No. 123926

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Illinois Appellate Court, Second District, No. 2-15-1112
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 14 CF 1229
v.	)	
SHADWICK A. KING,	)	The Honorable James C. Hallock,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

The People appeal from the judgment of the Illinois Appellate Court, Second District, reversing defendant's first degree murder conviction and remanding for a new trial. *People v. King*, 2018 IL App (2d) 151112 (A2).

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court appropriately exercised its discretion to permit Mark Safarik to offer expert witness testimony on crime scene analysis and the victim's cause of death.

2. Whether the appellate court erroneously concluded that testimony from the victim's father and sister was introduced solely for its emotional impact.

3. Whether the appellate court erroneously concluded that the prosecutor's closing argument improperly attempted to define and dilute the burden of proof.

JURISDICTION

Jurisdiction lies under Supreme Court Rule 315. This Court allowed the People's petition for leave to appeal on January 31, 2019.

STATEMENT OF FACTS

Defendant Shadwick R. King was charged with the first degree murder of his wife, Kathleen "Kate" King. C142-43 (indictment).

I. Motion in Limine

Before trial, the People filed a motion in limine to allow Mark Safarik, a former FBI behavioral analyst, to testify in accordance with his crime scene analysis report. C290-91. The circuit court granted the motion over defendant's objection. R414. If qualified as an expert at trial, the court ruled, Safarik would be permitted to testify about his analysis. *Id.* The court found that Safarik's expert opinion was reliable and relevant and would assist the jury in understanding the crime scene evidence. R415-18. It cautioned, however, that Safarik was prohibited from offering profiling testimony or identifying defendant as the killer by direct testimony. R414-15.

II. Trial Testimony

Kate's body is discovered on the railroad tracks near her home.

The trial evidence established that at 6:39 a.m. on the morning of July 6, 2014, thirty-two-year-old Kate's body was discovered on the railroad tracks just south of Esping Park, near the Geneva, Illinois home that she shared with defendant and their three young sons. *See* SR399-401, 437 (Metra train engineer observed Kate's body on adjacent track at 6:39 a.m.). The evidence further established that Kate's body was not there half an hour earlier. SR384 (engineer of freight train saw nothing on tracks at 6:04 a.m.).

Shortly before 7:00 a.m., Geneva Police were notified. SR333. Sergeant George Carbray testified that he arrived to find Kate's body on the

southernmost track, which is elevated on "jagged ballast rock." SR354. Kate's body lay on her left side, with her head facing south and her feet facing north; her head and neck lay over the northern rail of the southern set of tracks. SR354-56. Kate's body "appeared grayish in color," and Carbray noted possible lividity on her leg. SR356. On the other side of the tracks, Kate's iPhone was "placed up against a couple of railroad spikes" that held the rail in place. *Id.* Finding no pulse, Carbray called for paramedics, SR358, who confirmed that Kate was dead, SR497.

Evidence technicians Clint Montgomery and Matthew Hann testified that they arrived just after 7:00 a.m., and Montgomery also observed lividity (which he described as "pooling of blood after a death") on Kate's body. R687. The officers noted that a reddish or rusty substance on the bottom of responding officers' boots (which presumably came from the track or surrounding ballast rock) was not found on Kate's shoes. R566. Kate was wearing a t-shirt, shorts, and running shoes. R710. The loose shorts were untied, and Kate wore neither underwear nor any liner beneath them. R717. Her t-shirt and underwire bra were pulled halfway up her breasts, exposing the lower portion of her nipples. R714. A trail of saliva ran up the left side of her face from the corner of her mouth. *Id.*; *see* Peo. Exh. 110.

Deputy Coroner Lisa Gilbert testified that when she arrived, she observed that Kate's neck, chin, and lip were in contact with the rail. R743. Gilbert noted that Kate's injuries appeared inconsistent with Kate having

fallen onto the tracks. R754, 891. There was no trauma where one would expect to see it if Kate had fallen onto the tracks while running — for example, there were no bruises on the left side of Kate's face where it contacted the rail. R758. Gilbert also noted that had Kate fallen and tried to break the fall with her hands, one would expect to see injuries to her palms. R756. Gilbert noted bruising on other parts of Kate's body that was inconsistent with her position on the tracks, including bruising on the inside of her left arm and beneath her chin. R754-58. Accordingly, Gilbert reported that Kate's cause of death seemed suspicious. R759.

The medical examiner opines that Kate died from asphyxia.

Forensic pathologist Dr. Mitra Kalelkar testified that she conducted an autopsy the following day (July 7). R806, 816, 817. She noted postmortem lividity on the back of Kate's neck, R820, and on her left shoulder, R823, which, she explained, is discoloration of the skin due to settling of blood after death, R820. A dry, yellowish abrasion on the corner of Kate's right eye, likely inflicted after death, was inconsistent with falling and landing on her left side, as depicted in Exhibit 110. R847. Dr. Kalelkar also found contusions under Kate's chin and on her jaw, which Dr. Kalelkar determined were both inflicted before death and inconsistent with falling and landing in the position shown in Exhibit 110. R849. As Dr. Kalelkar explained, if a person were being choked and tried to remove the assailant's hands from her throat, such injuries could be caused by her own hands or knuckles, or by the

person choking her. R850. Dr. Kalelkar further explained that a red linear mark on Kate's neck was consistent with being choked, R851, and an injury to her outer left arm could be consistent with someone grabbing her arm at or near the time of death, R853. By contrast, if Kate had fallen and landed in this position, there would have been more and different injuries. R858.

In addition, Dr. Kalelkar noted that Kate's left bra strap and her right sock were twisted, and the sock contained a tuft of hair. R870-72. Bits of leafy material were found in her hair, inside her shorts, and in her left armpit. R819, 828, 871. Kate was not wearing contact lenses, an armband, or earbuds. R828-29. Although there was alcohol in Kate's system (her BAC was .15), Dr. Kalelkar did not believe that it contributed to her death. R843-45.

Dr. Kalelkar concluded that Kate died as a result of asphyxia — meaning lack of oxygen to the brain as a result of compression of the neck and chest. R883. Her report stated that Kate died of asphyxia and did not specify whether it was by choking, strangulation, or compression. R911. As she explained, the existence of petechial hemorrhages in Kate's eyes and laryngeal and epiglottic mucosa, and the focal hemorrhages[1] at the base of

[1] Dr. Kalelkar described the focal hemorrhages as "small blood vessels that ruptured and caused hemorrhage in small areas" at the base of Kate's tongue. R880. She explained that petechial hemorrhages are "pinpoint" hemorrhages, R882, that form when capillaries become engorged with blood and rupture "because blood is not flowing back into the heart as a result of compression of the neck," R874.

Kate's tongue were consistent with Kate having been choked and inconsistent with her having fallen while running and landed on the railroad tracks. R880-83. Moreover, although there were no injuries to Kate's neck tissue, in Dr. Kalelkar's experience, such injuries are not present in every strangulation case. R1013. In her opinion, Kate was killed and her body was placed on the railroad tracks after she died. R884.

Kate spends the night before her death with defendant, and they return home alone.

