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2018 IL App (5th) 150402-U

NO. 5-15-0402

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 14-CF-253
	)	
MICHAEL TODD NORRINGTON,	)	Honorable
	)	Ralph R. Bloodworth III,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Sufficient evidence was presented to prove the defendant guilty beyond a reasonable doubt for the unauthorized video recording of a minor; the challenged statute is constitutionally upheld where the least restrictive means of achieving the compelling government interest in question was met; without evidence of intentional or inadvertent destruction of requested discovery evidence, the imposition of sanctions and the granting of a mistrial were not warranted; and failure to argue plain error results in forfeiture on review.

¶ 2 Following a jury trial, the defendant, Michael Todd Norrington, was found guilty of unauthorized video recording (720 ILCS 5/26-4(a-10) (West 2012)), and the circuit court sentenced him to 150 days in jail and 30 months of probation and ordered him to pay $1250 in fines, costs, and surcharges. On appeal, the defendant challenges the

sufficiency of the evidence and argues that section 26-4(a-10) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/26-4(a-10) (West 2012)) is unconstitutional. The defendant also asserts that the circuit court erred in denying his motion to dismiss and motion to suppress statements. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 On June 11, 2014, the 14-year-old victim, J.N., and her mother, Julie Nance (Julie), patronized a Goodwill store in Carbondale, Illinois. While in Goodwill, they encountered the defendant two or three times in different aisles. After spending roughly 10 to 15 minutes in the store, J.N. and Julie walked to the checkout line. At that time, the defendant also walked to the checkout line. Shortly thereafter, the defendant used his iPhone to capture photographs of J.N. from behind. Immediately after, Julie confronted the defendant and asked him if he had taken photos of her "daughter's ass." After the defendant denied Julie's accusation, he exited the store. The defendant returned to his home in Carterville, Illinois, where he downloaded, reviewed, and deleted the photographs from his MacBook and iPhone.

¶ 5 Following the incident, Mark Murray, an officer with the Carbondale Police Department, met with J.N. and Julie and reviewed the in-store video surveillance footage at the Goodwill store. Later that evening, Officer Jarin Dunnigan and Officer Murray visited the defendant's home. Although the officers did not possess a search warrant, the defendant freely handed over his iPhone. At Officer Murray's request, the defendant drove himself to the police station for questioning. Officer Dunnigan remained at the defendant's home to question Dannyel Norrington (Dannyel), the defendant's wife.

¶ 6 After the defendant arrived at the police station, Officers Murray and Dunnigan interviewed him in room 109. The defendant acknowledged that Julie had confronted him in the checkout line at Goodwill, but he denied taking photographs of J.N. on his iPhone. At approximately 12:15 a.m. on June 12, 2014, Officer Murray placed the defendant under arrest for disorderly conduct.

¶ 7 On June 12, 2014, Michelle Erutti (Erutti), a loss prevention district manager for Goodwill, downloaded video surveillance footage from 5 of the 16 in-store cameras and created time-stamped photographic images for the police. The downloaded surveillance video included footage of two cash registers, the store entrance, the linens department, and the housewares section. That same day, counsel for the defendant entered his appearance and filed a motion for discovery. Although the defendant was initially arrested for disorderly conduct, the State later charged the defendant with unauthorized video recording.

¶ 8 On June 16, 2014, the defendant filed a motion to preserve and produce, requesting the circuit court to order "the Carbondale Police Department to preserve certain audio-video recordings and produce the same to the defendant." The defendant's motion indicated that the arresting officer had informed him that he was "interviewed in the booking/processing area of the Carbondale Police Department."

¶ 9 On June 17, 2014, the circuit court ordered "the Carbondale Police Department to preserve the audio-visual recordings of any statements made by the Defendant to officers of the Carbondale Police Department and further orders the Carbondale Police

Department and the Jackson County State's Attorney's Office to produce said recordings to the Defendant and his attorney pursuant to Supreme Court Rule 412."

¶ 10 Following the defendant's release on bond, the Carbondale Police Department executed a search warrant of his residence for the seizure of "any component which would store digital images." While there, officers seized a variety of electronic items, but no inappropriate content was discovered. On July 3, 2014, the defendant waived his right to a preliminary hearing.

