No. 123926

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

People of the State of Illinois, Plaintiff-Appellant, v. Shadwick R. King, Defendant-Appellee.	Appeal from the Appellate Court of Illinois, Second Judicial District No. 2-15-1112 There heard on Appeal from the Circuit Court of the 16th Judicial Circuit, Kane County, Illinois No. 14 CF 1229 Hon. James C. Hallock, Presiding

BRIEF OF DEFENDANT-APPELLEE
CROSS-RELIEF REQUESTED

Matthew R. Carter
Elizabeth S. Deshaies
Katie DeBoer
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
MCarter@winston.com
LDeshaies@winston.com
KDeBoer@winston.com

Adam R. Vaught
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, Illinois 60606
(312) 704-3584
AVaught@hinshawlaw.com

E-FILED
7/11/2019 4:53 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF POINTS AND AUTHORITIES

Page

Nature of the Case

Shadwick King was charged with the murder of his wife, Kathleen King, who was found dead on the railroad tracks at a park near her house in July 2014. Before trial, the court denied King's motion for substitution of judge. At trial in March 2015, two forensic pathologists presented conflicting testimony about the cause of death. A former law enforcement profiler also opined as an expert on the cause of death and on his observations of the evidence. The jury returned a guilty verdict. No questions are raised on the pleadings.

The Second District reversed, finding a number of prejudicial trial errors that required reversal. The court found error in the trial court's decision to allow a former law enforcement profiler to testify, to allow Mrs. King's family to testify for emotional impact, and to permit the State to redefine and dilute its burden of proof through comments at closing. The court concluded that the Double Jeopardy clause did not prohibit a new trial and remanded. The State appeals.

The State contends that the errors the Second District identified were not errors or that they were harmless. The appellate court's conclusions on error were correct and follow this Court's precedent.

Statement of the Issues

1. Whether the testimony of Mark Safarik, a paid consultant and former law enforcement profiler, was inadmissible and unduly prejudicial such that this

Court should affirm the reversal of King's conviction.

a. Whether Safarik's expert testimony about the cause of death and lividity was inadmissible because he was not qualified.

b. Whether Safarik's testimony about conclusions drawn from his analysis of the crime scene was inadmissible because it contained nothing more than conclusions a reasonable juror could have drawn.

c. Whether Safarik's testimony about the characteristics of individuals who stage crime scenes was inadmissible because it was unreliable and prohibited profiling testimony.

2. Whether the testimony from Mrs. King's family and the prosecutor's statements during closing argument are inadmissible on remand and each constitutes an independent basis for reversal.

a. Whether testimony from Mrs. King's family was inadmissible because it was introduced solely for emotional impact.

b. Whether certain of the State's comments at closing argument were inadmissible because they represented an attempt to dilute the State's burden of proof.

3. Whether reversal was also appropriate because King was entitled to a substitution of judge because the court had not yet made any substantive decisions.

4. Whether a new trial is prohibited by the Double Jeopardy Clause because the State failed to prove King guilty beyond a reasonable doubt.

Statement of Facts

Authorities found Mrs. King on railroad tracks in Esping Park, near Geneva, Illinois, on July 6, 2014. She was pronounced dead shortly after they arrived. (R2387.) King was charged with her murder by information a few days later. (C3–4.) Before King was indicted or discovery produced, the State sought permission to collect historical cell site records. (C11–13.) King objected, arguing that the federal statute that allowed such collection was unconstitutional. (R12–21.) The court granted the State's motion. (C35.)

Shortly thereafter, King moved for substitution of judge as a matter of right. (C38.) The trial court denied the motion, finding that its ruling on the discovery motion was substantive and eliminated King's substitution right. (C139–41.)

Before trial, the State moved *in limine* to introduce the testimony of Safarik as a crime scene analysis expert. (C290–93.) Safarik previously worked as a police detective and an FBI profiler in the Behavioral Analysis Unit. (R1273.) Since retiring, he has consulted on criminal investigations. (R1273–75.) He has no

training, certification, or experience in medicine or pathology. (R1274–96.) The trial court granted the motion over objection, but ruled that (1) Safarik could only render opinions pursuant to his qualifications, which the court would examine at trial; and (2) Safarik could not identify the defendant as the alleged killer by direct testimony or give profiling testimony. (R414–15.)

At trial, two forensic pathologists testified about cause of death: Dr. Mitra Kalelkar for the State (R806–64, 869–1013), and Dr. Larry William Blum for King (R2509–2728).

Dr. Kalelkar performed an autopsy. The autopsy report lists asphyxia as the cause of death but does not identify how it occurred. (R911.) Nor does it identify whether the death was homicidal. (R2622–23.) Dr. Blum explained that he reviewed Dr. Kalelkar's autopsy report and found it "raised a red flag…[b]ecause, technically, there is no cause of death listed." (R2622.)

At trial, Dr. Kalelkar testified that the cause of death was asphyxia brought on by manual strangulation and that the injuries on Mrs. King's body adhered to the theory that her body was placed on the tracks. (R2782–83.) Neither of these trial conclusions were included in her autopsy report. (R911, R970–72.) Dr. Kalelkar found no DNA from King or anyone else on the body. (R1711–13.)

Dr. Blum testified regarding the cause of death. He explained that the evidence did not support the conclusion that Mrs. King died of manual

strangulation. (R2624.) Only one of six indicators[1] of asphyxia was identified, (R2627–2631, R2671–75), and he found no injuries on either King or Mrs. King consistent with manual strangulation (R2639–44). According to Dr. Blum, Mrs. King experienced a fatal, sudden cardiac arrhythmic event brought on by alcohol intoxication, stress, sleep deprivation, and caffeine consumption. (R2631.) In response, Dr. Kalelkar maintained her opinion that the death was caused by manual strangulation, but admitted having done little research on the connection between alcohol and sudden cardiac events. (R2793–97.)

Apart from these conflicting accounts, the State introduced testimony from Safarik over objection. (R1341–44.) Safarik conducted no investigation or independent analysis, but instead drew his own conclusions from Dr. Kalelkar's autopsy report. (R1340–41.) While that report identified no suspected cause of asphyxiation, Safarik opined that it was caused by manual strangulation. (R1344–45.) He also testified that the appearance of lividity on the body and the position of the body suggested that the scene was "staged." (R1362–63.) Lividity is the discoloration of skin caused by blood settling and pooling following death. *Lividity*, Merriam-Webster's Online Dictionary.

---

[1] Dr. Blum listed as signs of asphyxia: cyanosis, pulmonary vascular congestion, edema, visceral congestion, petechiae, and fluidity of blood. (R2627.) Of those, he testified that he saw only petechial hemorrhaging. (R2630.)

Safarik further testified that the injuries on Mrs. King's body were inconsistent with someone having fallen on the tracks. (R1354–55.) He opined that Mrs. King was killed at her residence by someone close to her. (R1363–64.) And he testified about the state of Mrs. King's dress. (R1365.)

In support of his testimony that the crime scene was staged, Safarik testified that Mrs. King did not normally run on the railroad tracks (R1313); King's statement to police that Mrs. King left the house at 6:30 a.m. was inconsistent with the lividity first-responders reported seeing on Mrs. King's body when it was found (R1316–17); the lividity on Mrs. King's right leg was inconsistent with her position on the tracks (R1318); Mrs. King's shorts were loose and not tied (R1321); she was not wearing proper running undergarments (R1323–24); she was wearing a twisted sock with hair in it (R1329–30); she was not wearing the armband and earbuds other witnesses said she typically wore running (R1331–32); she was not wearing her eyeglasses or contacts (R1332–33); there were leaves on Mrs. King's body that were inconsistent with the area where she was found (R1333–34); her cell phone appeared to be placed intentionally on the tracks (R1334–36); and a trail of saliva on Mrs. King's cheek was inconsistent with the position of her head (R1336–39).

The trial court permitted the State to elicit testimony from Mrs. King's family, overruling King's objection that the testimony was irrelevant and unduly

prejudicial because it served only to arouse an emotional reaction. (R1232–35.) The State called Kristine Keuster, Mrs. King's sister, and asked her to testify to their close relationship. Asked repeatedly by the State, Ms. Keuster testified that Mrs. King took a "motherly role" toward her and shared, through tears, personal anecdotes about the things she and Mrs. King did together. (R1186–87.) The State admitted that this emotionally charged testimony was introduced to establish the sisters' "closeness," (R1187), and the trial court allowed it despite a continuing objection based on relevance and prejudice. (R1188.)

The State also elicited testimony from Ms. Keuster about her reaction to finding out that Mrs. King died. (R1232–33.) Ms. Keuster testified that she and Kurt Keuster, she and her sister's father, were pacing, crying, and shaking. (*Id.*) She testified that she told Mr. Keuster to call the police because she did not want King to pick the children up from Mr. Keuster's house. (R1233.) The State then called Mr. Keuster to testify about his reaction to hearing that Mrs. King had died, and he told the jury that he "started screaming." (R1925–26.) The trial court overruled the defense's continual objection to this testimony as irrelevant and unduly prejudicial. (*See, e.g.*, R1232–35.)

Finally, the State explained and diluted its burden of proof during its rebuttal closing argument. (R2976.) The State told the jurors, among other things, that "[i]t's okay for you to go back to the jury deliberation room and have

questions and still convict the defendant. It's okay for you to have questions such as what point of access did he take. It's okay for you to have a question like that and to convict the defendant." (*Id.*)

The jury found King guilty of first-degree murder. (C573.)

