2021 IL App (4th) 180593-U

NO. 4-18-0593

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 2, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TOMMY L. JOHNSON,	)	No. 18CF338
Defendant-Appellant.	)	
	)	Honorable
	)	Jason M. Bohm,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, granting appellate counsel's motion to withdraw in the absence of meritorious issues to raise on appeal.

¶ 2 In May 2018, a jury found defendant, Tommy L. Johnson, guilty of violation of an order of protection (Champaign County case No. 18-OP-123) with a prior violation of an order of protection (Champaign County case No. 08-CF-2211), a Class 4 felony (720 ILCS 5/12-3.4(a), (d) (West 2016)), where defendant called Jennifer M. on March 16, 2018, in violation of the order of protection. In June 2018, the trial court sentenced defendant to five years' imprisonment, followed by four years of mandatory supervised release.

¶ 3 On appeal, counsel for defendant filed a motion to withdraw as counsel, asserting this case presents no viable grounds for appeal and any appeal would be "frivolous." Counsel

supported her motion with a memorandum of law identifying potential issues and explaining why the issues lack merit.

¶ 4 Counsel for defendant identifies, as potential arguments on appeal, whether (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the trial court complied with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), (3) the trial properly ruled on pretrial motions *in limine*, (4) the trial court properly ruled on the admission of evidence, and (5) the trial court abused its discretion when it sentenced defendant to a five-year extended term sentence.

¶ 5 Defendant filed, *pro se*, a response in opposition to appellate counsel's motion to withdraw, alleging that several issues merit review. The State asserts appellate counsel's motion to withdraw is proper where there exist no meritorious issues for review. After examining the record, we grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 In March 2018, the State charged defendant with violation of an order of protection (Champaign County case No. 18-OP-123) with a prior violation of an order of protection (Champaign County case No. 08-CF-2211), a Class 4 felony (720 ILCS 5/12-3.4(a), (d) (West 2016)), where defendant called Jennifer on March 16, 2018, in violation of the order of protection.

¶ 8 A. Pretrial Motions

¶ 9 On May 11, 2018, defendant filed motions *in limine* seeking to (1) exclude the use of defendant's pending case, Champaign County case No. 17-CF-1648, (2) allow impeachment of Jennifer with her prior convictions, (3) preclude the State from introducing defendant's prior convictions, (4) bar any evidence regarding the allegations in the verified petition for order of

protection, (5) exclude evidence that the minor children and their schools were protected under the emergency order of protection, (6) preclude the State from introducing any evidence that the order of protection defendant was alleged to have violated was an emergency order of protection, and (7) bar any evidence detailing why defendant was incarcerated when he allegedly committed the offense in this case. On May 14, 2018, defendant filed additional motions *in limine* seeking to exclude from use at trial (1) any recording of a 911 call made by Jennifer on March 16, 2018, and (2) any recording of certain telephone calls made from the jail.

¶ 10 On May 15, 2018, the State filed motions *in limine* seeking to (1) bar defendant from presenting testimony regarding Champaign County case No. 17-JA-76 and (2) allow evidence of defendant's prior convictions. On May 16, 2018, the State filed another motion *in limine* seeking to prevent defendant from offering evidence regarding the March 27, 2018, dismissal of the order of protection in Champaign County case No. 18-OP-123. When Jennifer failed to appear in court and seek extension of the order, the judge in that case dismissed the order of protection.

¶ 11 At a pretrial hearing on May 14, 2018, the trial court ruled on defendant's motions *in limine*. The court granted defendant's motion to exclude use of defendant's pending Champaign County case No. 17-CF-1648. The court denied defendant's motion to allow impeachment of Jennifer with her prior convictions because her convictions were more than 10 years old. The court denied in part and granted in part defendant's motion to exclude the use of his prior convictions. Ultimately, the court indicated it would allow impeachment but limit the evidence to only eliciting the fact that defendant had prior felony convictions. In response to defendant's motions *in limine* regarding the order of protection, the court ordered certain portions of the emergency order of protection redacted and accepted the State's representation

that it did not intend to offer, as evidence, the verified petition for order of protection. The court granted defendant's motion to exclude any evidence detailing why defendant was incarcerated when the offense in this case occurred. The court also granted defendant's motion to exclude the 911 call recording. Last, the court found the jail telephone call recordings, with certain portions redacted, admissible.

¶ 12 On May 15, 2018, before any witnesses were called, the trial court ruled on the State's motions *in limine*. The court granted the State's motion to exclude defendant from offering evidence regarding pending Champaign County case No. 17-JA-76. Also, the court granted the State's motion to exclude any mention of the March 27, 2018, dismissal of the order of protection in Champaign County case No. 18-OP-123. However, the court indicated defense counsel would be allowed to examine Jennifer regarding any bias or motivation she had against defendant.

¶ 13 B. Defendant's May 2018 Jury Trial

¶ 14 Below, we summarize the relevant testimony elicited during defendant's May 2018 jury trial.

¶ 15 1. *Deputy Howard Wilson*

¶ 16 Howard Wilson, a Champaign County Sheriff's deputy testified that on March 7, 2018, he served defendant with an order of protection in the Champaign County jail. Defendant received service in his cell located in A-Pod. Wilson informed defendant he was being served with an order of protection and advised defendant to read the order of protection**.** Wilson did not review the order of protection with defendant.

