to the courtroom restrained in a wheelchair and wearing an orange jumpsuit. The court asked the public defender to obtain clothes for defendant and, after a brief hearing on applying restraints, the court ruled that, although defendant had previously conducted himself as a reasonable person, his threat about flipping tables posed a security threat in the courtroom. Defendant objected to wearing restraints at trial. While the State responded, defendant stated something that was inaudible to the court reporter. The trial court interrupted:

"[Trial Court]: Hang on a second.

Mr. Matthews, if I'm not mistaken you just uttered a profanity while Mr. Knight was talking.

[Defendant]: This is crazy.

[Trial Court]: All right. You know what? I will take notice. I've seen those.

That right there tells me everything I need to know. Mr. Matthews, has –

[Defendant]: I never acted up in this courtroom.

[Trial Court]: -- interrupted me again. He's unable to compose himself.

I am going to order the deputy sheriff or the Sheriff's office to make arrangements to have the skirts or the cardboard devices around the table so it can't be seen, and Mr. Matthews is going to be shackled during the balance of the trial.

I'm not – I am not going to have anything happen here and then worry about it afterwards."

¶ 83 The court ordered defendant to be taken away and given clothes. Defendant objected, stating that he wanted to proceed to trial, wearing the orange jumpsuit. The prosecutor noted that jail personnel had informed him that a stun gun had to be used on defendant when he was being returned to the courtroom. A deputy stated to the court that defendant had dropped to the floor and refused to move.

¶ 84 The jury was brought in. During opening statements, defendant denied killing Sade and stated that his confession was the result of tricks and lies. The court noted to the jury that defendant had walked away from the table during his opening statement, allowing them to see his shackles. It also reminded the jury that defendant was presumed innocent of the charges and that they should not consider the restraints in reaching their verdict.

¶ 85 1. The State's Case - Jesse Glover, Breah Andrea, and Marilyn Hertz

¶ 86 Jesse Glover, Sade's father, testified that he saw Sade alive on the afternoon of October 9, 2004. Breah Andrea, Sade's co-worker at Walgreens, testified that a man who sounded African-American called for Sade at about 9 p.m. on October 9, 2004, but Sade was not at work. (The parties stipulated to telephone records reflecting the call.) Marilyn Hertz, a Walgreens

employee, testified that Sade "came into the store to say hi" at about 9 p.m. and that Hertz asked her for a ride home. At about 10:30 p.m., Sade dropped off Hertz at her home in Naperville.

¶ 87 2. Various Witnesses' Testimony About Hearing Sounds

¶ 88 Sade's neighbors testified that, at about 10:30 p.m., they heard a series of "pops" (*i.e.*, possible shots) and called 911. Neighbor James Wong testified that he heard a girl's voice say "Oh, Mom." Officer Matt Komar of the Warrenville police department testified that he responded to a "shots-fired" dispatch at about 10:30 p.m. He drove through the area, but saw nothing unusual.

¶ 89 3. Barbara Hudson

¶ 90 Barbara Hudson, Sade's mother, testified that, on October 9, 2004, Sade lived with her in Warrenville at 29W529 Winchester Circle. Sade, born October 30, 1986, became acquainted with defendant in 1999 at school. Sade graduated from high school in 2004 and was working at Walgreens.

¶ 91 At about 10:30 p.m. on the night of the shooting, Hudson heard "pow, pow, pow" and a scream. She looked out her window, but saw nothing unusual and went to bed. At about 2 a.m., Hudson became aware that Sade was not home. She went downstairs and saw that the garage light was on. Hudson opened the garage door, saw Sade's car outside, and then saw Sade's body on the ground. Sade lay on her back, not breathing. Hudson called the police.

¶ 92 4. Officer Brian Feiler, Kevin Farley, Jeff Harkey, and Jennifer Cones

¶ 93 Officer Brian Feiler of the Warrenville police department testified that he responded at the scene and found a girl lying between a car and the garage door, with blood on her jacket, wounds, and no sign of life. The car's driver's door was slightly ajar, and there was blood inside the car by the gear shift and steering wheel and outside by the body and on the garage door.

¶ 94 Kevin Farley of the Du Page County sheriff's office testified that he arrived at the scene at about 5 a.m. on October 10, 2004. He observed drops of blood traveling from the driver's door around to the front of the car and on the garage door, near where Sade's body was lying on the ground.

¶ 95 Jeff Harkey testified as an expert in forensic pathology and performed an autopsy on Sade on October 10, 2004. He found four bullet wounds and opined that the cause of death was multiple gunshot wounds of the wrist, arm, and chest. Death would not have been immediate, but would have occurred within minutes. Sade would have been able to move "some number" of feet before collapsing. Three bullets were recovered from her body, and one was recovered from her jacket sleeve.

¶ 96 Jennifer Cones, a firearm identification expert, testified that she examined the four bullets and determined that they had all been fired from the same gun.

¶ 97 5. Officer Timothy Davis

¶ 98 Officer Timothy Davis testified about Sade's filing a battery complaint against defendant three months before her death. Davis stated that, on July 3, 2004, Sade and Hudson came to the police station and filed a complaint for battery against defendant. Sade reported that defendant had come to her home the previous day and asked her to hold some cannabis for him. She refused, and defendant became angry and started yelling at her. Sade pushed defendant, and he struck her in the face. Sade fell to the ground, and defendant left. Sade sought care in the emergency room and received several stitches to her mouth. Davis further testified that, when Sade came to the police station, he observed the stitches and her puffy lip.

¶ 99 After Sade gave a written sworn statement, which was admitted into evidence over defendant's objection, a warrant was issued for defendant's arrest for battery. On cross-

examination, Davis testified that he did not know if Sade's statements about the incident were truthful.