Kate's sister, Kristine Kuester, testified that Kate had been married to defendant for ten years, and they had three boys: Brandon (10), Nathan (7), and Justin (6). R1182-85.

On the day before her death, July 5, 2014, Kate and her family went to the home of Kate's father (Kurt Kuester) for a barbeque. R1215-16. Kristine and her fiancé, Tim Casey, were also present. R1215. During the course of the gathering, the sisters planned Kristine's upcoming bridal shower, and Kate drank a bottle of wine and started a second one. R1216-18. Kate and defendant departed around 10:45 p.m., leaving the boys to spend the night at Kurt's house. R1216, 1221. Kate had no visible injuries when she left Kurt's home. R1224-25, 1387, 1924.

Kate and defendant went to the Dam Bar in Geneva, arriving around 11:30 p.m. R1222, 1740. Kate had four glasses of wine, defendant had five bottles of beer, and a neighbor bought a round of shots before they departed at closing time, arriving home at approximately 2:00 a.m. R2701. The couple

appeared to get along well, R1121, 1138, 1159, and the neighbor did not notice any injuries or bruises on Kate, R1158; *see also* Peo. Exh. 505 (video of Kate and defendant at bar).

Kate exchanged numerous text messages with Billy Keogh, a man she met at Army training.

Kate had joined the Army Reserve and spent much of early 2014 in training. After completing basic training in April 2014, Kate pursued advanced training (AIT) at Fort Hood, Texas, where she met Billy Keogh, an army reservist from Boston. R1191.

Kate returned home in mid-June. *Id.* Kate's oldest son, Brandon, testified that he witnessed an argument between defendant and Kate shortly after her return from army training. Defendant accused Kate of flirting with and talking to someone more than she did to defendant. R1756-58. Defendant cursed at Kate and threw her cellphone into a pond, *id.*, and Kate and defendant bought new iPhones shortly thereafter, R1759.

Forensic analysis of Kate's iPhone revealed that she and Keogh exchanged 3,499 text messages (some of them intimate) during the few weeks that she owned the phone. R2212-36.

Kate's family learns of her death and notifies defendant.

Kristine called Kate on July 6 around 10:15 a.m. and got no answer. R1226. Around 11:30 a.m., Kristine read a Facebook message from defendant, who was asking for Kurt's cellphone number. R1228. Kristine called Kate again, and a police officer answered and told her that Kate was

dead. R1230-32. Kristine then called Kurt and told him about her conversation with the officer; in a second call, she told Kurt to call the police and that he should not let defendant pick up the boys. R1232-34. While Kurt was on the phone with Kristine, defendant arrived at Kurt's home, which was unusual because defendant "never" picked up the boys. R1927. Kurt asked defendant, "Where is Kathleen?" and defendant responded that they had been fighting and that she had gone for a run around 6:30 that morning. R1928. When Kurt told defendant, "Kate is dead, Shad," defendant responded "I didn't do anything. I didn't do anything." R1929.

Kurt called the police, SR719, and responding officers noted that both Kurt and defendant appeared agitated. SR715. Defendant told the officers that he had come to pick up his kids, but Kurt would not let him take them. R1167. Asked why he did not bring Kate to pick up the kids, defendant said that he got into a dispute with Kate about seeing a man she met during basic training and that he told Kate to choose between him and the other man. R1168. Defendant said that he last saw Kate before she left home around 6:30 a.m. to go running down by the river. R1168, 1178.

Defendant gives two taped statements to detectives.

Geneva police detectives Robert Pech and Brad Jerdee interviewed defendant on July 6, 2014, R1795; Peo. Exh. 73. In the recorded interview, which was played for the jury, R1797-1800, defendant stated that he and Kate were "kind of separated" after he had learned several weeks earlier that

Kate was seeing someone named "Keogh," whom she had met during military training. Peo. Exh. 73 1.13:13-15:00; 1.17:10-:51; 2.19:50. Defendant said that Kate did not want a divorce. *Id.* 7:10.

Defendant further stated that after they returned from the Dam Bar on July 6, he and Kate talked until around 5:00 a.m. about officer school and Kate's next career steps, as well as a possible move to Georgia. *Id.* 18:40-21-57. Around 4:00 a.m., Kate set down her phone, and defendant took it and read her text messages to Keogh; he then used Kate's phone to send Keogh several texts telling Keogh to leave his wife alone. *Id.* 1.18:05-18:34, 2.27:05-55. According to defendant, Kate dressed and left for a run between 6:00 and 7:00 a.m. *Id.* 1.23:27, 34:10, 1:15:30. Defendant said that he left home around 8:00 or 8:30 a.m. to get gas at a Shell station and donuts at Jewel. *Id.* 1.32:35-33:50, 1.35:38; R2042. Defendant wanted to spend the day with his kids, so at around 9:00 or 9:30, he drove to Kurt's house. *Id.* 1.37:35-:43, 2.45:14-46:02. Defendant called and texted Kate at around 9:30 a.m., looking for Kurt's cell phone number. *Id.* 2.25:16, 2.30:12; *see* R2489-98; Def. Exhs. 93 & 701. Finding no one at Kurt's home, he drove to Kate's grandmother's house in Chicago, and when no one answered the door there, he returned to Kurt's house. Peo. Exh. 73 1.38:10-42:31; 2.22:23-23:35.

After the interviews, the detectives drove defendant home, and defendant permitted the officers to enter and photograph the house. R1814-23, 1833-34, 1895-98, 2049-50, 2475-79; Peo. Exhs. 154-166. Although the

house appeared messy, there were no obvious signs of an altercation. R1815, 1900-01; *see also* Peo. Exhs. 101A, 151-166.

Detectives Pech and Jerdee interviewed defendant again on July 8. R1822, 2033-34. In the second interview, Peo. Exh. 74, which also was played for the jury, R1825, defendant admitted that while they were on vacation at his father's place shortly after Kate's return from military training, he "chucked" Kate's cellphone into a pond after viewing messages from another man. Peo. Exh. 74 at 34:00-36:25. He explained that he and Kate had previously discussed replacing their phones anyway and, within a day or two of their return home, they purchased new iPhones. *Id.* at 37:15-41:30. Defendant further stated that he had seen on Facebook that Keogh had been at the Cubs game on June 22, and he noticed that Kate had spent "a lot of money" at the Cubby Bear that same day. *Id.* 1.22:15-24:59, 1.33:55-37:03.

Next, defendant stated that, at 4:00 or 5:00 on the morning of Kate's death, he took Kate's iPhone and saw text messages about Keogh planning to see Kate on her birthday (in October). *Id.* 1.1:01:15-:02:50, 1.1:07:41. Defendant sent Keogh three or four text messages and set the phone on a table near the front door. *Id.* 1.1:03:03-06:26, 1.1:08:13-36.