¶ 11 On September 8, 2014, the State filed a motion for supplemental discovery stating that "[t]he People inform the defendant that he is in possession of all video available from the Carbondale Police Department ***." The motion also indicated that "Det. Baril informed the People that room 109 is a public interview room and there is no audio or video recording in those rooms. Additionally, Det. Baril indicated there is not video in room 147."

¶ 12 On September 18, 2014, the defendant filed a motion to suppress statements asserting that police had advised him that his alleged statements would be recorded. The defendant argued that police officers lied to him regarding the recording of any interrogation, which "further supports his claim that any statement he may have made was the product of coercion, trickery and deception."

¶ 13 On December 22, 2014, the circuit court held a hearing on the defendant's motion to suppress statements. The defendant testified to the following. On June 11, 2014, at 11 p.m., Officers Murray and Dunnigan arrived at his home. Without a search warrant, the officers confiscated the defendant's iPhone. After Officer Murray asked the defendant

to follow him to the Carbondale Police Department, the defendant willingly drove himself there. When the defendant arrived, he entered room 109, a conference room area, with Officers Murray and Dunnigan. He was not Mirandized at that time. After the defendant signed a consent to search, the officers entered the defendant's password and searched his iPhone. The officers did not find any illegal or inappropriate photographs on his iPhone. Shortly after the defendant denied all allegations in his first written statement, Officer Murray handcuffed the defendant and placed him under arrest for disorderly conduct at approximately 12:13 a.m. on June 12, 2014. Officer Murray stated that he had "seen what I need to see on the video, and I would never stand that close to someone."

¶ 14 On June 12, 2014, at approximately 12:35 a.m., the defendant was escorted to room 147. A sign outside room 147 stated "Video in Progress," which led the defendant to believe, in conjunction with the officers' statements, that his statements were being recorded. Once he entered room 147, the defendant was handcuffed to a table and advised of his *Miranda* rights. When the defendant asked the officers if he should have an attorney, the officers responded that "this could go a lot faster if we didn't get an attorney involved." The defendant believed that he would go home that evening if he cooperated. In a second statement written at approximately 2:55 a.m., the defendant admitted that he had used his iPhone to take photographs under J.N.'s shorts while he was at Goodwill.

¶ 15 Dannyel, the defendant's wife, testified to the following. The defendant called her from the police station at approximately 2:30 a.m. on June 12, 2014, and requested that she bring $150 to post bail. When Dannyel arrived at 3 a.m., she waited roughly 20 to 30

minutes until Officer Dunnigan informed her that the defendant could not post bail and would spend the night in jail.

¶ 16 At the close of the evidence, the State moved for a directed finding. The circuit court granted the State's motion for a directed finding, denying the defendant's motion to suppress statements.

¶ 17 On January 26, 2015, the defendant filed a motion to declare section 26-4(a-10) of the Criminal Code unconstitutional, arguing that it burdened more speech than necessary to serve a legitimate state interest. On April 2, 2015, the circuit court held a hearing on the defendant's motion. Following lengthy argument, the court upheld the constitutionality of section 26-4(a-10) finding that the intent of the statute was to prohibit acts where someone had intended to remain private but their privacy was intentionally violated by someone else. The court determined that the statute incorporated a specific intent element by the photographer because it was a statute that did not cover every photographer who took a photograph anywhere.

¶ 18 On July 14, 2015, the defendant's four-day trial commenced. During trial, the State and defense counsel referenced specific times indicated on the time-stamped photographic images, provided by Erutti on June 12, 2014.

¶ 19 Erutti testified to the following details. Erutti confirmed that the video surveillance footage did not show the defendant touch, approach, or engage in conversation with J.N. at any point. According to Erutti, however, the video footage showed "the white male being real close to the young female, and he held his camera out extremely close to her and followed them throughout the store." When asked to explain certain admitted

photographs, Erutti testified that the photographs depicted "a white male with a cell phone being real close to the young female's bottom." Erutti admitted that she could not decipher from the video surveillance footage or time-stamped photographs whether the defendant had taken a photo of J.N. with his iPhone.