The Second District examined several potential errors. It found that the motion for substitution was raised after the trial court addressed substantive issues and held that motion properly denied. *Id.* ¶ 60. The court went on to find, however, that the trial court erred in permitting Safarik to opine on the cause of Mrs. King's death and to testify about his observations of the crime scene. *Id.* ¶ 89. According to the Second District, that testimony was so prejudicial it required reversal. *Id.*

The court found that because there was no obvious fatal injury, medical testimony was helpful to explain the cause of death. *Id.* ¶ 78. But Safarik was not qualified to testify as a medical expert. *Id.* (R1296.) The court found the trial court's decision to nevertheless allow Safarik to opine that Mrs. King died of manual strangulation "especially egregious where [King] disputed Dr. Kalelkar's conclusion as to [Mrs. King's] cause of death and presented his own equally well-qualified forensic pathologist to testify that she died of natural causes." *King*, 2018 IL App (2d) 151112, ¶ 79. Because Safarik was not qualified to testify as a medical expert on the cause of death and "lividity correlates to the cause and manner of

death," the Second District found Safarik unqualified to testify on the effects of lividity. *Id.* ¶ 80.

The court found that Safarik was unqualified to testify that the leaf debris found on Mrs. King's body came from the King family house "because such an opinion was beyond his expertise" and the State presented no evidence of a correlation between the vegetation on Mrs. King's body and that found at the home. *Id.* ¶ 81. The court found the remainder of Safarik's testimony—drawn from his observations of the crime scene photos and reports—inadmissible, because it offered no assistance to a reasonable juror, who could have drawn the same conclusions on his or her own. *Id.* ¶ 82.

Lastly, the court found that Safarik's testimony included inadmissible profiling testimony, in violation of an earlier court order. *Id.* ¶ 86.

Having determined that King's conviction could not stand, the Second District addressed additional errors the trial court must avoid on remand. *Id.* ¶ 90. First, the court instructed that the trial court could not allow Mrs. King's family members to testify for emotional impact, as they had during the first trial. *Id.* ¶ 91. Second, the court prohibited the State from attempting to redefine the burden of proof by telling the jury it could convict despite lingering questions. *Id.* ¶ 92. The court did not bar a retrial based on double jeopardy. *Id.* ¶ 66.

The State petitioned and this Court granted leave to appeal.

Standard of Review

The trial court's ruling on a motion *in limine* is reviewed for abuse of discretion. *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000). So too is its decision to admit evidence, including expert testimony. *People v. Lerma*, 2016 IL 118496, ¶ 23; *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). The abuse of discretion standard thus applies to the issues related to Safarik's testimony and the testimony of Mrs. King's family. An abuse of discretion warrants reversal if the record "indicates the existence of substantial prejudice affecting the outcome of the trial." *People v. Jackson*, 232 Ill. 2d 246, 265 (2009) (quoting *In re Leona W.*, 228 Ill. 2d 439, 460 (2008)).

"Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). The Court also reviews *de novo* a ruling on a motion for substitution of judge. *People v. Klein*, 2015 IL App (3d) 130052, ¶ 83. When reviewing whether the State has met its burden of proving a defendant guilty beyond a reasonable doubt, the Court asks whether any rational fact-finder could have found the defendant guilty beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004).

Argument

King's trial was fraught with serious and prejudicial errors that each independently require reversal. *First* (Statement of the Issues 1(a), (b), and (c)), the court erred in allowing a litany of improper testimony from Safarik. Safarik was not qualified to testify to Mrs. King's cause of death, the effects of lividity on her body, or the origin of the vegetation found on her body. *People v. Enis*, 139 Ill. 2d 267, 288 (1990). By opining on basic observations of the crime scene evidence, Safarik improperly usurped the role of the jury. *Lerma*, 2016 IL 118496, ¶ 23. And by opining that Mrs. King was killed at her home by someone close to her and that the crime scene was staged, he gave prohibited, unreliable profiling testimony. *People v. Vasser*, 331 Ill. App. 3d 675, 687 (1st Dist. 2002).

Second (Statement of the Issues 2(a)), the trial court erred in allowing the State to introduce testimony from Mrs. King's family solely for emotional impact. This is error because "[p]roof that the victim of a crime is survived by a family is irrelevant to the guilt or innocence of a criminal defendant [and] can only serve to prejudice a defendant in the eyes of the jury." *People v. Blue*, 189 Ill. 2d 99, 129 (2000).

Third (Statement of the Issues 2(b)), the trial court erred by allowing the State to dilute its burden of proof by making misleading statements at closing. "The law in Illinois is clear that neither the court nor counsel should attempt to

define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992).

Fourth (Statement of the Issues 3), the trial court should have granted King's motion for substitution of judge because the court had not yet ruled on any substantive matter. 725 ILCS 5/114-5(a).

In light of these errors, this Court should prohibit a new trial because the U.S. Constitution's Double Jeopardy clause prevents it (Statement of the Issues 4).

I. Safarik's "Expert" Witness Testimony Was Inadmissible and Unduly Prejudicial.

"Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003); *see* Ill. R. Evid. 702. "Expert testimony addressing matters of common knowledge is not admissible 'unless the subject is difficult to understand and explain.'" *Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Becker*, 239 Ill. 2d 215, 235 (2010)).

The erroneous admission of expert testimony demands reversal unless the error is harmless. *Lerma*, 2016 IL 118496, ¶ 33. This Court "has recognized three approaches to determine whether an error…is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's

conviction; and (3) whether the…evidence [was] duplicative or cumulative." *Id.*; *see People v. Park*, 72 Ill. 2d 203, 209 (1978) (reversing a conviction because it was based on inadmissible expert testimony).

The trial court's admission of Safarik's testimony requires reversal because it meets neither of the applicable requirements for admission and it was *not* harmless, considering the facts and circumstances of this case.

First, Safarik was not qualified to opine on Mrs. King's cause of death. The State argues Safarik was qualified based on his experience as a non-medical expert. But only *medical* expert testimony could reasonably help the jury understand the cause of death here; other witnesses provided that testimony; and Safarik lacks the requisite education, training, or experience to offer that testimony. Nor was he qualified to opine about the effects of lividity, which correlates to the manner and cause of death.

Second, Safarik's crime-scene analysis testimony was inadmissible. He was not qualified to testify about the origins of vegetation found on Mrs. King's body. And, putting aside this lack of qualification, the State forfeited any argument to the contrary by failing to refute it in its opening brief. Ill. S. Ct. R. 341(h)(7) ("Points not argued [in the appellant's opening brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); Ill. S. Ct. R.

612(b)(2) (Rule 341 applies in criminal appeals); *People v. Villa*, 2011 IL 110777, ¶ 21 (finding the State forfeited an argument).

Safarik's remaining opinions about the crime scene were based on "logical conclusions the ordinary juror could have drawn from human behavior" and so were improper. *State v. Lenin*, 967 A.2d 915, 927 (N.J. Super. Ct. App. Div. 2009). The State argues the testimony was admissible because it was helpful to the jury, or, alternatively, that the error was harmless. Because expert testimony tends to "over-persuade" a jury, *People v. Perry*, 147 Ill. App. 3d 272, 276 (1st Dist. 1986), and because there is so little evidence in support of the State's theory, the admission was prejudicial.

Third, Safarik's profiling testimony is inadmissible. The State argues Safarik gave no profiling testimony or that profiling testimony is reliable and its admission harmless. By telling the jury Mrs. King was killed in her home by someone close to her who staged the scene, Safarik gave profiling testimony and indirectly identified King, contravening the trial court's earlier order. Such testimony is unreliable and its introduction harmful in a case with so little evidence linking the defendant to the crime.

For these reasons, this Court should reverse the conviction.

A. The Second District Correctly Held That Safarik Was Not Qualified to Opine on Mrs. King's Cause of Death or About Lividity.

Safarik was not qualified to opine as an expert witness on Mrs. King's cause of death. The State argues the Second District misconstrued the standard for admitting expert witness testimony regarding cause of death, and that Safarik was qualified to testify about cause of death based on his experience as a law enforcement profiler and crime scene analyst.

The State is wrong for at least three reasons: (1) the Second District applied the appropriate standard to determine whether Safarik was qualified to testify on cause of death; (2) Safarik provided medical expert testimony that he was not qualified to give; and (3) Safarik's non-medical experience and training did not qualify him to testify about cause of death in this case.

Contrary to the State's argument (Op. Br. at 20–22), the Second District did *not* hold that medical expert testimony is *always* required to establish cause of death. Nor did the court hold that the testimony of other types of experts is *never* admissible for establishing cause of death. Instead, the court explained why medical expert testimony was helpful *in this case* and held that Safarik was not qualified to provide it.

A medical-based understanding of pathology could help the jury understand Mrs. King's cause of death and lividity. *See People v. Davidson*, 82 Ill. App. 2d 245, 250 (2d Dist. 1967) (citing *Waller v. People*, 209 Ill. 284, 288 (1904))

(medical expert testimony is unnecessary *if* a person of average intelligence would understand that the "wound was mortal"). Mrs. King suffered no obviously fatal injuries that an average juror would understand to cause death without the assistance of an expert. *Cf. People v. Jones*, 22 Ill. 2d 592, 597 (1961) (cause-of-death opinion testimony was not needed to convict where record evidence showed an obviously fatal gunshot wound).

The State was required to provide an understanding of cardiac function; how tissue responds to physical pressure, lack of oxygen, and other factors; and how the skin appears following death based on position, movement, and time of death (lividity). Safarik does not have the qualifications necessary to provide such testimony. *Lerma*, 2016 IL 118496, ¶ 23 (concluding expert testimony must be "within the witness's experience and qualifications"). Safarik provided nothing close to the type of pathological or medical testimony that could help the jury understand anything about this case. *Park*, 72 Ill. 2d at 209–10 ("[T]he degree and manner of knowledge and experience required of an alleged expert is directly related to the complexity of the subject matter and the corresponding likelihood of error by one insufficiently familiar therewith.").