At 4:45 a.m., defendant explained, he drove to Chase Bank and used his ATM card to withdraw $500 in "pocket money" that he needed for repairs to his car. *Id.* 1.1:06:55-07:21, 1.1:08:40-13:15; *see* R2133-36, 2152-27, 2252; Peo. Exh. 512C-E. Shortly after he returned home, Kate got out of bed,

dressed in her running clothes, and left to go for a run at around 6:00 a.m. Peo. Exh. 74 1.1:14:26-18:59. Defendant slept for thirty minutes, then went to the Shell station, drove around for twenty minutes, and bought donuts at Jewel. *Id.* 1.1:19:35-27:53; *cf.* Peo. Exhs. 507, 509. When defendant returned home between 8:30 and 9:00 a.m., Kate was not home. Peo. Exh. 74 1.1:29:42-30:09, 1.1:38:08-39:04. He left to pick up the boys between 9:00 and 9:30 and, because he did not have Kurt's cell phone number, he called and texted Kate, and sent a Facebook message to Kristine, asking for Kurt's number. *Id.* 1.1:30:29-32:21; 1.1:32:30-36:25.

Detectives told defendant that the cause of Kate's death was asphyxiation and that the autopsy findings appeared inconsistent with her position on the railroad tracks, and they suggested to defendant that Kate's death may have been an accident. *See* R1883-84. Defendant repeatedly denied any role in Kate's death. Peo. Exh. 74, 2.15:52, 2.34:41, 2:51:21 ("I did not do it"); *id.* 2.20:55, 2.37:06 ("I'm not capable of that"); *id.* at 2.33:54 ("It wasn't me"); *id.* at 2.34:01, 2:50:06 ("I would not hurt that woman").

Expert Witness Mark Safarik testifies that Kate was strangled and that the scene at the railroad tracks was staged.

Safarik testified that the State's Attorney's Office asked him to review the evidence and determine whether the scene had been staged. R1271-72. He also testified regarding his background and qualifications. Safarik had an undergraduate degree in physiology and a graduate degree in criminology. He worked for the local police department in Davis, California, from 1977 to

1984, R1275, before joining the FBI, R1277. In 1995, he joined an eight-person adult crimes unit responsible for conducting in-depth analyses of complex cases, R1281, and he remained there until he retired in 2007, R1273. Over the course of his thirty-year career, Safarik had analyzed more than 4,000 cases. R1285. Safarik held numerous professional memberships and academic affiliations and had published approximately twenty peer-reviewed articles or chapters. R1285-89. While with the FBI, Safarik was the research coordinator on a strangulation study, and at the time of trial he was seeking publication of an article on neck structure injury and strangulation homicides. R1290. He had been qualified as an expert in crime scene analysis twenty to twenty-five times in various jurisdictions. R1296.

The trial court qualified Safarik as an expert in crime scene analysis. *Id.* Safarik then described his approach, explaining that when conducting a crime scene analysis, he focuses on the information gathered during the initial investigation, such as crime reports, crime scene photos, autopsy protocol, autopsy photos, diagrams or sketches of the scene, initial witness statements, and test results. R1297-98. Safarik explained that the purpose of crime scene analysis is not to determine who committed the crime; thus, it does not matter whom police have developed as a suspect, because the analysis only concerns what happened at the crime scene. R1299; 1301; SR629.

As part of his analysis in this case, Safarik learned that in the hours before her death, Kate was at her father's house for a barbeque, then went with defendant to the Dam Bar. R1305. They left the bar around 2:00 a.m. and went home. Defendant had claimed that Kate left around 6:30 a.m. to go running, but later changed the time to 6:00 a.m. R1306-07.

Safarik opined that Kate's attire and the location of her body were inconsistent with a typical run. One would expect that Kate would have tied her loose running shorts and would have worn underwear beneath them. R1321-24. Similarly, one would expect that Kate would have worn one of her many sports bras rather than an underwire bra, and would not have worn it with the strap twisted. R1325-27. Nor would one expect Kate to put on her sock with the heel bunched at the top of her ankle and a clump of hair between her foot and the sock. R1329-30. Kate's body was found without the armband and earbuds she customarily used while running, R1331-32, and she was not wearing contact lenses and her eyeglasses were not found at the scene, R1332-33. The location was also unusual. Both defendant and Brandon had told police that Kate usually ran in Esping Park, and data from an app on Kate's phone (Map My Run) showed that Kate usually took the circular path around Esping Park. R1308-10. There was no evidence that Kate ever ran on the railroad tracks. R1313.

Safarik also opined that photographs and reports of lividity observed shortly after her body was discovered were inconsistent with Kate having left

the house alive at 6:30 a.m. R1316-17. Lividity present on Kate's left leg was consistent with her position on the railroad tracks, but lividity on top of her right leg suggested that she had been in another position when the blood settled into that location. R1318-19. Although Kate had leaf fragments in her hair and shorts, no leaves were found in the vicinity of Kate's body. R1334. And, as depicted in Peo. Exh. 110, Kate's iPhone appeared to have been propped or placed on the railroad tie, not dropped. R1335. Further, the fact that the dried streak of saliva ran up rather than down Kate's cheek revealed that she had been moved into this position after her death. R1338-40.

Over defendant's objection, Safarik opined that the cause of Kate's death was manual strangulation. R1341-45. Safarik stated that he observed several physical indicators of manual strangulation, including petechial hemorrhaging in both eyes, abrasions on her neck and under her chin, and redness on her neck consistent with hands having been around it. R1345. Injuries to Kate's upper left arm were consistent with having been grabbed. R1357. By contrast, had Kate fallen on the rocks, she would have braced her fall with her hands and he would expect to find contusions and abrasions on her hands, forearms, and knees, and that the cause of death would have been blunt force trauma from striking her head on a rail, the rocks, or a railroad tie. R1353-55.

Next, Safarik described "staging," which he explained is a purposeful and intentional behavior to misdirect the police investigation: the offender creates a new scene to draw attention away from himself. R1361-62. Here, Safarik explained, an attempt was made to make Kate's death look like an accident – that is, like Kate had been running and was hit by a train. R1362. Safarik opined that Kate was killed at home and her body was then placed on the tracks. R1363-64; SR659.

Defense expert Larry Blum testifies that Kate died of cardiac arrest.

Defendant called retired forensic pathologist Larry Blum, who opined that, because he observed no drag marks on Kate's body or clothing, she must have collapsed onto the tracks, R2552, perhaps from a seated position, R2565. In Blum's opinion, Kate died of sudden arrhythmia due to the adverse effects of sleep deprivation, intoxication, stress, and caffeine consumption. R2631. The petechial hemorrhages alone would not, in Blum's opinion, support an asphyxiation diagnosis, R2634, and he opined that Kate was not manually strangled, R2646.

On cross-examination, Blum admitted that Kate could not have collapsed from a standing position, given the lack of injuries to her head and mouth. R2647. Blum agreed that the injury to the inside of Kate's left arm was consistent with someone grabbing it from behind and inconsistent with the position in which her body was found. R2664. Blum also conceded that the pathologist who performs the autopsy has a better opportunity to view

the body than someone who later just reads the report and looks at the autopsy pictures. R2668-69. Thus, Blum testified, "if there is a question, the benefit of the doubt should go to the initial pathologist unless it is totally overruled by other evidence." R2670. Blum conceded that he could not rule out asphyxia. R2678.

Defendant denies strangling Kate but confirms her running habits and his concerns about her relationship with Keogh.