¶ 17 Wilson identified the document he served on defendant (People's Exhibit No. 1) and the receipt he signed after serving defendant (People's Exhibit No. 2). The trial court

admitted People's Exhibit No. 2 over defense counsel's objection. Wilson identified the other party named in the order of protection as Jennifer M. Over defense counsel's objection, the court allowed the State to publish People's Exhibit Nos. 1 and 2.

¶ 18 2. *Jennifer*

¶ 19 Jennifer testified that in March 2018, she worked as a front desk clerk at America's Best Value Inn, in Champaign, Illinois. Jennifer identified her cellular telephone number and America's Best Value Inn's front desk telephone number. Jennifer testified America's Best Value Inn front desk telephone lacked Caller Identification.

¶ 20 Jennifer testified she and defendant were in an on-and-off-again romantic relationship for three to four years, during which they had two children together. According to Jennifer, the relationship ended in 2009, but she and defendant continued to communicate because of their children. Jennifer testified she could recognize defendant's voice over the telephone.

¶ 21 On March 7, 2018, Jennifer obtained an order of protection against defendant. Jennifer testified that on March 16, 2018, while she worked the front desk at America's Best Value Inn, she answered the front desk telephone and heard an automated voice stating, "you have a call from an inmate at the Champaign County Correctional Center and it said you have a call from, and it said [defendant]." When Jennifer heard defendant's name she hung up. The State played a portion of the telephone call (People's Exhibit No. 3) for the jury.

¶ 22 Three minutes after the first call, Jennifer answered another call to the front desk. Jennifer testified, "[a]gain it was the automated machine and then it said you have a call from an inmate, and it said [defendant]." Jennifer immediately hung up the telephone. The State played

a portion of the telephone call (People's Exhibit No. 4) for the jury. Following the call, Jennifer contacted the police.

¶ 23 Although in March 2018 Jennifer knew another Champaign County jail inmate, Davy Shaw, Jennifer testified the March 16, 2018, calls came from defendant.

¶ 24 3. *Officer Kaitlin Fisher*

¶ 25 Kaitlin Fisher, a Champaign County patrol officer, testified that on March 16, 2018, she responded to a call at America's Best Value Inn for a violation of an order of protection. Upon arriving at America's Best Value Inn, Officer Fisher met with Jennifer who told her about the telephone calls. Jennifer also provided Officer Fisher a copy of the order of protection.

¶ 26 Once Officer Fisher spoke with Jennifer, verified the order of protection was active, and confirmed defendant had been served with the order, she went to the Champaign County jail to verify the telephone calls. Once at the jail, Officer Fisher checked defendant's call log and identified telephone calls made to Jennifer's cellular telephone number and America's Best Value Inn. The telephone calls took place on March 13, 2018, and March 16, 2018. On March 13, 2018, defendant made a telephone call to Jennifer's cellular telephone. On March 16, 2018, defendant placed a call to Jennifer's cellular telephone and two calls to America's Best Value Inn.

¶ 27 4. *Sergeant Joshua Jones*

¶ 28 Joshua Jones, a sergeant with the corrections division of the Champaign County Sheriff's Office, testified that as part of his job, he listens to inmates' telephone calls. Inmates' telephone calls are recorded and stored in a system by a company called IC Solutions. A person from IC Solutions trained Sergeant Jones on the IC Solutions telephone system. Sergeant Jones

testified he received complaints about the system malfunctioning and inmates using other inmates' identification numbers to make telephone calls. However, to Sergeant Jones's knowledge, the system worked properly on March 16, 2018.

¶ 29 Sergeant Jones testified that on March 16, 2018, he received a telephone call from Officer Fisher inquiring about telephone calls made by an inmate. Sergeant Jones identified that inmate as defendant. Sergeant Jones retrieved defendant's telephone log in the system which logs every call an inmate makes using his name and inmate number. Over defense counsel's objection, the court allowed the State to admit defendant's telephone call log (People's Exhibit No. 5) as a business record.

¶ 30 Based on defendant's telephone call log, Sergeant Jones identified two telephone calls to Jennifer's cellular telephone, one on March 13, 2018, and another on March 16, 2018. The telephone call log showed that both calls ended in a "no call" which Sergeant Jones explained "is when the person on the other end refuses the call or blocks the call." After Sergeant Jones determined defendant made those calls, he went and spoke with defendant about not calling that number.

¶ 31 After he spoke with defendant, Sergeant Jones noticed defendant made another telephone call. Sergeant Jones reviewed the telephone call for substance. After Sergeant Jones listened to the telephone call, he contacted Officer Fisher to inform her that "[defendant] in the phone call was saying that he had attempted to contact Jennifer at her work and that they were sneaking calls back and forth." The court allowed the State to admit the telephone call recording (People's Exhibit No. 6) over defense counsel's objection based on foundation. Over defense counsel's objection, the court allowed the State to play the call (People's Exhibit No. 6) for the jury.