Recognizing the need for sophisticated expert medical and pathology testimony, the State and King each called forensic pathologists. The State's expert, Dr. Kalelkar, opined at trial that the cause of death was asphyxia caused by manual

strangulation. (R883–84.) By contrast, King's expert, Dr. Blum, explained that the evidence did not show the death was caused by manual strangulation and that Mrs. King likely suffered a sudden cardiac event brought on by stress, alcohol intoxication, sleep deprivation, and caffeine consumption. (R2624, R2631.)

Rather than allow the jury to do its job and decide which, if either, of these accounts was reliable, the State called Safarik to opine on the cause of death, despite his lack of qualification. This was wrong because experts may not opine on subject matters beyond the scope of their expertise.

People v. Park is particularly instructive. 72 Ill. 2d 203 (1978). In *Park*, this Court held that a police officer who had many encounters with marijuana was unqualified to testify that a substance was marijuana because he lacked chemical expertise or the assistance of chemical and microscopic analysis. *Id.* at 210–11. Because the conviction was based on that testimony, it was reversed. *Id.*

Similarly, in *People v. McKown*, the Court held that a police officer with extensive familiarity with HGN field-sobriety tests was not qualified to testify whether the test was generally accepted such that evidence from it was admissible. 236 Ill. 2d 278, 291, 300–01 (2010). The officer was an instructor on field sobriety testing at a police training institute, taught the physiology and pharmacology of alcohol at a university, was familiar with HGN research through collecting papers and articles, and had written and lectured on the subject. *Id.* These credentials did

not qualify him to testify because they did not render him an expert in the relevant fields of medicine, ophthalmology, or optometry. *Id.*; *see also People v. Hillis*, 2016 IL App (4th) 150703, ¶ 112 (finding an internal medicine doctor was qualified to diagnose and treat patient, but not to infer the cause of the injury, because "[a] doctor in internal medicine is not, *ipso facto*, a traffic-accident reconstructionist"); *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 23 (finding a witness who was a pathologist, but not a biomechanical engineer, unqualified to testify as an expert to the force required to cause the victim's brain injuries); *Perry*, 229 Ill. App. 3d 29, 33 (finding a forensic pathologist's expertise did not include an understanding of whether a sleeping mother could feel her child and so the expert could not testify to that subject).

Likewise, the fact that Safarik has observed the bodies of many crime victims does not qualify him to testify about the biological processes occurring in those bodies. He has no sufficient education, certification, or training in medicine or pathology, and nothing about his law enforcement experience signifies medical knowledge beyond that of an average person.

The State argues that Safarik's role in coordinating a study examining the effects of strangulation on elderly women or in publishing an article about that study qualified him to opine on cause of death as an expert. (Op. Br. at 20–21.) Safarik coordinated research for the study while he was employed at the FBI; the

study was completed after he retired. (R1290.) Several years later, Safarik testified that he was still in the *process* of publishing the data from the study (R1291), and there is no indication it was published.

The State has not explained whether those roles involved any actual understanding of pathology or otherwise demonstrated that the study or article establish that Safarik was qualified to provide medical expert testimony. *See McKown*, 236 Ill. 2d at 291, 300–01 (holding witness was not qualified as an expert despite the fact that he had written and lectured on a topic because he was not an expert in the relevant field). "[N]o matter how many crime scenes he had attended as a police officer, how much study he had done on violent crime scenes as an FBI profiler, or how many courses he had attended," Safarik "was not qualified by knowledge, skill, experience, training, or education to opine on the cause and manner of [Mrs. King's] death." 2018 IL App (2d) 151112, ¶ 78.

To avoid this shortfall, the State argues that Safarik was not testifying as a medical expert and that those qualifications are irrelevant. While "formal academic training or specific degrees are not required to qualify a person as an expert," there is still nothing about Safarik's experience that qualified him to provide his purportedly expert testimony. *Thompson v. Gordon*, 221 Ill. 2d 414, 429 (2006) (quoting *Lee v. Chi. Transit. Auth.*, 152 Ill. 2d 432, 459 (1992)) (alteration omitted).

At oral argument in the Second District, the State could not identify what other expertise Safarik had to offer:

> "At oral argument, we asked the State what was Safarik's area of expertise. That question was perspicacious, because the State could not readily answer it. Indeed, Safarik's opinions ranged from forensic pathology, to botany, to the sartorial."

King, 2018 IL App (2d) 151112, ¶ 74. The State also admitted that it used Safarik's testimony to "plug the holes" in the medical expert-witness testimony of Dr. Kalelkar. *Id.* Safarik conducted no independent investigation or analysis; he drew his conclusions based on the autopsy report authored by Dr. Kalelkar, further demonstrating that he was testifying as a medical expert. But Safarik is *not* a doctor or a medical expert; he only masqueraded as one. That is improper.

The State's fallback position is harmless error. But the admission of Safarik's cause-of-death and lividity testimony fails to satisfy any of the three harmless error criteria. *First*, it unquestionably contributed to King's wrongful conviction. Without Safarik's testimony, the jury would have had the assistance of two well-qualified medical experts to help it understand cause of death, one on each side. Safarik's cause-of-death-testimony was designed to "plug the holes" in the State's case unfairly, and improperly tipped the scales in the State's favor. *Id.* ¶ 88 (rejecting the harmless error argument, noting "the State forthrightly conceded at oral argument [that] Safarik's testimony was designed to 'plug the holes'" in Dr. Kalelkar's testimony).

Second, the other evidence in the case did *not* overwhelmingly support King's conviction. There was no physical evidence linking King to the crime scene, no eyewitness testimony, and no confession. It was established that Mrs. King was under significant stress and had recently consumed large quantities of alcohol, which, as Dr. Blum explained, could cause a sudden cardiac event. (R2631.)

Third, Safarik's testimony was not cumulative. The State purposely called Safarik to expand upon, not repeat, the testimony provided by Dr. Kalelkar. Again, he was there to "plug holes." *King*, 2018 IL App (2d) 151112, ¶ 88.

In sum, Safarik was not qualified to provide cause-of-death expert opinion—this case required expert medical testimony. Safarik's testimony on cause of death and lividity was not cumulative, the other evidence did not overwhelmingly support the conviction, and the testimony contributed to King's wrongful conviction. This Court should affirm the Second District's judgment and reverse King's conviction.

B. The Second District Correctly Held that Safarik's Crime Scene Analysis Testimony Was Inadmissible and Unduly Prejudicial.

Safarik's testimonial observations about the scene where Mrs. King's body was found were also unduly prejudicial, independently warranting reversal. He observed vegetation on Mrs. King's body, asserted it was the same as that found in the backyard of the Kings' home, and concluded Mrs. King was killed at the house and her body was later brought to the railroad tracks. (R1363–66.) But there

was no testimony about the kind and type of vegetation at the King residence and, as the Second District recognized, Safarik was in no way qualified to testify about the origin of vegetation. 2018 IL App (2d) 151112, ¶ 81. "[S]uch an opinion was beyond his expertise and the State presented no evidence of such a correlation." *Id.*

The Second District was right. The State has not offered any scientific or otherwise-reliable testing to establish that the leaves at the scene were the same as those at the house. Safarik's testimony was "nothing more than conjecture and guess." *Id.* And by failing to refute this conclusion in the petition for leave to appeal or opening brief, the State conceded Safarik was not qualified to offer this testimony. Ill. S. Ct. R. 341(h)(7); *Villa*, 2011 IL 110777, ¶ 21.

The remaining crime-scene testimony was equally improper because it contained nothing but potential conclusions that any reasonable juror could draw. "Under the guise of expert 'crime scene analysis,' Safarik basically offered his subjective opinion that the State's evidence was sufficient to convict defendant." *King*, 2018 IL App (2d) 151112, ¶ 74. The State argues that the testimony went beyond the understanding of a reasonable juror, or, alternatively, that the testimony was harmless. The State is wrong.

While a witness may testify "as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and

where such testimony will aid the trier of fact in reaching its conclusion," *Enis*, 139 Ill. 2d at 288, "the trial court should carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting that testimony for the jury's consideration," *Lerma*, 2016 IL 118496, ¶ 23. "[I]f the jury is competent to determine the facts in issue, then the expert opinion is of no special assistance to the jury and should not be admitted." *Harvey v. Norfolk & W. Ry. Co.*, 73 Ill. App. 3d 74, 83 (1979).

In *People v. Gilliam*, this Court held inadmissible an expert's testimony that a criminal defendant falsely confessed to protect his family. 172 Ill. 2d 484, 513 (1996). "Whether defendant falsely confessed to protect his family is not a concept beyond the understanding of ordinary citizens, and is not difficult to understand or explain." *Id.* Likewise, in *People v. Perry*, the First District held inadmissible a forensic pathologist's testimony that a mother could not have accidentally rolled onto and suffocated a child during sleep because it was a subject within the understanding of the average juror. 147 Ill. App. 3d at 275. And in *Harvey v. Norfolk & W. Ry. Co.*, the Fourth District held inadmissible an expert's opinion on whether a railway public safety rule was violated because "[n]othing contained in that testimony appear[ed] to be beyond the comprehension of the average juror." 73 Ill. App. 3d at 83–84.

Other courts have found similarly with respect to Safarik specifically. In *State v. Lenin*, for example, the New Jersey appellate court considered whether Safarik's testimony was admissible. 967 A.2d 915. The defendant there was charged with the murder of a woman that witnesses had seen with him the night she was killed. *Id.* at 919–20. The woman's body was found at a house where the defendant was known to occasionally stay. *Id.* At trial, the state sought to introduce expert testimony from Safarik about "the dynamics between the victim, the offender, and the location of the incident." *Id.* at 925. The trial court allowed only testimony about the circumstances of the victim and the crime scene. *Id.*

Safarik then testified that the victim's lack of defensive injuries showed she was unaware of the threat posed by the defendant; that the victim had voluntarily entered the house where she was killed; that the defendant was not motivated by sex or money; that the victim died of manual strangulation and blunt-force trauma; that the defendant must have been angry with the victim because he used more force than necessary to kill her; and that the crime was likely committed with a "weapon of opportunity," that is, one immediately accessible to the offender. *Id.* at 925.

