2013 IL App (2d) 120487-U
No. 2-12-0487
Order filed October 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN D. SHINER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County No. 11-CM-4239 Honorable Brian J. Diamond, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was proven guilty beyond a reasonable doubt of harassment by telephone; the best evidence rule did not require the voice messages to be produced; and any error in allowing testimony concerning the police report was forfeited or harmless.

¶ 2 On February 10, 2012, a jury found the defendant, John D. Shiner, guilty of harassment by telephone (720 ILCS 135/1-1(2) (West 2010)) and he was subsequently sentenced to two years' conditional discharge. On appeal, the defendant argues that he was not proved guilty beyond a reasonable doubt and challenges the admission of certain evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 On September 9, 2011, the defendant was charged by complaint with harassment by telephone. The complaint alleged that the defendant made a phone call to Cindy Priz's cell phone with the intent to threaten and intimidate her. A jury trial commenced on January 24, 2012.

¶ 5 At trial, Priz testified that she met the defendant in late November or December 2010 through a friend of hers named Derek. She identified the defendant in court. From the time she met him up until May 2011, she saw him about every two or three weeks. In May 2011, she saw the defendant about three or four times a week because she started to spend more time with her friend, Barb Costello, and the defendant would be with them. (The record indicates the defendant and Costello were dating.) She also met Costello through Derek. She did not generally speak directly with the defendant; their mutual friends would talk more with him. She heard the defendant speak to others "at least 100 times." She never spoke to the defendant over the phone.

¶ 6 On September 4, 2011, she was at home and received a phone call from Costello's phone at about 7:40 p.m. She did not answer the phone because she was not in the mood to talk to anyone. The call went to her voice mail and she noticed that the caller had left a message. When asked what she heard when the message was played, the defendant objected on the basis that the best evidence rule prohibited Priz from testifying as to the contents of the voice message and required the voice mail itself to be authenticated and admitted into evidence. The trial court overruled the objection without explanation. Priz testified that when she played the message the caller identified himself as "John" and she recognized that it was the defendant's voice. The defendant said that she should not come within 25 feet of him and Costello at a Caribou coffee or the public library (places where they normally hung out) and that she should move out of town. The message made her feel scared

and nervous because it sounded threatening. At the time of the message, she was not having any disputes with Costello or the defendant.

¶ 7 After listening to the message, Priz called the police and sent a text message to Costello's phone that indicated that she was contacting the police. After about 15 minutes, Officer Vacala arrived at her house. She showed him her phone and played the voice message for him. The officer made a report and told her to call the police again if she received any more phone calls. About five minutes after the policeman left, she received another call from Costello's phone. She let it go to voice mail and another message was left. Within 30 seconds of the second call, there was a third call from Costello's phone. She let the third call go to voice mail and the caller left a third message.

¶ 8 After receiving the second and third calls, Priz called the police again. She did not listen to the voice messages until the police arrived. When the same officer arrived, she played the messages. She recognized, from the sound of his voice, that the caller was the defendant. After the trial court overruled another best evidence objection, Priz testified that the second message was the defendant saying that he thought he had told her not to contact Costello's phone. She said the defendant's voice sounded threatening and that she was scared. She acknowledged that she could not recall the exact words the defendant used on the voice messages or what names the defendant had called her. She testified that she did not know of anything that would refresh her recollection.

¶ 9 Priz further testified that she saved the messages on her voice mail. She could not recall if the officer told her to save the messages. The officer did not try to make his own recording of the messages. After listening to the second and third messages, the officer made another report and left. On redirect examination, after refreshing her recollection by reviewing a copy of the police report,

Priz testified that, in the second message, the defendant called her a "fat bitch" and told her not to contact him or Costello.

¶ 10 About September 6 or 7, Priz went to her cell phone provider's local store to find out if there was a way to permanently save the voice messages. She was told it was not possible. On September 9, she was in court to testify so that the police could get a warrant. She played the voice messages for the court. On September 11, the messages were automatically deleted from her voice mail. She did not personally delete the messages from her voice mail and she did not know how long voice messages were normally available before being automatically deleted. It had not occurred to her to tape the voice messages with a tape recorder.