¶ 32 5. *Lieutenant Robert Cravens*

¶ 33 Lieutenant Robert Cravens, of the Champaign County Sheriff's Office, testified that in March 2018, he controlled the telephone system at the Champaign County jail. IC Solutions trained Lieutenant Cravens on the telephone system. Under the IC Solutions telephone system, when an inmate makes a telephone call using their inmate number, they must also use a four-digit personal identification number (PIN) previously registered by the inmate. Upon admission into the jail, each inmate records his or her voice which is played when they make a telephone call.

¶ 34 Lieutenant Cravens identified defendant's inmate number as 000059081. Lieutenant Cravens testified that on March 16, 2018, defendant was housed in block A-4, A-Pod at the jail. Lieutenant Cravens also testified to the telephone calls made by defendant on March 13, 2018, and March 16, 2018.

¶ 35 When the State played People's Exhibit No. 3 for the jury, defense counsel moved to strike because a woman's voice that was not excised could be heard on the recording. The trial court instructed the jury:

> "Sure. Once—ladies and gentleman, you're to disregard—there are voices at the end of the call you can—the recording itself of the computer voice and whatnot you can consider but once that—at the very end there was [*sic*] human voices. Please disregard whatever you heard there."

¶ 36 At the close of the State's evidence, defense counsel moved for a mistrial where a portion of the telephone call in People's Exhibit No. 3 played when it should have been redacted. Specifically, once the call was answered, a woman's voice was heard asking, "why are you

trying to do this to our kids?[,]" before the call hung up. The trial court instructed the jury to disregard what they heard and denied the motion for a mistrial.

¶ 37 6. *Defendant*

¶ 38 Defendant testified to his criminal record: (1) in October 2007, he pled guilty to a felony offense in Champaign County case No. 07-CF-1050, (2) in May 2009, he pled guilty to a felony offense in Champaign County case No. 08-CF-2211, and (3) in February 2014, he pled guilty to a felony offense in Champaign County Case No. 13-CF-1133.

¶ 39 Defendant then testified that in March 2018 he resided at the Champaign County jail. Defendant denied making telephone calls to Jennifer's cellular telephone or America's Best Value Inn on March 13, 2018, or March 16, 2018. Rather, defendant suggested another inmate, Davy Shaw, made the calls to Jennifer.

¶ 40 Defendant testified he called his grandmother on March 16, 2018. Defendant interchangeably used the term "mother" and "grandmother" when speaking about the same person. Defendant alleged someone altered his telephone call to his grandmother and indicated experiencing difficulty hearing and technical interference during the call. When defendant spoke with his grandmother, he discussed with her that someone put money on his books at the jail to make telephone calls. Defendant suspected Jennifer put the money on his books. Defendant denied he ever told his grandmother he tried to call Jennifer.

¶ 41 On redirect examination, when asked about his conversation with his grandmother, defendant stated, "Ma'am, I plead the Fifth 'cause I don't want these people to be brought up here on a subpoena messing up their life and—and they already old. I'm not goin' to do all that." The court instructed defendant he needed to tell defense counsel who he was talking on the telephone with. Defendant responded, "My mother."

¶ 42 7. *Jury Deliberations and Verdict*

¶ 43 Over defense counsel's objection, the trial court allowed the exhibits to go back to the jury room. During deliberations, the jury sent a note asking the court to define reasonable doubt and to play, for the jury, the recording of the telephone call between defendant and his grandmother. The court suggested sending the jury a note advising the jury "the definition of reasonable doubt is for the jury to determine." Defense counsel stated, "I have no objection to that response either. I believe it would be appropriate, an appropriate response to that question." Ultimately, the court sent the note, as proposed, to the jury.

¶ 44 Over defense counsel's objection, the trial court replayed, in the courtroom, the recording of the phone call between defendant and his grandmother. Prior to replaying the recording, the court informed the jury, "You're in the middle of deliberations which we are not a party to, so please do not interact with one another, don't interact with none of the parties. None of the court is going to interact with you. We are going to play for you what has been admitted. You can listen to it."

¶ 45 Following deliberations, the jury found defendant guilty of violation of an order of protection.

¶ 46 C. Sentence and Posttrial Motions

¶ 47 In June 2018, defendant filed a motion for acquittal or, in the alternative, motion for a new trial. At the June 26, 2018, sentencing hearing, the trial court denied the motion. The case then proceeded to sentencing. In aggravation, the State presented two witnesses who testified regarding other incidents between defendant and Jennifer. Jim Kerner, a police officer with the Urbana, Illinois, Police Department, testified to a July 29, 2008, incident where defendant violated an order of protection when he broke into Jennifer's residence and attacked

her and her boyfriend. Jennifer testified to a 2006 incident, the 2008 incident, and multiple 2017 incidents involving defendant. As a result of all the incidents with defendant, Jennifer felt anxious and traumatized all the time. Defendant did not present any evidence in mitigation. Defendant did make a statement in allocution.