The New Jersey appellate court determined that *all* of the testimony was inadmissible because it "fail[ed] to meet the threshold requirement" that expert witness testimony "be beyond the ken of the average juror." *Id.* at 926. Safarik "was

not testifying as to a subject matter peculiarly within his expertise or knowledge and unrecognizable or unfamiliar to the lay person"; he was "simply testifying about logical conclusions the ordinary juror could draw from human behavior." *Id.* at 926–27.

Safarik's testimony is inadmissible here for the same reasons. The ordinary juror needs no assistance understanding what type of clothes women wear running, that an individual who needs corrective lenses might wear them while running, or how to properly put on socks. The ordinary juror also understands that an individual might "stage" a crime scene if that individual knows he or she is a likely suspect. This type of testimony is not "unrecognizable or unfamiliar to the layperson" and is not the proper subject of expert testimony. *Id.* at 926.

The State cites two cases where Safarik's testimony was allowed—*State v. Swope*, 315 Wis. 2d 120 (2008) and *People v. Jackson*, 221 Cal. App. 4th 1223 (2013). (Op. Br. at 24.) Both are distinguishable. In *Swope*, a Wisconsin court applied Wisconsin's "relevancy test" to evaluate the admissibility of expert testimony. But this is a "unique" lenient test that "does not require the reliability of the underlying scientific evidence be established." *Swope*, 315 Wis. 2d at 132. Illinois does not use this test.

In *Jackson*, California law permitted expert testimony on evidence "even when common sense would explain its meaning." *Jackson*, 211 Cal. App. 4th at

1239. Under *Illinois* law, though, "[e]xpert testimony addressing matters of common knowledge is *not admissible* unless the subject is difficult to understand and explain." *Lerma*, 2016 IL 118496, ¶ 23 (emphasis added) (quotations omitted). *Jackson* also stressed that any error in Safarik's testimony was harmless because the other evidence against the defendant, including DNA evidence that "was not disputed by defendant's own expert except as to one minor point…was overwhelming." *Jackson*, 221 Cal. App. 4th at 1241. There is no DNA or other "overwhelming" evidence here, and the key issue was "disputed by defendant's own expert." *Id.*

This error requires reversal. Again, none of the three harmless-error approaches apply. *First*, there was no evidence other than Safarik's admittedly unqualified testimony about the leaf debris linking the scene where Mrs. King was found to the Kings' home. This was powerful evidence in support of the State's theory, but it was pure speculation. There was no basis for Safarik to testify that Mrs. King was killed at her home by someone close to her, and yet, this is exactly what the jury was told (and by a purported expert).

Without Safarik's testimony, the jury could have drawn its own observations about the crime scene evidence without the improper veneer of Safarik's purported expertise. In *Perry*, the appellate court reversed a conviction because the trial court erroneously allowed an expert to testify to a subject within

the understanding of an average juror. 147 Ill. App. 3d at 276. The court considered and rejected the argument that the error was harmless, noting that "[e]xpert testimony tends to 'overpersuade in favor of the party introducing it.'" *Id.* (quoting *Coffey v. Hancock*, 122 Ill. App. 3d 442, 448 (1984)). Here, the jury likely overvalued Safarik's testimony because of the veneer of expertise he provided. At closing, the State told the jurors King "set up a scene," that it was *Safarik* who had taught them how to look at the crime scene evidence, that they should look at the evidence as *he* instructed, and that, when they did, they would see that King was guilty. (R2975–78.) Safarik's testimony undoubtedly contributed to King's conviction.

Second, the other evidence against King was far from overwhelming. In this regard, *Lenin* is distinguishable in a manner that makes Safarik's testimony here more prejudicial. In *Lenin*, Safarik's conclusions "were supported by other competent evidence and witnesses." 967 A.2d at 927. Several other witnesses testified to seeing the *Lenin* defendant and the victim together shortly before the crime and to seeing the defendant and the victim enter the house where the victim was killed that night. *Id.* The medical examiner also testified that the cause of death was manual strangulation and blunt-force trauma, and several witnesses testified to seeing the defendant with a ball-peen hammer, the likely murder weapon. *Id.* The *Lenin* defendant also made incriminating statements to an informant wearing a wire. *Id.* Here, by contrast, Safarik's purported crime-scene conclusions were *not*

supported by, or redundant of, other competent evidence, other witness testimony, or a confession.

Third, Safarik's purported crime-scene testimony was not cumulative. According to the State, the testimony was cumulative because a juror could draw the same conclusions based on his or her own observation. (Op. Br. at 25–26.) But that does *not* make the evidence cumulative of anything, it makes it unique and inadmissible for all the reasons already described. *See Perry*, 147 Ill. App. 3d at 276 (reversing the defendant's conviction because an expert was permitted to testify about subjects within the understanding of the jury); *see also People v. Bartall*, 98 Ill. 2d 294, 320 (1983) (holding the exclusion of evidence was harmless error because the evidence was cumulative). The jury's potential observations are not independent evidence, nor do they have the over-persuasive weight of an expert's opinion.

The State relies on *People v. Mertz*, 218 Ill. 2d 1, 75 (2005), to argue the introduction of Safarik's testimony was harmless. (Op. Br. at 25–26.) *Mertz* is distinguishable. There, the expert witness testified about the characteristics he thought were typical of those who committed murder and arson and opined that the evidence showed the defendant's preparation for those crimes. *Mertz*, 218 Ill. 2d at 71. The Court found the admission of the expert's testimony harmless in part because the inferences "were commonsense ones the jurors no doubt had already

drawn themselves," but also because the testimony was "cumulative of testimony given by other witnesses." *Id.* at 75. Two other witnesses testified about how the victims appeared posed and about similarities between crime scenes. *Id.* Others testified that the defendant confessed to the crime, and there was evidence corroborating the confession. *Id.*

The evidence here is different. There was no confession. Witnesses who were in the vicinity at the time of the alleged crime testified that they saw no one and heard no cars. (R2328–29, R2339–40, R2355–56.) And there was considerable evidence that Mrs. King was alive when she arrived at the railroad tracks: the train engineer initially reported that he thought he saw her breathing (SR475–77), a paramedic reported Mrs. King's heart was producing pulseless electrical activity when he arrived at the scene (SR497–98), and another first-responder testified that he told a nurse Mrs. King's body was still warm to the touch when he arrived (R2394).

Safarik's testimony usurped the role of the jury and, because that error was substantially prejudicial, this Court should affirm the reversal of King's conviction.

C. The Second District Correctly Held that Safarik's Testimony Included Prohibited Profiling Testimony.

The trial court, when ruling on the State's motion *in limine*, specifically prohibited Safarik from offering profiling testimony. Yet Safarik did just that. This

represents a third independent basis for reversal. *People v. Brown*, 232 Ill. App. 3d 885, 899–900 (1st Dist. 1992) (reversing the defendant's conviction because the improper admission of profiling testimony deprived him of a fair trial).

The State argues that the profiling testimony did not profile King, or, alternatively, that the evidence is reliable and not prejudicial. (Op. Br. 26–29.) But the testimony falls comfortably within the definition of profiling testimony, it *is* unreliable, and its introduction *was* prejudicial. *Vasser*, 331 Ill. App. 3d at 687 ("[P]rofile testimony improperly invades the province of the finder of fact and may impermissibly imply a propensity to commit crime."). Because the State does not argue that the admission of the profiling testimony was harmless, that issue is forfeited.[2] Ill. S. Ct. R. 341(h)(7).

"Profile evidence usually involves a witness describing common practices, habits or characteristics of a group of people." *Vasser*, 331 Ill. App. 3d at 687 (citing *Brown*, 232 Ill. App. 3d at 898). Here, Safarik testified about the common practices, habits, and characteristics of individuals who stage crime scenes. He opined that

---

[2] Even if the argument were not forfeited, the error was not harmless. The testimony that identified Mr. King as someone who would stage a crime was the type of evidence that would compel a jury to wrongfully convict. No other witness offered this testimony, and, as discussed, there was scarce evidence to support the State's theory. *In re Rolandis G.*, 232 Ill. 2d 13, 46 (2008) (holding a conviction must be reversed when "the properly admitted evidence, standing alone, [does] not overwhelmingly establish the defendant's guilt").

individuals who stage crimes do so by changing the physical evidence to draw law enforcement's attention away from themselves. (R1361–62.) He opined that the behavior is not engaged in by individuals who are unfamiliar to their victims: "Strangers don't have a perception that law enforcement is going to link them to either the victim or to the crime scene location." (R1362.) He then added, "so that's why they engage in this post-homicide behavior to change the dynamics of the case, *and in this case I think the attempt was to make this look like it was an accident, that she had been running and got hit by a train.*" (*Id.* (emphasis added).) This is profiling testimony. *See Mertz*, 218 Ill. 2d at 69–73 (considering testimony about common practices and characteristics of individuals who commit murder and arson profiling testimony); *Brown*, 232 Ill. App. 3d at 898 (finding that testimony about the common practices, habits, and characteristics of drug sellers amounted to inadmissible profiling testimony).

In 2005, this Court declined to decide whether profiling testimony was ever reliable, though it recognized that recent decisions of other state supreme courts excluded such testimony. *Mertz*, 218 Ill. 2d at 72–73 (citing *State v. Fortin*, 843 A.2d 974, 1000–02 (N.J. 2004) (holding profiling testimony should not have been admitted until a reliable database corroborating the testimony was produced); *State v. Stevens*, 78 S.W.3d 817, 836 (Tenn. 2002) (holding profiling testimony was properly excluded because it did not "bear sufficient indicia of reliability to

substantially assist the trier of fact"); *see also In re Detention of Thorell*, 72 P.3d 708, 726 (Wash. 2003) (holding profiling testimony inadmissible because the potential for prejudice significantly outweighs its probative value).