¶ 100 6. Officer Charles Beckett

¶ 101 Officer Charles Beckett of the Warrenville police department testified that, on September 26, 2004, he went to Maywood and arrested defendant on the battery warrant. Defendant posted $1,000 bond, but was upset about it and claimed that he needed the money to obtain an apartment the following day. He was scheduled to appear in court on the battery charge, a Class A misdemeanor, on October 28, 2004.

¶ 102 The parties stipulated that defendant had previously been convicted of armed robbery and aggravated battery and that he was on parole at the times relevant to this case.

¶ 103 7. Edward Zanghi

¶ 104 Edward Zanghi, a parole supervisor, testified that committing a misdemeanor violates the terms of one's parole and that the parolee could be taken into custody for such a violation and be subject to imprisonment. According to Zanghi, a parole warrant for defendant's arrest was issued on October 12, 2004.

¶ 105 8. Jamie Seifert

¶ 106 Jamie Seifert, a clerk at the White Hen Pantry in Warrenville, testified that she knew defendant from high school and saw him at the store around 8 or 9 p.m. on October 9 or "the Wednesday just before that Saturday."

¶ 107 9. Assistant State's Attorney Jeff Kendall and Videotaped Confession

¶ 108 Assistant State's Attorney Jeff Kendall testified that, on the night of October 13 to 14, 2004, he was assisting in the investigation of Sade's murder. He returned to the police station at

about 2:40 a.m. and, along with Wheeler and Cobos, spoke with defendant. Wheeler and Cobos informed Kendall that defendant had confessed to shooting Sade.

¶ 109 Before giving his statement, defendant asked Kendall what sentence he would receive. Kendall testified that he told defendant that it would be up to a judge and that a judge is "more lenient to someone who tells the truth, accepts responsibility for what they did, are remorseful, and Judges are more harsh on people who, you know, lie or try to play the truth and what happened to avoid taking responsibility for their actions." According to Kendall, defendant wanted his statement to be videotaped.

¶ 110 The videotape, which begins at 2:57 a.m. and ends at 3:21 a.m. on October 14, 2004, was admitted into evidence over defendant's objection and played for the jury.

¶ 111 In the video, Kendall, Wheeler, Cobos, and defendant introduce themselves. Defendant waives his *Miranda* rights. Also, he confirms that, earlier in the evening, he had stated that he wanted to speak with the officers without an attorney, that no promises or threats were made, and that he was making his statement so that a judge would know what kind of person he is.

¶ 112 Next, defendant apologizes to Sade, her family and friends, his own family, and "to everyone I hurt—because I didn't mean to do it." Defendant states that he had known Sade for seven years. During the summer, Sade held marijuana for him, did something she was not supposed to do, and he confronted her about it. They had a heated argument, Sade told him to leave, and he told her that he wanted his money. Defendant states that he hit Sade, realized what he had done, and left. He later learned that Sade had obtained a warrant for battery against him. Officers Wheeler and Cobos served the warrant on September 26, 2004.

¶ 113 Addressing the day before the shooting, defendant states that, on Saturday, October 9, 2004, he was in Maywood, drinking and "doing everyday things." At about 9 p.m., he called the

Walgreens store where Sade worked, wanting to confront Sade about why she pressed charges against him on the battery. However, Sade was not at the store. Defendant went to Warrenville (he was dropped off by someone) to see his friend Devonte, who was not there. Defendant then walked to a gas station to purchase cigarettes. He had a .38 revolver with him—a black, six-shot Colt—because some people in Maywood were trying to hurt him. He carried it "in back."

¶ 114 Next, defendant states that he walked around, looking for his friend, Jay, but Jay was not there. He continued walking. Jay lived in the same complex as Sade. As defendant approached Sade's driveway, Sade pulled up in her vehicle. He approached her. Defendant was drunk and was high from smoking weed. As Sade exited the driver's side door, he "confronted her," asking " 'Why can't you answer your phone when I call you?' " According to defendant, Sade stated, " 'Leave me alone. You drunk.' " Next, defendant states that he was not certain what happened, but he must have made Sade uncomfortable (he was perhaps too close to her) because she slapped his face. Kendall asks, "What did you do?" Defendant replies, "I shot her."

¶ 115 The two were inches apart when he shot her and about two feet from Sade's car. The driver's door was open. Defendant states that the gun was at his front because he had dropped it earlier while he was walking. Defendant grabbed the gun and pulled the trigger. He states that he did not know how many times he shot Sade. "I realized what I was doing and I stopped shooting." He tried to help Sade up, but she kept screaming. Defendant states that he told her several times that he was sorry. She kept screaming, and, so, he ran.

¶ 116 According to defendant, he was so drunk that he did not know where he was going. Eventually, he found his friend Carlos, who gave him a ride to Hillside Manor. On the way, defendant put his gun, which he had wrapped in his t-shirt, into a dumpster behind a store in a mini-mall.

¶ 117 As the video concludes, defendant states that he never meant to kill Sade. He apologizes and states that it was an accident, "a ten-second mistake, a ten second f[**]k-up." Further, he states, "I was not thinking and high and not thinking." Defendant claims that he has not been able to sleep since the shooting, and he thanks Officers Wheeler and Cobos for helping him through this.

¶ 118 Next, Kendall is seen going to turn off the camera. Defendant states, "Probably ruined my life, man" and "Sade's gone." Kendall states that the time was 3:21 a.m., and the video ends.

¶ 119 At trial, Kendall testified that, after the videotaping was completed, defendant asked to call his mother. He was allowed to contact her from a telephone next to the interview room. According to Kendall, he heard defendant say into the telephone that "he had killed someone, that he had told the police what happened, he confessed about it, that it had been eating at him, and he wanted to get it off his chest, and he had gotten it off his chest." Defendant then walked over to Wheeler and Cobos, shook their hands, and told them to "keep the streets safe."