¶ 48 The trial court considered defendant's presentence investigation report (PSI), the evidence in aggravation and mitigation, and defendant's statement in allocution. Defendant's prior convictions made him extended term eligible. In sentencing defendant, the court stated,

> "Let's get one thing straight off at the very beginning. [Jennifer's] not on trial here. This isn't the State of Illinois [versus] Jennifer ***. This is the State of Illinois [versus] [defendant]. You do pose a threat to Jennifer ***. You have terrorized her for the better part of a decade, and it's time for that reign of terror to end.
>
> You've had multiple orders of protection. You know what an order [of] protection is. You know you can't contact her, and at trial we heard that you contacted her twice. You said there wasn't subpoenas of certain records. Well, there was your confession where you said that you called her at work. You knew you couldn't do that and you did do that and you've done it before.
>
> And an order—a violation of an order of protection has been characterized here today as a nonviolent offense. You can characterize it however you'd like. You, sir, are a violent person however. You have robbery convictions, aggravated battery

> convictions. These convictions are [evidence] that you'll do what you want when you want and you're not going to be deterred. You have 14 traffic offenses and some may say, well, that's just traffic, but it's also a pattern of consistent disregard for the law, a disrespect to the law. You've violated orders of protection in the past. You've been convicted of that in the past. You've failed on probation in the past. You have a disregard for the law.
>
> If you look at the way you handled this case, you confessed to your grandmother or your aunt whoever the woman was that you called the night you violated the order of protection, and rather than admit to what you did, rather than admit to your confession, you came in here, you [raised] your hand, you swore to take an oath to tell the truth and then you got on the witness stand and instead of telling the truth you lied. You told fairy tales. One of those fairy tales was that somehow that your confession was edited so that it wasn't really you saying that you called her twice but they were able to edit it. You then said that, well, maybe it was just loud and I couldn't think in the prison and my words came out or enemies set me up. All of those weren't the truth. The truth is you violated the order of protection."

The court sentenced defendant to five years' imprisonment, followed by four years of mandatory supervised release.

¶ 49 In July 2018, defendant filed a motion to reconsider his sentence. After an August 2018 hearing, the trial court denied the motion.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 On appeal, appellate counsel identifies five potential issues and asserts this case presents no meritorious issues for review. Defendant filed a *pro se* response in opposition to appellate counsel's motion to withdraw, alleging several issues merit review. The State asserts appellate counsel's motion to withdraw is proper where defendant presents no meritorious issues for review. We grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 53 A. Sufficiency of the Evidence

¶ 54 When considering the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. "It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *Id.* "Accordingly, a reviewing court will not substitute its judgment for the fact finder on questions involving the weight of the evidence or the credibility of the witnesses." *Id.* We reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 55 To prove defendant guilty of violation of an order of protection with a prior violation of an order of protection (720 ILCS 5/12-3.4(a), (d) (West 2016)), the State must

present evidence to establish defendant committed an act in violation of the order of protection, defendant had been served with notice of the contents of the order, the order was in effect at the time defendant violated the order, and defendant had been previously convicted of violation of an order of protection. 720 ILCS 5/12-3.4(a), (d) (West 2016).

¶ 56 At trial, the State presented evidence that defendant made multiple telephone calls to Jennifer from the Champaign County jail. According the evidence, defendant, on March 16, 2018, placed a call to Jennifer's cellular telephone and made two calls to America's Best Value Inn where Jennifer worked. The State presented this evidence through Jennifer, multiple police officers, defendant's call log sheet from jail, and audio recordings. Defendant denied he contacted Jennifer on March 16, 2018.

¶ 57 The State introduced a redacted copy of the emergency order of protection entered March 7, 2018, and in effect until March 27, 2018, which prohibited defendant from contacting Jennifer. See People's Exhibit No. 1. The State produced a signed receipt showing service on defendant on March 7, 2018. See People's Exhibit No. 2. Deputy Wilson also testified that on March 7, 2018, in the Champaign County jail, A-Pod, he served defendant with an order of protection. Last, defendant had a prior conviction for violation of an order of protection in Champaign County case No. 08-CF-2211.

¶ 58 Here, appellate counsel argues there is no basis on which to challenge the sufficiency of the evidence. The trier of fact is charged with the responsibility of weighing the credibility of witnesses and resolving any conflicts and inconsistencies in their testimony. *Bradford*, 2016 IL 118674, ¶ 12. Therefore, because the jury was in a superior position to assess witness credibility and conflicts in testimony, we will not reverse the decision where the

evidence is not so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt as to defendant's guilt.

¶ 59 When reviewing the evidence in the light most favorable to the State, we conclude there is no arguable merit to a claim that the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 60 B. Rule 431(b)

¶ 61 Appellate counsel next addresses whether, during jury selection, the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012).

¶ 62 First, we note defendant failed to raise this issue before the trial court or in a posttrial motion. To preserve an error for consideration on appeal, a defendant must object to the error at trial and raise the error in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675. Failure to do so constitutes forfeiture. *Id.* However, we may consider a forfeited claim where the defendant demonstrates a plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prevail under the plain-error doctrine, a defendant must first demonstrate a clear and obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). If an error occurred, we reverse only where (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.*

¶ 63 The Illinois Supreme Court adopted Rule 431(b) to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472, 476, 469 N.E.2d 1062, 1063-64 (1984). Rule 431(b) requires a trial court to ask potential jurors whether they both "understand[ ]" and

"accept[ ]" that (1) the defendant is presumed innocent, (2) the State bears the burden of proving the defendant guilty beyond a reasonable doubt, (3) the defendant has no obligation to present evidence, and (4) the defendant's choice to not testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Rule 431(b) "mandates a specific question and response process." *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403, 409 (2010).