¶ 20 Julie testified to the following details. On June 11, 2014, Julie and J.N. patronized a Goodwill store in Carbondale, Illinois. J.N. was dressed in "black Soffe shorts" because she had gymnastics practice that evening. Julie and J.N. entered Goodwill at approximately 5:50 p.m. and walked immediately to the housewares section. At 5:54:19 p.m., the defendant entered Goodwill and walked directly to housewares where Julie and J.N. encountered the defendant two or three times. Julie stated that the "proximity of the [defendant] is what caught our attention originally" because he kept following them. As such, Julie and J.N. proceeded to the checkout line.

¶ 21 As J.N. and Julie entered the checkout line, the defendant followed and stood very close to J.N. "A[s] a matter of fact, he made us so uncomfortable I kept moving [J.N.] from left to right, left to right, and he kept following her everywhere I moved her." Julie confirmed that the defendant followed J.N. from one side of her to the next. At 6:10:15 p.m., J.N. moved back to Julie's right side "after [the defendant] squatted down by her butt." At that point, Julie indicated that the defendant "just came up to the right side and stuck the phone under the shorts, and I watched him squeeze on his phone with *** his finger and retract his hand with his phone out from under my daughter's shorts." Immediately following this incident, Julie confronted the defendant and asked him if he

took a picture of her "daughter's ass." The defendant denied Julie's accusation and refused to show her his iPhone, although Julie requested several times.

¶ 22 On cross-examination, Julie indicated that she first encountered the defendant at 5:54:30 p.m. when he walked to the toy aisle, passing her and J.N. in another aisle. At 5:56:22 p.m., J.N. and Julie also entered the toy aisle. At 5:56:54 p.m., the defendant walked past Julie and J.N. in another aisle. Between 6:03:07 p.m. and 6:06:20 p.m., there were multiple patrons in the same aisles as the defendant, J.N., and Julie. At 6:06:26 p.m., the defendant was standing behind Julie and J.N. while looking at merchandise. At 6:06:55 p.m., the defendant walked down an aisle while J.N. and Julie proceeded to the checkout line. At 6:07:05 p.m., the defendant walked to the checkout line.

¶ 23 Julie admitted that she did not confront the defendant at any point between 5:54:30 p.m. and 6:07:08 p.m., although she indicated that he was following her and J.N. throughout the store. At 6:10:46 p.m., the defendant "pulled the phone out from under [J.N.'s] butt." Julie stated that she "saw [the defendant's] hand go horizontally under [J.N.'s] shorts and I saw his hand squeeze, his thumb and his fingers squeeze the top part of the phone, and then [he] retracted his phone back to his body." There were no audible sounds when the defendant took the photographs with his iPhone. On redirect, Julie stated that after she asked the defendant to view his iPhone, he told her that his "phone camera was broken and that it didn't work ***." The defendant exited the store after Julie confronted him.

¶ 24 J.N. testified to the following details. At the time of the incident, J.N. was a 14-year-old high school freshman. While in housewares, J.N. noticed that the defendant

"was coming into our bubble, our personal space and following us. We saw him a lot and he was just very, very close to us" for about "13-15 minutes." In fact, "[h]e was very close, like almost touching shoulders at all times." While at the cash register, her mother moved her from left to right to avoid the defendant. Despite her mother's attempts, the defendant followed J.N. from side to side. On cross-examination, J.N. acknowledged that she never asked the defendant to step away from her and that he never touched her with his hands. Rather, she stated that "we bumped into each other." J.N. was unaware that the defendant took a photo of her until after her mother confronted him.

¶ 25 Officer Murray testified to the following details. Officer Murray was dispatched to Goodwill to investigate a report for a disorderly complaint. After Officer Murray met with Julie and J.N., he viewed the in-store video surveillance footage. Later that evening, he and Officer Dunnigan visited the defendant's home, confiscated his phone, and requested his presence at the police station. Once the defendant arrived at the police station, the officers interrogated the defendant in room 109, a room without audio or video recording capabilities. Officer Murray read the defendant's first written statement before the circuit court:

> " 'As I was ready to purchase selected items from Goodwill store, I was waiting in line to make purchase when—' it looks like 'fill' is scratched, then it says '—finally ready to purchase. Woman and her daughter in front of me accused me of taking photos of her. I was shocked that she was accusing me and she was demanding I show her my phone. Not having done what she accused me of, I refused to give this woman my phone. I set down item and left the store.' "

Even though Officer Murray did not find photographs of J.N. on the defendant's iPhone, he arrested the defendant for disorderly conduct due to inconsistencies between the defendant's first written statement and the in-store video surveillance footage.