Defendant testified that he had never physically harmed his wife. R2765. He denied having a physical altercation with Kate in the early morning hours of July 6, and insisted that he did not kill her. R2766.

On cross-examination, defendant stated that, to his knowledge, Kate never ran on the railroad tracks. *Id.* Kate always wore running clothes to run; usually wore contact lenses; and always ran with her iPhone, armband, and earbuds. R2766-67. Defendant admitted that he sent the last text messages to Keogh from Kate's phone. R2768. Though he had told police that he did not keep tabs on Kate, defendant admitted that on June 22, when Kate went to the Cubs game, he kept tabs on her by repeatedly accessing their joint Chase account and Keogh's Facebook page. R2769.

The medical examiner testifies in rebuttal that the evidence does not support a finding of cardiac arrest.

In rebuttal, the State re-called the medical examiner, Dr. Kalelkar. She testified that there was no evidence that Kate had exhibited any warning signs of sudden arrhythmic death (such as fainting spells, chest pains, or

shortness of breath). R2785-86. She testified that Blum's opinion that Kate died of a sudden arrhythmia is "purely conjecture" and "ignor[es] the obvious findings at the autopsy, as well as that Kate was healthy, her clothing was in disarray, and she lacked any injuries consistent with falling onto the railroad tracks. R2787-89.

On cross-examination, Dr. Kalelkar agreed that intoxicated people sometimes go on railroad tracks because they lose some degree of judgment. R2808. But to opine that someone died of sudden cardiac death, one would have to rule out all other causes of death, and the facts of this case were inconsistent with anything other than strangulation. R2816, 2822-23.

The jury convicts defendant.

The jury convicted defendant of murder. R2992. Defendant filed a motion for new trial, that the circuit court denied, R3172. Following a sentencing hearing, defendant was sentenced to thirty years in prison. R3325.

III. Appeal

Defendant appealed, claiming, among other things, that the circuit court erred in admitting Safarik's testimony, and testimony by Kate's family members concerning their emotional reactions to her death, and that the prosecutor improperly defined reasonable doubt in his rebuttal closing argument.

The appellate court held that the trial court erred in admitting Safarik's testimony and this error warranted reversal for a new trial. Despite acknowledging Safarik's expertise in crime scene analysis, *King*, 2018 IL App (2d) 151112, ¶ 73, the appellate court concluded that the trial court erred by permitting Safarik to testify at all, *id.* ¶ 89 (holding "that it was prejudicial error to grant the State's motion *in limine*" to admit Safarik's testimony). The appellate court relied on three rationales to deem the entirety of Safarik's testimony inadmissible, finding that (1) Safarik was not qualified to opine on the cause of Kate's death because he lacked a medical degree, and he should not have been permitted to testify to "the effects of lividity" or that the vegetation on Kate's body came from her home, (2) Safarik's testimony consisted of common sense inferences that jurors could draw for themselves, and (3) portions of Safarik's testimony constituted impermissible "profiling." *Id.* ¶¶ 79-86.

The appellate court then addressed two issues that it deemed likely to recur on retrial. First, the court criticized the admission of testimony from Kristine and Kurt about their reactions to Kate's death, holding that it "went beyond anything that was relevant and was introduced solely for its emotional impact," and ordered that "[o]n retrial, such testimony is inadmissible." *Id.* ¶ 91. Second, addressing defendant's claim that the prosecutor misled the jury about the meaning of reasonable doubt during closing argument, the court held that the "argument was an improper

attempt to define and dilute the State's burden of proof," and that "nothing close to it is permitted on retrial." *Id.* ¶ 92.

ARGUMENT

I. The Circuit Court Did Not Abuse Its Discretion in Permitting Safarik to Testify as an Expert and Opine on the Victim's Cause of Death.

A. Governing principles and standard of review

Illinois Rule of Evidence 702, governing testimony by experts, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702; *see People v. Lerma*, 2016 IL 118496, ¶ 23 (witness may testify as expert if his experience and qualifications afford him knowledge that is not common to lay persons and his testimony will aid trier of fact); *People v. Miller*, 173 Ill. 2d 167, 186 (1996), *abrogated on other grounds by In re Commitment of Simons*, 213 Ill. 2d 523 (2004) ("an expert need only have knowledge and experience beyond that of the average citizen," there is "no predetermined formula for how an expert acquires specialized knowledge or experience[,] and the expert can gain such through practical experience, scientific study, education, training or research"); *Thompson v. Gordon*, 221 Ill. 2d 414, 429 (2006) ("'[f]ormal academic training or specific degrees are not required to qualify a person as an expert; practical experience in a field may

serve just as well to qualify him.'") (quoting *Lee v. Chi. Transit Auth.*, 152 Ill. 2d 432, 459 (1992)).

A trial court's decision to admit expert testimony is reviewed for an abuse of discretion, which occurs only when "the trial court's decision is 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.'" *Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37).

B. The circuit court appropriately exercised its discretion to permit Safarik to offer expert testimony on Kate's cause of death and lividity.

Because the cause of Kate's death would not have been obvious to a lay person, expert testimony unquestionably assisted the jury in determining that issue, as the appellate court recognized. *See King*, 2018 IL App (2d) 151112, ¶¶ 77-78.

And Safarik was qualified by his knowledge, skill, experience, training, and education to offer an expert opinion on Kate's cause of death. Specifically, Safarik holds a bachelor's degree in physiology, R1274, and he has thirty years of law enforcement experience in investigating murders and other violent crimes, R1273-75. Over the course of his career, Safarik reviewed, examined, or studied in excess of 4000 cases. R1285. His work at both the FBI and Forensic Behavioral Sciences entailed crime scene analysis and equivocal death investigations, *i.e.*, cases in which the manner of death was not well established. R1274, 1281. And while he was in the FBI, Safarik

was a research coordinator on a strangulation study. R1290. In fact, at the time of trial, Safarik had completed research on, and was in process of submitting for publication, an article about neck structure injury and strangulation homicides." *Id.*

Given Safarik's education, experience, training, and knowledge, the circuit court did not abuse its discretion in permitting him to offer expert testimony as to Kate's cause of death. *See Miller*, 173 Ill. 2d at 187 ("An individual will be allowed to testify as an expert if his experience and qualifications afford him knowledge which is not common to laypersons, and where such testimony will aid the trier of fact in reaching its conclusions."); *see also State v. Swope*, 315 Wis. 2d 120, 136 (2008) ("Through education and experience, Safarik had the necessary knowledge to provide helpful answers the jury could use in answering the central question, whether the [victims] died simultaneously from natural causes or as the result of a homicide.").

The appellate court framed the question of the admissibility of Safarik's testimony as "whether the cause of a person's death is the subject of only expert medical testimony or whether a lay person can so opine." *King*, 2018 IL App (2d) 151112, ¶ 76. But contrary to the court's belief that "*medical* evidence of the cause of Kathleen's death was necessary, because a lay person of average intelligence would not know what killed her," *id.* ¶ 78, "no Illinois case holds that only a medical doctor may render an opinion as to the cause of death," *Nicholas v. City of Alton*, 107 Ill. App. 3d 404, 407 (5th

Dist. 1982). Instead, *expert* testimony was required, and the issue was whether Safarik's qualifications placed his knowledge beyond that of an average citizen and qualified him as an expert. *See People v. Mertz*, 218 Ill. 2d 1, 72 (2005) (individual may testify as expert if experience and qualifications afford him knowledge not common to laypersons); *see also id.* ("expert's testimony will assist the jury when his or her testimony offers knowledge and application of principles beyond the ken of the average juror," and "[e]vidence is beyond the ken of the average juror when the evidence involves knowledge or experience that a juror generally lacks").

Indeed, Safarik was not only generally qualified to testify concerning causes of death, given his extensive experience in law enforcement and reconstruction of crime scenes, but he was specifically qualified to opine that Kate's death resulted from manual strangulation. Safarik had coordinated research on strangulation and was, at the time of trial, finalizing a peer-reviewed publication on that topic. In short, though he does not hold a medical degree, Safarik was properly qualified as an expert witness, for no rule or case required that Safarik hold a medical degree or any other particular qualification. *Mertz*, 218 Ill. 2d at 72. Similarly, Safarik's experience and qualifications qualified him to testify about the lividity observed on Kate's body. Accordingly, the circuit court appropriately permitted him to opine on lividity and Kate's cause of death, and the

appellate court erred in rejecting that opinion merely because Safarik did not hold a medical degree.

C. Safarik's testimony synthesizing the circumstantial evidence was helpful to the jury, and its admission was harmless.

The appellate court further held that Safarik should not have testified to conclusions that "the ordinary juror could draw." *King*, 2018 IL App (2d) 151112, ¶ 82. The court placed in this category Safarik's opinions that an experienced runner would not have dressed as Kate was found; that Kate would not have gone running without her contact lenses, earbuds, and armband; that she would not have gone running on the railroad tracks when it was her habit to run in the park; and that she would not have put her sock on with the heel at the top of her foot. *Id.* Safarik's testimony that the leaf material in Kate's hair and shorts likely came from her home because the clothes she was dressed in came from her home, leaf debris was found in the home, and no leaf debris was present on the tracks where her body was found, R1365-66, would also fall in this category.

But expert testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Ill. R. Evid. 702. A crime scene reconstruction expert may offer helpful testimony even if it overlaps with a juror's common sense. *See People v. Farnam*, 28 Cal. 4th 107, 162-63 (Cal. 2002) ("Expert opinion on crime scene reconstruction is generally admissible, and the jury need not be wholly ignorant of the subject matter of

the opinion in order to justify its admission.") (internal citations and quotation marks omitted). And such testimony does go beyond common sense, because the interpretation is informed by the crime scene analyst's specialized experience in law enforcement. *See State v. Patton*, 120 P.3d 760, 785 (Kan. 2005), *overruled on other grounds by State v. Gunby*, 144 P.3d 647 (Kan. 2006) (crime scene analysis testimony is based on specialized knowledge not familiar to lay person, "as it was knowledge which the agent had gained through extensive specialized training through the FBI").

The appellate court overlooked that the value of Safarik's testimony to the jury lay in his interpretation and synthesis of the evidence, as informed by his extensive experience. Other courts have deemed Safarik's testimony helpful — and admissible — on that basis. For example, in *Swope*, the Wisconsin Supreme Court held that it was "beyond the everyday knowledge of an average juror to recognize evidence of 'staging' or to understand the implication of such evidence," and it was "certainly beyond the ability of the average juror to correlate all nine factors Safarik considered in reaching his expert opinion." 315 Wis. 2d at 138. Similarly, in *People v. Jackson*, 221 Cal. App. 4th 1222 (2013), a California appellate court recognized that "[a]n expert opinion may assist the jury in evaluating the evidence, even when common sense would explain its meaning," and held that "the trial court could reasonably conclude the jury would be assisted by Safarik's expert testimony." *Id.* at 1239. Here, as in *Jackson*, Safarik's testimony "could have

assisted the jury in understanding that [the victim's] murder was committed by a lone killer who was close to her." *Id.* Further, "the significance of manual strangulation is not a matter of common knowledge and is the proper subject of expert testimony." *Id.* at 1240. And, as in *Jackson*, "Safarik's explanation of the staging element of [the victim's] murder touched upon a subject well beyond the common experience of jurors." *Id.*

That is not to say that Safarik's testimony was necessary, but it did not need to be. The "proper standard is helpfulness, not absolute necessity." *United States v. Meeks*, 35 M.J. 64, 68 (C.M.A. 1992), c*ited in Swope*, 315 Wis. 2d at 137. The fact that jurors could have, and likely did, reach similar inferences as a matter of common sense does not mean that Safarik's testimony was not helpful to them when making those connections. The appellate court thus wrongly relied on *State v. Lenin*, 406 N.J. Super. 361 (2009), to support its contrary conclusion, for in holding that the challenged testimony there was inadmissible because it was not beyond the ken of the average juror, *id.* at 380-81, the New Jersey court similarly overlooked that the proper standard is helpfulness, not absolute necessity.

Finally, even if the appellate court were correct that Safarik's testimony derived from common knowledge (such that it was inadmissible), it would follow that admission of the testimony was harmless. In *Mertz*, this Court reasoned that purported profiling testimony, even if admitted in error, was not prejudicial because "any inferences drawn by [the witness] were

commonsense ones that the jurors no doubt had already drawn for themselves." 218 Ill. 2d at 74; *see also Lenin*, 406 N.J. Super. at 382 (finding that admission of challenged evidence was harmless). The same logic applies here.

D. Safarik did not offer profiling testimony.

Nor is the appellate court's judgment justified on the rationale that Safarik offered improper "profiling" testimony. The appellate court opined that "Safarik ventured beyond 'crime scene analysis' into profiling when he testified to the characteristics of people who stage crime scenes," and it characterized profiling testimony as "unreliable." *King*, 2018 IL App (2d) 151112, ¶¶ 84-86.

At the outset, the appellate court was wrong to assume that any testimony constituting "profiling" is unreliable and inadmissible. *See id.* ¶¶ 84-85. This Court has noted that the "admissibility of profiler testimony in criminal cases has been a matter of some controversy," but it has previously declined to decide whether profiling testimony is admissible. *Mertz*, 218 Ill. 2d at 72-73.

Regardless, Safarik's testimony did not constitute profiling. In *Mertz*, this Court characterized the testimony of former FBI Agent James Wright as profiling evidence and it defined that terminology. The Court noted that Wright had engaged in profiling when he was asked to compare two murders and an arson and determine whether the crimes were committed by the same

offender (so-called profile-crime correspondence) and whether the defendant was responsible for them (profile-defendant correspondence). 218 Ill. 2d at 70; *see also Simmons v. State*, 797 So.2d 1134, 1150 (Ala. Crim. App. 2003) (profile evidence attempts to link general characteristics of serial murderers to specific characteristics of the defendant); R290 ("Criminal profiling is an inference of offender traits based on the evidence from the crime scene.").