Courts since have continued to hold such testimony inadmissible. *E.g.*, *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010); *Washington v. Crow*, 438 P.3d 541, 551 (Wash. Ct. App. 2019) (barring the use of profile evidence as substantive proof of guilt); *South Carolina v. Huckabee*, 798 S.E.2d 584, 589 (S.C. Ct. App. 2017) (holding there is "no place in a trial" for criminal profiling); *Commonwealth v. Horne*, 66 N.E.3d 633, 637–38 (Mass. 2017); *Arizona v. Ketchner*, 339 P.3d 645, 647–48 (Ariz. 2014); *State v. Hughes*, 191 P.3d 268, 281 (Kan. 2008); *see also Marsh v. Valyou*, 977 So. 2d 543, 561–63 (Fla. 2007) (requiring profile testimony to satisfy the *Frye* test for scientific expert testimony before it could be admissible).

This Court should adopt the same reasoning and likewise exclude profiling testimony as unreliable. But even if the Court decides against finding profiling testimony unreliable per se, the profiling testimony in this case warrants reversal and a new trial because "the evaluative testimony of the profiler is not supported by evidence of reliable databases and methodologies." *Mertz*, 218 Ill. 2d at 72–73. Safarik identified no databases, methodologies, or other resources that would make his testimony more reliable. No evidence suggested King was at the railroad

tracks other than Safarik's testimony. And by admitting the testimony, the trial court permitted a violation of its own order.

This is *another* independent basis for reversal. The profiling testimony drew on conclusions the jurors could have drawn for themselves, so it is inadmissible for all the reasons discussed above. Additionally, the profiling testimony was unreliable and not supported by reliable databases or methodologies. Again, the jury was likely over-persuaded by the purported gravitas of the expert. *Perry*, 147 Ill. App. 3d at 276. Because of this error, independently, and because of the cumulative effect of the errors related to Safarik's testimony together, the Court should affirm the Second District and reverse King's conviction.

II. The Second District Correctly Held that Mrs. King's Family's Testimony and the State's Remarks During Closing Argument Are Inadmissible on Retrial, and Both Issues Require Reversal.

After holding that the trial court's admission of Safarik's testimony constituted prejudicial error, the Second District correctly identified and prohibited the State from repeating two errors on retrial. *First*, the court ruled that the State may not introduce the emotionally charged testimony of Mrs. King's sister and father, because such testimony is irrelevant and unduly prejudicial. *King*, 2018 IL App (2d) 151112, ¶ 91. *Second*, the court held that the State's remarks during closing argument were "improper attempt[s] to define and dilute the

State's burden of proof" and instructed that "nothing close to it is permitted on retrial." *Id*. at ¶ 92.

The State argues that each of the appellate court's holdings is erroneous. (Op. Br. at 30, 32.) But precedent shows that testimony introduced solely for emotional impact and prosecutorial statements trying to define the burden of proof have no place in a criminal trial. *People v. Bernette*, 30 Ill. 2d 359, 371 (1964) (reversing murder conviction because prosecution drew out irrelevant and prejudicial testimony that the victim left behind a family); *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (4th Dist. 2008) (reversing conviction because the prosecution improperly shifted the burden of proof to the defendant). This Court should affirm to ensure King receives a fair trial.

Further, both of these errors represent independent bases for King to receive a new trial. *See People v. McDonough*, 239 Ill. 2d 260, 275 (2010) (recognizing that this Court "may affirm for any basis presented in the record").

A. The Second District Correctly Held that Mrs. King's Family's Testimony Is Inadmissible.

The Second District carefully reviewed the testimony the State elicited from Ms. Keuster and Mr. Keuster, holding that "the evidence of the family's emotional attachments and reactions went beyond anything that was relevant and was introduced solely for its emotional impact." *King*, 2018 IL App (2d) 151112, ¶ 91. The court was right. *Bernette*, 30 Ill. 2d at 371 ("[W]here testimony in a murder case

respecting the fact the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence.").

The State argues that the appellate court's ruling is erroneous because the State elicited the testimony as foundation for Mrs. King's habits and evidence of King's consciousness of guilt. (Op. Br. at 30–32.) As explained below, the record shows otherwise.

Moreover, even if Ms. Keuster's and Mr. Keuster's testimony was relevant in demonstrating Mrs. King's habits or King's consciousness of guilt, it is still inadmissible because its prejudicial impact far outweighs any probative value. Ill. R. Evid. 403. This was not a sentencing hearing where such family testimony was admissible. *See* 725 ILCS 120/4(a)(4) (giving immediate family members of a deceased victim the right to be heard at sentencing). This was a murder trial where the State was charged with proving King's guilt beyond a reasonable doubt, and in which such highly prejudicial and irrelevant testimony has no role.

1. The State repeatedly elicited irrelevant testimony from Mrs. King's family to highlight its emotional suffering.

The State presented the jury with emotionally charged testimony from Mrs. King's family time and time again. And while "some reference to the victim's

family is proper and inevitable," *King*, 2018 IL App (2d) 151112, ¶ 91 (citing *People v. Campos*, 227 Ill. App. 3d 434, 449 (1992)), "evidence that dwells on the victim's family is unduly prejudicial." *Id*. (*citing Bernette*, 30 Ill. 2d at 371). Here, the State elicited testimony that went far beyond anything relevant and served no purpose other than to provoke an emotional reaction. And, contrary to the State's assertion that the testimony amounted to an "incidental admission" (Op. Br. at 32), the State repeatedly drew out inflammatory testimony with intentional, leading questions.

The State began by introducing testimony from Ms. Keuster to show how close a relationship she and Mrs. King had. After asking background questions about their family, the State led Ms. Keuster to testify specifically about their bond:

> Q: Kristine, did you get long [sic] with your mother that well?
> A: Um, yeah. We had a brief time where we didn't talk, but for the past ten years now we have had a good relationship.
> Q: During that time frame did that affect your relationship with your sister Kathleen at all?
> A: Never.
> Q: Did you develop a closer bond with Kathleen as a result though?
> A: Yes.

(R1186.)

The defense objected to the leading questions, but the trial court overruled the objection. (*Id*.) The State continued, asking for anecdotes that could demonstrate Ms. Keuster's close bond with Mrs. King:

> Q: What types of things in terms of developing a closer bond was it that you can describe Kathleen did for you?

A: When I was in high school she kind of took that motherly role. She was there for me through everything through starting high school and beginning college. She was my best friend.
Q: Now, as a matter of fact, didn't – when you got engaged she did something for you; is that correct?

(R1186–87.)

The defense objected again and asked to approach. *Id*. In sidebar, the defense argued that the testimony was irrelevant, prejudicial, and amounted to "nothing more than emotional testimony" designed to "prejudice the jury and make them feel pity." (R1187.) The State argued that the testimony "goes to their relationship, their closeness in terms of what happened in the days and months before between them, how close they were, the observations that she made." (R1188.) The trial court overruled the objection and allowed the testimony. The State returned to its line of questioning and asked Ms. Keuster to "tell the ladies and gentlemen of the jury" about something that Mrs. King did for her when she got engaged. In response, she told the jury that Mrs. King went with her and bought her a wedding dress. (R1187–88.)

After describing the close relationship, the State asked Ms. Keuster to describe her and Mr. Keuster's reactions to finding out that Mrs. King had passed away (again over the defense's continuing objections):

Q: What was your dad's demeanor?
[Defense objection overruled.]
A: He was frantic, and he didn't believe me. He kept asking me what I was saying.
Q: What was your demeanor?

A: I was – I didn't know what to do. I was – I was walking back and forth in my apartment. I had given Tim my phone to get directions to the police station, and I was crying. I burst out into tears.

(R1232–33.)

After Ms. Keuster testified that she went to their father's house, the State again asked her to testify about their emotional reactions:

Q: And what was your emotion while you were there?
[Defense objection overruled.]
A: I was really upset. I couldn't stop crying. I was shaking and just crying nonstop.
Q: What was your dad's emotion?
A: He was crying and same, shaking and –
[Defense objection overruled.]

(R1235.)

The State compounded the prejudicial impact of this testimony by asking Mr. Keuster to answer the same questions about his reaction to his daughter's death:

Q: And when Christine told you that Kathleen was dead, what was your reaction, Mr. Kuester [sic]?

(R1925.)

The defense objected, and the trial court sustained the objection. *Id*. The State then asked the question a different way, drawing another objection. This objection was overruled, however, and Mr. Keuster testified as follows:

Q: What did you do?
[Defense objection overruled.]
A: I started screaming on the phone, "What are you talking about? What are you – where?" Everything. Just, "What are you talking about?"

(R1925–26.)

This allowed the State to present the highly emotional testimony twice, through both Ms. Keuster and Mr. Keuster.

The trial court also erred in permitting Ms. Keuster to testify in a way that suggested King was guilty:

> Q: And what did you do when you called your dad?
> A: I told him that my sister died.
> Q: Was that the – was that the – the second time you called your dad with Tim's phone.
> A: I told him to call the police.
> Q: Why did you do that?
> A: Because the boys –
> [Defense objection overruled]
> A: The boys were there.
> Q: Okay.
> A: And I didn't want the Defendant to pick up the boys.
> [Defense objection and motion to strike overruled.]

(R1233–34.)

With this testimony, Ms. Keuster implied that she did not want King to pick up his children because she thought he was responsible for Mrs. King's death.

This testimony constitutes reversible error because lay witnesses may not opine on the ultimate issue of guilt in a criminal case. *People v. Crump*, 319 Ill. App. 3d 538, 544 (3d Dist. 2001); *People v. McClellan*, 216 Ill. App. 3d 1007, 1013 (4th Dist. 1991) (explaining that improper opinion testimony from lay witnesses is "especially improper and prejudicial when it goes to an ultimate question of fact

to be decided by the jury"). It also highlighted the emotional nature of the testimony by placing blame on King.