¶ 11 Officer Lawrence Vacala testified that he had been a Downers Grove police officer for 10 years. On September 4, 2011, he was dispatched to Priz's home in response to her report of telephone harassment. Priz told him that she had received a threatening phone message. She played the message on speaker phone so that he could hear it. Officer Vacala stated that the caller was male, identified himself as "John," and that his speech sounded slurred, aggressive, and angry. He listened to the entire message. He explained to Priz that he would file a police report and told her that if she received any more calls, she should contact the police so that the calls could be documented. Priz seemed frightened and upset by the phone message. He left Priz's home.

¶ 12 Officer Vacala further testified that, about a half-hour after he left Priz's residence, he was again dispatched to her home because she had received a couple more telephone calls. When he arrived she was extremely upset, almost on the verge of tears. Priz played the second and third messages for him via speaker phone. He recognized that the caller was the same caller as the one who left the first message. The messages were again slurred and in an angry tone of voice. The

messages included profanity. He told Priz he would document the calls with a police report and indicated that a criminal complaint would be prepared if she wished. He subsequently prepared a complaint and a warrant. Priz appeared in court to have the complaint warrant signed.

¶ 13 On cross-examination, Officer Vacala testified that he knew the defendant from previous contacts. He told Priz to save the voice messages. It was not police procedure to make a recording of the voice messages. He acknowledged, however, that the police department had the necessary equipment to record such voice messages. In the first message, he did not recall the caller saying "don't come within 25 feet of me" or telling Priz to "move out of town." In the second message, he did not recall the caller saying that he told Priz not to contact him anymore. His police reports contained summaries of what he felt were the important details of the voice messages. He testified that the caller identified himself as "John" just once, on the first voice mail message.

¶ 14 Also on cross-examination, Officer Vacala was presented with a copy of his police report. After reviewing the report, Officer Vacala acknowledged that his police report indicated that the defendant had identified himself by first name in all three messages. He explained that he wrote that because Priz had identified the defendant as the caller for all three messages. He acknowledged that the defendant had only identified himself by first name in the first message.

¶ 15 On redirect examination, Officer Vacala testified that he included the important events that occurred the evening of September 4, 2011, in his police report. The following colloquy ensued:

"BY MR. FRIEDLAND [State's Attorney]:

Q. And you did include in your police report the majority of the important events and notes that you deemed appropriate, correct?

MS. PHILLIPS [Defense Attorney]: Objection, leading.

THE COURT: Overruled.

THE WITNESS: I detailed the important facts in a report pertaining to the criminal offense of telephone harassment in her report.

BY MR. FRIEDLAND:

Q. And you did include that [the defendant] warned—some of the substance of the voicemails that you had listened to, correct?

A. Correct.

Q. And included that [the defendant] had warned [Priz] to stay away from him and his girlfriend, [Costello]?

MS. PHILLIPS: Objection, leading.

THE COURT: Overruled.

BY MR. FRIEDLAND:

Q. You did include that [the defendant] had warned the victim to stay away from him and his girlfriend, Barb—

MS. PHILLIPS: Objection, your Honor, this is—the prosecution is testifying.

THE COURT: I am going to sustain the objection.

MR. FRIEDLAND: May we approach very briefly, Judge?

THE COURT: Yes.

(Whereupon an inaudible sidebar discussion was had between the Court and Counsel outside the hearing of the jurors.)

THE COURT: The objection is overruled.

BY MR. FRIEDLAND:

Q. Did you include in your police report that [the defendant] warned the victim to stay away from his and his girlfriend, [Costello], or there would be consequences?

A. I did.

Q. Did you include in your police report that the second message that the defendant called the victim a fat bitch?

A. I did.

Q. And did you call—did you also include in your police report that [the defendant] proceeded to call a third time and again calling her a fat bitch?

A. I did.

MS. PHILLIPS: Objection, your Honor.

THE COURT: Overruled.

BY MR. FRIEDLAND:

Q. As well as did you include that the defendant indicated in a voice mail stay away from him and [Costello]?

A. I did."

¶ 16 Following the denial of his motion for a directed finding, the defendant testified that he had never spoken to Priz on the phone and that he never left any voice messages on Priz's cell phone. In 2010, he had pled guilty to the offense of aggravated battery to a police officer. On cross-examination, the defendant testified that he had known Priz, through mutual friends, for about three or four months. On September 4, 2011, he had his own cell phone and, had he been so inclined, would have used that phone to call and harass Priz—not Costello's phone. He testified that he had never used Costello's phone. He reiterated that he had not called Priz's cell phone. He never hung

around with Priz alone. He and Priz merely socialized with the same group of friends and they would be four or five feet apart on these occasions. On September 4, 2011, he was at home with his roommate going over work for the next day. At about 7 p.m., he took his roommate's dog for a walk. The defendant testified that there were other people named "John" that hung out in their group, one of whom would dress up as Santa every year.