¶ 26 Following the defendant's arrest, a second interview occurred in room 147, a room with continuous video recording but optional audio recording capabilities. Officer Murray stated the following:

> "In Room 147 in the booking area the server has video capability of the interview rooms and the main booking area. Audio may be turned on in the interview rooms. It's running constantly in the center main area. You have to turn the audio on. The video is running constantly on the server for all of those areas."

Officer Murray stated that, although audio recording was available, the audio switch was not turned on for the defendant's interrogation. Officer Murray also indicated that he never received a request from the State to save the defendant's entire video and audio recording. Without a request, all recordings lapsed and the information was automatically deleted from the server 30 days after it was recorded.

¶ 27 Officer Murray testified that the defendant "[i]nitially *** said that he wanted to take photos of this girl *** and later on he admitted that he had taken eight photos of her near the checkout counter" with his iPhone. According to Officer Murray, the defendant told him that he took the photographs of J.N. because "[h]e was attracted to her short shorts ***." Officer Murray also stated that the defendant informed him that when he returned home from Goodwill, he downloaded and viewed the photographs on his MacBook. The defendant then deleted all photographs from his MacBook and iPhone because they "weren't discernable."

¶ 28 Officer Murray further testified that the defendant was asked whether he wanted to record his confession or provide a written statement. The defendant chose the latter. Officer Murray read the defendant's second written statement before the circuit court:

> " 'Officers came to my house around 10:15 p.m. to ask if I could come to the Carbondale P.D. to—' 'clarify' is scratched out and then its says '—clear up what might be a misunderstanding in regards to a complaint that I had taken photos of a person at the Carbondale Goodwill store without their knowledge. Upon being confronted by this person at the Goodwill store, she asked if I had taken photos of her daughter's behind. I at that time stated no and left the store. I in fact had taken photos of her rear, and upon viewing them at home, deleted them.
>
> There are not any excuses that can justify my actions. Having been under much stress and lack of intimacy may be of some reason. I do not feel that I—' 'was' is scratched out '—am being a predator or have to feel that I am unfit to continue working. I truly regret my actions and will seek help in finding the—' and then underneath that is scratched out 'for my addiction' '—underlying issues that have led to me taking photos of tightly dressed women. In this case the woman was a girl of which I did not think clearly, nor did I have good judgment in part of the situation.' "

¶ 29 On cross-examination, Officer Murray admitted that he had watched only 5 to 10 minutes of the in-store video surveillance footage before he arrested the defendant. At approximately 11 p.m. on June 11, 2014, Officer Murray went to the defendant's home and requested his iPhone. The defendant complied with Officer Murray's request and then drove himself to the police station. Officer Murray acknowledged that he first questioned the defendant in room 109, a room without audio or video recording capabilities. Officer Murray admitted that the defendant had been told that he could go home if he posted $150 for bail.

¶ 30 Detective Aaron Baril, with the Carbondale Police Department, testified to the following details. Detective Baril admitted that he received an order from the circuit

court, dated June 17, 2014, to preserve and produce evidence. Detective Baril, however, did not prepare a recording from room 147, which offered continuous video but optional audio recording capabilities. On June 16, 2014, after Detective Baril obtained a search warrant, he searched the defendant's iPhone and MacBook with the assistance of the Greenville Police Department Cybercrimes Task Force. It was discovered that the defendant's iPhone had been "remotely wiped" to factory settings. Detective Baril indicated that the task force did not locate photographic images of J.N. at any point during the defendant's investigation. Immediately following the cross-examination of Detective Baril, the circuit court took judicial notice of the circuit court's June 17, 2014, order to preserve and produce evidence.

¶ 31 The defendant testified to the following details. The defendant asserted that he did not take photographs under J.N.'s shorts, between her legs, of her underwear or bare bottom. He further asserted that it was not his intention to photograph J.N.'s underwear, bare buttocks, or any part of J.N.'s body that could not be seen with the naked eye. The defendant did state, however, that he viewed the photographs he took of J.N. on his iPhone before he deleted them. According to the defendant, Officers Murray and Dunnigan threatened to charge him with obstruction of justice unless he cooperated. Thus, he wrote the second statement so he could post bail and go home. Moreover, he did not believe he would receive his iPhone after it was confiscated and examined, so he cancelled his service plan and deleted his iCloud account.

¶ 32 Following the close of evidence, the circuit court provided the jury with the following jury instructions to establish the offense of unauthorized video recording (720 ILCS 5/26-4(a-10) (West 2012)):

> "First Proposition: That the defendant knowingly made a video record of [J.N.]; and
>
> Second Proposition: That said video record was made under or through the clothing worn by [J.N.]; and
>
> Third Proposition: That the video record was made for the purpose of viewing the body or the undergarments worn by [J.N.]; and
>
> Fourth Proposition: That the video record was made without the consent of [J.N.]."

The court further stated that "if you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty." After deliberation, the jury found the defendant guilty of unauthorized video recording.

¶ 33 On September 15, 2015, the circuit court sentenced the defendant to 150 days in jail and 30 months of probation and ordered him to pay $1250 in fines, costs, and surcharges. The defendant filed a motion to reconsider, which the circuit court denied on September 23, 2015. The defendant filed a timely notice of appeal.

¶ 34 II. Analysis

¶ 35 A. Unauthorized Video Recording

¶ 36 The defendant argues on appeal that he was not proven guilty beyond a reasonable doubt of the offense of unauthorized video recording because the State failed to present evidence of a video record or photograph made under or through J.N.'s clothing. Additionally, the defendant asserts that the State failed to prove that the defendant had

the purpose of viewing J.N.'s body or undergarments. In response, the State argues that the in-store video surveillance footage depicted the defendant taking photos with his iPhone near J.N.'s buttocks. The State also argues that the defendant admitted that he downloaded, viewed, and then deleted the photographs of J.N. from his MacBook after he returned home from Goodwill.

¶ 37 Proof of an offense in Illinois "requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). In many cases, like this one, a defendant's confession may be integral to proving the *corpus delicti. Id.* It is well established, however, that proof of a *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement. *Id.* (citing *People v. Furby*, 138 Ill. 2d 434, 446 (1990)). Where a defendant's confession is part of the proof of the *corpus delicti*, the prosecution must also adduce corroborating evidence independent of the defendant's own statement. *Id.* (citing *People v. Cloutier*, 156 Ill. 2d 483, 503 (1993)). If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained. *Id.* (citing *People v. Willingham*, 89 Ill. 2d 352, 358-59 (1982)).

¶ 38 Based upon a review of the record, we find that the State presented sufficient evidence to prove the defendant guilty beyond a reasonable doubt. Although the defendant argues that the State's only evidence was his confession, which he contends is insufficient to convict, our supreme court has held that the *corpus delicti* can be proven circumstantially. See *Campbell v. People*, 159 Ill. 9, 20 (1895); see also *People v.*

Goodwin, 263 Ill. 99, 102 (1914). Here, not only did substantial circumstantial evidence exist, specifically, the in-store video surveillance footage that showed the defendant position his iPhone near J.N.'s buttocks, but the State also presented Julie's direct testimony that the defendant continuously followed J.N. from side to side before he positioned his iPhone perpendicularly to the floor near her buttocks. As the State pointed out, the defendant's ability to take a perpendicular photograph under J.N.'s shorts is consistent with the forward-facing photographic capabilities on an iPhone.

¶ 39 Moreover, the defendant asserts that the State's evidence failed to show that he acted with the purpose of viewing J.N.'s undergarments or body. We, once again, find his argument unpersuasive in light of the defendant's confession, the corroborating in-store video surveillance footage, and Julie's direct testimony. Thus, sufficient evidence was presented to prove, even absent the production of a photograph of J.N.'s body or undergarments taken by the defendant, that the defendant was guilty beyond a reasonable doubt.

¶ 40 B. 720 ILCS 5/26-4(a-10) Constitutionality

¶ 41 Next, the defendant contends that section 26-4(a-10) of the Criminal Code, the unauthorized video recording and live video transmission statute, violates the first amendment, as it is vague and overbroad. The defendant asserts that this provision violates the overbreadth doctrine because it uses the word "body," which consists of many parts, and "undergarments," which "applies both to leggings worn under a dress or skirt and to a 'g-string' thong." As such, the defendant asserts that because these words are broadly written, items of innocence, such as leggings and t-shirts, are included in the

definition. Thus, the defendant argues, relying on *People v. Clark*, 2014 IL 115776, that section 26-4(a-10) prohibits "all non-consensual photography, whether in a public setting or otherwise, under or through a person's clothing for the purpose of viewing the other person's body or undergarments."

¶ 42 Under a first amendment challenge, a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (Internal quotation marks omitted.) *United States v. Stevens*, 559 U.S. 460, 473 (2010). A statute "may be invalidated on overbreadth grounds only if the overbreadth is substantial" (*Clark*, 2014 IL 115776, ¶ 11), in that " 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.' " *Board of Airport Commissioners v. Jews For Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

¶ 43 The first step in an overbreadth analysis is to interpret the challenged statute. As such, the unauthorized video recording and live video transmission statute provides as follows:

> "(a-10) It is unlawful for any person to knowingly make a video record or transmit live video of another person under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person without that person's consent." 720 ILCS 5/26-4(a-10) (West 2012).

Statutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of proving that the statute is unconstitutional. *People v. Hollins*, 2012 IL 112754, ¶ 13 (citing *People v. Donoho*, 204 Ill. 2d 159, 177 (2003)). The primary objective in construing a statute is to ascertain and give effect to the legislature's intent in enacting the statute. *People v. Gutman*, 2011 IL 110338, ¶ 12. In construing a statute, a court must give effect to every word, clause, and sentence, and it must not read a statute so as to render any part superfluous. *Id.* The determination of whether a statute is constitutional is a question of law to be reviewed *de novo. Id.*

¶ 44 In addressing the constitutionality of section 26-4(a-10) of the Criminal Code, the defendant also argues that this statutory provision focuses on "another person," thus, it is content-based and strict scrutiny applies. The State, however, argues that intermediate scrutiny applies because the regulation of speech is content-neutral. Under the content-neutrality principle, "the government may not proscribe any expression because of its content, and an otherwise valid regulation violates the first amendment if it differentiates between types of expression based on content." (Internal quotation marks omitted.) *People v. Sanders*, 182 Ill. 2d 524, 529 (1998). Content-based regulations are presumptively invalid and will be upheld under the first amendment only if necessary to serve a compelling governmental interest and are narrowly tailored to achieve that end. *People v. Jones*, 188 Ill. 2d 352, 357 (1999). When a statute is content-based, it may be upheld only if it is the least restrictive means of achieving the compelling government interest in question. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307 (2008).

¶ 45 Here, we note that the statutory provision at issue does not penalize all nonconsensual acts of taking photographs and in making live video recordings. A statute that did so would be content-neutral. Rather, the provision at issue penalizes only a subset of nonconsensual photography and video activity, specifically, that which is accomplished with the intent to view the body or undergarments under or through the clothing of another. As such, this section of the unauthorized video recording and live video transmission statute is content based.

¶ 46 In particular, section 26-4(a-10) of the Criminal Code is limited specifically to a video record or live video of another person under or through their clothing with the purpose of viewing the body of or the undergarments of that person. As such, there is no specificity as to where the video record or live video must be taken, either publicly or privately. A thorough review of section 26-4, in its entirety, supports this contention where other provisions specify certain places, such as a restroom, tanning bed, tanning salon, locker room, changing room, hotel bedroom, or a person's residence, that a person knowingly cannot make a video record or transmit live video without the subject's consent. See 720 ILCS 5/26-4(a), (a-5), (a-6), (a-15), (a-20) (West 2012). Rather, the substance or content of the message being communicated, here, in section 26-4(a-10) is a focal point without a specific location identified.

¶ 47 The first step under strict scrutiny is to determine the compelling government interest behind the law. The State asserts an interest in protecting the privacy of those photographed or recorded, arguing that the government's justification in enacting this provision was "to protect individuals' privacy interest in their clothed bodies." We

certainly agree with the State that substantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place or with respect to an area of the person that is not exposed to the general public. In fact, a reading of section 26-4 reveals that the legislature enacted it to prevent the taking and dissemination of photographs or live videos of another person without their knowledge or permission. See 720 ILCS 5/26-4 *et seq.* (West 2012).

¶ 48 The defendant, however, attempts to argue that section 26-4(a-10) of the Criminal Code applies broadly to *any* nonconsensual act of photography or video recording, thus, it "criminalizes a tremendous amount of innocent conduct." In support, the defendant identifies several situations that would be subject to criminalization under the statute, such as: "[a] paparazzi taking photographs of a starlet wearing a risqué dress could potentially face a criminal charge *** if he captures a shot of the starlet's underwear," or a "newspaper photographer covering a sporting event faces possible criminal charges *** if he takes a picture of a cheerleader in the middle of a high kick." Moreover, the defendant argues that section 26-4(a-10) does not contain language addressing privacy concerns nor does it exempt potential subjects who consciously and voluntarily wear risqué clothing. We disagree.

¶ 49 A plain reading of the statute reveals that the legislature narrowed the scope of section 26-4(a-10) of the Criminal Code by specifically prohibiting the deliberate taking of a photograph or live record under or through a person's clothing. Thus, the legislative enactment does not prohibit the photography of people, their entire bodies, or a specific body part, except in the circumstance that the video record is intended to pierce the

subject's privacy where the photographer, unauthorized to do so, takes a nonconsensual photograph or live video under or through the clothing of their subject.

¶ 50 Additionally, in response to the defendant's contention that several innocent situations could be subject to criminalization, we find the State's argument compelling where it contends that a violation of the unauthorized video recording statute can only be reasonably committed when an individual knowingly takes a photograph "under or through the clothing" of what was intended to be kept hidden. Moreover, the photographer must possess the requisite purpose of viewing the body of or the undergarments worn by another person. As such, a necessary *mens rea* attaches, which renders meritless the defendant's argument that certain innocent behaviors (*e.g.*, the risqué starlet and cheerleaders) would be subject to criminalization under this statute. Therefore, where the legislature narrowly drew the provision to protect a substantial privacy interest—nonconsensual photography under or through one's clothing by another with the purpose of viewing the body of or undergarments worn by that other person without that person's consent—the provision at issue is the least restrictive means of achieving the compelling government interest.

¶ 51 C. Discovery Violations

¶ 52 The defendant also argues that the circuit court erred when it denied his motion to dismiss and failed to grant him a mistrial where the State violated Illinois Supreme Court rules governing discovery. The defendant contends that he requested all audio and video recordings of his statements made to police on June 11, 2014, and June 12, 2014. In response, the State argues that, although it was a mistake not to preserve the video

recording, there exists no evidence that the loss of the video was attributable to a willful or intentional act by police. Moreover, the State asserts that "it is highly doubtful that even if the lost evidence had not been lost, it would have produced any material evidence or even been admissible at all for any purpose." We agree.

¶ 53 We must first determine whether the State's failure to produce and preserve the audio-video recordings constitutes a discovery violation. The goals of discovery are to eliminate surprise and unfairness and to afford an opportunity to investigate. *People v. Rubino*, 305 Ill. App. 3d 85, 87 (1999). Discovery sanctions are not designed to punish and should be used to further these goals and to compel compliance. *Id.* When the State fails to comply with a discovery order, the "court may order a variety of sanctions, including discovery of the previously undisclosed statement, a continuance, the exclusion of evidence *in toto,* or some other remedy it sees fit." *People v. Harper*, 392 Ill. App. 3d 809, 822 (2009). The exclusion of evidence is generally not a preferred sanction because it does not further the goal of truth seeking, a remedy in only the most extreme situations. *Id.* Sanctions are not appropriate unless there is first a determination that the requested information existed in the first place. See *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 12. We review the circuit court's decision to deny a discovery sanction under an abuse of discretion standard. *Id.* ¶ 7. The court abuses its discretion only in cases where the court's decision is arbitrary, fanciful, or where no reasonable person would take the view adopted by the court. *Id.*

¶ 54 On June 17, 2014, following the defendant's request, the circuit court ordered the Carbondale Police Department "to preserve the audio-visual recordings of any statements

made by the Defendant to officers of the Carbondale Police Department and further orders the Carbondale Police Department and the Jackson County State's Attorney's Office to produce said recordings to the Defendant and his attorney pursuant to Supreme Court Rule 412." We note that audio and video recording capabilities were available in room 147 on June 12, 2014. Officer Murray testified that video was automatically recorded, whereas the audio recording had to be manually turned on. Officer Murray testified that this switch was not turned on during the defendant's interrogation in room 147. Officer Murray testified that, although the defendant was interrogated from 12:30 a.m. to 3:52 a.m., the only available video recording was of the defendant's written confession from 2:29 a.m. to 2:59 a.m. Also, both Officer Murray and Detective Baril testified that video recordings from the police station server were not downloaded within 30 days of being recorded, even though the circuit court had ordered preservation and production of all audio-visual recordings of any and all statements made by the defendant.

¶ 55 In support of his argument, the defendant argues that it is possible that the video portion of his interrogation, from 12:30 a.m. to 3:52 a.m., excluding the preserved portion from 2:29 a.m. to 2:59 a.m., could have assisted in his defense. However, "[i]t is equally possible the [unpreserved video] had 'the potential to banish any hope of exoneration.' " *People v. Olsen*, 2015 IL App (2d) 140267, ¶ 20. We cannot resolve this question by pondering possibilities. Instead, we must consider only that which is certain before this court: only roughly 30 minutes of the defendant's interrogation was preserved. Here, as in *Strobel*, "[t]here is nothing in this record to support any inference or suggestion that

the police or the prosecution intentionally or inadvertently destroyed any preexisting discoverable evidence." *Strobel*, 2014 IL App (1st) 130300, ¶ 11. Without evidence to the contrary, we cannot conclude that the court abused its discretion when it denied the defendant's motion to dismiss and did not grant him a mistrial.

¶ 56 D. Motion to Suppress

¶ 57 Finally, the defendant argues, and the State agrees, that the circuit court erred when the court found that the defendant had failed to make a *prima facie* case that his statements were involuntary at the hearing on the motion to suppress statements. The State agrees that it had the initial burden of showing that the defendant's statements were voluntary, at which point, the burden would shift to the defendant.

¶ 58 Where a defendant challenges the admissibility of an inculpatory statement through a motion to suppress, the State bears the burden of proving, by a preponderance of the evidence, that the statement was voluntary. *People v. Richardson*, 234 Ill. 2d 233, 254 (2009). Once the State makes its *prima facie* case that the statement was voluntary, the burden shifts to the defense to produce some evidence that the confession was involuntary, and the burden reverts to the State only upon such production by the defense. *Id.* Here, the defendant presented his evidence first at the suppression hearing. According to our supreme court, the circuit court may, in its discretion, reverse the order of proof so that a defendant presents his or her evidence first. *People v. Reid*, 136 Ill. 2d 27, 51 (1990). Thus, contrary to the defendant's argument, the court did not err simply because the defendant presented his evidence first.

¶ 59 We, however, agree that the circuit court's denial of the defendant's motion to suppress, without requiring the State to produce any evidence, demonstrated that the court misallocated the burden of proof, and consequently, committed error. However, it is well settled that to preserve a claim of error for review, counsel must object to the error at trial and raise the error in a written posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). The defendant failed to object at the suppression hearing.

¶ 60 Moreover, where unpreserved error exists, as is the case here, the failure to make a plain-error argument or invoke the plain-error rule results in the forfeiture of defendant's claim on review. See *People v. White*, 2016 IL App (2d) 140479, ¶ 42. Although the parties briefly state that harmless-error applies, harmless error does not pertain to the facts of this case where the defendant challenges unpreserved error. Although a plain-error analysis normally requires the same kind of inquiry as does harmless-error review, there is an "important difference" between the two. *United States v. Olano*, 507 U.S. 725, 734 (1993). Under harmless error, which applies when a defendant has made a timely objection, it is the State that "bears the burden of persuasion with respect to prejudice." *Id.* The situation, however, is different under plain error, which applies when a defendant has failed to make a timely objection. *Id.* at 734-35. Thus, the defendant, not the State, bears the burden of persuasion with respect to prejudice. *Id.* As such, where the defendant, here, failed to assert a plain-error argument, forfeiture applies on review.

¶ 61 III. Conclusion

¶ 62 For the foregoing reasons, we hereby affirm the judgment of the circuit court of Jackson County.

¶ 63 Affirmed.