In light of the above, the Second District found that "the evidence of the family's emotional attachments and reactions went beyond anything that was relevant and was introduced solely for its emotional impact." *King*, 2018 IL App (2d) 151112, ¶ 91. The State claims otherwise, arguing that "none of the challenged testimony was problematic" because the testimony was relevant to lay a foundation for Mrs. King's habits and to demonstrate King's consciousness of guilt. (Op. Br. at 30–32.) The State is wrong, and neither of the purported bases for relevance supports admission.

The State first argues that Ms. Keuster's testimony about her close relationship with Mrs. King—including the anecdotal and emotional testimony about wedding dress shopping—was properly admitted as foundation for testimony about Mrs. King's habits pertaining to the day of her death. (Op. Br. at 30–31.) But the State fails to explain how testimony about the close emotional bond between the two (let alone evidence about buying a wedding dress) lays a foundation for knowledge of Mrs. King's relevant daily habits.

The State points to a defense objection to the foundation-of-habit testimony as the reason these statements were elicited, arguing that "[g]iven this objection and the five-year age difference between" Mrs. King and her sister, "the People

presented Kristine's testimony to establish, and it was relevant to establishing, sufficient foundation for the People's habit evidence." (Op. Br. at 31.) The State is mistaken: The defense objected to the State's foundation for this habit evidence only *after* the State elicited testimony about the sisters' close bond. (R1198.) The State did *not* introduce this testimony in response to objection.

Moreover, the State offers no explanation or case law in support of its contention that evidence of Mrs. King's "motherly role" toward her sister lays a foundation for any knowledge of Mrs. King's daily habits and routine that could have anything to do with the issues at trial. This is important because, as the State quotes in its brief, this Court has specifically "condemned the introduction of otherwise irrelevant information about a crime victim's personal traits or familial relationships at the guilt phase of trial." *People v. Lewis*, 165 Ill. 2d 305, 330 (1995); (Op. Br. at 30).

The Court has similarly found that testimony that a murder victim left behind family is irrelevant and prejudicial. *Blue*, 189 Ill. 2d at 129 ("Proof that the victim of a crime is survived by a family is irrelevant to the guilt or innocence of a criminal defendant…. It can only serve to prejudice a defendant in the eyes of the jury."); *Bernette*, 30 Ill. 2d at 371 ("[T]his Court has consistently condemned the admission of evidence that the deceased left a spouse and a family, inasmuch as such evidence has no relationship to the guilt or innocence of the accused or

the punishment to be inflicted upon him, but serves ordinarily only to prejudice him in the eyes of the jury."); *People v. Dukes*, 12 Ill. 2d 334, 340 (1957) ("Such evidence has no relation to the guilt or innocence of the accused or the punishment to be administered to him, and is ordinarily calculated only to prejudice the defendant with the jury."). The same concerns are at play here, and the State's repeated focus on Mrs. King's closeness to her sister is more prejudicial than the simple fact that she left family behind.

People v. Hope, 116 Ill. 2d 265 (1986) is instructive. There, this Court reversed a defendant's conviction where "[t]hroughout the guilt phase of the defendant's trial, the prosecutor made reference to and elicited testimony regarding the decedent's family." *Id*. at 276. The prosecutor in *Hope* referenced that the decedent left behind family four times during trial and asked the decedent's widow the ages of their children and to show the jury a family picture from when the decedent was alive. *Id.* at 276–77.

In the face of this evidence, this Court held that "[t]he questions about the victim's family had no relevance to the defendant's guilt or innocence. The only purpose these questions could serve is to prejudice the defendant in the eyes of the jury." *Id*. at 278. The manner in which the testimony was elicited added to its prejudicial impact:

> The evidence concerning the decedent's family was not brought to the jury's attention *incidentally*, rather it was presented in a series of

> statements and questions in such a method as to permit the jury to believe it material. If any doubt existed as to its materiality, it was removed when defense counsel's objections were overruled. In overruling the objections the prejudicial effect was amplified.

Id. (citation omitted).

All of these problems are present here. Ms. Keuster's testimony about her close relationship with Mrs. King was not incidental, but drawn out by the State's pointed questions. After she testified to her once-strained relationship with her mother, the prosecutor asked, "[d]id you develop a closer bond with Kathleen as a result though?" (R1186.) The State asked Ms. Keuster "[w]hat types of things in terms of developing a closer bond was it that you can describe Kathleen did for you?" (*id.*), and for her to describe something that Mrs. King did for her when she got engaged. (R1187–88.)

The State's multiple questions eliciting this testimony compounded its prejudicial impact. *See People v. Lewis*, 165 Ill. 2d 305, 332 (1995) (distinguishing from *Hope* and *Bernette* because the prosecutor asked "[o]nly one question…to elicit the prejudicial testimony"); *Dukes*, 12 Ill. 2d at 340 ("Where it is not elicited incidently [sic], but is presented in such manner as to cause the jury to understand that it is a matter material and proper to be proved, its admission is prejudicial error."). And the materiality of that prejudicial impact was "amplified" because the trial court continually overruled defense objections. *Hope*, 116 Ill. 2d at 278.

The State argues that Ms. Keuster's and Mr. Keuster's testimony about their emotional reactions was "relevant to show that by contrast, the defendant's reaction to the news…were [sic] unusual and supported a consciousness of guilt." (Op. Br. at 31–32.) But the State cites, and we could find, no case law to support the argument that the emotional reactions of some family members is probative to the consciousness of guilt of another. Nor does the State explain its repeated introduction of this testimony.

2. *Ms. Keuster's and Mr. Keuster's testimony served no purpose other than to prejudice the jury against King.*

Assuming that Ms. Keuster's and Mr. Keuster's reactions were relevant to demonstrate consciousness of guilt by comparison (they are not), the testimony is still inadmissible because its prejudicial effect substantially outweighs its probative value. *See* Ill. R. Evid. 403. Through repeated questions about the demeanor of family members and their emotional reaction and what they did upon finding out Mrs. King had died (R1232–35, R1925–26), the State pointed the jury to the suffering of Mrs. King's family at least five times in "an improper appeal to the emotions of the jurors." *Hope*, 116 Ill. 2d at 277. This ensured that any possibly probative value was outweighed by prejudicial effect.

This Court should affirm the Second District and hold that Mrs. King's family's testimony is irrelevant and unduly prejudicial, and prohibit the State from adducing similar evidence during King's retrial.

B. The Appellate Court Correctly Held that the State's Remarks in Closing Inappropriately Sought to Dilute Its Burden of Proof.

During closing, the State discussed its burden of proof and advised the jury that it was "okay" for the jury to have questions and "still convict the defendant." (R2976.) The Second District found this an improper attempt to "define and dilute the State's burden of proof," admonishing the State that "nothing close to it is permitted on retrial." *King*, 2018 IL App (2d) 151112, ¶ 92. The State argues that its remarks were permissible because they did not misstate the burden of proof and responded to the defense counsel's closing argument. (Op. Br. at 33–34.) The Second District was right, and the State is wrong.

"The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *Speight*, 153 Ill. 2d at 374. "It is therefore improper for counsel to give an 'instruction' on reasonable doubt during closing argument." *People v. Carroll*, 278 Ill. App. 3d 464, 467 (4th Dist. 1996). Courts find particularly problematic remarks that "attempt to improperly define reasonable doubt by describing what it is not." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 44; *see also People v. Eddington*, 129 Ill. App. 3d 745, 780–81 (4th Dist. 1984) (instructing the prosecution not to address the definition of reasonable doubt after the prosecution advised the jury, "[a]s long as you may have some doubt as to what exactly occurred, that doesn't mean the

defendant is not guilty"). "Such remarks tend to de-emphasize the State's burden." *Eddington*, 129 Ill. App. 3d at 781.

Here, the State violated these rules by improperly instructing the jury on the burden of proof during closing. The State told the jury:

> What you need to understand is that it's okay for you to go back there to the jury deliberation room and have questions. It's okay for you to go back to the jury deliberation room and have questions and still convict the defendant. It's okay for you to have questions such as what point of access did he take. It's okay for you to have a question like that and to convict the defendant. As long as those questions don't amount to a reasonable doubt. If you take a look at all the other evidence in this case, it is clear that this is beyond a reasonable doubt.

(R2975–76.)

First, the State argues that this accurately stated the burden of proof. (Op. Br. at 34.) Citing *People v. Hall*, 194 Ill. 2d 305, 330 (2000), the State claims that "[i]t is firmly established that the jury need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances…. In telling the jury that it was 'okay' to have questions about which three points of access defendant took to reach the railroad tracks, R2976, the prosecutor merely offered an example of such a link in the chain of circumstances." (Op. Br. at 34.)

The defendant in *Hall* challenged the State's comment during closing argument that the police had "eliminated a lot of [possible suspects]." 194 Ill. 2d at 346. The *Hall* defendant argued that this comment misstated the evidence presented at trial. *Id*. This Court disagreed, and held that the prosecutor's

comment did not "implicate[] the integrity of defendant's trial" because it was responsive to the defendant's closing argument. *Id*.

The State's comments in *Hall* are distinguishable. The *Hall* defendant did not challenge any comment relating to the burden of proof and did not argue that the State had attempted to dilute or redefine its burden. *Id*. In *Hall*, the defendant attacked the thoroughness of the investigation and argued that the police immediately focused their investigation on the defendant. *Id*. The State responded to this argument in reply by commenting that the police "could be proud of the investigation" and citing the size of the investigatory file. *Id*. The State concluded that the police "eliminated a lot of [possible suspects]." *Id*. This Court held that the prosecutor's remarks were proper because the defendant's comments on the integrity of the investigation "invited a response." *Id*.