¶ 120 On cross-examination, Kendall denied that the story about defendant asking to speak with the Maywood detectives was a lie. He also denied that he conspired with the other officers to trick defendant into making the videotape.

¶ 121 10. Tony Dutkovich

¶ 122 Officer Tony Dutkovich of the Warrenville police department testified that defendant's mother, Rhonda Matthews, visited defendant at the jail on October 14, 2010. He overheard defendant telling his mother that "it happened at 10:00," that he was "very angry," and that "he didn't mean to do it[,] it happened very fast[,] and the gun just kept going off." Also, defendant asked his mother if she was going to visit him in jail, and she responded that she would not, "that

jail wasn't a place for her and that this is probably going to be [the] last time they saw each other."

¶ 123 The State rested.

¶ 124 11. Defendant's Case – Preliminary Matters

¶ 125 Before he called his first witness, the trial court ruled again that defendant was barred from making any argument or introducing any evidence to show that the crime was committed by a third person.

¶ 126 Defendant proffered that the police had information that, prior to her death, Sade had knocked out the teeth of her boyfriend, Jarvis Green, after he ripped off her clothes in front of a group of people; that she had been selling drugs for Green; and that Green had been stalking her and had threatened to kill her. Defendant did not know exactly when each of these incidents had occurred, but some had occurred about 16 to 18 months prior to Sade's death. The trial court found that this evidence was too remote, speculative, and primarily hearsay. It further noted that, even if not hearsay, it was insufficient to "pass muster under the third-party perpetrator analysis."

¶ 127 During his case-in-chief, defendant called 33 witnesses, some of whose testimony was as follows.

¶ 128 12. Katie Marquardt

¶ 129 Katie Marquardt testified that she worked with Sade at Walgreens and that Sade was normally cheerful. However, on the day before she died, Sade was extremely upset, shaking, and crying. People were consoling her.

¶ 130 13. Pierce Cole

¶ 131 Pierce Cole, Sade's boyfriend, testified that, on the night of her death, Sade called him at about 10 or 11 p.m., stating that she wanted to see him right away. She was going to come to Cole's house after dropping off her friend, but she never came.

¶ 132 13. Officer Duane Wheeler

¶ 133 Wheeler testified that, on October 13, 2004, he went to the Warrenville police station to help in the investigation and arrived there at about 11:45 p.m. He heard defendant call to him, and he and Cobos spoke with defendant for about two hours about the homicide after making the re-initiation video. Wheeler testified, "I believe we spoke about different, about the law of which what you can be charged with, homicide, aggravated battery."

¶ 134 On cross-examination, Wheeler stated that, after defendant gave his videotaped confession, "he shook my hand, gave me a hug, and stated again he made a ten second F up, excuse my language, and that just keep doing a good job in Maywood, about the gangs and things like that."

¶ 135 14. Officer Warren Cobos

¶ 136 Officer Cobos testified that he and Wheeler arrived at the Warrenville police station at about 11:45 p.m. and that they spoke with defendant from about midnight to 2:57 a.m. During that time, they discussed the case for "[p]robably 20 minutes maybe 'cause then you [*i.e.*, defendant] were asking how we were doing. I asked how you were doing and how Maywood was doing and how all these friends of yours are doing, and we shot the sh[*]t for about an hour and a half." Cobos denied discussing different degrees of murder and different sentences, and he denied saying that it would be in defendant's best interest to give a convincing story and say he was sorry.

¶ 137 14. John C. Clayton

¶ 138 John C. Clayton testified as an expert witness in forensic examination of firearms and toolmarks. He examined the bullets recovered from Sade's body and determined that they could have been fired from a Colt .38 or .357, or by various other makes, including Armscor, EIG Importers, Miroku, Garate Anitua, Squires Bingham, Davis Industries, Security Industry, Forehand Arms, American Derringer, FIE, and Thompson Center. Clayton testified that Colt was the most common maker, but that others, including ones he had not named, were also possible.

¶ 139 15. Barry G. Dickey

¶ 140 Barry G. Dickey testified as an expert witness in forensic analysis in the fields of audio, video, and voice identification. He examined the videotapes of defendant's interrogation, re-initiation video, and his videotaped confession. Dickey determined that the video ending with defendant stating that he did not want to speak anymore and requesting counsel stopped at 11:19 p.m. He also determined that the 17-second re-initiation video started and stopped at 12:01 a.m.

¶ 141 Dickey testified about the start and stop times of the videos. He stated that the actual times (as measured from the time stated by an officer on the recording) are calculated by adding an hour and 10 minutes to the embedded times. He called this hour-and-10-minute difference the "offset time."

¶ 142 13. Defendant

¶ 143 Defendant testified that he met Sade in 1999, when he lived in Warrenville. They became best friends and were inseparable. In 2002, defendant was locked up for robbery and aggravated battery and he remained in prison until September 2003. When he came out, he sold drugs. Sade also sold drugs, and defendant supplied her.

¶ 144 After Mother's Day 2004, defendant sold drugs in Warrenville because of trouble in Maywood, where he lived. He asked Sade to hold some of his supply. He subsequently retrieved it, but noticed that it was in different bags. Defendant went to Sade's house to speak to her about a shortage. Sade told him that he was mistaken and started trying to hit him. Defendant backed up. Finally, he hit her and knocked her down. After that incident, defendant wanted to speak to Sade, but she would not answer his calls.

¶ 145 Police raided defendant's house in September 2004, took all his guns and drugs, and arrested him. He bonded out and returned to hustling.

¶ 146 Defendant stated that October 9, 2004, was a regular night. He called Walgreens to speak to Sade, but she was not there. He stayed in Maywood, playing dice on the streets in front of a store on his block with security cameras. At about 11 p.m., he went to a hotel with a girl named Keisha. Early the next morning, defendant received a call from a friend who told him that Sade had been killed and that the police were looking for him. Defendant dropped the phone. He took Keisha home, and the police arrested him at Keisha's house. Defendant denied having anything to do with killing Sade.