¶ 17 Following closing argument and deliberation, the jury found the defendant guilty of harassment by telephone. The trial court entered judgment on the verdict. The State was not ready and the case was set over for sentencing. On February 16, 2012, following a sentencing hearing, the defendant was sentenced to two years of conditional discharge. The trial court admonished the defendant that he had the right to an appeal and that if he wished to appeal, he had 30 days from the date of sentencing to file a motion for a new trial or a motion to modify the sentence. On March 16, 2012, the defendant filed a motion for a new trial, which was amended on April 12, 2012. On May 3, 2012, the trial court denied the amended motion for a new trial. On May 4, 2012, the defendant filed a notice of appeal.

¶ 18 ANALYSIS

¶ 19 Before we consider the merits of the defendant's appeal, we must address our jurisdiction to hear the appeal. Section 116-1(b) of the Code of Criminal Procedure (725 ILCS 5/116-1(b) (West 2010)) requires a motion for a new trial to be filed within 30 days after entry of a guilty verdict or finding. The defendant's March 16, 2012, motion for a new trial was not timely filed as it was not filed within 30 days of February 10, 2012, the date on which the guilty verdict was entered. Moreover, a notice of appeal in a criminal case must be filed within 30 days of "the entry of the final judgment appealed from" unless there is a timely posttrial motion directed against the judgment.

Sup. Ct. R. 606(b) (eff. Mar. 20, 2009). In this case, no timely posttrial motion was filed—the defendant's motion for a new trial was untimely—and so the notice of appeal should have been filed no later than March 19, 2012, 30 days after the defendant was sentenced. As the defendant's notice of appeal was filed May 4, 2012, it was untimely.

¶ 20 The defendant did not file a motion pursuant to Supreme Court Rule 606(c) (eff. Mar. 20, 2009) for leave to file a late notice of appeal. However, the defendant's notice of appeal, filed May 4, 2012, is within the six-month period during which the defendant could have filed such a motion. See *id.* We also note that in this case the trial court's comments to the defendant regarding his appeal rights were not correct. Following sentencing, the trial court advised the defendant that he had another 30 days after the sentencing in which to file a motion for a new trial, despite the fact that the 30-day period under section 116-1 had already started six days earlier. Under similar circumstances, the supreme court has held that we may treat a late notice of appeal as if it contained an implicit motion for leave to file it. See *People v. Williams*, 59 Ill. 2d 243, 246 (1973) (citing *People v. Brown*, 54 Ill. 2d 25, 26 (1973), in which the court held that to dismiss such an appeal merely because the defendant failed to petition for leave to file a late notice of appeal "unduly emphasizes formality at the expense of substance."). We grant that implicit motion in this case. Having done so, we have jurisdiction over the appeal and may address its substance.

¶ 21 The defendant's first argument on appeal is that he was not proven guilty beyond a reasonable doubt. Specifically, the defendant argues that the State failed to prove that Priz suffered emotional distress akin to that from a threat of injury or damage to her person or property or that the defendant intended to produce that level of distress.

¶ 22 When reviewing the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). In making this determination, the "reviewing court will not substitute its judgment for that of the trier of fact on issues of the weight of evidence or the credibility of witnesses." *People v. Phelps*, 211 Ill. 2d 1, 7 (2004). This court will not disturb a guilty verdict unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt as to the defendant's guilt. *People v. Brandon*, 197 Ill. App. 3d 866, 874 (1990).

¶ 23 As charged in this case, a person commits the offense of harassment by telephone when he (1) makes a telephone call and (2) places the call with the intent to abuse, threaten, or harass a person at the number called. 720 ILCS 135/1-1(2) (West 2010); *People v. Karberg*, 356 Ill. App. 3d 500, 502 (2005). The intent element of section 1-1(2) (720 ILCS 135/1-1(2) (West 2010)) is measured at the time the telephone call is placed. *People v. Jones*, 334 Ill. App. 3d 420, 424 (2002). A person acts intentionally when his conscious objective or purpose is to accomplish the result or engage in the conduct proscribed. 720 ILCS 5/4-4 (West 2000); *People v. Cooper*, 32 Ill. App. 3d 516, 518 (1975). Intent may be inferred from surrounding circumstances and may be proved by circumstantial evidence. *People v. Maggette*, 311 Ill. App. 3d 388, 398 (2000). For a call to be made with intent to harass, the caller must have had the intent to produce emotional distress akin to that of a threat. *People v. Taylor*, 349 Ill. App. 3d 839, 843 (2004). Nonetheless, the State need not prove the existence of a threat; the State need only establish that there was a phone call, and that the caller had the requisite intent. *Szucz-Toldy v. Gonzalez*, 400 F. 3d 978, 981 (7th Cir. 2005). The question of