Here, rather than respond to specific arguments with counter-arguments on the evidence presented, the State instructed the jury that it could still convict King even despite their questions. (R2976.) The State contends that the comments were proper because "beyond a reasonable doubt" does not require the jury's satisfaction "with each link in the chain of circumstances." (Op. Br. at 34). But the State's argument itself shows that it improperly sought to instruct the jury on the nuances of its burden of proof by explaining the requirements of causation.

Eddington, 129 Ill. App. 3d at 780–81 (holding that the prosecutor's attempt to define "reasonable doubt" and the "presumption of innocence" was error).

The State's explanation of the burden of proof went further astray by telling the jury that it was okay to have questions about a material issue in dispute—King's access to the railroad tracks—and still convict. (R2976.) In essence, the State acknowledged one of King's defenses—that there was no evidence that King took the point of access he would have had to take to bring Mrs. King's body to the tracks without being seen or injuring Mrs. King post-mortem—and then used that defense as an example of an issue that the jury could overlook and still convict. The law does not allow this, because it amounts to an "instruction" on reasonable doubt. *See Burman*, 2013 IL App (2d) 110807 at ¶ 44 ("In our view, the prosecution's stating that it need not present proof 'beyond all doubt' or 'beyond an unreasonable doubt' was an attempt to improperly define reasonable doubt by describing what it is not.").

Second, the State argues that its remarks were proper because they responded to arguments made in King's closing. (Op. Br. at 34–35.) As described above, this is wrong. The State does not point to any comment by defense counsel that the above remarks reasonably respond to. Instead, the State points to King's challenge to the State's theory of the case in general and the questions the defense believes it raised, such as why King would have dressed Mrs. King in running

clothes, how King would have moved Mrs. King or reached the railroad tracks, and why King would have said Mrs. King was going running. (*Id*.)

These arguments are all the type of arguments defendants routinely make to establish reasonable doubt. Put simply, the State has not cited, nor could we find, any case that suggests that these types of arguments are sufficient to open the door to allow the State to overcome the presumption against explaining the burden of proof. This makes sense because, if it were otherwise, the rule prohibiting instruction on the standard of proof would have no meaning.

The State cites *People v. Evans*, 209 Ill. 2d 194 (2004) (Op. Br. at 34), but *Evans* provides it no support. In *Evans*, a defendant appealed his conviction and argued that the prosecutor's remarks referencing O.J. Simpson inappropriately implied that "like O.J. Simpson, defendant is guilty and, unlike O.J. Simpson, defendant should not escape justice." *Evans*, 209 Ill. 2d 194 at 223. This Court rejected the argument because the reference to Simpson responded to the defendant's closing argument theme. *Id*. at 225. Unlike the prosecution in *Evans*, the State's comments were not responsive to King's theory of the case (that Mrs. King died from a sudden cardiac event, not a crime) or interpretation of the evidence (that some of it did not make sense)—instead, the State responded to King's arguments by improperly instructing the jury on the contours of reasonable doubt. (R2976.)

Supporting its decision, the *Evans* Court relied on a number of other cases finding that reference to O.J. Simpson, while ill-advised, did not constitute error. *Id*. at 225–26. The State's comments here, though, were fundamentally different. In *Evans*, the prosecution did not try to instruct the jury on the bounds of reasonable doubt and did not use an example of a disputed factual issue to tell the jury it is okay to have questions. *Evans* provides no guidance.

This Court should affirm the Second District and instruct the State to refrain from improperly attempting to explain the burden of proof on retrial.

C. The Admission of Ms. Keuster's and Mr. Keuster's Testimony and the State's Remarks During Closing Argument Are Grounds to Affirm and Remand for a New Trial.

The admission of irrelevant and prejudicial testimony from Mrs. King's family, and the prosecutor's improper attempt to dilute the State's burden of proof during closing, each independently deprived King of a fair trial. The State argues that King forfeited any challenge to either issue because he failed to object at trial and raise the issues in his post-trial motion, and thus cannot rely on these errors as independent bases for reversal. (Op. Br. at 29, n.2, 32, n.3.) The State is wrong for two reasons.

First, with respect to Mrs. King's family's testimony, there was no forfeiture because King repeatedly objected to the trial court's errors in admitting Ms. Keuster's and Mr. Keuster's testimony at trial *and* raised those errors in his

post-trial motion. *Second*, forfeiture does not apply to Mrs. King's family's testimony *or* the State's improper characterization of the burden of proof during closing argument because of the plain-error doctrine.

To start, "where testimony in a murder case respecting the fact the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence." *People v. Jordan*, 38 Ill. 2d 83, 91 (1967) (quoting *Bernette*, 30 Ill. 2d at 371). To preserve a claim of error in admitting such testimony, a defendant must object to the testimony at trial and include the error in a post-trial motion. *People v. Macri*, 185 Ill. 2d 1, 43 (1998).

Here, the record refutes the State's contention that King did not object to the family's testimony or raise those objections in his post-trial motion. (Op. Br. at 32, n.3.) Defense counsel repeatedly objected to the inappropriate family testimony and the trial court overruled those objections. (*See, e.g.*, R1232–35.) King raised these errors in his post-trial motion. (C626–27.)[3] King did not forfeit his

---

[3] King included the following errors relating to this testimony in his post-trial motion:

- "Overruling Defendant's objection based on 'leading' to the State's question during direct examination about the impact of the deceased's relationship with her mother on the deceased's relationship with the witness." (C626.)

arguments about the family's testimony and the record presents a concrete basis to affirm. *Bernette*, 30 Ill. 2d at 367 (reversing conviction, despite sufficient evidence of guilt, because the trial court admitted prejudicial testimony from the victim's family).

Next, even if King *had* failed to object to Mrs. King's family's testimony and raise those errors in his post-trial motion, this Court can reverse his conviction because these constitute plain error. As applied, the plain-error doctrine permits a court to reverse a conviction based on an unpreserved error

---

- "Overruling Defendant's objection based on relevance, to the State's question during direct examination about the deceased taking on a motherly role to the witness who was her sister." (C626.)
- "Overruling Defendant's objection based on relevance, to the State's question during direct examination as to what the deceased did for the witness when the witness got engaged, allowing the state to elicit testimony that the deceased purchased the witness's wedding gown for her." (C626.)
- "Overruling Defendant's objection based on relevance, to the State's question during direct examination as to what the witness's father's demeanor was when she called him and informed him that the deceased had died." (C627.)
- "Overruling Defendant's objection based on relevance, to the State's question during direct examination as to why the witness told her father to call the police." (C627.)
- "Overruling Defendant's objection based on relevance, to the State's question during direct examination as to the witness not wanting Defendant to pick up his children." (C627.)
- "Overruling Defendant's objection based on relevance, to the State's question during direct examination about the witness's demeanor and emotions." (C627.)

when a "clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The Second District closely reviewed the record and correctly held that the evidence was closely balanced, identifying the main areas where serious factual questions arose: "[T]he evidence of guilt in the present case was not overwhelming. Dr. Blum questioned Dr. Kalelkar's methodology and conclusions. There was no eyewitness, no confession, and no forensic evidence connecting defendant to the crime." *King*, 2018 IL App (2d) 151112, ¶ 89. Therefore, any error "alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *Piatkowski*, 225 Ill. 2d at 565.

The trial court's admission of Mrs. King's family's irrelevant and prejudicial testimony was clear error and, given the closely balanced evidence, demands reversal. *See People v. Sykes*, 2012 IL App (4th) 111110, ¶¶ 55–57 (4th Dist. 2012) (reversing conviction because admission of prejudicial testimony and improper remarks during closing argument constitute plain error in a trial where the evidence is closely balanced); *Hope*, 116 Ill. 2d at 279 (reversing conviction based on testimony from the victim's family because "[t]he extent to which such

inflammatory questions affected the jury in its conviction…will never be known").

For the same reason, this Court should reverse based on the State's improper arguments concerning the burden of proof during closing argument. Forfeiture does not apply because those remarks constitute plain error.[4]

The State cites three cases to support its claim that King forfeited his challenge to the State's closing-argument statements by failing to include it in his post-trial motion. But those cases hold only that an objection is forfeited *in the absence of plain error*. *See People v. Harris*, 225 Ill. 2d 1, 31 (2007) (considering whether admission of testimony constituted plain error after observing that the argument was "procedurally defaulted" for lack of objection); *People v. Enoch*, 122 Ill. 2d 176, 190–91 (1988) ("[S]uch a failure has, in the past, constituted waiver,

---

[4] It is true that Illinois courts have often held that improper remarks on the burden of proof do not constitute plain error. Those courts, however, found that the evidence was *not* closely balanced and thus reviewed the improper remarks under the second, more difficult prong of the plain-error doctrine, which requires that a "clear or obvious error occured [sic] and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565. By contrast, the Court here may reverse "regardless of the seriousness of the error" because the evidence was closely balanced. *Id*. In circumstances like these, courts have reversed based on improper comments made during closing argument. *See, e.g.*, *People v. Easley*, 2015 IL App (2d) 130791, ¶ 17 (reversing conviction and remanding for new trial for improper remarks during closing argument because the evidence was closely balanced); *People v. Johnson*, 2014 IL App (2d) 121165-U, ¶ 65 (same); *People v. Eckhardt*, 124 Ill. App. 3d 1041, 1044 (2d Dist. 1984) (same).

except in cases involving plain error."); *People v. Maldonado*, 398 Ill. App. 3d 401, 416 (1st Dist. 2010) (holding that "the record shows that the evidence adduced at trial was so closely balanced in this case that the error alone could have affected the outcome and thus the waiver rule does not apply").

