No. 2—09—1145
Order filed May 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—235
DARIUSZ HREHOROWICZ,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: Where defendant did not establish that trial counsel was ineffective for failing to introduce police officers' testimony regarding defendant's demeanor at the time of arrest and where the trial court's failure to admit hearsay testimony under the state-of-mind exception was harmless error, defendant's conviction for attempted first-degree murder was affirmed.

Defendant, Dariusz Hrehorowicz, appeals his conviction for attempted first-degree murder (720 ILCS 5/8—4(a), 5/9—1(a)(1) (West 2008)). He argues that his trial counsel was ineffective for failing to introduce police officers' testimony regarding defendant's demeanor at the time of arrest

and that the trial court should have admitted hearsay testimony under the state-of-mind exception. For the following reasons, we affirm.

BACKGROUND

Defendant was indicted for one count each of attempted first-degree murder, aggravated unlawful restraint, aggravated battery, unlawful interference with reporting domestic violence, and two counts of domestic battery. The victim, Aneta Cop, was defendant's wife. Prior to trial, the State nol-prossed the aggravated battery, unlawful interference with reporting domestic violence, and domestic battery counts. Defendant's first trial resulted in a mistrial because the jury was deadlocked. While being sworn in as a witness in the second trial, Cop fainted in the courtroom; the trial court granted defendant's motion for a mistrial.

At the third trial, Cop testified that she and defendant had been married for almost 14 years. They started a commercial cleaning business in January 2006. In addition to another full-time job, Cop handled the sales, accounting, and administrative work for the cleaning business. Defendant performed the cleaning services. In early January 2008, Cop filed for divorce. At that point, defendant stopped working for the business and Cop replaced him. Defendant and Cop continued to live together at their marital home.

Cop testified that on the morning of January 23, 2008, she attempted to move the business's cleaning supplies from the basement storage closet in their marital home to a storage facility so that the replacement employee could access the supplies. She began by bringing the supplies from the basement closet to the kitchen. Cop testified that as she was doing this, defendant "would follow [her] downstairs and he would start touching me. And I would tell him not to touch me, and he just didn't want to listen. He says that I'm still your husband. And I just told him just leave me alone."

Cop testified that when she finished bringing the necessary supplies to the kitchen and was about to bring them outside to the company van, defendant beckoned her to the basement under the guise that she forgot something. Cop followed defendant to the basement. Cop testified that defendant walked directly into the storage closet and pointed to the opposite side of the closet. According to Cop, when she stepped into the closet to see what defendant was pointing at, defendant was behind her and put a plastic bag on her head and closed his hands. Cop turned around with her hands in the air, and her arms made contact with defendant's arms, at which point she was able to pull the bag off her head.

Cop testified that defendant grabbed her around her shoulders, and they began to struggle. They fell out of the closet, and defendant threw Cop on the floor where she landed on her back on an area rug. Defendant jumped on her, placed his knee on her chest, and, while holding her hands, he placed his free hand over her mouth although she was able to breathe through her nose. According to Cop, defendant yelled, "I have to do this so you don't hurt anybody else."

Cop testified that she escaped from defendant and ran up the stairs. She grabbed a telephone and dialed 911, but defendant told her "not to bother" because the telephone was not working. Cop could not detect a dial tone. According to Cop, she attempted to retrieve her cell phone off the desk in the kitchen, but defendant reached it first and put it in his pocket. She also attempted to grab defendant's cell phone from the desk, but he grabbed her and pulled the phone away from her.

Cop testified that she was able to get away from defendant and ran out of the house through the back door. She jumped over the fence in the back yard and fell in her neighbor's yard. A piece of the fence broke. She reached her neighbor's back door, banged on the window, and her neighbor

let her in. Cop testified that she told her neighbor that defendant tried to kill her. Her neighbor telephoned 911 and gave the telephone to Cop.