Safarik did neither. The appellate court held that "in testifying that a staged scene indicates that the killer is someone close to the victim, Safarik indirectly, but pointedly, identified defendant as Kathleen's killer[.]" *King*, 2018 IL App (2d) 151112, ¶ 85. But Safarik's testimony did not accuse defendant of committing the crime; his testimony focused on the crime scene and what it told him about the circumstances of Kate's death. *See Simmons*, 797 So.2d at 1150-51 (testimony from FBI agent was not profiling testimony; agent "concentrated on his opinion of what the crime scene and the physical condition of [the victim's] body suggested happened during the murder"). "There is an enormous difference in testimony identifying a person who bears certain characteristics as being more likely to have committed the offense and in testimony that the physical evidence of a crime indicates certain characteristics about the offense." *Id.* at 1151.

Safarik opined that the crime scene was "staged" to create the impression of an "accident, that she had been running and got hit by a train." R1362. From there, Safarik explained that strangers do not need to engage

in staging, which he described as purposeful behavior intended to misdirect the police investigation. R1361. Offenders who stage crime scenes do so to create a new crime scene; they want the police to think the crime happened there. R1362. Although it is logical to infer from Safarik's testimony that Kate's killer was not a "stranger," it is illogical to conclude, as the appellate court did, that Safarik by this testimony indirectly identified defendant as the killer. At most, Safarik's "staging" testimony pointed to *all* non-strangers in Kate's life as possible suspects, and the appellate court erred in concluding otherwise. In short, Safarik's testimony about the characteristics of the offender was within his expertise and relevant to the issues at trial, and it did not constitute the type of profiling evidence that has been deemed controversial. Thus, this testimony provided no basis for reversal.

The appellate court's reliance on *People v. Brown*, 232 Ill. App. 3d 885 (1st Dist. 1992), was misplaced, for that case did not involve "profiling" at all; the challenged evidence should have been excluded on relevance grounds, not as profiling evidence. In *Brown*, a police officer called as an expert witness to establish the street value of drugs also testified regarding the common practices of drug dealers and users in general. *Id.* at 888-91. The First District found that the officer's testimony "amounted to profile testimony which was not in any way connected to the defendant or the circumstances surrounding his arrest." *Id.* at 898. The court did not explain what it meant by "profile testimony," but it plainly found that the officer's testimony was

objectionable precisely because it did *not* apply to the defendant specifically. The First District's characterization of this testimony as "profile evidence" thus cannot be squared with this Court's definition in *Mertz*. Moreover, *People v. Bradley*, 172 Ill. App. 3d 545, 551-52 (4th Dist. 1988), which the *Brown* court relied on for this point, had excluded similar evidence on *relevance* grounds — not because the evidence was impermissible "profiling" evidence. Thus, *Brown* is inapposite.

II. The Appellate Court Erroneously Concluded that Evidence of the Family's Reactions Was Introduced Solely for Its Emotional Impact.

After reversing defendant's conviction due to Safarik's testimony, the appellate court went on to address issues that it considered likely to recur on remand. *King*, 2018 IL App (2d) 151112, ¶ 90. One such issue was defendant's claim concerning evidence of the emotional effects on the victim's family.[2] In finding that this testimony was improperly introduced solely for

[2] The appellate court's opinion makes clear that it did not rely on this perceived error as an independent basis for reversal, nor could it. Defendant forfeited most of his challenges to Kristine's testimony by failing both to object to it and to raise it in his post-trial motion, *see People v. Harris*, 225 Ill. 2d 1, 31 (2007), and the appellate court did not find that defendant had shown plain error to overcome his forfeitures, *see People v. Enoch*, 122 Ill. 2d 176, 198-99 (1988). Thus, the appellate court did not address forfeiture, as would be necessary to grant relief on this issue, but merely provided instructions to limit testimony at a new trial. *See generally People v. Maldonado*, 398 Ill. App. 3d 401, 421 (1st Dist. 2010) (noting that court ordering a new trial may address forfeited issues likely to recur on remand "in the interest of judicial economy").

its emotional impact, the appellate court erred. Specifically, defendant complained of testimony from Kate's sister, Kristine, to the effect that (1) Kate was like a mother to her, and her best friend; (2) Kate accompanied Kristine when Kristine obtained her wedding gown and purchased the gown for her; (3) when she called Kurt to tell him that Kate was dead, she described Kurt as "frantic" and said that she was crying; and (4) when she arrived at Kurt's house, she and Kurt were "crying" and "shaking." Defendant further complained that (5) Kurt testified that he screamed upon learning that Kate was dead.

"This [C]ourt has 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, 330-33 (1995). But not every mention of a deceased's family entitles the defendant to a new trial. *People v. Hope*, 116 Ill. 2d 265, 276 (1986). Incidental evidence about a victim's family is "not only permissible, but in most trials, unavoidable, since '[c]ommon sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members.'" *People v. Blue*, 189 Ill. 2d 99, 131 (2000) (quoting *People v. Free*, 94 Ill. 2d 378, 415 (1983)).

Here, none of the challenged testimony was problematic. Defendant's complaints about Kristine's testimony concerning Kate's "motherly role" and "best friend" status— as well as Kristine's testimony that she and Kate had shopped for her wedding dress — was properly admitted as foundation for

Kristine's testimony about Kate's habits (*i.e.*, when Kate wore her eyeglasses and when she wore her contact lenses). *See* Ill. R. Evid. 406 (evidence of habit of a person is relevant to prove that conduct of person on particular occasion was in conformity with the habit or routine practice); Ill. R. Evid. 602 ("witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). Defense counsel had objected that there was insufficient foundation for Kristine's testimony about Kate's habits and routines. R1198 ("She said she spent two weeks one summer six years ago at most during college which was at least six years ago and that she had not lived with her since she was 12 years old."). Given this objection and the five-year age difference between Kate and Kristine, R1182, the People presented Kristine's testimony to establish, and it was relevant to establishing, sufficient foundation for the People's habit evidence.

Defendant also complained of Kristine's testimony describing her phone call to Kurt to inform him of Kate's death, and that she and Kurt were shaking and crying later at his house. Asked about Kurt's demeanor upon hearing of Kate's death, over a defense objection, Kristine replied that Kurt was "frantic" and "didn't believe [her]." R1233. Kristine further testified, without objection, that she "didn't know what to do" and she was "crying" and "burst into tears." *Id.* These challenged remarks were relevant to show that by contrast, defendant's reaction to the news of Kate's death (his "flat"

demeanor and his "I didn't do anything" statement) were unusual and supported a consciousness of guilt.

Lastly, as for Kurt's testimony about his reaction upon learning about Kate's death, the prosecutor asked Kurt "what did you do" upon learning that Kate was dead, and Kurt answered that he "started screaming on the phone." The State did not elicit the testimony about Kurt's tone of voice and "did nothing to make it appear material to establishing guilt or innocence," so the incidental admission of this snippet of testimony was not improper.

III. The Appellate Court Erroneously held that the Prosecutor's Closing Argument Defined and Diluted the People's Burden of Proof.

The second issue that the appellate court addressed as likely to recur on remand was defendant's challenge to the prosecutor's remarks in closing argument.[3] The appellate court erred in concluding that the prosecutor's closing argument "was an improper attempt to define and dilute the State's burden of proof." *King*, 2018 IL App (2d) 151112, ¶ 92.