Given the underwhelming evidence presented against King, the errors at closing argument threatened the fairness of his trial. *See Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993) (holding that a constitutionally deficient definition of reasonable doubt is plain error requiring reversal); *Carroll*, 278 Ill. App. 3d at 467 (holding that errors in stating the burden of proof during closing argument constitute plain error "because of their potential for undermining such fundamental concepts of justice as the defendant's presumption of innocence and the prosecution's burden of establishing beyond a reasonable doubt all elements of the charged offense.").

In light of the balanced trial evidence, any error potentially deprived King justice. Thus, this Court may review and reverse King's conviction based on the State's improper attempt to define and dilute its burden of proof because it constitutes plain error.

III. The Trial Court Should Have Granted King's Motion for Substitution of Judge and Reversal was Appropriate for that Reason as Well.

Before trial, King moved for a substitution of judge as a matter of right. The motion was erroneously denied, warranting reversal. Ill. S. Ct. R. 318(a) (permitting the Court to afford relief for reasons not raised in the petition for leave to appeal); Ill. S. Ct. R. 612(b)(2) (providing that Rule 318 applies to criminal appeals); *see McDonough*, 239 Ill. 2d at 275 (recognizing that this Court "may affirm for any basis presented in the record").

Illinois law entitles a litigant to an automatic substitution of judge if the motion (1) is timely filed; (2) names the appropriate number of judges; (3) is in writing; (4) alleges substantial prejudice; and (5) is filed before the court has ruled on any substantive matters in the case. 725 ILCS 5/114-5(a); *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13. "'[T]he provisions of the statute are to be construed liberally to promote rather than defeat substitution,' and 'reversible error occurs where the statute is not so construed.'" *People v. McDuffee*, 187 Ill. 2d 481, 488 (1999) (quoting *People v. Walker*, 119 Ill. 2d 465, 480–81 (1988)).

King's motion met these requirements, but the trial court denied the motion, finding that it had already ruled on a substantive matter. A ruling is considered substantive for these purposes if it "goes to the merits of the case or relates to any issue of the crimes charged." *People v. Ehrler*, 114 Ill. App. 2d 171, 179 (2d Dist. 1969). Before the substitution motion was filed, the trial court ruled on the State's motion seeking historical cell site records. This was not a "substantive"

ruling. *See In re Marriage of Birt*, 157 Ill. App. 3d 363, 368–69 (2d Dist. 1987) (holding that "rulings on discovery motions" were "not substantial issues in the case").

Nothing about the ruling here went to the merits or related to the issues of the crimes charged. The federal statute under which the State moved required the trial court to consider whether there were reasonable grounds to believe that the contents of the records sought were relevant and material to an ongoing investigation, but it did not ask the court to weigh that evidence or consider whether it tended to prove King guilty. *Cf. People v. Chambers*, 9 Ill. 2d 83, 90–92 (1956) (holding a ruling on a motion to suppress evidence was substantive because it required the court to determine whose evidence was more credible).

In the Second District, the State stressed that King objected to the motion and challenged the constitutionality of the statute that allowed the State to obtain data without having probable cause. (R12–17.) That objection, the State urged, is what made the court's ruling "substantive" (R36), but there is no authority to support the suggestion that a ruling on any contested motion is inherently substantive. King argued the State needed a warrant, not that the State lacked probable cause to obtain a warrant. (R13–21, R23–24.)

The trial court had to rule either in favor of the State or King, but that ruling was limited to the propriety of the motion. It did not involve the consideration of whether the State could prove King guilty of a crime. Nor was it an opportunity

for King to test the waters. *See Chambers*, 9 Ill. 2d at 89 (explaining that the restrictions on the right to substitution of judge are intended to prevent a litigant "from first ascertaining the attitude of the trial judge on a hearing relating to some of the issues of the cause, and then, if the court's judgment is not in harmony with counsel's theory, to assert the prejudice of the court"); *see also In re Austin D.*, 358 Ill. App. 3d 277, 283–84 (4th Dist. 2005) (concluding that a probable-cause determination is not a substantive issue precluding a substitution of judge).

Because the trial court had not yet made any substantive ruling and all the other statutory requirements were satisfied, King was entitled to a substitution of judge as a matter of right. This requires reversal and a new trial because this Court has found that the erroneous denial of a motion for substitution renders any further actions "null and void." *E.g.*, *McDuffee*, 187 Ill. 2d at 492.

The First District's decision in *People v. Tate* demonstrates that this rule holds even after this Court's decision in *People v. Castleberry*, 2015 IL 116916, which explained that a judgment is void only if the court that entered the judgment lacked jurisdiction. 2016 IL App (1st) 140598, ¶¶ 24–46 (supplemental opinion upon denial of rehearing). *Tate* concluded that, although an erroneous denial of substitution did not divest the court of jurisdiction, the error warranted reversal regardless of whether the movant filed a post-trial motion sustaining his objection. *Id.* ¶ 32. The court explained that "the right to a section 114-5(a) substitution of

judge is absolute and automatic reversal is required for its denial." *Id.* ¶ 44. The same is true here, and the denial of King's motion for substitution is another basis for reversal.

IV. The State Failed to Carry Its Burden of Proving King Guilty Beyond a Reasonable Doubt, so the Double Jeopardy Clause Prohibits a New Trial.

In the midst of all the above-described errors, the State failed to prove beyond a reasonable doubt that Mrs. King was killed and that the crime was committed by King. Where the evidence, when viewed in the light most favorable to the State, is so improbable or unsatisfactory that no rational fact-finder could have found the defendant guilty beyond a reasonable doubt, the court should reverse outright with no remand for a new trial. *Ehlert*, 211 Ill. 2d at 202; *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 46. To prove King guilty of first-degree murder, the State was required to prove death, causation, and intent. *Rivera*, 2011 IL App (2d) 091060, ¶ 26. "[A] conviction for murder will not be allowed to stand in the absence of proof beyond a reasonable doubt that the convicted defendant caused the victim's death." *Ehlert*, 211 Ill. 2d at 211.

Here, three witnesses testified to the cause of Mrs. King's death: one was impeached (Dr. Kalelkar), one was unqualified (Safarik), and the third testified that she died of natural causes (Dr. Blum). When presented with that evidence, no rational fact-finder could find King guilty beyond a reasonable doubt.

Dr. Kalelkar reported she could not conclude the mechanism by which Mrs. King was allegedly killed based on the autopsy. (R911.) She listed "asphyxiation" on her report and did not, until trial, suggest that Mrs. King died by manual strangulation. (*Id.*) She did not identify all the conditions normally associated with death by manual strangulation and agreed that the hemorrhaging involved is caused by a number of reasons, including hard vomiting, which is consistent with reports that Mrs. King had consumed a large quantity of alcohol the night before, that she was known to have stomach problems after drinking, that the autopsy showed her stomach was empty except for a brown fluid, and that Dr. Kalelkar described the fluid seen on Mrs. King's cheek as possibly containing "regurgitated stomach contents." (R1001–03, R877–78, R1254–55.)

Dr. Blum agreed that certain hemorrhaging was observed, that it is caused by a number of reasons, and that no other conditions associated with manual strangulation were observed. (R2627–31, R2671–75.) Dr. Blum's testimony that Mrs. King died of a sudden cardiac arrhythmic event was consistent with testimony from other witnesses that Mrs. King was just told she needed to decide between her husband and the man with whom she was having an affair, a stress-inducing conversation; that she had consumed large quantities of alcohol; and that she would have had very little sleep. (R843, R1168, R2631, R2701, R2704–06.)

Additionally, a train engineer who first arrived at the scene reported he thought Mrs. King was breathing when he first saw her on the tracks, paramedics found electrical activity in her heart, and a paramedic reported that she was warm to the touch, all suggesting Mrs. King was alive when she reached the railroad tracks. (SR475–77, SR497, R2394, R2583–86.) No reasonable finder of fact could find King guilty of first-degree murder.

The State presented a theory of what could have occurred, but it did not prove beyond a reasonable doubt (nor can it) that Mrs. King was intentionally killed or that King was responsible. A new trial would threaten King's rights protected by the double jeopardy clause, and this Court should reject it outright. *Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

CONCLUSION

For at least *seven* reasons, many of which are sufficient alone, this Court should reverse King's conviction outright (with no new trial) or, at the very least, affirm the appellate court's decision requiring retrial. The first three reasons relate to Safarik's inadmissible and inappropriate testimony and all three require reversal independently. The fourth and fifth errors that require reversal and a new trial are the admission of Mrs. King's family's testimony and the State's improper

comments at closing argument. The sixth reason this Court should reverse the conviction is that King was entitled to, and improperly denied, his right to a substitution of judge. Finally, this Court should reverse the conviction outright because the State failed to carry its burden of proving King guilty beyond a reasonable doubt.

July 11, 2019

Respectfully submitted,

/s/ Matthew R. Carter

Matthew R. Carter
Elizabeth S. Deshaies
Katie DeBoer
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
MCarter@winston.com
LDeshaies@winston.com
KDeBoer@winston.com

Adam R. Vaught
HINSHAW & CULBERTSON LLP
151 N. Franklin Street, Suite 2500
Chicago, Illinois 60606
(312) 704-3584
AVaught@hinshawlaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 14,956 words.

Dated: July 11, 2019

/s/ Matthew R. Carter

CERTIFICATE OF FILING AND SERVICE

The undersigned attorney certifies that on July 11, 2019, he filed the foregoing brief of Defendant-Appellee with the Clerk of the Illinois Supreme Court using the court's electronic filing system, and copies were served by email to the following addresses. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Kwame Raoul, Attorney General of Illinois

Jane Elinor Notz, Solicitor General

Michael M. Glick, Criminal Appeals Division Chief

Katherine M. Doersch, Assistant Attorney General

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312)814-6128
Eserve.criminalappeals@atg.state.il.us

Additionally, upon acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

By: /s/ Matthew R. Carter
Matthew R. Carter

E-FILED
7/11/2019 4:53 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK