2016 IL App (3d) 140720-U

Order filed December 20, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 10th Judicial Circuit, |
| | ) | Peoria County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-14-0720 |
| v. | ) | Circuit No. 13-CF-208 |
| | ) | |
| NATHAN A. LEUTHOLD, | ) | Honorable |
| | ) | Kevin Lyons, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The State's evidence was sufficient to prove defendant guilty beyond a reasonable doubt of first degree murder. The trial court did not err by denying defendant's pretrial motions to suppress evidence or by denying defendant's request to admit other crimes evidence at trial. Defendant challenges for the first time on appeal a number of unpreserved errors, which do not qualify as plain error requiring a new trial. Defendant did not receive ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant, Nathan Leuthold, was found guilty of first degree murder. He was sentenced to 80 years of imprisonment. Defendant filed a posttrial motion, which the trial court denied. Defendant appeals.

¶ 3 FACTS

¶ 4 Defendant was arrested and was charged by information with first degree murder in violation of section 9-1 of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2012)) for killing his wife, Denise Leuthold ("the victim"). According to the information, the murder occurred on February 14, 2013.

¶ 5 On the date of the murder, defendant and the victim had been married for eighteen years and had three children, ages 4, 10 and 12. In 2013, the Leuthold family was living with the victim's parents, Diane and Douglas Newton, at 700 West Mossville Road, Peoria, Illinois.

¶ 6 The Leutholds had been involved in missionary work that required residency and travel to areas outside the United States. When working in Lithuania, the Leutholds met a young child named Aina Dobilaite ("Aina") and her family. As of July 2014, Aina had known defendant for at least 13 or 14 years. Defendant became Aina's sponsor when she moved to the United States at age 18 on a student visa. Defendant and Aina had a joint banking account into which defendant made deposits. Defendant also paid Aina's living expenses and school expenses for at least two years prior to the victim's murder.

¶ 7 In 2012, Aina resided at the Newton home while she attended Illinois Central College in Peoria. The victim's parents provided Aina with her own bedroom on the lower level of their home on Mossville Road.

¶ 8 Two days before the murder, defendant called the police on February 12, 2013, shortly after midnight, to report a suspicious vehicle parked in the driveway directly across the street from the Newton home. Officer Needham responded to the call and by the time he arrived, the car was gone. Needham searched the area, but did not find any vehicles that matched the

description provided by defendant and did not notice anything unusual. Needham did not speak to the neighbors because defendant told him not to disturb them.

¶ 9 On February 14, 2013, at around 12:15 p.m., the victim took her four-year-old daughter to her afternoon kindergarten class. According to Michelle Lunquist, the associate director at the school, the victim left the school at approximately 12:20 or 12:25 that day. Defendant picked up his daughter from kindergarten at the end of the day.

¶ 10 On February 14, 2013, shortly after 3:00 p.m., defendant called 911 to report a burglary at 700 West Mossville Road. Officer Linthicum responded and observed the garage door open at 700 West Mossville Road. Defendant was standing across the street in the driveway at 703 West Mossville Road.

¶ 11 Defendant told Linthicum that he had just returned home from picking up his youngest daughter from school and when he came up to the house, he saw the garage door open and some broken glass at the home. Defendant said that he was trying to contact his wife who was supposed to pick up their children in East Peoria, but was unable to reach her.

¶ 12 After speaking to defendant, Linthicum went to the Newton's home and gained entry through the open garage door. After observing broken glass, Linthicum checked the muddy area behind the house for footprints but did not see any tracks. Linthicum then went to the front of the house and waited for backup.

¶ 13 According to Linthicum, defendant did not approach him or ask any questions. After Officer Kampas arrived, both officers entered the house and observed shards of glass in the door, kitchen cabinets open, and some kitchen drawers on the floor. Linthicum testified that usually, when a burglary occurs, the kitchen is not a common place that a burglar would look for items.

Also, in most burglaries, items are scattered about and drawers are dumped on the floor. In this case, the drawers were placed neatly on the floor.

¶ 14 Linthicum noticed that the family's electronics, including their television and VCR, were present in the living room. There was a long hallway off the living room towards the front door. As Linthicum walked towards the front entryway, he observed a female facedown with her head in a pool of blood and a spent shell casing and a live round next to her head. The blood was beginning to coagulate. The female was identified as defendant's wife. The victim's car keys were later discovered underneath her head.

¶ 15 Kampas and Linthicum immediately retreated from the house, radioed for backup, and asked that the area be secured as a murder scene. Linthicum went to his squad car and retrieved his bulletproof shield from his trunk.

¶ 16 Defendant, who was standing in the driveway of the home across the street, saw Linthicum getting out his bulletproof shield but did not approach the officer or ask any questions. When enough other officers arrived, several officers went inside to clear the rest of the residence. The officers did not find anyone in the home.

¶ 17 After this search, Linthicum exited the house and noticed defendant was no longer outside. Linthicum went to the house located at 703 West Mossville Road and knocked on the door. The resident invited Linthicum inside where he spoke to defendant. Defendant did not ask Linthicum any questions about what had occurred or what he found inside the home. Defendant provided Linthicum information about what kind of car his wife was driving and Linthicum broadcasted the information over the police radio.

¶ 18 Officer Wong located the victim's car at a park located down the street from the Newton home, Robinson Park. Wong also recovered a pair of fleece gloves that were less than 50 feet

from the car, next to a picnic table. The next day the investigators found a set of keys to the victim's vehicle in a trash can near where the victim's car had been located.

¶ 19 Detective Garner transported defendant in an unmarked police car back to the police station to continue interviewing him. Defendant sat in the front seat next to Garner on the drive to the station. During the drive, Garner did not ask defendant any questions. When they passed Robinson Park, defendant remarked, "[t]he car is gone."

¶ 20 Detective Leigh and Officer Moore interviewed defendant in the interview room at the police station beginning at approximately 6:00 p.m. on February 14, 2013. Defendant was interviewed for approximately six hours, which was video-recorded and a redacted portion was played for the jury at trial. According to defendant, he left the police station in his own vehicle at about 12:30 p.m. on February 15, 2013.

¶ 21 On February 14, 2013, defendant signed four separate consent forms, including a consent to search his vehicle, a consent to search the bedroom that he shared with the victim at 700 West Mossville Road, Peoria, Illinois, a consent to search his cell phone, and a consent to search his HP laptop and USB hard drive. In addition, the State later obtained a search warrant to search defendant's laptop and USB hard drive. Defendant's computer was not searched until after the search warrant was obtained.

¶ 22 On February 14, 2013, the Newtons also provided their consent to allow the police to search the entire home. Due to the ongoing investigation, defendant, the Newtons, and their grandchildren could not to return to the home that evening while the Peoria Police Department retained control of the crime scene into the next day when Detective Moore searched the bedroom that the Leuthold's occupied in the Newton's home. During this search of the bedroom, Moore found a day planner in a desk on the right side of the bed. The day

planner contained handwritten notes, Post-it notes, notes about home schooling, and Bible scriptures. Tucked inside the day planner he found a note that read:

> What on earth could you possibly be thinking? I can't imagine anything you could tell me that would hurt worse than what you were doing to me now – every day. I really don't think there is anything that I have done or not done that would cause me to deserve this. I have tried to please you for seventeen years and never succeeded. I've never been good enough. Never done enough. I know that you want me dead. I'm not stupid. I suppose it will confirm my worthlessness to you when I write that I am not brave enough to do that job for you. And now all of a sudden, you are taking me with you places. What is that all about? Maybe you think I don't feel bad enough. You act like you are somehow noble because you won't tell me why you are doing this. It makes me sick. I have been willing at any time to fall in love with you again, but you reject me every time. I wish I could hate you. I've tried to hate you because I thought it would make it easier. I thought it wouldn't hurt so bad. Of course, I couldn't do it, so I have failed at that, too. I have been without pride. I have humiliated myself to try to win something that belongs to me. You defraud me, and you don't seem to care. Well, I quit. I'm not going to try to please you anymore. I will do what I have to do, but no more of that game. You want to humiliate me by running around with a 20 year old? Fine. I won't grovel. If I haven't pleased you in seventeen years, nothing I do now will please you. And I refuse to leave my children just because you have decided to do this to me. You are the only person who thinks I am a bad mother. Complete strangers compliment me on them, so I

> will not join you in your obsession with perfection. I am the same person that I've always been. I am not weaker and in many ways stronger. I refuse to play to your perfectionism in that, too. I have borne neglect and criticism and kept going. But now this. How long? How long are you going to do this to me? Oh, yeah until I break. That's what you said, isn't it? Well, happy waiting.

On that same date, Detectives Moore and Curry also recovered a black hooded sweatshirt from the bedroom. Detective Curry also noticed that the victim's purse and wallet were left undisturbed. He also discovered $300 in a dresser drawer.

¶ 23 Defendant was arrested on March 6, 2013, for first degree murder on February 14, 2013. Following defendant's arrest, the parties filed several pretrial motions.

¶ 24 I. Defendant's Motion to Suppress Statements

¶ 25 On March 28, 2014, defendant filed an amended motion to suppress all statements that he made on February 14, 2013. In the motion, defendant argued that he was subjected to a custodial interrogation but was not properly informed of his *Miranda* rights. The trial court conducted an extensive two-day hearing on defendant's motion to suppress in which the court heard testimony from the State's witnesses, Detectives Leigh, Garner, and Moore, and from several defense witnesses, including defendant, Bruce Leuthold (defendant's father), and Abigail Patton (defendant's sister). In addition, the court reviewed the entire video of defendant's interview at the police station.

¶ 26 When ruling on defendant's motion, the trial court judge recited his detailed analysis of the circumstances leading up to the questioning at the police station as well as of the video-recorded interview. When defendant arrived at the police station, he initially spoke with Detective Leigh and Officer Moore in the interview room. The court noted that the first couple of

hours involved a pleasant exchange of information. The court found the vocabulary used by the police was not overwhelming, cumbersome, or confusing in nature. Moreover, the court noted that defendant was confident during the interview and expressed himself very well.

¶ 27 The court found defendant had access to his personal cell phone during the interview and made and received numerous personal phone calls. At one point on the video, defendant exclaimed, "I'm getting calls like crazy." The court also noted that defendant was able to send text messages to anyone he wished.

¶ 28 The court noted that at two hours and 53 minutes, defendant called his father while he was alone in the interview room. According to the court's recitation of the events recorded on the video, defendant did not mention anything to his father about wanting to leave and did not tell his father that he wanted to speak to a lawyer. Instead, the court found defendant seemed overly concerned by his father's report that news of the murder was being broadcast on the radio and on Facebook. Defendant also expressed concerns to his father that the pastor at his church, David Sexton, might have learned about what had happened. Defendant also spoke to his father about getting his children clothing at Target and Walmart.

¶ 29 After defendant spoke to his father, the detectives came back into the interview room. The court focused on the fact that defendant described the phone call with his father to the detectives by stating, "[m]y whole family is together right now." The trial court judge inferred from defendant's statements that he was able to talk to his father, his mother, and his sister.

¶ 30 The court also noted that at 2 hours and 58 minutes, the Detectives said, "[n]o, you're not in custody. You're not in custody. You're able to walk right outside that door right now." The court observed that during the interview, the door was not locked and at some point defendant

opened the door himself and walked out of the interview room without knocking. The parties also took numerous breaks during the interview.

¶ 31 Further, the court noted that at three hours and one minute, defendant said he wanted to call "this person," meaning the Lithuanian student in Chicago, Aina. The court noted for the record that at three hours and three minutes into the videotaped interview, defendant called Aina again and at 3 hours and six minutes he made another call to someone.

¶ 32 The court also observed that at approximately 3 hours and 21 minutes, defendant said that he had talked to the victim's parents, Doug and Diana Newton. Immediately after speaking to them, defendant asked the detectives, "I'm not in custody, but I can talk to you?" Based on defendant's statement, the court concluded that defendant was just repeating what the detectives had told him earlier and concluded defendant understood he was not in custody.

¶ 33 The court noted that at about three hours into the interview, Detective Curry arrived at the police station after going through the Newton's home. After taking a break, Detective Curry joined the interview with Detective Leigh, and Officer Moore left the room. At four hours and 12 minutes, Detectives Leigh and Curry told defendant, "[y]ou're not under arrest. Nothing like that." Curry informed defendant that he had been inside the house and that they were going to give defendant his *Miranda* rights. Leigh then told defendant, "[q]uestions are going to get a little more like we are digging."

¶ 34 The court noted that the detectives were very careful in giving defendant his *Miranda* rights. They read defendant his *Miranda* rights sentence-by-sentence and asked him whether he understood after each sentence. Then, Curry stated, "[i]f at any time you don't want to answer or don't feel comfortable with any question you don't have to answer that." Once they finished giving defendant his *Miranda* warning, they again asked, "[k]nowing these or having had these

rights read to you, do you wish to waive them and speak to us?" Defendant responded that he did want to continue speaking to them.

¶ 35 The court observed that at five hours, which was 9:56 p.m., Curry began to ask defendant questions. At five hours and eight minutes, defendant called Aina again. Finally, at 5 hours and 31 minutes, defendant said, "I'm so physically tired. If you guys want to keep talking, I don't want to do this." The court said that that at this time, they had already finished the interview. The court observed that only at the very end of the video defendant stated, "[i]f the only way for me to stop the dead-end conversation is for me to exercise a right, then I need to know how to do that."

¶ 36 Based on its review, the court found that the length of the interview, six hours, was not excessive since defendant was the person who called the police to report the crime. The trial court found defendant was not in custody before *Miranda* warnings were given. Further, the court concluded that defendant did not at any point convincingly and unambiguously express that he wished to invoke his rights, and the investigators were not required to end the interview. The court explained that defendant "continued to try to ask how to perfect it, shape it, express it, write it, convey it; but the truth is, it just seemed to be a very cagey way to not appear evasive, to want to appear to be cooperative, but not quite sure how to walk the tightrope between the two." Further, the trial court was unable to identify any inculpatory statements made by defendant. For these reasons, the court held that the detectives did not violate defendant's constitutional rights when taking his statement and, therefore, denied defendant's motion to suppress.

¶ 37 II. Defendant's Motion to Suppress Evidence

¶ 38 On April 23, 2014, defendant filed a generic motion to suppress evidence gathered by law enforcement on February 14, 2013, in violation of his Fourth Amendment rights. The trial court

held a hearing on the motion on June 13, 2014. Defendant and Detective Leigh testified for purposes of this motion. At the hearing, defense counsel clarified that he was seeking to suppress the electronic information collected from defendant's cellular telephone, laptop, and the USB flash drive.

¶ 39 The court found that evidence was properly gathered by law enforcement since defendant knowingly and voluntarily executed written consent forms granting permission for law enforcement to search these electronic devices without any limitations. Finally, the court concluded there was no evidence that defendant signed each consent form after he requested counsel. In fact, the court found that defendant did not make a request to speak with counsel at any time.

¶ 40 III. Pretrial Motions Regarding the Victim's Note

¶ 41 On April 23, 2014, defendant also filed a motion *in limine* to bar the State from presenting evidence related to the victim's journals and any conversations covered by the marital privilege. On June 4, 2014, the State filed a motion seeking a ruling that the note from the victim's day planner was admissible based on section 115-10.2 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.2(a) (West 2012)). Further, the State argued that the admission of the letter would not violate defendant's confrontation clause rights under the sixth amendment because the victim's statement was nontestimonial. On June 10, 2014, defendant filed a response to the State's motion to admit the victim's note, arguing that it was privileged under the marital privilege. See 725 ILCS 5/115-16 (West Supp. 2013).

¶ 42 The trial court held a hearing on the parties' motions related to the admissibility of the victim's handwritten note on June 13, 2014. The State argued that the marital privilege did not

apply to the note because the statute contains an exception when the defendant is charged with a crime against the other.

¶ 43 On July 2, 2014, the court issued an order granting the State's motion seeking to admit the note, provided the State offered the note with the appropriate evidentiary and foundational requirements at trial. The court concluded: (1) the victim's letter was spontaneous and not the result of questioning; (2) the letter contained personal knowledge about the victim's relationship with defendant; (3) it was not made in solemn fashion nor with government involvement; and (4) there was no evidence that suggested that the victim intended for the letter to be used against defendant. Thus, the court held that the admission of the letter would not violate defendant's confrontation clause rights.

¶ 44 The trial court issued a second order dated July 2, 2014, denying defendant's motion *in limine* seeking to exclude evidence based on the marital privilege. At the hearing, the trial court judge stated that defendant's motion was not specific enough and that he was not going to issue a blanket order holding that any communication between defendant and the victim was inadmissible.

¶ 45 IV. Jury Trial

¶ 46 A. State's Evidence

¶ 47 At trial, witness Diane Parrish testified that she lived at 607 West Mossville Road, Peoria, Illinois, on February 14, 2013. At about 12:20 p.m. that day, she left her home with her husband in their car. As her husband drove towards Robinson Park, she noticed a man, wearing a black pullover sweatshirt, walking on the side of the road against traffic. Parrish felt the situation was unusual because most people would use the road to exercise before or after work, not in the

middle of the day. Also, it was very cold outside and the man was wearing only a sweatshirt. She was concerned that if the man saw them leave, he would rob their home.

¶ 48 Parrish asked her husband to slow down their vehicle because she wanted to get a good look at the man. Since the man had his hood pulled over his head and his hands in his pockets, Parrish could only see his cheeks and jawline. She described his facial hair as "scruffy." Parrish identified defendant in court as the person she saw on Mossville Road on February 14, 2013. Parrish testified that her husband did not get a good look at the man, but thought the man was African-American. Parrish did not call the police because she did not observe the man doing anything illegal. As Parrish and her husband drove by Robinson Park, they observed two cars at the park.

¶ 49 After learning of the murder, Parrish called the police. On February 16, 2013, she met with Detectives Leigh and Moore. The detectives showed her a photo array and she testified that she identified defendant's photo as depicting the person that she saw walking along Mossville Road on February 14, 2013. Later during trial, Detective Leigh also testified about Parrish's prior out-of-court identification of defendant.

¶ 50 Witness Becky Skehan-Passie testified that on both February 3, 2013, and February 14, 2013, she drove to her sister's house, which is located on Mossville Road, to drop some things off. On February 14, 2013, Skehan-Passie arrived at her sister's house at about 12:30 p.m. On one of those two dates, she heard a gunshot. She was "more sure" that she heard the gunshot on February 14, but she was "not 100 percent" sure. Skehan-Passie identified a screenshot of her phone with a text message she sent to her sister after she dropped off things at her sister's house. This text message was time-stamped February 14, 2013, at 12:47 p.m. Skehan-Passie testified that she heard the gunshot before she sent the text message.

¶ 51 Skehan-Passie testified during cross-examination that she heard the gunshot at "12:40ish." During redirect examination, she testified that she heard the gunshot when she arrived at her sister's at 12:30 p.m.

¶ 52 Aina also testified during the State's case-in-chief with the help of an interpreter.[1] Prior to trial, Aina initially invoked her fifth amendment right to remain silent but later agreed to testify for the State in exchange for a grant of transactional and use immunity from the prosecution. Aina testified that she attended a college in Pensacola, Florida, starting in 2010 through sometime in December of 2011. Aina admitted that during that time, she visited hotels with defendant in Florida. After the school learned that Aina stayed off-campus with defendant, she left the college and moved into the Newton's home in Peoria.

¶ 53 Defendant accompanied Aina to visits at Five Senses Spa in Peoria, but she could not recall how many times. According to Aina, defendant paid for Aina's massages, waxing, and hair care services at the spa.

¶ 54 Aina testified she traveled to Europe with defendant during the summers of 2011 and 2012. The victim did not go with them. Aina and defendant also went to the Cougarplex, a sports center at Illinois Central College, at least every other week beginning in the middle of the spring semester of 2012 until the summer. The victim did not accompany defendant and Aina at any time to the gym.

¶ 55 According to Aina, in November 2012, she accompanied defendant to an apartment that he rented at One Superior Place in Chicago, Apartment 1503. Aina agreed she stayed with defendant at the luxury apartment building during the period from November 20-26, 2012.

[1]Aina attended several English-speaking colleges in the United States and received good grades. Aina admitted that she is proficient in both written and spoken English; yet, she still used a Lithuanian translator to testify in court.

¶ 56 In December 2012, Aina visited with defendant in apartments in Chicago. Aina denied that she stayed overnight during those visits. Aina agreed defendant bought her an Eddie Bauer jacket and took her out to eat at restaurants in Chicago in 2012.

¶ 57 Aina also admitted that she went horseback riding with defendant and without the victim in the Cook County Forest Preserve. Two horseback riding passes in defendant's and Aina's names were admitted into evidence.

¶ 58 Aina also testified that most of the time she wrote defendant in Lithuanian. She could not remember if she sent him any written messages in English. Aina denied telling defendant she loved him and denied they were lovers.

¶ 59 According to Aina's testimony on January 18, 2013, defendant sent Aina the following email:

> I let you down and I'm sorry. I'm not going to make excuses. That would not be fair to you. You deserve someone who respects you and puts their relationship first, and from now on I want to do all that I can to be that person. There is nothing more important to me than you in this relationship. I'm so blessed to have you in my life, and I know it.

¶ 60 On February 14, 2013, Aina spoke with defendant three times and exchanged text messages. At 3 p.m. on that date, defendant sent Aina a text message informing her that the police believed that a burglary or robbery had occurred at the Newton home. Aina texted back the word, "[i]nteresting" with a smiley face emoticon. Aina agreed that her response was not an appropriate reaction after learning that her sponsor family's home had been burglarized.

¶ 61 Aina agreed that on February 20, 2013, she told detectives she had been to a shooting range with defendant over the summer. At trial, Aina denied going to the shooting range, and testified that they shot a gun at a friend's house. The victim was not present.

¶ 62 Aina also testified that defendant's family was paying for her attorney. Aina denied knowing that the funds for her attorney came from an account set up for defendant's children. Since defendant was arrested, Aina has maintained contact with defendant's parents, Bruce and Kathy Leuthold, on a daily basis. Defendant's parents advised Aina not to talk to the police. Aina had three telephone conversations from May 16-18, 2013, with defendant while he was in jail. She spoke to defendant in Lithuanian.

¶ 63 Aina did not attend the victim's funeral. Aina agreed she had not had any contact with the Newtons since the victim died, though she claimed she met with them once and expressed her sympathy. Aina emailed her own mother, Inga, shortly after the victim's death, but before her funeral. In the email, Aina stated in part:

> Everything is under God's control. He has a plan, and this is a part of his plan. Everything is not as awful as it sounds. Children and [defendant] are really doing well. It might be quite difficult on Monday and Tuesday; but after that, it should be better. Many people are praying, and it can be felt. Children cried only once when they first learned about it. [The victim's daughter] did not say once that she wanted her mother, but if she needs anything, she asks for Aina.

¶ 64 David Sexton testified he was the pastor of LaMarsh Baptist Church and that defendant and the victim were members of the church. About eight months before the victim's death, Sexton spoke with both defendant and the victim after he observed defendant "riding around with Aina in a car without anybody else." Sexton explained to defendant and his wife that

defendant's behavior did not look good and was detrimental to his ministry. Sexton warned defendant that if his behavior continued, the church would remove its financial support. According to Minister Kenneth Linder, defendant received $2500 every two weeks in financial support for his missionary work, which was collected from various churches throughout the country.

¶ 65 Paola Hinton testified she was the owner of Five Senses Spa and Salon in Peoria. Hinton knew defendant as a regular customer and knew Aina because "[e]very time she would come in for a service, [defendant] would accompany her, whether it was for a service he was also getting at the same time or separately." Hinton testified that she provided services to defendant and Aina for at least a couple of years.

¶ 66 Hinton also testified that she knew the victim as a client of the spa. Hinton associated defendant and Aina as a couple. However, Hinton first realized defendant and the victim were married on February 14, 2013, when defendant purchased a gift certificate for the victim.

¶ 67 Inmate David Smith testified he was in the Peoria County Jail, serving a 14-year sentence on a drug case, when he met defendant in March or April of 2013. The men were housed in the same jail unit and spoke on a daily basis for hours. Defendant asked Smith for guidance based on hypothetical legal questions. About two or three weeks after defendant arrived in the unit, Smith told defendant to be honest if he wanted Smith's help. Smith shook hands with defendant and promised to never say anything about what defendant would tell him. According to Smith, defendant said that the victim was overbearing, he met someone else, and wanted to move on with his life. Defendant said the name of the new woman was a student "named Anna, Lana, something like that."

¶ 68 According to Smith, defendant told him that on the day of the murder, he did certain things so he could account for his whereabouts at certain times. In the morning, defendant presented Valentine's Day gifts to the victim so everything looked fine. Then later in the day, he parked his car at Robinson Park and returned to the house through the woods. Defendant hid in the closet and waited for the victim to come home. Defendant told Smith he had some black clothes including a hoodie, but he changed his clothes because he thought someone saw him going to the house. When the victim came in, defendant had some words with her and then shot her in the head. Defendant told Smith he shot his wife on the left side of her head.

¶ 69 Defendant told Smith he chose Valentine's Day as the date to murder the victim as a present to the other woman. Defendant informed Smith he initially thought about poisoning the victim with insulin or potassium. He decided if he used a gun, he had to do research to find a silencer for a 40 Glock. Defendant told Smith that he had visited "a car wash, a car place, and a Starbucks Coffee, just hung out at these places so he could *** account for certain times during the day and some people could be able to say that he was at this place or that place." Smith kept notes of everything defendant told him so that he could turn his notes over to the detectives.

¶ 70 Smith also testified that at the jail, the inmates received phone cards for personal phone calls. Each inmate had a separate PIN number and could sell and trade "calls and stuff off the phone cards." Smith testified he allowed defendant to make at least three phone calls using his PIN number. To allow defendant to make a phone call using his PIN number, Smith would make a three-way call to one of his family members and that family member would then call the person with whom defendant wanted to speak. Defendant's family provided Smith with money for defendant's phone calls.

¶ 71 Smith identified People's exhibit No. 93 as a list written by defendant identifying items that had been taken from the house during the burglary. Smith testified that after talking to the detective, the detective advised him "it would help if they could come up with this gun or some of these items." Thus, Smith "told [defendant] that he needed them items that he took out of that house." Defendant provided the list and said that if those items "popped up mysteriously somewhere on the street and somebody contacted the media *** it would take some of the weight off [defendant]."

¶ 72 Dustin Johnson testified he was a forensic scientist with the Illinois State Police specializing in firearms identification. Johnson examined the bullet and cartridge casings recovered in this case and concluded to a reasonable degree of scientific certainty that the bullet and shell casings were fired by a Glock firearm.

¶ 73 Dr. Scott Denton testified he was the coroner's forensic pathologist. On February 15, 2013, he conducted the autopsy of the victim. The victim's main injury was a gunshot wound that entered the back left side of her head. There was no evidence of close-range firing, which meant the muzzle of the gun was at a distance greater than 18 to 24 inches. The bullet would have caused her to become instantly incapacitated. The entrance wound could have been made by a .40 caliber, 9 mm, or .38 caliber bullet. Denton opined that the victim died of a gunshot wound to the head. He did not observe any evidence of defensive wounds.

¶ 74 Ann Yeagle testified she was a forensic scientist for the State Police Crime Lab. She examined the black hooded sweatshirt recovered from defendant's bedroom. She did not observe any blood stains. She also swabbed the inside of the collar for DNA.

¶ 75 Debra Minton, a forensic scientist with the Illinois State Police Crime Lab, testified that she analyzed DNA from the collar of the black sweatshirt and determined there was a mixture of

DNA profiles. The major profile matched defendant. Aina's DNA could not be excluded from the second minor profile. Minton could exclude all of the other individuals for whom she had a DNA profile from the second minor profile, including the victim, the victim's three children, and Diane and Douglas Newton.

¶ 76 The steering wheel of the victim's Ford Focus found at Robinson Park had a DNA mixture from two people. The major profile was matched to the victim. The minor profiles present were of at least two people and were too low and unsuitable for comparison to known standards. The gearshift of the victim's car had a mixture of two people's DNA. There was a major profile that was female and matched the victim's DNA profile. The minor profile was a partial male DNA profile, and defendant could not be excluded from having contributed to it. Everyone else tested could be excluded. In his videotaped statement, defendant stated that he had not driven the victim's car for more than an hour in the prior year.

¶ 77 Scott Rochowitz testified that he worked for the Illinois State Police and spent twenty-three and a half years in forensic science. Rochowitz examined the black hooded sweatshirt recovered from defendant's bedroom for gunshot residue. Rochowitz concluded that the right cuff of the black sweatshirt was in close proximity to a firearm either when it was discharged or contacted a primer gunshot residue-related item.

¶ 78 At trial, Detective Leigh identified a video of a drive he and Detective Moore took between Starbucks, the house, and Robinson Park. Leigh also testified that during the four times he met with defendant during the course of the investigation, defendant never asked about the investigation nor did he ask about any leads in the case.

¶ 79 Officer Smith testified that he downloaded calls made between defendant and Aina using inmate David Smith's PIN number. The calls were not in English, but were later translated into

English. Officer Smith identified an exhibit containing the translation of the calls that occurred in May of 2013, which were read into the record.

¶ 80 In one phone call, defendant tells Aina to write down what he was saying. Among other things, defendant described how Aina knew him and his family and how Aina was treated like a family member. Defendant told Aina that he was her sponsor, his name appeared on her visa because both his name and the victim's name would not fit, and the insurance company sees her as his dependent. Defendant then stated "now, your relationship with [the victim]" and described how the victim bought Aina clothes, including from Eddie Bauer, how the victim told defendant to treat Aina as family and always take care of her, and that the victim said everything in PCC [the Pensacola school] "was stupid" and "nonsense." Defendant said, "we can say that [the victim] loved you and that you were in her daily prayers." Defendant also said, "[y]ou were the only one she trusted with the children, even in America." Defendant said the victim liked that he was teaching Aina to use a gun.

¶ 81 In another call, defendant told Aina that he was her spiritual advisor in America and explained to her that "communication[s] with your clergy [are] also private." Aina told defendant that their pastor sent her a letter asking for answers to specific questions. During the call, Aina read a portion of the pastor's letter and stated:

> Press says that allegedly there is a love triangle. Can you comment on or explain these facts? First, police say that you are kicked out of Florida college for not right relations with [defendant]. Is this true? Second, [defendant] supported you 90 percent. Did [the victim] know that? Third, during August through February nearly 20 times you stayed with [defendant] in hotels; sometimes went to spa. Did you go just with [defendant] or [the victim] was with you? Were you

> spending nights in the same room? What was the purpose of these meetings? Did [the victim] know about these meetings, and was she okay with that? Did you have sex with [defendant]? The relationship between you and [defendant] was too close. This was observed and said by people in Lithuania, especially during the conference.

The pastor also wrote in the letter to Aina, "[e]xplanations from you are necessary because, frankly, people do not feel a great desire to pray for you." Aina told defendant it would be unwise to answer the pastor's questions, explaining "the police still has my e-mail" and "[t]hey [can] check my e-mail probably…They can use them against us if we write something."

¶ 82 Defendant told Aina that regarding the Pensacola school, he wrote, "I have come to the PCC to help with your health, your hands, and joints. She [the victim] did not come because the children had school, and she could not travel." Aina pointed out that the sheet from Pensacola said that the victim had traveled too because they said that she did. Defendant said he made a mistake when he filled out the form. Defendant also told Aina that "technically [the Pensacola school] did not throw you out *** [i]t was academic withdrawal because if they would have thrown you out, there would be no credits." In regards to a Groupon receipt for a spa off Michigan Avenue in Chicago, defendant explained they were there once, but were in separate rooms. Defendant also stated, "[w]e did not fill out the form there. My name was not there." Aina told defendant he should prove that someone else was there.

¶ 83 Regarding traveling together in Europe, defendant stated, in relevant part, "[t]his is problematic and needs to be looked at." Defendant suggested that the victim made erroneous reservations for travel and then insisted that defendant and Aina go on the trip. Later, defendant tells Aina, "[t]he hardest is because of you, the children, that we cannot be together now."

¶ 84 Detective Lynn testified he was part of the Central Illinois Cyber Crime Working Group. Lynn created bit-for-bit images of defendant's hard drive from his laptop and of defendant's thumb drive. From the laptop drive, Lynn uncovered internet search history. He recovered searches for the following terms:

> "Blow to the head," "Hitting someone over the head to knock them out," "How easy is it to electrocute oneself," "How to electrocute," "How to erase everything from iPad," "How to erase everything from iPad II," "How to erase HTC Incredible," "How to hide the sound of a gunshot," "How to make GHB [a date rape drug] without distillation," "How to muffle a gunshot," "How to silence a Glock 40," "How to suppress a Glock 40," "How to suppress the sound of a gunshot," "Lethal Injection," "Murder Insulin," "Nitrogen P3," "Nondiabetic getting insulin shot," "Nondiabetic getting insulin SHO," "Sleep inducing drugs," "Sleep inducing knockout," "Suicide by injecting air," "Suicide insulin," "Suicide methods," "Visine knockout," "What fumes if inhaled can make you pass out," "Where to buy potassium chloride," "Where to buy pure potassium chloride in stores," "Herbal knockout drops," "How to erase HTC Incredible," "How to muffle a gunshot," "Lethal injection," "Nitrogen P3" "Sleep inducing knockout," "Where to buy pure potassium chloride," "How to kill yourself with insulin," "Bathtub electrocution," "Does insulin work for suicide," "How to best shoot yourself," and "How to cause sleep paralysis," and "Short-term furnished apartments, Pensacola, FL."

Lynn testified the only user account on defendant's laptop was in his name and the laptop was registered to defendant. Documents and emails recovered also connected the laptop to defendant.

Nothing Lynn found indicated someone other than defendant used the computer. The laptop's registry showed the user account was last logged in on February 14, 2013, at 11:03 a.m. and last logged off at 11:29 a.m. on the same date.

¶ 85 Detective Freehan testified he was a digital forensics examiner with the computer crime unit. He downloaded information from the victim's and Aina's cell phones on February 20, 2013, defendant's iPad on February 21, 2013, and defendant's cell phone on March 7, 2013. Defendant and the victim did not have the same model cell phone, but defendant had the same model cell phone as Aina. Defendant and Aina also had the same cell phone service provider, which was different from the victim's cell phone service provider. Further, he received over 2,000 emails recovered from the hard drive of defendant's laptop computer.

¶ 86 Freehan identified text messages sent between defendant and Aina. In one text message sent on February 12, 2013, defendant told Aina, "[f]uture and a hope. He has plans for our future and our hope." That message was deleted from both phones. On February 13, 2013, at 8:05 a.m., Aina texted defendant, "I got up half an hour earlier to meet with Doctor Park, and she is not here. This morning she goes to see a doctor." The message was deleted from Aina's phone. Defendant responded at 8:07 a.m., "I can pretend I am Doctor Park ☺." That message was deleted from both phones. At 8:08 a.m, the two then had a phone conversation for 13 minutes and 38 seconds. Aina deleted the call from her call log.

¶ 87 On February 13, 2013, at 12:19 p.m., Aina texted defendant she was going to the gym. Defendant responded at 12:20 p.m. with, "[w]ithout me! ☺." At 1:24 p.m., Aina texted defendant that she was "done with gym." At 1:24 p.m., defendant texted Aina, "☺ Wet?" Aina responded at 1:27 p.m. with, "[a] little bit ☺." At 1:28 p.m., defendant texted Aina, "[b]ut you smell good ☺" and "[a]nd you are also so beautiful ☺." These messages were deleted from both their

phones. In addition, Freehan identified a large number of phone calls exchanged between defendant and Aina on February 13, 2013. Aina deleted every phone call from her call log.

¶ 88 On February 14, 2013, at 7:36 a.m., Aina texted defendant, "[h]ello" at 7:37 a.m., defendant responded "Hello ☺." Both texts were deleted from their phones. At 8:37 a.m., defendant texted Aina stating, "I know there is a lot to do today. I pray that there is enough time to do everything. Have good lectures and meeting. ☺ Take care of yourself." At 8:39 a.m., Aina texted back "☺." Both messages were deleted from Aina's phone.

¶ 89 Freehan testified that the police were able to determine defendant's locations at various times on February 14, 2013, through surveillance videos. Defendant was at a Chase Bank at 124 Southwest Adams Street in Peoria at 9:20 a.m. and again at 10:20 a.m. At 10:41 a.m., defendant purchased gas at Huck's gas station at 1415 Alta Road in Peoria. From 11:00 a.m. through 11:31 a.m., defendant was at the Starbucks located at Knoxville Avenue and Pioneer Parkway in Peoria. At 12:45 p.m. until 12:50 p.m., defendant was again at the same Starbucks location. At 1:00 p.m., defendant was at Brush Auto at 2918 Alta Road making an appointment. From 1:15 p.m. until 1:18 p.m., he was at the Five Senses Spa located at the Grand Prairie Mall in Peoria. From 1:22 p.m. until 1:43 p.m., defendant was at the Starbucks located in the Grand Prairie Mall. From 2:25 p.m. until 2:33 p.m., defendant was at the Red Carpet Car Wash getting his car washed.

¶ 90 On February 14, 2013, at 2:31 p.m., Aina called defendant, but it was a missed call and the attempt was deleted from Aina's phone. At 2:32 p.m., defendant texted Aina, "I'll call you in a minute," which was deleted from her phone. At 2:33 p.m., defendant called Aina and had a 1 minute, 46 second call, which was deleted from her call log. At 2:36 p.m., defendant sent a text message to the victim indicating he was going to the bank and then picking up their daughter and

asked the victim if she wanted to meet for ice cream. At 2:37 p.m., defendant called Aina for 6 minutes and 11 seconds, which was also deleted from Aina's phone.

¶ 91 Detective Curry testified that on February 14, 2013, he was assigned to this case. Among other things, Curry testified that on February 15, 2013, he returned to the house after speaking with defendant and specifically searched for the lockbox with the Glock handgun or pieces of it, but found neither. Curry testified he looked in the victim's purse and found the wallet and its contents still inside. He also discovered $300 in cash left undisturbed in the Newton's dresser.

¶ 92 B. Defense Evidence

¶ 93 Defendant presented evidence in his case-in-chief to support his position that someone else committed a burglary at the Newton home and murdered his wife. Defendant called Christopher Williams, an individual who lived near 700 West Mossville Road. Williams testified that about seven to ten days before the victim's murder, he observed a suspicious vehicle on at least two occasions. He observed the vehicle parked with its headlights on for an extended period of time, at least five to ten minutes, which he found to be unusual. Williams did not see the vehicle leave.

¶ 94 Defendant also sought to introduce evidence regarding other home invasions and burglaries that occurred in Peoria after this incident. Defense counsel stated that Detective Batterham would testify that there were a series of home invasions that occurred subsequent to this incident in the same year in which "people would enter a house, people would remove items of a similar nature – electronics, jewelry, things like that; and in fact, on [*sic*] several of them, drove off in the resident's car." Further, defense counsel stated that he would also call Officer Moore, one of the lead detectives who investigated the other home invasions, to testify that he arrested several people who committed the crimes, one of whom looked very similar to

defendant. The State argued that the other home invasions and burglaries were too dissimilar to the murder in this case to have any probative value.

¶ 95 After hearing the parties' arguments, the trial court concluded that none of the other crimes had any relevance or probative value to the instant case. The judge noted that the other crimes occurred months after the victim's murder. The other crimes were in a different part of town, in more densely populated areas. Furthermore, in the other crimes, the burglar's *modus operandi* included "tying up people, binding them, taunting them, speaking with them, taking their vehicles, and then looting the home, stacking the cars with the loot, and then driving it to a convenient location to unload it." The court also noted that here, the victim's car was driven to the shortest distance possible from the Newton home, whereas in the other crimes, the victims' vehicles were abandoned in another section of Peoria. Also, unlike this case, no one was hurt or killed in the other cases. Accordingly, the Court sustained the State's objection on relevancy grounds and held that defendant's proffered evidence of other crimes was inadmissible.

¶ 96 C. Closing Arguments

¶ 97 In defendant's closing argument, the State began by posing a series of four questions, including, "[w]hat person would take his children's funds to hire a lawyer to silence his lover from talking to the police?" The State's attorney then summarized the physical evidence and emphasized the evidence related to motive arising out of defendant's extramarital affair with Aina. In addition, he argued that defendant showed no emotion in the video-recorded interview and never inquired as to what happened to his wife.

¶ 98 In the State's rebuttal argument, it played certain portions of defendant's video-recorded interview and the surveillance videos. In addition, the State argued that there was no explanation as to why defendant's DNA could not be excluded as having contributed to the DNA found on

the gearshift other than that he drove the victim's car away from the scene of the murder. Specifically, the State's attorney stated:

> Remember the DNA evidence? Remember Deb Minton said that [defendant] cannot be excluded? Every other DNA sample they had, it was an exclusion but not his; that at the eight loci or eight locations, all of his DNA was present. She said she can't call it a match because you have to have the entire set. So how is it that if he doesn't drive that car, if he hasn't driven it in a year, an hour total in a year, how is he not excluded? How is that possible?
>
> I submit what also didn't go as planned is probably the little scrape on his hand that was able to maybe leave just enough on that gear shift as he's driving away. There is absolutely no other explanation for why he would not be excluded on the gear shift. No explanation. The only explanation is because he drove that car away from the house that day after he murdered Denise, but he screwed up again.

¶ 99 D. Jury Verdict, Posttrial Motion, and Sentence

¶ 100 The jury deliberated for less than two hours. The jury returned a guilty verdict on the first degree murder charge. Subsequently, defendant filed an amended motion for a new trial. On September 10, 2014, the court held a hearing on defendant's posttrial motion and his sentencing. The trial court denied defendant's motion for a new trial and sentenced defendant to an 80-year term in the Illinois Department of Corrections followed by a three-year term of mandatory supervised release.

¶ 101 ANALYSIS

¶ 102 Following his conviction for first degree murder in violation of section 9-1 of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2012)), defendant filed a timely notice of appeal. In this direct appeal, defendant raises eleven issues for our review, including both preserved and unpreserved errors.

¶ 103 We first consider those issues that have been properly preserved for our review. The three preserved issues include challenges to the sufficiency of the evidence at trial and the propriety of the court's pretrial rulings on defendant's two separate motions to suppress.

¶ 104 After addressing the preserved errors at issue in this appeal, we will consider those additional issues defendant raises for the first time on appeal. The State asserts these issues have been forfeited for review. Acknowledging forfeiture, defendant has alternatively requested this court to review the unpreserved issues for plain error, or alternatively, to hold that his trial counsel was unconstitutionally ineffective for failing to raise these issues in the trial court. As stated, we first address the three issues that have been properly preserved for our review.

¶ 105 I. Preserved Issues

¶ 106 A. Reasonable Doubt

¶ 107 Defendant contends that the evidence was insufficient to prove that he committed first degree murder beyond a reasonable doubt. The State responds that the evidence was more than sufficient to support the jury's guilty verdict in this case.

¶ 108 A person commits first degree murder when he "kills an individual without lawful justification *** [and] he either intends to kill or do great bodily harm to that individual or

another, or knows that such acts will cause death to that individual or another."[2] 720 ILCS 5/9-1(a)(1) (West 2012). We will not overturn a conviction unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 109 When a defendant challenges the sufficiency of the evidence, our function is not to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the elements of the crime had been proved beyond a reasonable doubt. *People v. Davis*, 242 Ill. App. 3d 409, 410–11 (1993). It is the responsibility of the jury to determine the credibility of witnesses, the weight to be given to witnesses' testimony, reasonable inferences to be drawn from the testimony, and the resolution of conflicts in the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 110 In support of his argument that the State's evidence was insufficient, defendant points to conflicting evidence that he claims invalidates the jury's verdict. For instance, defendant points out that Parrish testified she observed a Caucasian man walking along Mossville Road close in time to the murder. However, Parrish admitted during her testimony that her husband perceived the same person was African-American. Defendant argues the black sweatshirt retrieved from the Newton home did not match Parrish's description of the clothing worn by the person she observed walking in the area on the day of the murder.

¶ 111 Defendant also attacks the credibility of the jailhouse informant. Defendant argues that the jailhouse informant's testimony was "purchased by the State" in exchange for a reduced sentence. Defendant argues the specific details the jailhouse informant provided about the

[2]Defendant's 80-year sentence included a 25-year firearm enhancement because the jury found that defendant personally discharged a firearm that proximately caused the victim's death. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West Supp. 2013).

murder could have been learned through other sources supporting a theory that his testimony was not credible.

¶ 112 Finally, defendant claims that the footage from the security cameras of various businesses, clearly demonstrates defendant did not have an opportunity to commit the murder and stage a burglary. Defendant points out that Skehan-Passie heard a gunshot at approximately 12:40 p.m. Next, defendant observes the Starbucks' surveillance camera footage proves he was physically present at the Starbucks at 12:45 p.m. Finally, Detective Leigh estimated that the trip from Robinson Park to Starbucks should take nearly seven minutes. Based on this evidence, defendant contends that "it was simply inconceivable that [he] would have committed the murder, cleaned up the scene, driven to a drop-off point and exchanged cars, and made it to Starbucks in that period of time."

¶ 113 Credibility determinations and the weight to be afforded to conflicting evidence are questions for the jury to resolve, we give the jury tremendous deference on these matters and will not substitute our judgment for that of the jury. See *People v. Brink*, 294 Ill. App. 3d 295, 300 (1998); *People v. Cerda*, 2014 IL App (1st) 120484, ¶ 156. Moreover, "[t]hat one witness's testimony contradicts the testimony of other prosecution witnesses does not render each witness's testimony beyond belief." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22. Rather, the jury "is free to accept or reject as much or as little of a witness' testimony as it pleases." *Id.*

¶ 114 By all accounts, defendant's whereabouts were unaccounted for from about 11:31 a.m. when he left the Starbucks located at Knoxville Avenue and Pioneer Parkway until 12:45 p.m. when he returned to the same Starbucks. Thus, it was within the province of the jury to

determine whether the timeline of events was so improbable or unreasonable that it created reasonable doubt as to defendant's guilt.

¶ 115 The record reveals the jury heard testimony from numerous witnesses. These witnesses included various police officers who responded to, investigated, and collected evidence at the crime scene together with testimony from the victim's mother, a close friend, a school administrator, defendant's employer, a spa employee, expert witnesses, and defendant's paramour. The jury also viewed a redacted copy of the videotape of defendant's interview. This videotape contained defendant's detailed explanation, in his own words, admitting he owned a Glock and describing his whereabouts on the day of the murder.

¶ 116 Unrefuted evidence retrieved from defendant's computer revealed defendant researched how to silence a Glock weapon. The computer hard drive also documented defendant researched numerous methods for killing a person. Defendant's text messages with Aina on the day in question also support the conclusion that the victim's murder was premeditated and motivated by a long-standing extramarital affair.

¶ 117 In addition, the jury received undisputed physical evidence that the victim was shot in the head with a Glock, the type of gun defendant owned. A sweatshirt was found in defendant's bedroom containing his DNA and gunshot residue. Debra Minton, a forensic scientist, testified that defendant's DNA could not be excluded from the partial male DNA profile contained on the gearshift of the victim's car.

¶ 118 After considering the evidence in the light most favorable to the State, we conclude that the State's evidence was more than sufficient to prove beyond a reasonable doubt that defendant

shot and killed the victim and that he intended to do so.[3] For these reasons, we reject defendant's contention that no rational trier of fact could have found defendant guilty of first degree murder.

¶ 119 B. Motion to Suppress Evidence

¶ 120 Next, defendant claims that the trial court erred by denying his motion to suppress evidence obtained from a forensic analysis of his hard drive. The State denies any fourth amendment violation occurred since defendant signed written consents to allow the searches of the electronic devices he surrendered to the police for inspection on February 14, 2013. The State emphasizes that defendant's initial brief failed to disclose that law enforcement obtained a search warrant before harvesting information from defendant's computer.

¶ 121 When reviewing the trial court's ruling on defendant's motion to suppress, we review the court's factual findings under a manifest weight of the evidence standard but apply a *de novo* standard to the ultimate question of whether the evidence should have been suppressed. *People v. Harper*, 2012 IL App (4th) 110880, ¶ 22.

¶ 122 Although defendant did not provide the written consent forms in the record for our review, this court requested the circuit clerk to supplement the record with those exhibits. Having carefully reviewed the face of each written consent form signed by defendant, we conclude the trial court correctly found the written consent forms that resulted in defendant's decision to surrender his phone, computer, and USB drive were voluntary and not limited in scope or duration.

¶ 123 Further, defendant claims he should receive a new trial because his consent to allow a search of his laptop and USB drive could not be reasonably construed as a consent to allow the forensic analysis of his hard drive that took place. This issue raised by defendant is disingenuous

[3]For the purpose of this evaluation of reasonable doubt, we exclude consideration of the informant's testimony and the victim's note since defendant asserts the introduction of this evidence was erroneous.

and unsupported by the record. Here, law enforcement obtained a valid search warrant before conducting the forensic examination of the contents of the hard drive of defendant's computer. For these reasons, we affirm the trial court's denial of defendant's motion to suppress the electronic evidence.

¶ 124 C. Motion to Suppress Statements

¶ 125 On appeal, defendant claims that the trial court erred by denying his pretrial motion to suppress his statements to the detectives at the police station on the night of the murder. In particular, defendant claims the interview was a custodial interrogation from the beginning and should have been preceded by a recitation of the *Miranda* warnings. On this basis, defendant argues the trial court erroneously denied his motion to suppress his six-hour videotaped interview. In response, the State argues that defendant's interview was entirely noncustodial, and therefore, no *Miranda* warnings were required. The State contends the detectives recited *Miranda* warnings near the conclusion of the interview out of an abundance of caution.

¶ 126 In *Miranda v. Arizona*, the Supreme Court held that the prosecution may not use an individual's statements made during a custodial interrogation unless it can demonstrate that certain procedural safeguards were used to protect the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Specifically, the court held that before a person in custody is interrogated, he "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. The court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. Thus, *Miranda* protections are not required in noncustodial settings, even if

the defendant is already a suspect in the police investigation. See *People v. Whitecotton*, 162 Ill. App. 3d 173, 180 (1987).

¶ 127 When determining whether a defendant is "in custody" for purposes of *Miranda*, a court should consider: (1) what the circumstances were surrounding the interrogation; and (2) whether a reasonable person would have felt he was at liberty to terminate the interrogation and leave in light of those circumstances. *People v. Slater*, 228 Ill. 2d 137, 150 (2008). To determine whether a defendant's statements were made in a custodial setting, we consider the following factors:

> (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused.

*Slater*, 228 Ill. 2d at 150.

¶ 128 When reviewing a trial court's ruling on the motion to suppress, we will not disturb its ruling as to whether a custodial interrogation occurred unless it is manifestly erroneous. *People v. Rivera*, 304 Ill. App. 3d 124, 128 (1999). Under a manifest weight of the evidence standard, we must not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or inferences to be drawn. *In re D.F.*, 201 Ill. 2d 476, 498–99 (2002).

¶ 129 In this case, the trial court conducted an extensive two-day hearing on defendant's motion to suppress his statements. During the hearing, the court heard testimony from Detectives Leigh, Garner, and Moore, defendant, Bruce Leuthold (defendant's father), and Abigail Patton

(defendant's sister). In addition, the court reviewed the entire video recording of defendant's interview at the police station.

¶ 130 Based on the evidence presented, the trial court judge found defendant was not in custody during the ride to the police station. The court found the police were trying to accommodate defendant following the unexpected death of his wife. The record supported this finding.

¶ 131 Next, the trial court found the mode of the questioning at the station was conversational and the mood was nonthreatening throughout the interview. The court also found, based on a review of the videotape, that the door to the interview room was closed, but unlocked. Defendant had access to his own cell phone and had several conversations with others that he initiated during the six-hour time frame. The court reasoned that the detectives told defendant multiple times that he was not in custody, he was free to leave, and could refuse to answer any questions that made him feel uncomfortable. In addition, the court noted defendant was confident and well spoken throughout the interview. The court also noted that when the interview concluded, it is undisputed defendant left the station in his own vehicle.

¶ 132 After carefully reviewing the entire video-recorded interview and considering the relevant factors in this case, we also conclude as a matter of law, defendant was not in custody at any point during the six-hour interview that concluded with defendant driving himself home from the interview. Consequently, we hold the trial court properly denied defendant's pretrial motion to suppress his videotaped statement to the police.

¶ 133 II. Unpreserved Errors

¶ 134 In addition to the preserved issues discussed above, defendant also requests this court to address numerous issues that defendant did not bring to the attention of the trial court. The State asserts the issues, which defendant did not raise before the trial court, have been forfeited for

purposes of this appeal. In response, defendant claims some of the forfeited errors are so serious they require a new trial due to ineffective assistance of counsel and/or based on plain error.

¶ 135 Before addressing the remaining issues before this court, we outline the applicable law regarding both plain error and ineffective assistance of counsel to avoid unnecessary redundancy when separately considering each issue. The plain error doctrine allows a reviewing court to consider unpreserved error when:

> (1) "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

*People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 136 In order to demonstrate ineffective assistance of counsel under the sixth amendment, a defendant must establish: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) his counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 137 For a defendant to establish that prejudice resulted from his trial counsel's failure to file a motion to suppress evidence, he must show a reasonable probability that: "(1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed." *People v. Givens*, 237 Ill. 2d 311, 331 (2010). A defendant must satisfy both prongs of the *Strickland* test, and a failure to satisfy one of the prongs precludes a finding of ineffectiveness. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 138 A. Items Seized from the Newton's Home

¶ 139 For the first time on appeal, defendant argues the State unlawfully seized the victim's note and the sweatshirt from the Newton house on February 15, 2013 because the consent form did not extend beyond February 14, 2013. Defendant submits that the warrantless search of the Newton's home on this date was improper.

¶ 140 The State contends the seizure was proper and points out that defendant failed to preserve this issue in the trial court. In the event that this court agrees with the State's contention that the issue was forfeited, defendant requests this court to review the fourth amendment claim using an approach based on ineffective assistance of counsel.

¶ 141 As a preliminary matter, we address the State's forfeiture argument. The record reveals that on April 23, 2014, defense counsel filed a generic pretrial motion to suppress evidence seized by law enforcement on February 14, 2013, in violation of his fourth amendment rights. Due to the vagueness of defendant's motion to suppress, the trial court asked defense counsel at the hearing on the motion to specify the particular physical evidence defendant was seeking to suppress. In response to the court's inquiry, defense counsel informed the court that the motion to suppress was directed at the electronic information collected from defendant's cellular telephone, laptop, and the USB flash drive. Based on this record, we conclude that defendant failed to preserve any challenge to the warrantless seizure of the note and the sweatshirt on February 15, 2013.

¶ 142 However, it is important to note that defense counsel did not ignore the victim's handwritten note. In fact, defense counsel filed a motion *in limine* seeking to exclude the note based on the marital privilege. While defense counsel did not prevail on this motion *in limine*

attacking the admissibility of the victim's note based on marital privilege, this court is required to give great deference to an attorney's strategic decisions.

¶ 143 It is well settled that there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. For purposes of this appeal, defendant must overcome the presumption that, under the circumstances, the challenge to the admissibility of the handwritten note on an evidentiary basis rather than contesting the circumstances of the seizure of this exhibit might be considered sound trial strategy.

¶ 144 The soundness of this strategy is demonstrated by the unique circumstances in the case at bar. Here, defendant was a guest in the household where the bedroom was located. Due to this unusual circumstance, defense counsel may have faced an uphill battle concerning defendant's expectation of privacy. It is also undisputed that the victim's parents, who owned the home, separately provided law enforcement with their permission for investigators to enter and then remain in their home as long as necessary to collect evidence regarding their daughter's murder.

¶ 145 Generally, under these circumstances, there is a presumption that the homeowners had common authority over the bedroom sufficient to authorize the consent to search the home, including the bedroom at issue. See *People v. Howard*, 121 Ill. App. 3d 938, 946-47 (1984). In any event, given the deficiencies in the record, we will not speculate about the outcome of a motion to suppress that was not presented in the trial court. [4] See *People v. Givens*, 237 Ill. 2d 311, 326 (2010).

[4]Defendant's failure to adequately preserve this issue has also left this court with a record devoid of the information necessary to determine whether defendant had a reasonable expectation of privacy with respect to the guest bedroom in the Newton's home. For example, if the Newtons had common authority over the bedroom, the Newton's consent would be sufficient to support the search. See, *e.g.*, *U.S. v. Matlock*, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."). In cases in which the defendant resides with a close relative, and the relative consents to a search of the defendant's bedroom, "it should be presumed that there is a

¶ 146 In addition, our supreme court has indicated we need not address the merits of a proposed motion to suppress when the defendant cannot establish that the outcome of his trial would have been different if the evidence had been suppressed. "If it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." See *People v. Givens*, 237 Ill. 2d at 331 (citing *Strickland*, 466 U.S. at 697).

¶ 147 Here, the victim's note contained incriminating evidence of both motive and intent. In the note, the victim expressed her view that defendant would like her "dead." Other evidence introduced at trial independently established the same information. For example, the testimony from both the spa owner and Aina provided independent evidence of defendant's extramarital affair. The State also presented particularly damaging information from defendant's phone conversations and text messages with Aina. With respect to the victim's concern that defendant wanted her "dead," defendant's computer hard drive revealed defendant conducted numerous internet searches about different ways to kill a person, including searches concerning how to silence a Glock.

¶ 148 In this case, the victim's note expressed details about the marriage that the jury received from other unchallenged evidence. For this reason, we conclude defendant has not established the outcome of the trial would have been different without the victim's handwritten note. Thus, defendant cannot demonstrate an ineffective assistance of counsel claim premised on counsel's failure to seek suppression of this exhibit on fourth amendment concerns.

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common authority over the bedroom sufficient to authorize the consent to search." *People v. Howard*, 121 Ill. App. 3d at 946-47. Two factors indicative of exclusive possession are that the defendant kept his room locked in his absence and that he gave explicit instructions not to allow anyone into his bedroom. *Id.* at 947. In this case, the State, however, was not afforded an opportunity to develop the record regarding whether the Newtons had common authority over the bedroom at issue.

¶ 149 Similarly, defendant did not attempt to articulate the nature of the prejudicial effect of the sweatshirt. Defendant did not present an argument for our consideration regarding whether the outcome of the trial would have been different without this evidence. The case law provides, "the burden is on defendant to show a reasonable probability that a different result would have been obtained." See *People v. Glenn*, 363 Ill. App. 3d 170, 174 (2006).

¶ 150 Lastly, defendant attempts to convince this court that this unpreserved issue regarding the seizure of the victim's note and sweatshirt qualifies as plain error. However, defendant's conclusory contention of plain error appears for the first time in defendant's reply brief and does not include any discussion of either prong of the plain error doctrine. Consequently, we conclude such a cursory approach to plain error does not merit further discussion at this time. See *People v. McCoy*, 405 Ill. App. 3d 269, 274 (2010) (holding that conclusory assertion that error constituted plain error is not an adequate legal argument sufficient to sustain the defendant's burden of persuasion). For these reasons, we conclude defendant is not entitled to a new trial due to defense counsel's failure to seek the suppression of the sweatshirt and the handwritten note collected from the murder scene on February 15, 2013.