¶ 147 Addressing his confession, he testified that it was false. Kendall brought in the Maywood detectives, but defendant did not want to speak with them. However, they gave him cigarettes and told him they would speak to the other officers if defendant spoke with the Maywood detectives. After 40 minutes, defendant agreed to make the re-initiation video.

¶ 148 After the video, Kendall left. Wheeler and Cobos remained in the room with defendant. Defendant testified that the Maywood officers knew his history. They told him that he was going to be charged and that, if defendant followed their instructions, "say what we tell you to say, you will be home in nine years" instead of receiving a death sentence. According to

defendant, the officers told him to say that he was intoxicated, "and it just happened, man. Everybody['s] going to know. Everybody knows it's a crime of passion." Defendant further testified that the officers told him that they would testify to his character and that defendant should "say sorry to everybody." They told defendant that he would receive a second-degree murder conviction, which carries a 20-year sentence, and that, by serving 50%, he would be "home in nine."

> "Yes, yes, I can do that. Do it, man. All you got to do is say you just happy to be there. *** All you got to do is say you just happened to walk up and she hit you. And it was an argument and you just snapped and you didn't know what happened. You blinked your eyes and, next thing, it was over with. It was a ten-second f[**]k-up."

¶ 149 Defendant testified that he agreed to make the videotaped confession. He asserted that Kendall led him through the story by asking leading questions (including "Was it a Colt?"), instead of having defendant tell the story on his own.

¶ 150 Defendant further testified that, although he telephoned his mother after making the video, he did not tell her that he had killed someone; rather, he told her that he had confessed to killing someone. He could not recall what he said to his mother the next day when she visited him at the jail, but he was certain that he did not tell her that he shot Sade.

¶ 151 14. State's Rebuttal – Jeff Kendall

¶ 152 In rebuttal for the State, Kendall testified that, to his knowledge, Wheeler and Cobos did not speak to defendant before the re-initiation tape, but they were in the room when the tape was made. He further testified that he did not know the manufacturer of the gun until defendant made his statement.

¶ 153 15. Verdict and Subsequent Proceedings

¶ 154 On January 21, 2011, the jury found defendant guilty of first-degree murder and further found that he personally discharged a firearm that proximately caused Sade's death. On February 15, 2011, defendant moved for a new trial, arguing, *inter alia*, that the trial court erred in denying his motions to suppress and in not allowing him to "withdraw from *pro se* representation." On February 23, 2011, the trial court denied defendant's motion, finding that defendant waived his right to be represented by counsel and that standby counsel was properly denied.

¶ 155 The court sentenced defendant to 100 years' imprisonment (55 years for murder, with 45 additional years for personal discharge of the firearm), to be followed by three years of mandatory supervised release. Defendant appeals.

¶ 156 II. ANALYSIS

¶ 157 A. Denial of Request for Counsel

¶ 158 First, defendant argues that he is entitled to a new trial because the trial court erred in denying his request for counsel, where, three months before trial, defendant unequivocally revoked his waiver of counsel and requested counsel in response to a new trial judge significantly changing the circumstances. For the following reasons, we reject defendant's argument.

¶ 159 In general, courts apply a *de novo* standard of review to determine if an individual's constitutional rights have been violated. *People v. Burns*, 209 Ill. 2d 551, 560 (2004). However, the determination as to whether the defendant made an intelligent waiver of his right to counsel and invoked his right of self-representation is reviewed for an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44, 116 (2011). A trial court abuses its discretion only where no reasonable person would take the view adopted by the court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 160 Defendant contends that *de novo* review is appropriate because Judge Kleeman's ruling was based on a mistake of law—that the waiver of counsel could not be revoked. Defendant points to the court's comment (after it revoked defendant's unlimited phone privileges and instead ordered that he use a phone card) that "the law doesn't provide for that. If it did, you could decide to proceed *pro se* and on the eve of trial say, I want an attorney." We reject defendant's argument that *de novo* review is appropriate. In its comments, the trial court was conveying to defendant that the law did not provide that defendant could go back and forth on his decision to proceed *pro se* and that the court was charged with the responsibility to ensure the efficient administration of justice: "And if I was obligated to go back and forth like that, I would abdicate any ability to control the proceedings here." The court did assess the factual circumstances (contrary to defendant's argument that there were no factual disputes) and found that, under the circumstances, defendant had had the ability to adequately communicate with potential witnesses: "I have never been made aware of any request you made of the public defender investigators that has not been honored in a reasonable period of time." The court further noted that defendant had been able to subpoena every witness on his list or that it was in the process of occurring. Accordingly, we apply the deferential standard of review.

¶ 161 Turning to the merits, a defendant has a sixth amendment right to represent himself. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). To proceed *pro se*, a defendant must knowingly and intelligently relinquish his or her right to counsel, and the defendant's statement must be clear and unequivocal. *Id.* "The purpose of requiring that a criminal defendant make an 'unequivocal' request to waive counsel is to: (1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the defendant from

manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*." *People v. Mayo*, 198 Ill. 2d 530, 538 (2002).