¶ 64 During *voir dire*, the trial court asked the panel of prospective jurors if they understood and accepted each of the legal principles set forth in Rule 431(b). All the prospective jurors indicated he or she understood and accepted the principles. Accordingly, appellate counsel argues there is no basis on which to challenge the trial court's compliance with Rule 431(b). We agree.

¶ 65 Where the record demonstrates the trial court complied with Rule 431(b), we find no clear or obvious error occurred. See *Piatkowski*, 225 Ill. 2d at 565. Thus, we conclude there is no arguable merit to a claim that the trial court failed to comply with Rule 431(b).

¶ 66 C. Motions *In Limine*

¶ 67 Appellate counsel next addresses the trial court's rulings on the various motions *in limine*. Appellate counsel reviewed the rulings on the motions and determined there is no basis on which to challenge the trial court's rulings.

¶ 68 "Evidence is admissible if it (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilty more or less probable." *People v. Limon*, 405 Ill. App. 3d 770, 772-73, 940 N.E.2d 737, 738 (2010). "It is within the trial court's discretion to decide whether evidence is relevant and admissible." *People v. Morgan*, 197 Ill. 2d 404, 455, 758 N.E.2d 813, 842 (2001). "A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of

discretion." *Id.* "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

¶ 69 Prior to trial, the State filed a motion *in limine* seeking to exclude (1) any evidence regarding the dismissal, on March 27, 2018, of the order of protection in Champaign County case No. 18-OP-123 and (2) testimony regarding Champaign County case, No. 17-JA-76, a pending case involving Jennifer. The trial court granted the State's motion to exclude any mention that the order of protection in Champaign County case No. 18-OP-123 was dismissed on March 27, 2018. The court also granted the State's motion to exclude testimony regarding pending Champaign County case No. 17-JA-76.

¶ 70 Defendant argues the trial court erred and he should have been allowed to introduce evidence showing the circuit court dismissed the order of protection on March 27, 2018, when Jennifer failed to appear in court. We find the trial court's rulings on the motions *in limine* proper.

¶ 71 The State charged defendant with violating the March 7, 2018, order of protection on March 16, 2018, when he contacted Jennifer. The fact the order of protection lapsed when Jennifer failed to appear on March 27, 2018, is not relevant where the order was in effect when defendant contacted Jennifer on March 16, 2018.

¶ 72 Also, pending Champaign County case No. 17-JA-76 was in no way relevant to proving defendant violated the order of protection. Additionally, although the court did not allow defense counsel to suggest pending Champaign County case No. 17-JA-76 provided a basis to question Jennifer's credibility or motive, the court did indicate defense counsel would

otherwise be allowed, on cross-examination, to inquire into Jennifer's bias or motivation against defendant.

¶ 73 Prior to trial, defendant filed a motion *in limine* asking the trial court to (1) allow impeachment of Jennifer with her prior convictions and (2) exclude use of defendant's prior convictions. The State also filed a motion *in limine* seeking permission to impeach defendant with his prior convictions. The trial court denied defendant's motion to allow impeachment of Jennifer with her prior convictions where her convictions were more than 10 years old. The court denied in part and granted in part defendant's motion to exclude the use of defendant's prior convictions. Ultimately, the court allowed use of defendant's prior convictions but limited the evidence to the fact defendant had prior felony convictions.

¶ 74 In Illinois, "evidence of a witness's prior conviction is admissible to attack the witness's credibility when: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements; (2) less than 10 years have elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Williams*, 2015 IL App (1st) 130097, ¶ 40, 35 N.E.3d 1043 (citing *People v. Montgomery*, 47 Ill. 2d 510, 516-17, 268 N.E.2d 695, 698-99 (1971)).

¶ 75 According to defendant's motion *in limine*, Jennifer was last convicted of a felony in Champaign County case No. 05-CF-1488. Therefore, the trial court's ruling to exclude Jennifer's prior convictions was proper where her last conviction was more than 10 years old.

¶ 76 When ruling on the admissibility of defendant's prior convictions, the court found defendant's three prior convictions within the last 10 years to be relevant. However, the court

recognized their admission presented a risk of potential prejudice to defendant and therefore decided to limit the evidence to the fact defendant had prior felony convictions.

¶ 77 Based on the record, the trial court's rulings on the motions *in limine* were not an abuse of discretion. Thus, we conclude there is no arguable merit to any challenge to the trial court's rulings on the motions *in limine*.

¶ 78 D. Admission of Evidence

¶ 79 Appellate counsel next addresses the admission of multiple pieces of evidence. Specifically, appellate counsel reviews the trial court's admission of (1) defendant's telephone call log and (2) recordings of defendant's telephone calls on March 16, 2018, from the Champaign County jail.

¶ 80 "Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion." *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Hall*, 195 Ill. 2d at 20.