On cross-examination, Cop denied that defendant had informed her that he was depressed. However, she admitted that defendant visited a doctor. Cop testified that she and her husband are almost the same height and weight. Cop testified that she did not remember actually touching the plastic bag as she removed it and acknowledged her testimony that she freed herself by hitting defendant's hands. She testified that after she freed herself from the bag and they landed on the floor, defendant grabbed her by her wrists with one hand.

Cop further testified on cross-examination that the police arrived about ten minutes after she telephoned 911. At that time, she did not inform the police that she was injured. Cop admitted that she had no scratches on her face or hands and no bruises or marks on her neck. She did not request medical attention. She testified that she discovered bruises on her later that day.

Cop's father, Jerzy Cop, testified that defendant telephoned him on January 22, 2008, the day prior to the incident, and told him that he would hurt Cop if she did not calm down. On cross-examination, Jerzy stated that he neither told Cop about the telephone call nor reported the information to the police.

Greg Manko, a City of North Aurora police officer, testified that on January 23, 2008, at about 9:05 a.m., he was dispatched to Cop's neighbor's home in response to a woman's complaint that her husband had beaten her and placed a bag over her head. Fellow officer, Dan Cyko, arrived at the neighbor's home shortly after Officer Manko arrived. Officer Manko testified that Cop was very upset and hysterical. According to Officer Manko, Cop reported that she and her husband had argued and that he had beaten her and put a bag over her head. Officer Manko asked Cop if she

wanted them to arrest defendant for domestic battery, and she said yes. Officer Manko testified that after a few minutes, he, Officer Cyko, and another police officer who had arrived at the scene after them, Sergeant David Summer, went to Cop's and defendant's home. Officer Manko and Sergeant Summer knocked on the front door; Officer Cyko lingered by the garage because he thought he heard something. Officer Manko testified that defendant answered the door, although not immediately. According to Officer Manko, it "took us a few seconds to knock, waited [*sic*] and then he answered." Officer Manko said that defendant was sweating and seemed nervous. Officer Manko testified, "I asked [defendant] what had occurred. And he said, he didn't know what I was talking about." According to Officer Manko, defendant then became fidgety. Officer Manko stated that he did not notice any injuries on defendant and did not recall that defendant reported any injuries. Officer Manko arrested defendant for domestic battery. On cross-examination, Officer Manko testified that defendant's clothes were not torn, and that he did not notice any injuries on Cop, and Cop did not request medical attention.

Officer Cyko testified that when he encountered Cop at her neighbor's house, she was not wearing a jacket despite the freezing temperature. According to Officer Cyko, Cop appeared to have been crying and was "very disturbed," "frantic," and "seemed very excitable." Cop "said that her husband tried to put a bag — or actually put a bag over her head and she was able to escape and take refuge" at the neighbor's house.

Officer Cyko testified that when all three police officers went to Cop's and defendant's home, he stood near the garage while Officers Manko and Summer knocked on the front door. When the officers knocked on the door, he "heard through the garage door, the closed aluminum garage door, an interior type service door closing. The actual aluminum service overhead garage door itself moved

from the chain and pressure." Officer Cyko alerted the other police officers that he heard movement in the garage. Shortly thereafter, defendant answered the front door.

Officer Cyko testified that after defendant was arrested, Officer Cyko walked through the home with Cop and Sergeant Summer. He noticed that an area rug in the basement was out of place, and a portion of the fence was broken and pushed in the direction of the neighbor's house. Officer Cyko testified that in the first-floor laundry room adjacent to the garage, the police officers recovered an empty, white plastic garbage bag that had "visible stretch marks caused by an object that attempted to tear through the bag." Officer Cyko stated that it appeared to him that fingers had caused the stretching in the bag.

On cross-examination, Officer Cyko testified that he did not see any injuries on Cop, and did not see any bruises or marks on her body, face, or hands, and that Cop declined medical attention. Officer Cyko testified that he did not find any debris around the broken piece of the fence and could not say when the fence broke. Officer Cyko admitted that no testing was conducted on the plastic bag to determine how the stretch marks occurred. On redirect, he testified that he was not aware of any such testing.

Robyn Stecklein, a City of North Aurora police officer, testified that she met with Cop on January 26, 2008 (three days after the incident) to photograph the injuries that Cop reportedly sustained during the incident. The photographs depicted bruising on Cop's abdomen and around her knees. Officer Stecklein testified that Cop "seemed very upset. Her eyes started [*sic*], when she was showing me the injuries, she started crying again. She was visibly shaking. She seemed scared or nervous."

After the State rested, defendant moved for a directed verdict. The trial court denied the motion.

Defendant proffered the testimony of Izabella Podraza, a long-time social acquaintance of defendant and Cop, and Jozefa Hrehorowicz, defendant's mother. Defendant sought to admit Podraza's testimony that about a month prior to the incident, Cop told Podraza that she not only wanted to divorce defendant, but also wanted him "gone." In response to the State's hearsay objection, defense counsel argued that the testimony was not hearsay because it was not being offered for the truth of the matter asserted. Rather, "[i]t is offered for the statement that it was made. We are not saying that that's what happened, but that she made the statement." Defense counsel also argued that the testimony showed Cop's intent to testify untruthfully. The trial court held that the proffered testimony was inadmissible hearsay. The trial court reasoned that Cop's statement was not an "admission against interest, because the interest in this case is that of the People of the State of Illinois. [Cop] is merely a witness." Defendant also sought to call Podraza as a reputation witness, which the trial court allowed. Podraza proceeded to testify that defendant has a reputation for being a nonviolent person.

With respect to the proffer of Jozefa's testimony, defense counsel did not articulate the proposed testimony, but the prosecutor stated that defendant "may also try to elicit the statement from Jozefa Hrehorowicz, and I ask that you bar that as well." The trial court stated that "we may need to be heard outside the presence of the jury on that witness." Jozefa proceeded to testify that she resides in Poland but frequently visited her son and daughter-in-law for extended time periods. According to Jozefa, Cop is very athletic and strong. The trial court sustained the prosecutor's hearsay objection to defense counsel's question whether Cop ever told Jozefa that she was planning

to divorce defendant. With respect to defense counsel's question as to whether she knew that Cop filed for divorce, Jozefa testified, "I didn't know right now that she did it. But I did know about her prior attempts to do that. I found out about it later, after she did that."

Defendant testified that in mid-December 2007, the commercial cleaning business lost an account. Cop asked him whether he was ready to bear the consequences. Defendant testified that he had been exhausted and on sick leave from the cleaning business since January 15, 2008. He was aware of the potential that his wife would replace him in the business. According to defendant, he telephoned his father-in-law twice on January 22, 2008 (the day before the incident) to obtain money for a divorce lawyer. Defendant denied that he threatened Cop during these telephone calls.

With respect to the events of January 23, 2008, defendant testified that his wife rejected his assistance in moving the cleaning supplies from their basement to the kitchen and said, "I have to count on myself right now." When Cop was finished transporting the supplies to the kitchen, defendant surveyed the supplies and told Cop that he wanted to show her a waxing mop that she left in the basement closet. Defendant testified that when they went to the basement, he showed Cop the mop, and she said that she would take it later. According to defendant, he urged Cop to take the mop, and in response, Cop called defendant a "son of a bitch" and punched defendant "all over [his] body" for about 15 to 20 seconds while they were in the entrance to the basement closet. Defendant protected his face and saw "darkness" while Cop punched him. As he was "turning [his] head around and trying to come to [him]self," he "hit [his] head with [his] fist and [he] started seeing stars and [he] realized [he was] in the basement," and then "heard steps going upstairs." Defendant was standing when this happened.

Defendant testified that he then went upstairs "to see where [Cop] was." Defendant saw Cop "by the table and she was calling a remote control, and she was pushing the buttons on the remote and she was speaking English." According to defendant, Cop saw him and "was getting really mad." She "approached like a tiny desk or a table where she had her bag and an estimate book, and she went around the table towards the door leading to the garage." When he told her to calm down, she "dropped everything and she ran outside through the yard, and the dog ran after her." She slipped and fell by the fence, got up, jumped over the fence, and went to their neighbor's house.

Defendant denied placing a plastic bag over Cop's head, denied pushing her to the floor in the basement, denied holding her down on the floor with his hands, denied placing his hands over Cop's mouth, denied attempting to prevent Cop from calling the police, and denied attempting to keep Cop inside the house against her will. Defendant testified that on the day of the incident, garbage bags were in various places in their home, including the garage and the laundry room cabinet. He said that he did not see any garbage bags lying around the house but was not watching for them. He said that he did not think Cop used any garbage bags to move the cleaning supplies. Defendant testified that after Cop left, his heart started to pound, and he took some prescribed medication and fell asleep on the couch. Later, he heard the doorbell ring, and he allowed the police into his house.

During cross-examination, defendant denied that he grabbed Cop inside the house and wrestled with her. He was impeached with testimony from his prior trial in which he stated, "I grabbed [Cop] when the — when the bag and keys where she dropped them [*sic*]," and answered yes to the question, "You grabbed her with both of your arms, correct?" Defendant denied that he threatened Cop during the telephone conversation with his father-in-law the day before the incident. He was impeached with his testimony from the prior trial during which he answered yes to the

question of whether he told his father-in-law during that telephone conversation that he was going to hurt Cop.

Defendant testified that he was not upset about the pending divorce and acknowledged that his wife wanted a divorce in 2001. He admitted that when the police came to his door, he told them that nothing had happened. He said that he did not tell the police that his wife hit him because he thought that they would laugh at him. Defendant stated that he takes medication to calm him down and that the medication works very quickly. According to defendant, Cop became angry because defendant told her to take all of the cleaning supplies. She told him that if she had to hire someone, defendant would not be coming back to work. He reminded her that he was a co-owner of the business.

On redirect examination, defendant testified that his wife would leave the house for several minutes after they had an argument about the business. He further testified that around Thanksgiving, he had proposed hiring an additional employee for the cleaning business.

The jury returned a verdict of guilty on the attempted first-degree murder and aggravated unlawful restraint counts. Defendant filed a posttrial motion on grounds, *inter alia*, that the trial court erred in not allowing the evidence of Cop's conversations with Podraza and Jozefa "relating to her plans as to her marriage with [d]efendant." According to defendant, Podraza would have testified that Cop revealed to her on December 31, 2007, that "she did not want to be married to [d]efendant anymore, and that she is planning not only to divorce him but to make him suffer and conduct the divorce in such a manner so she did not have to share with the custody of their children nor their property ([Cop] state [*sic*] that she wanted to 'get rid' of [defendant])." Defendant represented that Jozefa would have testified that on December 23, 2007, Cop told her that "she hates

[defendant] and she would not only divorce him but she would 'destroy' him in order to keep all their property to herself (which she stated was only hers)." Defendant argued that the evidence was admissible to establish Cop's motive to testify falsely against defendant. Following oral argument, the trial court denied the posttrial motion.

Defendant was sentenced to six years' imprisonment on the attempted first-degree murder. The trial court merged the aggravated unlawful restraint conviction into the attempted first-degree murder conviction. Defendant timely appealed.

ANALYSIS

Defendant argues that his trial counsel was ineffective for failing to introduce police officers' testimony from defendant's first trial regarding defendant's demeanor at the time of arrest and that the trial court erred in excluding Podraza and Jozefa's testimony regarding Cop's statements to them about the divorce.

Ineffective Assistance of Counsel

Defendant contends that he received ineffective assistance of counsel because his trial attorney failed to elicit testimony from Sergeant Summer and Officer Cyko that defendant seemed calm, puzzled, and surprised when they arrived at his home on the night of incident. Specifically, at the first trial, Sergeant Summer testified that he met defendant at the door of his home and asked him what transpired. According to Sergeant Summer, defendant "could not understand why [the officers] were there" and had "somewhat of a puzzled look on this face." Also at the first trial, Officer Cyko testified that when he encountered defendant, defendant "appeared calm and somewhat surprised that we were at his home." At the third trial, Sergeant Summer was not called to testify. Officer Cyko testified at the third trial, but defense counsel did not question him about defendant's demeanor on

the night of the incident. We disagree that defense counsel's failure to elicit Sergeant Summer's and Officer Cyko's testimony about defendant's demeanor amounted to ineffective assistance of counsel.

Defendant's claim is subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Houston*, 226 Ill. 2d 135, 144 (2007). In demonstrating that counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's conduct might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Houston*, 226 Ill. 2d at 144. A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Houston*, 226 Ill. 2d at 144. Failure to satisfy one prong defeats the claim. *Strickland*, 466 U.S. at 697; *Houston*, 226 Ill. 2d at 144-45.

Defendant fails to overcome the strong presumption that his attorney's decision not to elicit Sergeant Summer's and Officer Cyko's testimony was trial strategy. Indeed, "trial counsel's decision regarding the extent of cross-examination, whether to present witnesses, and what defense theory to assert all constitute matters of trial strategy." *People v. Whitamore*, 241 Ill. App. 3d 519, 525 (1993). The record demonstrates that trial counsel argued defendant's case, cross-examined the State's witnesses, and presented the defense theory that Cop was the aggressor. Under the circumstances, defendant does not establish that his attorney's performance fell below an objective standard of reasonableness. See *Whitamore*, 241 Ill. App. 3d at 525-26.

Defendant nevertheless argues that "it can be ineffective for counsel to fail to use prior favorable testimony on behalf of a client." In support, defendant cites *People v. Salgado*, 263 Ill. App. 3d 238 (1994), and *People v. Wilson*, 149 Ill. App. 3d 1075 (1986). *Salgado* and *Wilson* are inapposite.

In *Salgado*, the defendant's attorney in his murder trial failed to impeach the sole eyewitness to the shooting with the eyewitness's testimony from the codefendant's trial that he did *not* see the shooters. *Salgado*, 263 Ill. App. 3d at 246-47. In holding that the defendant established his ineffective assistance of counsel claim, the appellate court reasoned that the "complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim." *Salgado*, 263 Ill. App. 3d at 246-47. Moreover, the court pointed out, "the impeachment value of directly contradictory testimony made under oath at a prior trial by the State's premier eyewitness can hardly be overestimated." *Salgado*, 263 Ill. App. 3d at 247.

The defendant in *Wilson* was convicted of attempted murder, armed violence, and theft. *Wilson*, 149 Ill. App. 3d at 1076. At the preliminary hearing one day after the incident, the victim testified that the defendant snatched her purse and then fired his gun over his shoulder without looking back at her. *Wilson*, 149 Ill. App. 3d at 1077. In contrast, the victim testified at trial that the defendant fired the gun at the victim while looking over his shoulder. *Wilson*, 149 Ill. App. 3d at 1076. The defendant's trial counsel impeached the victim with the conflicting testimony but failed to use the prior inconsistent statement as substantive evidence. *Wilson*, 149 Ill. App. 3d at 1077. Instead, trial counsel tendered an incorrect jury instruction that prior inconsistent statements may be considered only for the purpose of deciding the weight to be given the testimony. *Wilson*, 149 Ill.

App. 3d at 1078. The appellate court held that trial counsel's failure to use the inconsistent statement as substantive evidence deprived the defendant of an essential element of his defense to the attempted murder and armed violence charges—that he did not possess the requisite intent to kill the victim. *Wilson*, 149 Ill. App. 3d at 1079.

Here, the testimony of Sergeant Summer and Officer Cyko that defendant contends should have been elicited was not eyewitness testimony. Rather, the testimony was that defendant was calm, puzzled, and surprised when the officers arrived at his home on the day of the incident. Defendant contends that this testimony about his demeanor would have supported the defense theory that defendant was the target of Cop's emotional volatility. However, defendant testified that Cop was volatile and the aggressor during the incident. The police officers' testimony about his subsequent demeanor was merely incidental to defendant's testimony about the events of the day.

According to defendant, he nevertheless could have argued that in light of the discrepancy between Sergeant Summer's and Officer Cyko's description of him as calm, puzzled, and surprised and Officer Manko's description of him as nervous and sweaty, Officers Manko and Cyko did not make an accurate assessment of *Cop's* demeanor as upset, hysterical, disturbed, frantic, and excitable. This argument is entirely speculative and lacks any record support. Defendant does not establish that his trial counsel was ineffective for failing to elicit Sergeant Summer's and Officer Cyko's testimony about his demeanor.

Moreover, defendant fails to establish a reasonable probability that the jury would have acquitted him if the testimony had been admitted. Both Cop and defendant testified extensively about their versions of the incident. Evidence regarding the recovered plastic bag with stretch marks, displaced basement rug, broken fence, and Cop's bruising supported Cop's account. Cop's father

testified that defendant threatened to hurt Cop the day before the incident. The parties' demeanor when the police officers arrived was simply not a critical issue in the case. We cannot say that there is a reasonable probability that the result of the trial would have been different if Sergeant Summer's and Officer Cyko's testimony about defendant's demeanor was admitted.

Hearsay Testimony

Defendant argues that the trial court should have allowed Podraza and Jozefa to testify that Cop told them about a month before the incident that she wanted defendant "gone" and would "destroy" him. According to defendant, the testimony was admissible under the state-of-mind exception to the hearsay rule. A trial court's ruling with respect to the admissibility of evidence is reviewed for abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

Initially, the State argues that defendant forfeited the argument that Podraza's and Jozefa's testimony was admissible under the state-of-mind exception because he did not raise the argument at trial or in his posttrial motion. We agree. At trial, defendant argued that the testimony was not offered to prove the truth of the matter asserted and that the testimony was admissible to show Cop's intent to testify falsely against defendant. In his posttrial motion, defendant likewise argued that the testimony was admissible to show Cop's motive to testify falsely against defendant. However, he neither articulated nor argued the state-of-mind exception. Defendant, therefore, forfeited the argument that Podraza's and Jozefa's testimony was admissible under the state-of-mind exception. See *People v. Evans*, 373 Ill. App. 3d 948, 965 (2007) (stating that the defendant forfeited his argument that favorable testimony should have been admitted under the excited-utterance exception to the hearsay rule by failing to raise the theory in his motion for a new trial); see also *Brooke Inns,*

Inc. v. S & R Hi-Fi & TV, 249 Ill. App. 3d 1064, 1086 (1993) ("Generally, the proponent of excluded testimony is limited on appeal to the grounds for admissibility raised in the circuit court.").

Morever, although the State does not raise the issue, we note that defendant never made an offer of proof with respect to Jozefa's testimony. Prior to Podraza's and Jozefa's testimony, defense counsel specified that he sought to admit *Podraza's* testimony that, a month before the incident, Cop told Podraza that she wanted defendant "gone." The prosecutor stated that defendant "may also try to elicit the statement from Jozefa Hrehorowicz, and I ask that you bar that as well." But defense counsel never articulated the content of Jozefa's proffered testimony. Defendant appears to recognize this deficiency in his opening brief on appeal: "According to defendant's post-trial motion, [Jozefa] would have testified that on December 23, 2007, Cop told her that she hated the defendant and would 'destroy' him in order to obtain all of the property in the divorce." Defendant was required to make his offer of proof at trial, not in his posttrial motion. Accordingly, defendant forfeited his argument regarding the admissibility of Jozefa's testimony. See *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992) ("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.").

Forfeiture aside, the issue is whether Podraza's and Jozefa's testimony that Cop told them about a month before the incident that she wanted defendant "gone" and would "destroy" him was admissible under the state-of-mind exception to the hearsay rule. Defendant argues that the testimony was admissible to show Cop's state of mind—"that her hostility for [] defendant was so deep that she wanted to 'destroy' him" and therefore concocted the attempted murder story.