> "Even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel. Under certain circumstances, defendant may acquiesce by vacillating or abandoning an earlier request to proceed *pro se*. See, *e.g.*, *People v. Meeks*, 249 Ill. App. 3d 152, 170 (1993); *Williams v. Bartlett*, 44 F.3d 95, 100-01 (2d Cir.1994); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir.1982). In determining whether a defendant seeks to relinquish counsel, courts may look at the defendant's conduct following the defendant's request to represent himself. See *Raulerson v. Wainright*, 732 F.2d 803, 808-09 (11th Cir. 1984) (the defendant waived his right to represent himself where he voluntarily and abruptly left the courtroom after asking to represent himself); *Bennett v. Duckworth*, 909 F. Supp. 1169, 1175-76 (N.D. Ind. 1995) (the defendant acquiesced in the representation of his court-appointed counsel where he raised the possibility of proceeding *pro se* but did not mention the issue again after the trial judge declined to appoint substitute counsel); but see *Orazio v. Dugger*, 876 F.2d 1508, 1512 (11th Cir. 1989) (the defendant did not acquiesce where his request to represent himself was conclusively denied and a renewed request would have been fruitless). A defendant may forfeit self-representation by remaining silent at critical junctures of the proceedings. *Cain v.Peters*, 972 F.2d 748, 750 (7th Cir. 1992).
>
> The timing of a defendant's request is also significant. A number of courts have held that a defendant's request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun. See, *e.g.*, *United States v. Jones*, 938 F.2d 737, 743 (7th Cir. 1991); *United States v.*

> *Oakey*, 853 F.2d 551, 553 (7th Cir. 1988); *United States v. Betancourt-Arretuche*, 933 F.2d 89, 92 (1st Cir. 1991); *Pitts v. Redman*, 776 F. Supp. 907 (D. Del. 1991); *People v. Woodruff*, 85 Ill. App. 3d 654, 660 (1980); *Mallory v. State*, 225 Ga. App. 418, 422 (1997). Once such proceedings have begun, the trial judge has discretion to deny a defendant's request to represent himself. *Oakey*, 853 F.2d at 553; *Pitts*, 776 F. Supp. at 915." *Id.* at 23-24.

A court must look at the overall context of the proceedings, including the defendant's conduct following his request. *Burton*, 184 Ill. 2d at 22-24.

¶ 162 Where a court has properly admonished the defendant about proceeding *pro se*, the court can hold the defendant to his or her election, even though the defendant subsequently changes his or her mind during trial. *People v. Palmer*, 382 Ill. App. 3d 1151, 1163 (2008). "Indeed, considering (1) the importance of judicial administration and (2) the need to avoid giving a defendant the opportunity 'to game the system' ***, a court would be justified in informing a defendant of a deadline (perhaps a few weeks before the trial date) by which his decision to proceed *pro se* at trial will become irrevocable, making clear that it is not just at trial itself that the decision will become irrevocable." *Id.*

¶ 163 Here, defendant contends that, after he waived counsel, the trial court imposed a significant change in circumstances of his self-representation—revocation of Judge Thompson's phone order and imposition of the phone card. Defendant notes that he complained to the court that he waived counsel "knowing I would have communication" and that the changed circumstances rendered his waiver no longer knowing and voluntary. Defendant further urges that nothing in the record suggests that his request for counsel was motivated by a desire to delay trial or thwart the administration of justice. Rather, it was motivated only by the restrictions the

court imposed on his ability to communicate by telephone. In his view, no serious argument can be made that, under the Sixth Amendment, the public defender's investigator's services were the equivalent of counsel.

¶ 164 We conclude that defendant's argument is unavailing because his request for counsel was made only because he was unhappy with the trial court's decision to change his phone privileges—his position was, essentially, that anything less than unlimited phone privileges was unreasonable—and he tried to manipulate the court into restoring unlimited phone privileges.

¶ 165 Defendant was initially represented by counsel—the public defender's office—in this case. On July 14, 2006, after 18 months, he waived his right to counsel and proceeded *pro se*.[6] For the next 4 1/2 years, defendant filed numerous motions and other pleadings and had generous phone privileges and investigative services through the public defender's office. Defendant reaffirmed his choice to represent himself in September 2007, August 2010, and September 2010.

¶ 166 On September 29, 2010, the trial court set the January 11, 2011, trial date. At an October 7, 2010, hearing, the court questioned Judge Thompson's phone order, expressing its concern over the use of the public defender's resources. The defendant expressed concern over the State's proposal that he use a phone card, apparently because it would limit his calls and where some of his witnesses were difficult to reach. At this point, about three months before trial and over four years since he waived his right to counsel, defendant asked for representation. In denying defendant's request, the court noted that, if defendant had concerns about the investigative services being provided by the public defender's office, he could raise them before

[6] Defendant has never asserted that he was improperly admonished concerning his waiver of counsel.

the court. It also noted that defendant could not go back and forth on his decision to waive his right to counsel.

¶ 167 On October 17, 2010, defendant moved to re-instate the earlier telephone order, arguing that he was unable to represent himself without being able to adequately communicate with witnesses; in the alternative, he requested to be represented by counsel. The State, in response, argued that jail personnel had randomly listened in on one of defendant's phone conversations (for security purposes) and informed it that defendant's conversation had nothing to do with the case. Defendant repeatedly complained that his phone time was inadequate. The court agreed to consider allowing more time and assured defendant that the investigator would assist him with contacting witnesses. After asking several times for representation, the trial court again told defendant that he could not go back and forth on his decision to proceed *pro se*. Further, it noted:

> "What I intend to do is to do everything in my power to fashion a solution that honors both the sheriff's concerns, which I think are warranted about communication and running the jail, your concerns about communication and the need to be able to represent yourself, which you have elected to do, and that decision I am not going to continue to go back and forth about that. I went over it. You have had more than enough time to think about it. And part of the problems we addressed when I took your waiver of right to be represented, and I want to make it clear, at this point in time, the trial date 90 days away, the solution to any problems that arise is not going to be, as you couch it, withdrawing from the case or having an attorney appointed. We're going to have to address how to make communication work."

¶ 168 Harvey assured the court that he and fellow investigators were communicating with defendant and acting upon his requests. He also noted that, if defendant provided a list, he would contact those persons. Defendant complained of the work involved (*i.e.*, having to call multiple individuals to reach the person to which he wished to speak). The court denied his request for counsel:

> "If there is means of communication that we need to address, I am not closing the door and continuing to look at this, but I guess what I don't understand is if you have somebody who you got contacts, you're looking for a particular individual, you give that information to Mr. Harvey and give him a reasonable period of time, what Mr. Harvey, I believe, does is he finds the name, number, contacts the person and he tells you they are willing to talk to you or not willing to talk to you. That is what an investigator does in helping you prepare for trial."

¶ 169 The court expanded defendant's calling card to 90 minutes and found that defendant had the ability to communicate. It set a status date to address any communication issues.

¶ 170 At a January 3, 2011, hearing (one week before trial), defendant sought a continuance and commented that the trial court had taken "the phone from me." The court took issue with the characterization, noting that defendant's phone privileges had been limited after it was discovered that he had "called a food service provider for the jail complaining about the food." As to defendant's ability to communicate with potential witnesses, the court again found that there were no investigator requests that had not been "honored in a reasonable time." The court denied defendant's motion to continue[7]:

> "Now, you tell me that you want to continue the matter because these problems

[7] This ruling is not at issue on appeal.

> wouldn't be happening. I don't know what problems you're referring to. It seems to me that every witness you've asked for to be subpoenaed has either been subpoenaed or we are tracking it down. The only witness you're not able to call is a witness who's been stricken because, not because you weren't able to have a phone [but] because you either forgot or chose not to comply with Supreme Court Rules. Your motion to continue is denied."

¶ 171 The trial court also, *sua sponte*, appointed a private process server to serve defendant's final four subpoenas. Next, after a discussion concerning defendant's trial clothes, defendant renewed his request to withdraw: "I asked for counsel when he first came on this case, sir." The trial court disagreed, noting that defendant had been "adamant" about representing himself.

> "I told you once you waived your right to appointed counsel, we set a trial date, I would not move that trial date and I would not appoint counsel which would surely result in a continuance of a six-year old trial. That representation to my recollection is plainly false. You wanted to have counsel appointed once the trial date was set, and I'm not playing that game any more. Six-years is long enough. We are going to trial on Tuesday. Good day, Mr. Matthews."

¶ 172 Clearly, defendant was unhappy with the changed telephone access and sought to force the court to reinstate his privileges or allow him to withdraw on the eve of trial. Such manipulation of the judicial system or gamesmanship is not allowed. *Mayo*, 198 Ill. 2d at 538; *Palmer*, 382 Ill. App. 3d at 1163. Further, the choice given the court does not in any way constitute an unequivocal assertion of defendant's right to counsel. Defendant never offered evidence showing that he was unable to contact potential witnesses (or even explain how having an attorney would significantly improve his ability to reach people). That is, he never provided

the court with any specific information concerning his alleged difficulties in communicating with any specific witnesses or other issues in defending his case. This is most telling, as it reflects that defendant wanted nothing less than unlimited phone privileges. His request for counsel was an attempt to manipulate the court to grant him such privileges. See *Burton*, 184 Ill. 2d at 24-25 (finding that defendant did not clearly and unequivocally invoke his right to self-representation because his request was based on his desire to obtain access to court records). We cannot condone such gamesmanship.

¶ 173 The court asked defendant numerous times to provide lists of witnesses that he wished to contact and assured him that the public defender's office would assist him in contacting those individuals. Again, as late as three months before trial, the court expressed its frustration with defendant's "back and forth" on the representation issue.

> "You have had more than enough time to think about it. And part of the problems we addressed when I took your waiver of right to be represented, and I want to make it clear, at this point in time, the trial date 90 days away, the solution to any problems that arise is not going to be, as you couch it, withdrawing from the case or having an attorney appointed. We're going to have to address how to make communication work."

¶ 174 The court expanded the time on defendant's phone card and assured him that it would revisit the communication issue if problems arose. Again, defendant never identified any particular witnesses that he was having trouble contacting. Without actual evidence of inadequate communication (or explanation of how having counsel would have significantly improved his situation), the trial court's refusal of defendant's request for counsel was not unreasonable. We find no abuse of discretion.

¶ 175 B. Denial of Two Motions to Suppress Statements

¶ 176 1. Promises

¶ 177 Next, defendant argues that a new trial is required because his Fifth Amendment right against self-incrimination was violated when the trial court denied his motion to suppress statements induced by an interrogation calculated to convince him that he would receive leniency if he confessed. Defendant urges that his statements were, thus, not voluntary. For the following reasons, we reject his argument.

¶ 178 "In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review." *People v. Cummings*, 2014 IL 115769, ¶ 13. The trial court's factual findings are reviewed for clear error, and are only reversed if they are against the manifest weight of the evidence. *Id.* However, the ultimate decision of whether or not suppression is warranted is a question of law that is reviewed *de novo*. *People v. Harris*, 228 Ill. 2d 222, 230 (2008).

¶ 179 The due process clause of the fourteenth amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. The United States Supreme Court "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Generally, courts frame the inquiry by asking whether the defendant's confession was voluntary. *Miller*, 474 U.S. at 109; *People v. Davis*, 35 Ill. 2d 202, 205 (1966) ("The constitutional test for the admission of a confession in evidence is whether the confession was made freely, voluntarily and without compulsion or inducement of any sort"). Also, the fifth amendment, which applies to the states through the fourtheenth amendment's due process clause (*Malloy v. Hogan*, 378 U.S. 1, 6

(1964)), commands in pertinent part that no person shall be compelled in any criminal case to be a witness against himself or herself. U.S. Const., amend. V. However, the Court continues to measure confessions against the requirements of due process and to exclude involuntary confessions. *Dickerson v. United State*s, 530 U.S. 428, 434 (2000); *Miller*, 474 U.S. at 110.

¶ 180 The test for voluntariness is "whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he *** confessed." *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996). Whether a statement is voluntarily given depends upon the totality of the circumstances. *Id.* Factors to consider in determining the voluntariness of a statement includes "the age, education and intelligence of the accused; the length of the detention and the duration of the questioning; previous experience with the criminal justice system; falsely aroused sympathy; offers of leniency or other promises to induce a confession; whether the accused was advised of his constitutional rights; and whether the accused was subjected to any physical mistreatment." *People v. Ball*, 322 Ill. App. 3d 521, 531-32 (2001). Here, defendant focuses his argument on alleged promises of leniency.

¶ 181 Confessions induced by promises or suggestions of leniency have been held involuntary. *People v. Ruegger*, 32 Ill. App. 3d 765 (1975) (statement involuntary where police told the defendant that he would "go to bat" for him on such matters as recognizance bond and probation if he confessed). However, mere exhortations to tell the truth or to make a statement do not, without more, render a subsequent confession inadmissible. *People v. Veal*, 149 Ill. App. 3d 619, 623 (1986). "To constitute an offer of leniency that renders a confession inadmissible, a police statement must be coupled with a suggestion of a specific benefit that will follow if the defendant confesses." *People v. Kellerman*, 342 Ill. App. 3d 1019, 1027 (2003); see also *People*

v. Wipfler, 68 Ill. 2d 158, 173 (1977) (mere exhortations to tell the truth are permissible absent a suggestion of a specific benefit to the individual being interrogated). See, *e.g.*, *People v. Lee*, 2012 IL App (1st) 101851, ¶ 36 (police's statement that " 'isn't it better to be known as a robber instead of a murderer of old men?' " not a promise of leniency because it lacked any suggestion of a specific benefit that would ensue from the defendant's confession); *People v. Johnson*, 285 Ill. App. 3d 802, 806, 809 (1996) (statement, " 'You said if I give this statement and tell the truth the judge will see I cooperated, and he might take it into consideration' " was not a promise by the police that they would do anything on the defendant's behalf or that he would receive less time; rather, it was open-ended); *People v. Howard*, 139 Ill. App. 3d 755, 758 (1985) (police promise that "if [he] told the truth that everything would go right on [him] and stuff like that" was a statement for the defendant to tell the truth that did not render his confession involuntary); *People v. Eckles*, 128 Ill. App. 3d 276, 277-78 (1984) (police statement to the defendant that it would be in his best interest to get the truth out as fast as possible and that, if the defendant told the truth and cooperated, the police would inform the State's Attorney and testify in court as to the defendant's cooperation was not a promise of leniency because it was open-ended with no promise of a specific result).

¶ 182 Here, Sergeant Wheeler testified that neither he nor Cobos made any promises to defendant during their two-hour discussion that commenced shortly after midnight on October 14, 2004. Specifically, he denied promising defendant that he would get out if he spoke with the officers or telling him that he was going to be charged anyway or that he and Cobos came to Warrenville to help him. Wheeler's cross-examination testimony reflected that he discussed punishment with defendant for the crime, but he also testified that he told defendant that the punishment would be up to a judge. He also acknowledged telling defendant that, people who

show remorse and take responsibility for a crime normally receive less harsh sentences than those who do not, but that it would be up to a judge to decide. Wheeler also acknowledged talking about "what the truth would do, the leniency [*sic*]."

¶ 183 Defendant, who stated on his videotaped confession that no promises or threats were made to him, testified at the suppression hearing that the officers persuaded him that he was going to be charged no matter what and that, if he gave a statement taking responsibility for Sade's murder, he would be treated more leniently. He stated that the officers gave him examples of second degree murder and told him that he could be home in 10 years under such a conviction:

> "Detective Wheeler relayed to me that if I got charged with second-degree murder instead of first-degree murder, there was a chance that I would come home in no more – in no less than [15] years. He said it was a chance I would be home in [10] years. And they convinced me that this was better than spending my life in jail. And I mean anyone can figure that [10] years is better than life."

¶ 184 The trial court found Wheeler's testimony credible and denied defendant's motion to suppress. It characterized Wheeler's statement to defendant as, in his experience, "things may go better" for people who take responsibility for their actions; thus, it did not constitute an improper inducement. The court also determined that defendant's statement was given freely, voluntarily, and without any threats or violations of his rights.

¶ 185 We conclude that the trial court's assessment was reasonable, and we find no error with its denial of defendant's motion. The court's credibility determinations are key here. The court credited Wheeler's testimony. We cannot conclude that its assessment was unreasonable, as we cannot find that his statements were inherently incredible. Clearly, Wheeler's testimony

conflicted with defendant's version of the events. As discussed previously, we give deference to a trial court's factual findings and credibility determinations, unless such findings and determinations are against the manifest weight of the evidence. *People v. Almond*, 2015 IL 113817, ¶ 63. This deference is warranted because a trial court is in a superior position to determine the witnesses' credibility and to resolve conflicting testimony. *People v. Gonzalez*, 184 Ill. 2d 402, 412 (1998). The trial court did not err in denying defendant's motion to suppress concerning alleged promises of leniency.[8]

¶ 186 2. Re-Initiation

¶ 187 Defendant's final argument is that the trial court erred in denying his motion to suppress his statements, where his statements were involuntary because the police, not defendant, re-initiated the interrogation after defendant requested to speak to an attorney. We reject this argument.