¶ 81 1. *Telephone Call Log*

¶ 82 At trial, defendant objected to the admission of the telephone call log on the ground that the State failed to lay a proper foundation for admission. The trial court overruled the objection and admitted the telephone call log as a business record.

¶ 83 Appellate counsel asserts the court properly admitted the telephone call log as a business record. Under section 115-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(a) (West 2016)), "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall

be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

¶ 84 Here, Sergeant Jones testified all inmate telephone calls at the Champaign County jail are recorded and stored in a system by a company called IC Solutions, in the regular course of business. On March 16, 2018, Sergeant Jones received a telephone call from Officer Fisher inquiring about telephone calls made by defendant. Sergeant Jones retrieved defendant's telephone call log in the system which he testified logs every call an inmate makes using his name and inmate number. Sergeant Jones identified State's Exhibit No. 5 as defendant's telephone call log. Sergeant Jones also testified that to his knowledge, the system worked properly on March 16, 2018. Based on the evidence, we find the trial court properly admitted defendant's telephone call log as a business record.

¶ 85 2. *Recorded Telephone Calls*

¶ 86 At trial, defendant objected to the admission of the March 16, 2018, telephone calls from the Champaign County jail on the grounds of hearsay, relevance, and foundation. The trial court admitted the telephone call recordings with certain portions redacted.

¶ 87 Appellate counsel asserts the court properly admitted the recorded telephone calls where the State laid the proper foundation, the telephone calls were relevant to prove defendant's guilt, and defendant's statement during his telephone call to his grandmother constituted an admission by a party-opponent.

¶ 88 At trial, the State presented evidence defendant, on March 16, 2018, made multiple calls from the Champaign County jail. On March 16, 2018, defendant made a telephone

call to Jennifer's cellular telephone, two calls to America's Best Value Inn where Jennifer worked (People's Exhibit Nos. 3 and 4), and a call to his grandmother (People's Exhibit No. 6).

¶ 89 Appellate counsel concludes the telephone calls were relevant where their admission at trial proved defendant's guilt. Specifically, the telephone calls showed defendant engaged in conduct prohibited by the order of protection. "The controlling principles concerning the admissibility of evidence are well settled. The court must ask whether the proffered evidence fairly tends to prove or disprove the offense charged and whether that evidence is relevant in that it tends to make the question of guilt more or less probable." *People v. Wheeler*, 226 Ill. 2d 92, 132, 871 N.E.2d 728, 750 (2007) (citing *Caffey*, 205 Ill. 2d at 114-15).

¶ 90 Appellate counsel also argues the State laid a proper foundation for the authentication of the telephone calls. Under Illinois Rule of Evidence 901(a) (eff. Jan. 1, 2011), "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ill. R. Evid. 901(a) (eff. Jan. 1, 2011). "A party lays a proper foundation when a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." *In re C.H.*, 398 Ill. App. 3d 603, 607, 925 N.E.2d 1260, 1264 (2010). "Where *** no party to the conversation testifies to the accuracy of the recording, a sufficient foundation may be laid by evidence as to (1) capability of the device for recording, (2) competency of the operator; (3) proper operation of the device; (4) preservation of the recording with no changes, additions, or deletions; and (5) identification of the speakers." *People v. Smith*, 321 Ill. App. 3d 669, 675, 749 N.E.2d 986, 991 (2001). "Each case must be evaluated on its own and depending on the facts of the case, some of the factors may not be

relevant or additional factors may need to be considered. The dispositive issue in every case is the accuracy and reliability of the process that produced the recording." *People v. Taylor*, 2011 IL 110067, ¶ 35, 956 N.E.2d 431.

¶ 91 Here, the State provided evidence of authentication through Jennifer, Sergeant Jones, and Lieutenant Cravens. Jennifer testified that on March 16, 2018, she received two telephone calls (People's Exhibit Nos. 3 and 4) at work from the defendant at the Champaign County jail. Each time Jennifer answered a call she heard an automated voice stating, "you have a call from an inmate at the Champaign County Correctional Center" and then indicating "you have a call from, and it said [defendant]." Jennifer recognized defendant's voice on both calls. Thus, the State provided sufficient foundation to admit People's Exhibit Nos. 3 and 4.

¶ 92 Sergeant Jones and Lieutenant Cravens both provided testimony regarding the telephone system at the jail. Under the IC Solutions telephone system, when an inmate makes a telephone call using their inmate number, they must also use a four-digit PIN previously registered by the inmate. Upon admission into the jail, each inmate records his or her voice to be played when they make a telephone call. The telephone calls are recorded and stored in a system provided by IC Solutions. Evidence also showed that on March 16, 2018, the system was working properly. Both Sergeant Jones and Lieutenant Cravens testified to the March 16, 2018, telephone calls made by defendant. Thus, the State did not need to call defendant's grandmother as a witness where it was able to lay a foundation for the call through Sergeant Jones and Lieutenant Cravens. Because the evidence demonstrated the accuracy and reliability of the system, the trial court did not err by admitting People's Exhibit No. 6.