A hearsay statement is admissible under the state-of-mind exception if it conveys the declarant's state of mind at the time of the utterance, that is, the declarant's intentions, plans, or

motivations. *People v. Munoz*, 398 Ill. App. 3d 455, 479 (2010). Defendant likens this case to *People v. Bartall*, 98 Ill. 2d 294 (1983). There, the defendant was convicted of murder and armed violence for the drive-by shooting of the victim. *Bartall*, 98 Ill. 2d at 300. Evidence of the defendant's involvement in a subsequent shooting was admitted to show the defendant's intent. *Bartall*, 98 Ill. 2d at 302-03. Our supreme court held that the trial court erroneously excluded witness testimony that the defendant stated, with respect to the subsequent shooting, that he merely intended to shoot the tires of a car. *Bartall*, 98 Ill. 2d at 319. The court reasoned that the statement was admissible to prove the defendant's intent in the attack and that he acted in accordance with that intent, although the court ultimately determined that exclusion of the testimony was harmless error. *Bartall*, 98 Ill. 2d at 319.

The State contends that *Bartall* is distinguishable from this case because "the error in not allowing a witness to testify about the state of mind of the defendant differs significantly from the circumstances in the case at bar, in which defendant wanted to elicit testimony about the state of mind about the complaining witness, Aneta Cop, who was available to be challenged about her motive to testify falsely." The state-of-mind exception is not limited to testimony about the *defendant's* state of mind. See, *e.g.*, *People v. Collins*, 351 Ill. App. 3d 175, 181-82 (2004) (holding that the trial court properly admitted testimony about the murder victim's hearsay statements under the state-of-mind exception). We agree with defendant that Podraza's and Jozefa's testimony that Cop told them a month before the incident that she wanted defendant "gone" and would "destroy" him was admissible to show Cop's intent and that she acted in accordance with that intent, namely, that she concocted the charges against defendant to "get rid of him."

The parties argue at length about whether Cop was "available" to testify. The issue is not relevant. Historically, statements were admitted under the state-of-mind exception only if, *inter alia*, the declarant was unavailable to testify. *Munoz*, 398 Ill. App. 3d at 479. However, Illinois Rule of Evidence 803(3) ("Then Existing Mental, Emotional, or Physical Condition") (eff. Jan. 1, 2011), eliminated this requirement. Rules of evidence are considered matters of procedure and therefore apply retroactively. See *Schuttler v. Ruark*, 225 Ill. App. 3d 678, 684-85 (1992). Defendant does not need to establish Cop's unavailability in order to invoke the state-of-mind exception to the hearsay rule.

Notwithstanding our determination that, forfeiture aside, Podraza's and Jozefa's testimony about Cop's statements was admissible under the state-of-mind exception, we hold that the exclusion of the testimony was harmless error. The record reflects ample other testimony regarding the contentious divorce proceedings and the animosity between Cop and defendant. See *People v. Swaggirt*, 282 Ill. App. 3d 692, 705 (1996) (error is harmless where the evidence is cumulative or merely duplicates properly admitted evidence). Cop had filed for divorce a few weeks before the incident, at which point defendant stopped working for the cleaning business. Defendant himself testified that Cop was mad at him for not coming back to work and had to do some of the cleaning herself in addition to her full-time job. According to defendant, Cop informed him, "[I]f I hire a man, you're not coming back. And I said, well we will see about that." Defendant further testified that when he lost an account for the business in mid-December 2007, Cop asked him if he was ready to bear the consequences. Defendant said that Cop also "took her ring off and put it on the table," and asked defendant, "[W]here are you gonna sleep?" Defendant testified that he and Cop argued in the past because defendant "had a different opinion about the way we run the business." During the

arguments, Cop would run out of the house and then drive around for several minutes. Defendant testified that Cop told him in 2001 that she wanted to divorce him because he "brought a friend, a female friend from Poland." In light of this evidence, the exclusion of Podraza's and Jozefa's testimony about Cop's statements does not warrant reversal.

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.