¶ 151 B. State's Pretrial Motion *in Limine*

¶ 152 Next, defendant contends the trial court erroneously found the victim's note would be admissible pursuant to the provisions of section 115-16 of the Code of Criminal Procedure of 1963, 725 ILCS 5/115-16 (West Supp. 2013). On appeal, defendant asserts that the admission of the victim's note violated his sixth amendment confrontation clause rights.[5]

[5]On appeal, defendant initially challenged the admission of the note based on the marital privilege statute. However, on reply, defendant conceded that this case falls within an exception to the statute because defendant was charged with murdering his wife. See 725 ILCS 5/115-16 (West Supp. 2013) (stating the Witness Disqualification Act does not apply where either spouse is charged with an offense against the other).

¶ 153 As an initial matter, we note that defendant's written response to the State's motion *in limine* did not take issue with the State's assertion that the note was nontestimonial. Rather, defendant's motion *in limine* argued that the note was inadmissible based *only* on the marital privilege statute.

¶ 154 Similarly, during the jury trial itself, defense counsel objected to the admission of the note based solely on the marital privilege. It is significant to this court that defendant did not raise an objection during trial based on a violation of the Confrontation Clause. Therefore, based on this record, we conclude that defendant failed to preserve his Confrontation Clause arguments for purposes of this appeal. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (holding that to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion).

¶ 155 In spite of procedural forfeiture, defendant requests this court to engage in a plain error analysis to determine whether the introduction of the victim's note violated the confrontation clause. Consequently, we next consider whether plain error occurred due to the introduction of the victim's handwritten note.

¶ 156 The confrontation clause in the sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. The confrontation clause prohibits the prosecution from admitting "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had *** a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). However, the confrontation clause does not apply if the statements are not testimonial. *People v. Stechly*, 225 Ill. 2d 246, 279 (2007) (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)).

¶ 157 In *Crawford*, the supreme court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' " *Crawford*, 541 U.S. at 68. However, the court held that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*. at 68. Further, the court characterized testimonial statements as those made in a "solemn" fashion and "for the purpose of establishing or proving some fact." *Id*. at 51. A statement is made in a solemn fashion if it was made formally, such as under oath or after *Miranda* warnings have been given, or where there were severe consequences that could discourage dishonesty. *People v. Cleary*, 2013 IL App (3d) 110610, ¶ 47. In *Crawford*, the court went on to say, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51.

¶ 158 Recently, in *Ohio v. Clark*, the supreme court held that a statement cannot fall within the confrontation clause unless in light of all of the circumstances, viewed objectively, the "primary purpose" of the statement was to create "an out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). There, although the court declined to adopt a categorical rule that statements to individuals other than law enforcement are beyond the reach of the confrontation clause, it noted that the identity of the recipient of the statements is a "highly relevant" factor. *Id*. at 2182. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id*.

¶ 159 We review the question whether the victim's statements were testimonial *de novo*. See *People v. Burnett*, 2015 IL App (1st) 133610, ¶ 84. Here, the handwritten note was not made in a "solemn fashion" and was not formally given under oath. The victim's note was directed to

defendant, not a governmental official. There is no evidence that the victim shared her note with anyone else. In fact, it is unclear whether the victim even displayed the note to defendant. The note was found in the victim's day planner during the search of defendant's and the victim's shared bedroom.

¶ 160 In addition, the style and content of the note do not support the conclusion that a reasonable person in the victim's place would have foreseen that the statements would be used in a future prosecution of defendant. To the contrary, the victim stated in the note that she expected defendant's behavior would continue "until [she] breaks," suggesting that she did not anticipate being murdered. In short, we conclude that the note was not testimonial in nature.

¶ 161 Therefore, the trial court's decision allowing the State to introduce the victim's handwritten note as evidence did not constitute error, much less plain error. We conclude defendant is not entitled to a new trial due to the admission of the victim's handwritten note for the jury's consideration.

¶ 162 C. Jailhouse Informant

¶ 163 The next unpreserved error involves the testimony of a jailhouse informant. During trial, defendant did not object to the jailhouse informant's testimony. Now, for the first time on appeal, defendant contends the jailhouse informant was acting as an agent of the State. Defendant also claims that the list of items taken from the house during the burglary, which the State introduced at trial, should have been suppressed.

¶ 164 The State points out this issue was not preserved in the trial court and denies the jailhouse informant acted as an agent of the State. Alternatively, the State argues that the error, if any, was harmless due to the weight of the other compelling evidence against defendant.

¶ 165 It is well settled that the State is not permitted to use a cellmate to obtain incriminating evidence from a defendant represented by counsel. See *People v. Brown*, 358 Ill. App. 3d 580 (2005) (holding that the defendant's sixth amendment right to counsel in a murder case was violated when the prosecution obtained incriminating evidence by using the defendant's cellmate). It is undisputed in this case that the friendship between defendant and the jailhouse informant occurred after defendant obtained appointed counsel. It is also undisputed that the jailhouse informant took notes of his conversations with defendant, obtained the list from defendant, and then turned this evidence over to the Peoria Police Department. However, as the State correctly notes, the record is scant regarding the circumstances that prompted the jailhouse informant to document his conversations with defendant. The incomplete nature of the record makes appellate review concerning the relationship of the jailhouse informant to the State difficult, if not impossible.

¶ 166 In order to preserve this claim for review, the defendant must both object at trial and include the alleged error in a written posttrial motion. *Thompson*, 238 Ill. 2d at 611–12. Here, defendant did not file a pretrial motion to exclude the testimony of the jailhouse informant as an agent of the State, nor did defense counsel object to the testimony at trial or attempt to cross-examine the jailhouse informant regarding his relationship to the investigators. Finally, defendant did not include this issue in his posttrial motion. Therefore, we agree that defendant did not preserve this issue for our review.

¶ 167 Defendant asserts forfeiture should be excused based on plain error. As stated above, there are two avenues for defendant to establish that plain error is present and requires a reversal of the conviction in this case. Here, defendant relies on the first prong of plain error and claims

the evidence in this case was so closely balanced that the error alone threatened to tip the scales of justice against the defendant.

¶ 168 Although defendant asserts plain error, he has neglected to develop an argument in support of his claim for our consideration. The case law provides that an unsupported and skeletal assertion that the evidence is closely balanced standing alone is insufficient to warrant review based on plain error. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (stating that under plain error analysis, it is the defendant rather than the State who bears the burden of persuasion). Here, defendant has not presented a good faith basis for this court to conclude the verdict would have been different without the informant's version of the events.

¶ 169 Even assuming *arguendo* the jailhouse informant was acting as an agent of the State, the evidence in this case was not closely balanced as required for a plain error analysis. As discussed in the opening issue of this decision, the evidence in this case was, in fact, extensive, compelling, and more than sufficient to support the jury's verdict even without the evidence that may be traced to the jailhouse informant. Thus, we conclude that the result of the trial would not have been different if the evidence at issue had been suppressed. For these reasons, we conclude that even considering defendant's plain error argument on the merits, the admission of the informant's testimony would not warrant reversal of defendant's conviction.

¶ 170 D. Out-of-Court Identification

¶ 171 Defendant takes issue with the testimony of Parrish and Detective Leigh. Both witnesses discussed Parrish's out-of-court identification of defendant two days after the murder. Defendant now claims a new trial is required because the State improperly used this testimony to bolster Parrish's credibility, which was contradicted by her husband's stated belief that the man he saw was African-American.

¶ 172 The State's brief argues the issue has not been properly preserved for appeal. We agree defendant forfeited this issue since defense counsel failed to object to Parrish's and Leigh's testimony at trial and failed to include this issue in his post trial motion. Moreover, at trial, defendant had the opportunity to cross-examine these witnesses regarding the lineup, and in fact, defense counsel did question Parrish about the validity of her prior identification. See *People v. Hudson*, 137 Ill. App. 3d 606, 609 (1985) (delineating guidelines for admissibility of a prior out-of-court identification).

¶ 173 For the first time in his reply brief, defendant claims that we should review this issue under the plain error doctrine. Defendant argues that the alleged error "may" have affected the jury's verdict. Such speculative impact on the outcome of the trial is not sufficient to support plain error review. Once again, defendant does not provide any factual support for his cursory argument concerning plain error. Therefore, we reject defendant's contention that a new trial is in order based on the uncontested testimony from Parrish and Leigh regarding an out-of-court identification of defendant close in time to the murder.

¶ 174 E. Extramarital Affair

¶ 175 Defendant also argues that his trial was unfair because the prosecution introduced excessive evidence regarding an extramarital affair between defendant and Aina. Again, we note that defense counsel did not file a pretrial motion *in limine* to bar the evidence of the extramarital affair and did not object when it was introduced during Aina's testimony and the testimony of several other witnesses at trial. Finally, defendant did not include this issue in his posttrial motion. See *Thompson*, 238 Ill. 2d at 611–12. Hence, the issue has not been properly preserved for our review.

¶ 176 On appeal, defendant has not acknowledged forfeiture applies or asserted that this issue qualifies as plain error. See *People v. Klein*, 2011 IL App (2d) 100724-U, ¶ 10 (stating that where a defendant fails to argue that the alleged error fell under either of the plain error prongs, he has forfeited his plain error argument). Accordingly, we will not address the merits of this issue. Defendant has simply forfeited review of this issue.

¶ 177 F. Prosecutorial Misconduct

¶ 178 Defendant argues that prosecutorial misconduct requires a new trial. In particular, defendant submits the prosecutor improperly mentioned Aina's initial decision to rely on her fifth amendment rights to support an unfair inference of guilt by association against defendant. Similarly, defendant argues that it was improper for the prosecution to comment on defendant's decision to pay for Aina's lawyer with his children's funds. Finally, defendant claims the State improperly commented on defendant's fifth amendment right to remain silent by making remarks that drew unfair inferences about defendant's failure to testify.

¶ 179 The State responds that these closing arguments were proper because the remarks were supported by the evidence presented at trial. In addition, the State contends defendant's failure to object to these remarks during closing arguments forfeits the issues for review. In response, defendant claims that this case falls into both categories of plain error.