intent is one for the trier of fact and its ruling should not be reversed on appeal unless inherently impossible or unreasonable. *Maggette*, 311 Ill. App. 3d at 398.

¶ 24 Here, taking the evidence in the light most favorable to the State, there were sufficient facts upon which the trier of fact could have found the requisite intent. The defendant's repeated phone calls, angry or threatening tone of voice, use of profanity, and warnings not to come near him and to move out of town establish an intent to threaten or harass the victim. See *People v. Spencer*, 314 Ill. App. 3d 206, 208 (2000) (the usual indicia of harassment include repeated phone calls and the use of profanity). Although the use of profanity alone is not a basis to find an intent to threaten or harass, it can, as in this case, support an inference of an intent to harass. *People v. Taylor*, 349 Ill. App. 3d 839, 845 (2004). Additionally, Priz testified that the messages made her feel threatened and scared. If the defendant merely wanted to convey a message for Priz to stay away from him and Costello, he would only have needed to leave one message. Instead, he left repeated messages. Based upon the totality of the circumstances here, and the reasonable inferences that could be drawn therefrom, we cannot say that the jury's determination that the defendant acted with the requisite intent to threaten or harass Priz was inherently impossible or unreasonable. *Id.*

¶ 25 Relying on *Taylor*, the defendant argues that the messages do not convey an intent to harass, merely an intent to offend. In *Taylor*, the defendant was convicted of harassment by telephone based on a message she had left on the complainant's answering machine. *Taylor*, 349 Ill. App. 3d at 840. In the message, the defendant stated: "I was just wondering if you and your friends are that [f***ing] ghetto and low class that you have to go onto a web site uh talking shit on-line about a child that just came into this world just because you're jealous that it's not yours. [Inaudible, several words] grow up and learn how to spell." *Id.* The defendant admitted that she left the message in response to a

series of negative comments the complainant had left on a hospital website that displayed pictures of the defendant's newborn god-daughter. The comments included that the baby was fat, ugly, and had a big head. *Id.* at 841. The reviewing court held that one could not infer an intent to harass from the defendant's calling to deliver a rebuke and that the use of profanity alone did not bring the call within the reach of the statute. *Id.* at 844. Rather, the language in the message supported only an intent to express anger or perhaps to offend. *Id.*

¶ 26 *Taylor* is distinguishable from the present case. In the present case, unlike the single message in *Taylor*, the defendant called Priz three times and left messages. Additionally, in *Taylor* the purpose of the phone call was to deliver a rebuke in response to specific actions of the complainant. Here, the calls were apparently unprovoked. Priz testified that, at the time the messages were left, she was not having any type of dispute with either the defendant or Costello.

¶ 27 The defendant also relies on *People v. Jones*, 334 Ill. App. 3d 420 (2002), in arguing that he was not proven guilty beyond a reasonable doubt. In *Jones*, the defendant was convicted of harassment by telephone based on a phone call she made to a supervisor at the department of consumer services. *Id.* at 422. The call was pertaining to an attorney at the department that had represented the defendant on a certain consumer case. *Id.* The defendant had called the office numerous times to complain about her attorney's handling of the case. *Id.* The calls were increasingly "combative." *Id.* at 421. On the date at issue, the defendant called the supervisor again to complain about her case and her attorney and then stated that she was "sick of it" and that she would "come down and kill [her attorney]." *Id.* at 422. The defendant subsequently arrived at the office and was arrested. *Id.*

¶ 28 We find the defendant's reliance on *Jones* unpersuasive. The defendant argues that, unlike *Jones*, the defendant in this case did not make escalating harassing phone calls prior to the calls at issue. However, similar to *Jones*, the defendant here made multiple phone calls (they just all happened to be on the same day) and the calls were all in an aggressive and angry tone of voice. The defendant also argues that, unlike *Jones*, where the defendant threatened to "kill" the complaining witness, the defendant's call was not threatening as there was no suggested course of action if Priz did not stay away from him or move out of town. However, as noted above, to sustain a conviction for harassment by telephone, it is not necessary to prove the use or threatened use of physical force. *Szucz-Toldy*, 400 F. 3d at 981. Accordingly, *Jones* does not provide a basis to disturb the jury's determination.