¶ 93 Prior to trial, defendant filed a motion *in limine* to exclude recorded jail telephone calls. The trial court allowed the recorded jail telephone calls to be admitted but with certain

portions redacted. Specifically, the court ordered the State to redact People's Exhibit No. 3 where a woman's voice was heard asking, "why are you trying to do this to our kids?[,]" before the call hung up.

¶ 95 At trial, during Lieutenant Craven's testimony, the State played People's Exhibit No. 3 for the jury. Defense counsel moved to strike where a woman's voice could be heard on the recording. The trial court immediately sustained defense counsel's objection and instructed the jury to disregard the human voice at the end of the call. At the close of the State's evidence, defense counsel moved for a mistrial where a portion of the telephone call in People's Exhibit No. 3 played when it should have been redacted. The court instructed the jury to disregard what they heard and denied the motion for a mistrial.

¶ 96 Appellate counsel also acknowledges that a redacted portion of one of the telephone calls (People's Exhibit No. 3) accidently played for the jury. Appellate counsel considered raising an issue based on the mistake but found the trial court cured the error by instructing the jury to disregard the voices heard at the end of the recording.

¶ 97 " 'Generally, the prompt sustaining of an objection by a trial judge is sufficient to cure any error in a question or answer before the jury.' " *People v. Mims*, 403 Ill. App. 3d 884, 897, 934 N.E.2d 665, 678 (2010) (quoting *People v. Ross*, 303 Ill. App. 3d 966, 983, 709 N.E.2d 621, 634 (1999)). "Moreover, the jury is presumed to follow the instructions given to it by the trial court." *Id.*

¶ 98 We find the trial court's instruction cured any error that resulted from the redacted portion of the recording played for the jury. Moreover, we agree with appellate counsel that the State presented overwhelming evidence of defendant's guilt, as analyzed under the sufficiency of the evidence. Because the court did not abuse its discretion in admitting defendant's

telephone call log and the telephone calls, we conclude there is no arguable merit to challenge the court's rulings on the admission of evidence.

¶ 99 E. Sentencing

¶ 100 Last, appellate counsel addresses whether the trial court abused its discretion when it sentenced defendant to a five-year extended term sentence.

¶ 101 A trial court has discretion in sentencing, and we will not reverse a sentence absent an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Franks*, 292 Ill. App. 3d 776, 779, 686 N.E.2d 361, 363 (1997).

¶ 103 ¶ 102A violation of an order of protection with a prior violation of an order of protection is a Class 4 felony with a sentencing range of one to three years in prison. 730 ILCS 5/5-4.5-45 (West 2016). The sentencing range for an extended term Class 4 felony is three to six years in prison. 730 ILCS 5/5-4.5-45 (West 2016).Here, the trial court considered defendant's PSI, the evidence in aggravation and mitigation, and defendant's statement in allocution. Based on defendant's prior convictions, he was extended term eligible. Ultimately, the court sentenced defendant to five years' imprisonment, followed by four years of mandatory supervised release. In looking to the applicable sentencing statute, appellate counsel determined the court sentenced defendant within the ranges permitted by the statue. Accordingly, appellate counsel argues there is no basis on which to challenge the trial court's sentence.

¶ 104 Defendant disagrees and raises several arguments regarding sentencing. Specifically, defendant asserts (1) the trial court should not have admitted the evidence in aggravation and (2) the sentencing judge was biased and did not consider his statement in

allocution. Defendant failed to preserve these issues in his motion to reconsider sentence. See *Sebby*, 2017 IL 119445, ¶ 45. Consequently, defendant must demonstrate a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 105 Here, the trial court properly admitted the testimony of Officer Kerner and Jennifer in aggravation where the evidence showed defendant's history of violence involving Jennifer. "The ordinary rules of evidence governing at trial are relaxed at the sentencing hearing." *People v. Williams*, 2018 IL App (4th) 150759, ¶ 17, 99 N.E.3d 590. "At a sentencing hearing, evidence is admissible if it is relevant and reliable." *Id.* Moreover, "evidence of other crimes is admissible at sentencing regardless of whether the defendant was charged with or convicted of the crimes." *People v. Bilski*, 33 Ill. App. 3d 808, 816, 776 N.E.2d 882, 889 (2002).

¶ 106 We also find the trial court took into consideration defendant's statement of allocution and did not exhibit bias against defendant. "There is a presumption that a trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors." *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). Here, there is no indication from the record that the court failed to take into consideration defendant's statement in allocution. The court explicitly stated it took into consideration defendant's PSI, the evidence in aggravation and mitigation, and defendant's statement in allocution.

¶ 107 Further, the court did not exhibit a bias against defendant at sentencing where the court responded to defendant's assertions in his statement of allocution and addressed defendant's lack of credibility. See *People v. Ward*, 113 Ill. 2d 516, 528, 499 N.E.2d 422, 426 (1986) (A trial court may consider a defendant's credibility when imposing a sentence.). Based

on the record, no clear or obvious error occurred. See *Piatkowski*, 225 Ill. 2d at 565. Therefore, the trial court did not abuse its discretion when sentencing defendant.

¶ 108 F. Defendant's *Pro Se* Claims

¶ 109 In addition to responding to appellate counsel's analysis of potential issues on appeal, defendant asserts, *pro se*, that additional issues merit review. We find no merit in defendant's additional claims.

¶ 110 Defendant argues the trial court improperly allowed the jury to consider evidence regarding the March 13, 2018, call from the jail to Jennifer's cellular telephone. According to defendant, this evidence lacked relevance and was highly prejudicial.

¶ 111 As asserted by the State, the evidence was relevant to show identity, motive, or absence of mistake, particularly where defendant claimed someone else made the calls. See *People v. Wilson*, 214 Ill. 2d 127, 135-36, 925 N.E.2d 191, 196 (2005). Given the position taken by defendant, and the State's burden of proof, the trial court did not abuse its discretion when it allowed evidence helpful to the jury in determining what actually occurred. Moreover, while highly probative, the evidence was minimally prejudicial where the jury simply learned a call was attempted.

¶ 112 Defendant argues his statement made during his phone call from the jail to his grandmother constituted hearsay.

¶ 113 Under the Illinois rules of evidence, certain statements are excluded from the definition of hearsay. Notably, a statement by party-opponent meeting the criteria contained within the rule is excluded from the definition of hearsay. Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015). Here, the State offered against defendant a statement it proved to be defendant's own.

Thus, the record shows the statement made by defendant during the call to his grandmother fails to constitute hearsay.

¶ 114 Defendant argues his constitutional rights were violated when the trial court denied him his right to exercise his fifth amendment right not to incriminate himself.

¶ 115 At trial, the court admonished defendant about his right to testify, and defendant chose to testify. On redirect examination, when asked about his conversation with his grandmother, defendant stated, "Ma'am, I plead the Fifth 'cause I don't want these people to be brought up here on a subpoena messing up their life and—and they already old. I'm not goin' to do all that." The court instructed defendant he needed to tell defense counsel who he was talking on the telephone with. Defendant responded, "My mother." Defendant now contends his fifth amendment rights were violated.

¶ 116 "When a defendant takes the witness stand and testifies on his own behalf, he waives his privilege not to testify and subjects himself to legitimate cross-examination." *People v. Swank*, 344 Ill. App. 3d 738, 747, 800 N.E.2d 864, 871 (2003). Thus, we find defendant waived his fifth amendment privilege when he chose to testify.

¶ 117 Defendant also argues the trial court erred during jury deliberations when it (1) failed to define reasonable doubt for the jury and (2) replayed People's Exhibit No. 6, in its entirety, for the jury.

¶ 118 During jury deliberations, the jury requested a definition of reasonable doubt. The trial court suggested sending a note back with the jury instructing the jury that "the definition of reasonable doubt is for the jury to determine." Defense counsel stated, "I have no objection to that response either. I believe it would be appropriate, an appropriate response to that question." Subsequently, the court sent the instruction back with the jury.

¶ 119 We find defendant waived his first issue where defense counsel, at trial, agreed to the trial court's response to the jury asking the court to define reasonable doubt. See *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 12, 992 N.E.2d 184 (Where counsel affirmatively agreed to the instruction given, the issue is waived.).

¶ 120 Moreover, the trial court properly refused to define reasonable doubt for the jury. See *People v. Tokich*, 314 Ill. App. 3d 1070, 1075, 734 N.E.2d 117, 122 (2000) ("Neither the trial court nor counsel should define reasonable doubt for the jury.").

¶ 121 Last, defendant argues it was highly prejudicial for the trial court to play the entire recording in People's Exhibit No. 6 for the jury during deliberations. Defendant asserts the court should have only played the portion of the recording that played in open court during trial.

¶ 122 The record demonstrates the court only replayed for the jury what was already played in open court during trial. Specifically, the court stated, "only what we have heard in open court will be played for them. Nothing else." Therefore, we find the trial court did not err when it allowed the jury to rehear a portion of People's Exhibit No. 6.

¶ 123 G. Motion to Withdraw

¶ 124 In *People v. Jones*, 38 Ill. 2d 384, 385, 231 N.E.2d 390, 391-92 (1967), the Illinois Supreme Court set forth the proper procedure for appellate counsel's request to withdraw based on an *Anders* motion in a criminal case. The court stated,

> "Pursuant to the *Anders* decision, an attorney seeking to withdraw from a case because he has decided the appeal is without merit must file a supporting brief or memorandum analyzing the case legally, citing record references to the transcript and any cases

> upon which he relies in arriving at his ultimate conclusion. The memorandum or brief of counsel's investigation and evaluation of the appeal should cover not only points his client has raised, or wishes to raise, but in addition anything in the record that might arguably support the appeal." (Internal quotation marks omitted.) *Jones*, 38 Ill. 2d at 385.

¶ 125 After examining the record, the motion to withdraw, appellate counsel's memorandum of law, and defendant's response to appellate counsel's motion, we agree with appellate counsel that this appeal presents no issues of arguable merit. Appellate counsel's motion and memorandum sufficiently comply with the above procedures. We, therefore, grant appellate counsel's motion to withdraw and affirm the judgment of the trial court.

¶ 126 III. CONCLUSION

¶ 127 For the reasons stated, we affirm the trial court's judgment.

¶ 128 Affirmed.