¶ 180 First, we consider whether the prosecutor made improper remarks that commented on Aina's fifth amendment privilege not to testify. In his closing argument, the State's attorney asked four questions including the following query: "[w]hat person would take his children's funds to silence his lover from talking to the police?"

¶ 181 In *Namet v. United States*, the Supreme Court noted that it is error when the prosecution makes a conscious and flagrant attempt to build its case out of inferences arising from a witness'

use of the testimonial privilege. *Namet v. United States*, 373 U.S. 179, 186 (1963); see also *People v. Hamilton*, 27 Ill. App. 3d 249, 253 (1975) (same). In this case, the prosecutor's comment on Aina's invocation of her fifth amendment rights constituted error. However, we cannot conclude that this lapse, when viewed in the context of the entire trial, amounted to a deliberate attempt by the State to build a case from any inferences arising from Aina's initial refusal to testify.

¶ 182 Here, the crux of the prosecutor's comment was that defendant had used funds that had been set aside for his children to benefit his mistress. We conclude this comment did not call attention to the fact that his mistress initially refused to testify but changed her mind after her attorney secured a promise of use and transactional immunity in exchange for her testimony. Further, this prosecutorial remark was isolated and not repeated during the remainder of the closing remarks, which are reflected in a twenty-one page transcript contained in the record on appeal.

¶ 183 Given the abundance of evidence against defendant, we conclude this isolated remark was not so serious that it denied defendant a fair trial. "It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant." *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). Finally, any potential prejudice from the prosecutor's comment was mitigated when the trial court instructed the jury that comments made during closing arguments are not evidence. See *People v. Desantiago*, 365 Ill. App. 3d 855, 866 (2006).

¶ 184 Next, defendant argues that the State's attorney improperly commented on defendant's fifth amendment right to remain silent. Specifically, defendant objects to the prosecutor's remark that there was no other explanation for why defendant was not excluded as the source of the

DNA found on the gearshift of the victim's vehicle other than to say defendant drove the victim's car away from the murder scene. Defendant claims that he was the only person who could have explained why his DNA was not excluded. Further, defendant argues that the prosecutor's remark improperly shifted the burden to him to prove that it was not his DNA on the gearshift.

¶ 185 We agree defendant has no obligation to testify on his own behalf or to present the testimony of an expert witness to rebut the State's DNA expert. However, defendant's argument is somewhat strained. Here, the prosecutor's comment drew a fair inference from the evidence. Because the expert could not exclude defendant as the source of the male's DNA on the gearshift, we conclude it was fair commentary for the prosecutor to make this observation.

¶ 186 Defendant also argues that the prosecutor inappropriately "morphed the inconclusive evidence of the source of the male DNA into proof that the DNA belonged to [defendant]." In support of this claim, defendant points to the following statements made by the prosecutor on rebuttal:

> Remember the DNA evidence? Remember Deb Minton said that [defendant] cannot be excluded? Every other DNA sample they had, it was an exclusion but not his; that at the eight loci or eight locations, all of his DNA was present. She said she can't call it a match because you have to have the entire set. So how is it that if he doesn't drive that car, if he hasn't driven it in a year, an hour total in a year, how is he not excluded? How is it possible?
>
> I submit what also didn't go as planned is probably the little scrape on his hand that was able to maybe leave just enough on that gear shift as he's driving away. There is absolutely no other explanation for why he would not be excluded

> on the gear shift. No explanation. The only explanation is because he drove that car away from the house that day after he murdered Denise, but he screwed up again.

Contrary to defendant's assertions, the prosecutor did not misstate Minton's testimony. Rather, the prosecutor accurately observed the evidence showed that defendant's DNA profile could not be excluded from the minor male DNA profile on the gearshift. As the prosecutor stated, DNA samples were also taken from [the victim], the victim's three children, and Diane and Douglas Newton, and all of these individuals could be excluded as having contributed to the minor DNA profile on the gearshift.

¶ 187 We also reject defendant's contention that the prosecutor's closing remark shifted the burden to defendant to prove that his DNA was not on the gearshift. Although a prosecutor must not state that the defendant has an obligation to come forward with evidence that would create a reasonable doubt as to his guilt, a prosecutor may comment on the "defendant's failure to submit any evidence that would tend to refute the case against him." *People v. Luna*, 2013 IL App (1st) 072253, ¶ 129 (internal citations omitted); see also *People v. Herrett*, 137 Ill. 2d 195, 211 (1990) (stating that while a prosecutor may not make comments intended or calculated to direct the jury's attention to the defendant's failure to testify, a prosecutor may, however, describe the State's evidence as uncontroverted). Thus, a prosecutor may argue that its expert witness was not contradicted at trial. See *Luna*, 2013 IL App (1st) 072253, ¶ 129; see also *People v. Peter*, 55 Ill. 2d 443, 460–61 (1973) (holding that prosecutor's comments "concerning the lack of evidence contradicting the evidence the State had offered on the subject of fingerprints" did not shift the burden of proof to the defendant). For these reasons, we conclude that the prosecutor's

comments regarding the DNA evidence on the gearshift did not violate defendant's fifth amendment right to remain silent.

¶ 188 In sum, we conclude that neither comment constitutes plain error and, therefore, we deny defendant's request for a new trial on these grounds.

¶ 189 G. Defendant's Proposed Other Crimes Evidence

¶ 190 Defendant next argues that the trial court erred by not allowing him to introduce testimony from a detective concerning a series of home invasions and burglaries that occurred months after the murder in this case. Defendant claims that this evidence supports the inference that someone else murdered the victim. The State argues that the other crimes were too dissimilar to the instant case to be relevant and admissible and contends the issue has been forfeited based on defendant's failure to make an adequate offer of proof at trial.[6]

¶ 191 A trial court's determination as to whether certain evidence is relevant and admissible is within its sound discretion. *People v. Gonzalez*, 379 Ill. App. 3d 941, 948 (2008). We will not reverse a trial court's evidentiary rulings absent a clear abuse of discretion that results in manifest prejudice to the defendant. *Id.* at 948-49.

¶ 192 It is well established that a person accused of a crime may prove any fact or circumstance tending to show that someone else committed the crime. *People v. Wilson*, 149 Ill. App. 3d 293, 297 (1986). However, such evidence will be excluded if it is too remote in time or too speculative in nature. *Id*. Testimony is relevant if it would, if believed, tend to make any fact in issue more or less probable. *People v. Makiel*, 263 Ill. App. 3d 54, 70 (1994). Evidence is

[6]The State also argues that defendant's report that he observed a suspicious vehicle a few days before the victim's murder can be interpreted as defendant creating a record of strangers in the neighborhood that he could later point to in order to cast suspicion elsewhere. The State notes that there was nothing to corroborate defendant's report. In addition, the State contends that the relevance of the neighbor's testimony regarding the suspicious vehicle that he observed several weeks prior to the victim's murder is tenuous at best and notes that the neighbor did not testify that he observed any illegal activity by anyone in or around the vehicle.

speculative if the jury would need to engage in substantial speculation to connect the facts to which the witness has testified to the matters at issue in the case. *Id.* at 70-71.

¶ 193 To preserve a claim regarding the exclusion of evidence for review, a party must make an adequate offer of proof as to what the excluded evidence would have been in the trial court. "It is well recognized that the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court." *People v. Andrews,* 146 Ill. 2d 413, 420–21 (1992). "Such an offer of proof serves dual purposes: (1) it discloses to the court and opposing counsel the nature of the offered evidence, thus enabling the court to take appropriate action, and (2) it provides the reviewing court with an adequate record to determine whether the trial court's action was erroneous." *People v. Pelo,* 404 Ill. App. 3d 839, 875 (2010). The failure to make an adequate offer of proof results in the forfeiture of the issue on appeal. *Andrews*, 146 Ill. 2d at 21.

¶ 194 A party may make a formal offer of proof by placing the witness on the stand, outside of the jury's presence, and asking the witness questions to elicit with particularity what the witness would testify to if permitted to do so. *Pelo,* 404 Ill. App. 3d at 875. In lieu of a formal offer of proof, a court may, as a matter of its discretion, allow an informal offer of proof in which a party makes representations regarding the proffered testimony. *Id*. To make an adequate informal offer of proof, counsel must state with particularity (1) what the testimony will be, (2) by whom it will be presented, and (3) its purpose. *Id*.

¶ 195 The case law provides that an informal offer of proof that merely summarizes the witness' testimony in a conclusory manner or offers unsupported speculation as to what a witness would say is inadequate. *Id*. at 875-76. "Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony." *Andrews*, 146 Ill. 2d at 421.

¶ 196 Here, we conclude that defendant's informal offer of proof lacked sufficient specificity to preserve this alleged error for our review.[7] In response to the State's objection to evidence of similar crimes in the area, defense counsel merely stated that Officer Batterham would testify that there were a series of home invasions that occurred subsequent to this incident in the same year in which "people would enter a house, people would remove items of a similar nature – electronics, jewelry, things like that; and in fact, on several of them, drove off in the resident's car." Defense counsel further stated that he intended to call Officer Moore, who was one of the lead detectives in the home invasions, and he would testify that he arrested several people, including one who looked very similar to defendant.

¶ 197 Based on this record, we hold that defendant failed to create an adequate record allowing this court to review whether the other crimes were sufficiently similar to the circumstances of this offense. See *People v. Files*, 260 Ill. App. 3d 618, 628 (1994).

¶ 198 CONCLUSION

¶ 199 The judgment of the circuit court of Peoria County is affirmed.

¶ 200 Affirmed.

[7]In his reply brief, defendant claims that his "offer of proof came from a policeman who would have testified about a number of crimes in the general area, albeit a different part of town, where the thief tied up his victims and taunted the victims before loading up the victims' cars with loot, driving to a convenient location and unloading it." To the contrary, defense counsel did not make a formal offer of proof by eliciting testimony from Detective Batterham regarding the other crimes, but merely summarized what he anticipated the testimony to be in a conclusory manner.