¶ 29 The defendant's next contention on appeal is that the best evidence rule required the actual voice messages to be produced and that the trial court erred in allowing testimony about the content of the messages without first requiring the State to prove that they were unavailable. "The best evidence rule states a preference for the production of the original of documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Tharpe-Williams*, 286 Ill. App. 3d 605, 610 (1997). Nonetheless, a party does not need to produce the best evidence that the nature of the case permits. *Id.* Rather, the existence of a writing, recording, or photograph may be proven by testimony or other indirect evidence when it is shown that the original was lost, destroyed, or otherwise unavailable. *People v. Barber*, 116 Ill. App. 3d 767, 778 (1983). In such a case, the proponent must prove the prior existence of the original recording, its unavailability, and the proponent's own diligence in attempting to procure the original. *People v. Baptist*, 76 Ill. 2d 19, 26 (1979). The sufficiency of the evidence showing that it is not within the offering party's power

to produce the original depends upon the circumstances of each case. *Id.* at 26-27. Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105 (2009).

¶ 30 In the present case, we agree with the defendant's assertion that the best evidence rule applies to the voice messages at issue. Nonetheless, Priz testified that she had gone to her cell phone provider's local store to inquire about saving the voice messages and was told that there was no way to preserve them. She further testified that a few days later, the voice messages were automatically deleted. There was no evidence indicating that the recordings were destroyed in bad faith and the defendant offered nothing to contravene Priz's testimony as to the unavailability of the recordings. Moreover, the jury heard Priz's testimony about the voice messages, Officer Vacala's testimony, and the defendant's testimony that he had not called Priz. The jury had the opportunity to observe the witnesses and make credibility determinations. Under these circumstances, the trial court did not abuse its discretion in allowing testimony about the content of the voice messages. See *People v. Taylor*, 314 Ill. App. 3d 658, (2000) (best evidence rule did not require exclusion of testimony about contents of videotape, as videotape was not missing through an act of bad faith by the State and the defendant's right to cross-examine the witnesses gave him an opportunity to expose their alleged unreliability to the jury).

¶ 31 The defendant takes issue with the fact that the trial court overruled his best evidence objections, without explanation, prior to Priz's testimony about the voice messages being automatically deleted. The defendant asserts, therefore, that the trial court erred in allowing her testimony prior to making a determination as to the unavailability of the actual voice messages. Even if it was error to allow Priz's testimony prior to the proper foundation being laid, any harm was

mitigated when Priz later testified as to the unavailability of the voice messages. Moreover, the trial court was aware of the unavailability of the voice messages at that time the best evidence objections were made. In pre-trial hearings on a day that was set for trial, the State obtained a continuance based on the fact that Priz informed the State's attorney that the voice messages had been automatically deleted from her voice mail system. The State requested a continuance to subpoena the phone records. At a subsequent hearing, the State requested and the trial court entered a "comply order" requiring the keeper of records for the cell phone provider to comply with the State's subpoena or appear in court to explain any non-compliance. Accordingly, at the time the trial court overruled the best evidence objections, it was aware of the State's position that the voice messages had been automatically deleted and that the State had attempted to subpoena information regarding the voice messages. As such, to the extent there was any error, it was harmless.

¶ 32 The defendant's final contention on appeal is that the trial court erred in allowing Officer Vacala's conclusory opinions contained in his police report to be used as substantive evidence. The defendant further argues that the police report did not meet the foundational requirements to be used to refresh Priz's or Vacala's recollection or as a past recollection recorded. The admissibility of evidence is a matter within the discretion of the trial court. *Dunmore*, 389 Ill. App. 3d at 1105.

¶ 33 In order to preserve a claim of error for review, a defendant must object to the error at trial and raise the error in a motion for a new trial before the trial court. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). If a defendant fails to fulfill one or both of these requirements, he forfeits appellate review of the claimed error. *Id.* By failing to object at trial, the defendant has forfeited review of the arguments that: (1) the information contained in the police report was conclusory opinion, (2) the police report was improperly used as substantive evidence, and (3) there was no foundation to

use the police report to refresh the witnesses' recollections or as a past recollection recorded. At trial, the defendant only objected on the basis that the questions regarding the police report were leading; the defendant did not object on the basis of hearsay, lack of foundation, or improper opinion testimony. *People v. Canaday*, 49 Ill. 2d 416, 424 (1971) (an objection to evidence based upon a specified ground waives all grounds not specified).

¶ 34 Even absent forfeiture, the defendant's contention is without merit. The defendant first contends that Officer Vacala's testimony as to the contents of his police report was improper because it included conclusory opinions about the contents of the voice messages. The defendant relies on the theory that a witness may not state his opinion concerning an out-of-court statement, but is required to recite statements, to which the witness has personal knowledge, as nearly as possible. See *People v. Linkogle*, 54 Ill. App. 3d 830, 833 (1977). Nonetheless, Officer Vacala's testimony, that the defendant warned Priz to stay away from him and Costello or there would be consequences, was not opinion testimony. The evidence shows that the officer listened to the voice messages with Priz, and that when he completed his police report, he included what was relevant to the charge of harassment by telephone. Officer Vacala did not express any opinion as to the defendant's intent in placing the phone calls. He simply described the content of the voice messages based on his own personal knowledge. This was not improper opinion testimony.

¶ 35 The defendant next argues that the State did not meet the foundational requirements to refresh Priz's recollection with a copy of the police report. Police reports are usually not admissible in evidence. *People v. Garrett*, 216 Ill. App. 3d 348, 357 (1991). A witness' memory can only be refreshed after it has been established that the witness has no memory concerning the facts in question. *People v. Shatner*, 174 Ill. 2d 133, 153 (1996). The manner and mode of refreshing a

witness' recollection lies within the discretion of the trial court. *Id.* In the present case, on redirect examination Priz testified that she could not recall the exact words the defendant used in the second and third voice messages and she could not remember what names he had called her. She was asked if a copy of the police report would refresh her recollection and she stated that it "might." She was then presented with a copy of the police report. After reviewing the report, Priz testified that her memory had been refreshed and that she remembered parts of the second and third voice messages. She then testified from her own recollection. As such, the State laid an adequate foundation to refresh Priz's recollection.

¶ 36 The defendant also argues that the trial court erred in allowing the State to ask Officer Vacala leading questions on redirect examination concerning the contents of his police report. The defendant asserts that, by asking leading questions, the State was essentially able to enter the contents of the police report into evidence. We agree. The State had not attempted to lay a foundation to use the police report to refresh Officer Vacala's memory or to enter the police report as a past recollection recorded. See *Garrett*, 216 Ill. App. 3d at 357 (noting that if a proper foundation is laid, police reports can be used to refresh recollection, as evidence of past recollection recorded, or for impeachment of the witness).

¶ 37 The State argues that the police report was properly used to rehabilitate Officer Vacala after his impeachment. Specifically, on cross-examination, the defendant had impeached Officer Vacala by having him acknowledge that although the defendant had only introduced himself by first name in the first voice message, his police report indicated that the defendant identified himself by first name in all three messages. However, the State's questioning on redirect, as to what was written in his police report about the content of the voice messages, did not rehabilitate Officer Vacala.

Officer Vacala's testimony on redirect examination did not serve to explain the inconsistency brought out on cross-examination. Additionally, because Officer Vacala had not previously testified about the content of the voice messages, his testimony on re-direct did not show that there were more consistencies than inconsistencies between his testimony and his police report.

¶ 38 Nonetheless, the leading questions on redirect examination did not prejudice the defendant. An error may be harmless if it pertained to evidence that was merely cumulative or corroborative of other evidence. *People v. Fletcher*, 328 Ill. App. 3d 1062, 1071-72 (2002). Here, in response to the leading questions on redirect examination, Officer Vacala testified that his report included the following: (1) the defendant warning Priz to stay away from him and Costello or there would be consequences; and (2) the defendant called Priz a "fat bitch" on the third message. This evidence was merely cumulative. Priz testified that the defendant stated in the first voice message, in a threatening manner, that she should not come near him and Costello and that she should move out of town. She also testified that the defendant called her a "fat bitch" in the second and third voice messages. Accordingly, the evidence admitted on redirect examination was cumulative and did not prejudice the defendant. *Id.*

¶ 39 CONCLUSION

¶ 40 For the reasons stated, the decision of the circuit court of Du Page County is affirmed.

¶ 41 Affirmed.