¶ 188 "An "accused *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The exclusionary rule bars the prosecution from using statements obtained after a defendant invokes his right to counsel, unless the State can establish that: (1) the defendant initiated further conversations; and (2) he knowingly and intelligently waived the right he had invoked. *People v. Winsett*, 153 Ill. 2d 335, 350 (1992). Thus, if the police subsequently initiate a conversation with

[8] The trial court barred defendant's proposed expert on false confessions. Defendant nevertheless repeatedly refers to her testimony in addressing his promises argument. In reaching our holding, we have not considered that testimony.

the accused in the absence of counsel, the accused's statements are presumed involuntary and are inadmissible as substantive evidence at trial. *People v. Woolley*, 178 Ill. 2d 175, 198 (1997). Any waiver of the right to counsel given in a discussion initiated by the police is presumed invalid. *Id.* The State bears the burden of proving that a defendant initiated further conversations, in that he " 'evinced a willingness and a desire for a generalized discussion about the investigation.' " *People v. Outlaw*, 388 Ill. App. 3d 1072, 1083 (2009) (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983)). "Whether a defendant has in fact initiated a conversation with the police is determined by examining the totality of the circumstances, and the trial court's determination on that issue will not be disturbed unless it is manifestly erroneous." *People v. Wright*, 272 Ill. App. 3d 1033, 1042 (1995).

¶ 189 In this case, defendant contends that there was significant time for a discussion between him and the Maywood officers, during which they persuaded defendant to resume the interrogation after had requested an attorney. The State's position is that the evidence reasonably showed that there was little time for such a discussion and that the re-initiation video was made almost immediately after Wheeler's and Cobos's arrival at the Warrenville police station. We find the State's argument more compelling.

¶ 190 Defendant testified that, after he invoked *Miranda* (at about 11:50 or 11:55 p.m., according to Giammarese and Kendall), Kendall entered the interview room with Wheeler and Cobos, whom defendant knew from Maywood. According to defendant, they told him that they would help him walk out and that they spoke to him for 30 to 45 minutes. Afterwards, defendant agreed to make the re-initiation video.

¶ 191 Wheeler testified that he arrived at the station at about 11:45 p.m. and that, on the way in, he saw defendant in the interview room. Defendant asked to speak to him. Cobos similarly

testified that he arrived at the station at about 11:40 p.m. and that defendant waived to him and Wheeler. Jacobsen, Kendall, and Giammarese testified that, shortly after midnight, defendant knocked on the interview room window and stated that he wanted to speak with Giammarese again. Kendall testified that he told the officers that defendant would have to sign a re-initiation-and-waiver-of-counsel form. A form was obtained, and the officers and Kendall entered the interview room. Kendall testified that, as they spoke with defendant about documenting his consent, defendant gestured toward the hallway and stated that he wanted to speak to Wheeler. Kendall retrieved Wheeler and Cobos, explained the situation, and discussed with defendant the need to document his consent. (Kendall was in the interview room for about 30 minutes.) Defendant then made the video.

¶ 192 Wittenberg testified that the police station was monitored by video cameras, but that the time was not accurate on cameras and that they were not synchronized, which was common knowledge. (The time stamp showing the arrival of a black Crown Victoria, presumably Wheeler's and Cobos's vehicle, was 11:12 p.m.)

¶ 193 Defendant denied waiving to Wheeler and Cobos and asserted that the officers spoke to him for about 45 minutes to one hour before he agreed to make the re-initiation video (*i.e.*, a "secret" interrogation between about 11:05 p.m. and 12:20 a.m.). .

¶ 194 In denying defendant's motion, the trial court noted that, despite some discrepancies in the times, the sequence of events described by the State's witnesses was credible. The surveillance video and testimony reflected that Wheeler and Cobos arrived at about 11:26 p.m., which, the court further found, was close in time to what the officers testified. Accordingly, the court could not find that there had been a conspiracy among the State's witnesses to manipulate

the times to hide a secret interrogation. The court also determined that the re-initiation tape did not reflect that defendant was coerced.

¶ 195 We conclude that the trial court's assessment was reasonable and that it did not err in denying defendant's motion to suppress. Assessment of this issue, as the court noted, rests on witness credibility, which was resolved against defendant. We cannot conclude that the trial court's resolution was unreasonable. The video time stamp evidence (primarily Dickey's trial testimony) was not clear, and we fail to see how it would have been reasonable for the court to place much weight on it.

¶ 196 Defendant relies on Dickey's trial testimony, which he concedes "is difficult to follow." Defendant contends that, when the trial court found the State's witnesses' testimony to be more credible, it did not have the benefit of the forensic analysis of the videotapes that Dickey conducted. See *People v. Valle*, 405 Ill. App. 3d 46, 56 (2010) ("In reviewing a ruling on the suppression of inculpatory statements, we may consider all the evidence adduced at trial as well as that adduced at the suppression hearing."). Dickey testified at trial that the interrogation videotape was turned off at 11:19 p.m. after defendant requested counsel and that the re-initiation video started and stopped at 12:01 a.m. (Giammarese testified that the video was turned off at about 11:50 or 11:55 p.m., and Kendall's testimony reflected that the re-initiation video was made at 12:10 a.m.)

¶ 197 As the State notes, if Dickey is correct, defendant requested an attorney at 11:21 p.m.[9] (calculated by adding 1:12—the "offset" time Dickey calculated—to the time stamp of the part of the tape where defendant invokes his *Miranda* rights—10:09 p.m.). The re-initiation video

[9] Dickey testified at trial that, by his calculations, defendant requested counsel at 11:19 p.m.

was made either at 12:03 a.m. (per Dickey) or 12:10 a.m. (per Kendall's testimony). This seven-minute discrepancy, *without more*, hardly evinces time for police to re-initiate the interrogation (via coercion or otherwise).

¶ 198 In any event, as the foregoing reflects, the testimony concerning the video time stamps was hardly clear and we disagree with defendant that it "confirmed" that there was time for the Maywood detectives to persuade defendant to resume talking to police. The trial court, thus, was left to assess the credibility of the State's witnesses against defendant's testimony. We defer to its findings, as we cannot conclude that the State's witnesses were inherently incredible. Accordingly, we affirm the trial court's denial of defendant's motion to suppress.

¶ 199 III. CONCLUSION

¶ 200 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 201 Affirmed.