On appeal, defendant challenged a portion of the prosecutor's rebuttal closing argument. Regarding the burden of proof, the prosecutor stated:

> One of the things that you need to understand here is that it is the burden upon the People of the State of Illinois to prove to

[3] This claim, like defendant's evidentiary challenge, did not, and cannot, provide an independent basis for granting a new trial. Among other things, defendant failed to object to the argument or include it in his post-trial motion, and he cannot overcome his forfeiture by demonstrating plain error. Notably, the appellate court did not address the forfeiture; it simply provided instructions to limit prosecutorial argument at a new trial. *See generally Maldonado*, 398 Ill. App. 3d at 421 (court ordering new trial may address forfeited issues that might recur on remand).

> you beyond a reasonable doubt that the defendant is guilty of first degree murder.
>
> It is the burden that is put upon us. 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.

"Prosecutors are afforded wide latitude in closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). And although "[t]his [C]ourt has long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury," *People v. Downs*, 2015 IL 117934, ¶ 19, not every comment by the court or counsel regarding the reasonable doubt standard is error. *E.g.*, *People v. Kidd*, 175 Ill.2d 1 (1996) (no error where prosecutor argued that proof beyond reasonable doubt burden is met in courtrooms across this country and in this building every day).

While it is improper to suggest to the jury that the State has no burden of proof, to attempt to shift the burden to the defendant, or to reduce the State's burden to a pro forma or minor detail, *People v. Speight*, 153 Ill. 2d 365, 374 (1992), the prosecutor's remarks here did none of those things. Even in the challenged remark itself, the prosecutor acknowledged the People's

burden to prove defendant's guilt beyond a reasonable doubt. R2975-76 ("it is the burden upon the People of the State of Illinois to prove to you beyond a reasonable doubt that the defendant is guilty of first degree murder").

In further stating to the jury that "[i]t's okay for you to have questions such as what point of access did he take" to reach the railroad tracks, R2976, the prosecutor did not attempt to dilute the burden of proof. It is firmly established that the jury need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). In telling the jury that it was "okay" to have questions about which of 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. And he immediately followed up by cautioning that it was only "okay . . . to have a question like that and to convict the defendant. As long as those questions don't amount to a reasonable doubt." *Id.* Accordingly, the comment was not error.

Moreover, the argument was plainly proper in context, because it responded to points raised by defense counsel. *See People v. Evans*, 209 Ill. 2d 194, 225 (2004) (when defense counsel provokes a response, defendant cannot complain that prosecutor's reply in rebuttal argument denied him a fair trial). The defense argument asked at length why defendant would have

dressed Kate in running clothes, R2872-73, why defendant would have said that Kate was going running instead of taking a walk, R2874, why defendant would move her body to that location, R2874-75, how defendant had moved Kate's body to the railroad tracks and which point of access was used to reach the tracks, R2874-79,[4] and how defendant carried her to the car, R2877-78. The defense attorney concluded by telling the jury that because "reasonable, educated, intelligent people can all disagree on what exactly happened … this is reasonable doubt." R2898-99. The prosecutor's statement that it was okay to have questions such as what point of access did he take, as long as those questions did not amount to a reasonable doubt, was invited by defense counsel's argument, and a prosecutor may properly raise points in rebuttal.

In sum, because the prosecutor's statement was not error, and was invited by defense counsel's argument, the appellate court erred in concluding that the remarks were improper.

[4] *See, e.g.*, R2876 (Defense counsel: "If he did drive to this location, did he go that way through the north end of the park and across that concrete bridge where the police officers went? Then when he got down to that walking path, did he just carry her all that way? Did he go that route, come across the entire north end of the park? Did he come down to the south end of the park and go across the running path there? And then did he drive across that field or did he go across the field coming from Sandholm Street? Or did he go across that south end of the park and still go around and cross that concrete bridge[?]").

CONCLUSION

This Court should reverse the appellate court's judgment.

May 29, 2019

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirty-six pages.

s/Katherine M. Doersch
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APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

INDEX TO RECORD ON APPEAL

Common Law Record (3 Volumes)

Volume 1 of 3: Trial Court Record

Volume 2 of 3: Trial Court Record

[1] *See* Vol. 3 Supplemental Report of Proceedings for March 6, 2015 p.m. transcript.

[2] Duplicate pages of testimony appear in Volumes 8-10.

Volume 2 of 3:

Exhibits

7/31/2015 DX 1 Geneva Police Dept. Supplementary Reports

3/16/2015 DX 1 photo - body at tracks from back with EKG

3/16/2015 DX 2 EKG Strip

3/16/2015 DX 3 photo - body at tracks, shoes

3/16/2015 DX 4 photo - body at tracks, face up and hands bagged

3/16/2015 DX 5 photo - Coroner's photo

3/16/2015 DX 6 photo - body at the tracks

3/16/2015 DX 7 photo - body at the tracks, face up

3/16/2015 DX 8 photo - body on tracks

3/16/2015 DX 9 photo - body at tracks

3/16/2015 DX 10 group exhibit of 15 photos - Coroner's photos from tracks

3/16/2015 DX 12 body diagram

3/16/2015 DX 13 Preliminary Pathologist report

3/16/2015 DX 14 Toxicology report

3/16/2015 DX 15 report of Postmortem examination

3/16/2015 DX 15a autopsy sign in sheet

3/16/2015 DX 16a photo - body at tracks - view from behind

3/16/2015 DX 16b photo - body at tracks from the top of head

3/16/2015 DX 16c photo - body at autopsy - left armpit

3/16/2015 DX 18a photo - body at tracks - view from feet looking up

3/16/2015 DX 18b photo - body at tracks - shoes from side

3/16/2015 DX 18c photo - body at tracks - shoes from front

3/16/2015 DX 18d photo - body at tracks - bottom of shoes

3/16/2015 DX 19a photo - body at tracks - scrapes on shin with left shoe

3/16/2015 DX 19b photo - body at tracks - top of right shin

3/16/2015 DX 19c photo - body at tracks - legs

3/16/2015 DX 19d photo - body at autopsy - both feet

3/16/2015 DX 19e photo - body at autopsy - left foot and ankle

3/16/2015 DX 20a photo - body at tracks - shoulder and head

3/16/2015 DX 20b photo - body at autopsy - back of head, neck and shoulder

3/16/2015 DX 21 photo - body at autopsy from shorts to ankles

3/16/2015 DX 23a photo - body at autopsy - left eye

3/16/2015 DX 23b photo - body at autopsy - left eye

3/16/2015 DX 24b photo - body at autopsy - right eye

3/16/2015 DX 25a photo - body at tracks - front view

3/16/2015 DX 25b photo - body at autopsy

3/16/2015 DX 27 photo - body at autopsy - bottom right foot

3/16/2015 DX 28 photo - body at tracks

3/16/2015 DX 30 photo - stomach and contents at autopsy

3/16/2015 DX 30a photo - body at tracks

3/16/2015 DX 30b photo - body at autopsy - bruises under chin

3/16/2015 DX 30c photo - body at autopsy - bruises under chin

3/16/2015 DX 31a photo - closet

3/16/2015 DX 31b photo - of bedroom

3/16/2015 DX 32a photo - clothes behind bathroom door on floor

3/16/2015 DX 32b photo - clothes behind bathroom door on floor

3/16/2015 DX 32c photo - denim shorts with leaf

3/16/2015 DX 32d photo - of denim shorts

3/16/2015 DX 33a photo - of bathroom

3/16/2015 DX 38a photo - comforter hanging at GPD

3/16/2015 DX 39b photo - of mirror

3/16/2015 DX 39c photo - top of vanity and shard of wood

3/16/2015 DX 39e photo - bench in living room

3/16/2015 DX 39f photo - laundry area

3/16/2015 DX 40 photo - body at autopsy - left shoulder

3/16/2015 DX 41 photo - body at tracks - face and neck

3/16/2015 DX 42 photo - damage to bathroom door

3/16/2015 DX 43 photo - picture of bathroom door frame

3/16/2015 DX 44 photo - bathroom sink

3/16/2015 DX 48a-d map my run

3/16/2015 DX 50a photo - body at autopsy - left shoulder

3/16/2015 DX 50b photo - body at autopsy - back view

3/16/2015 DX 50c photo - body at autopsy - left armpit

3/12/2015 DX 51 a photo - of vegetative area

3/12/2015 DX 51 b photo - of vegetative area and fence

3/16/2015 DX 51b photo - end of path by railroad

3/12/2015 DX 90 a photo - vegetative area with tire marks

3/12/2015 DX 90 b photo - vegetative area with tire marks and a train

3/12/2015 DX 90 c photo - close up photo of tire mark and a ruler

3/12/2015 DX 90 d close up photo of tire mark

3/12/2015 DX 90 e close up photo of tire mark

3/12/2015 DX 90 f close up photo of tire mark and ruler

3/12/2015 DX 90 g close up photo of tire mark and ruler

3/12/2015 DX 90 j photo - of open field with tire marks

3/16/2015 DX 93 extraction report

3/16/2015 DX 93a text from Shad to Kate (previously admitted)

3/16/2015 DX 113 photo - body at autopsy

3/16/2015 DX 220 photo - clothes on bathroom

3/16/2015 DX 221 photo - clothes on bathroom

3/16/2015 DX 229 Grand Jury Transcript

3/16/2015 DX 230 photo - pile of clothes by closet

3/16/2015 DX 231 photo - pile of clothes by closet

3/16/2015 DX 232 photo – closet

3/16/2015 DX 233 photo - pink shirt hanging in closet

3/16/2015 DX 234 photo - purple comforter at GPD

3/16/2015 DX 240 Shadwick's note to Kate

3/16/2015 DX 242 Screen shots of Kindle web browser history

3/16/2015 DX 300 photo - body at autopsy - bruise on foot

3/16/2015 DX 301 photo - body at autopsy - bruises on chin

3/16/2015 DX 302 photo - body at autopsy - bruises on chin

3/16/2015 DX 303 photo - body at autopsy - from waist to head

3/16/2015 DX 304 photo - body at autopsy - both legs from above

3/13/2015 DX 305 photo - abrasion to skin on leg

3/16/2015 DX 305 photo - body at tracks - abrasion to left front ankle

3/13/2015 DX 306 photo - abrasion to leg

3/16/2015 DX 306 photo - body at autopsy - left ankle abrasion

3/13/2015 DX 307 photo - right eye

3/16/2015 DX 307 photo - body at tracks - face and neck

3/13/2015 DX 308 photo - abrasion to chin

3/16/2015 DX 308 photo - body at tracks - bottom of chin and face

3/13/2015 DX 309 photo - right eye

3/16/2015 DX 309 photo - body at autopsy - right eye abrasion

3/16/2015 DX 310 photo - body at tracks - front view from shoulder to feet

3/16/2015 DX 311 photo - body at tracks - head and torso

3/16/2015 DX 312 photo - body at tracks - view from feet toward head

3/16/2015 DX 313 photo - body at tracks - bottom of shoes

3/13/2015 DX 314 photo - left arm

3/16/2015 DX 314 photo - body at tracks - entire body from behind

3/16/2015 DX 315 photo - body at tracks

3/16/2015 DX 316 photo - body at autopsy - bruise to right forearm

3/13/2015 DX 317 photo - left upper arm

3/16/2015 DX 317 photo - body at autopsy - left shoulder

3/16/2015 DX 318 photo - body at tracks - left knee

3/16/2015 DX 319 photo - body at tracks - legs

3/16/2015 DX 320 photo - body at tracks

3/16/2015 DX 321 photo - body at tracks - view from front

3/16/2015 DX 323 photo - body at tracks - right inner shin

3/16/2015 DX 324 photo - body at tracks - lower left leg

3/16/2015 DX 325 photo - body at autopsy - legs

3/16/2015 DX 326 photo - body at tracks - left leg shin and top left shoe

3/16/2015 DX 327 photo - body at tracks

3/16/2015 DX 329 photo - body at tracks

3/16/2015 DX 330 photo - body at autopsy

3/16/2015 DX 331 photo - body at autopsy - left armpit

3/16/2015 DX 332 photo - body at autopsy - right forearm

3/16/2015 DX 335 photo - body at tracks

3/16/2015 DX 336 photo - body at autopsy

3/16/2015 DX 337 photo - body at autopsy - left arm

3/16/2015 DX 343 photo –

3/16/2015 DX 370 photo - Shawick King's driver's license photo

3/16/2015 DX 371 photo - Shadwick King

3/16/2015 DX 372 photo - Shadwick King's left hand

3/16/2015 DX 373 photo - Shadwick King's palms

3/16/2015 DX 374 photo - Shadwick King's right hand

3/13/2015 DX 400 photo - front of King's home

3/13/2015 DX 401 photo - front of King's home

3/13/2015 DX 402 photo - of King's garage

3/13/2015 DX 403 photo - of King's garage

3/13/2015 DX 404 photo - of King's garage

3/16/2015 DX 405 Jerdee's Field notes

3/16/2015 DX 502 disc

3/12/2015 DX 514BB Entry of a movie file - record information

3/12/2015 DX 514CC Disc

3/12/2015 DX 514DD Entry of an image

3/12/2015 DX 514k-AA Text messages

3/12/2015 DX 517a Header - Facebook Business Record pg 113

3/12/2015 DX 517b Header - Facebook Business Record pg 212

3/12/2015 DX 517c Header - Facebook Business Record pg 372

3/16/2015 DX 701 disc

3/16/2015 DX 702 disc

3/12/2015 DX 900 k close up photo of tire mark

7/31/2015 PX 2 Extracted report 6/26/14 from victim's IPhone

3/5/2015 PX 10a photo - leaf fragment

3/5/2015 PX 10b photo - leaf fragment with scale

3/5/2015 PX 11a photo - partial leaf fragment

3/5/2015 PX 11b photo - partial leaf fragment with scale

3/5/2015 PX 12a photo - leaf fragments with scale

3/5/2015 PX 13a photo - leaf fragments

3/5/2015 PX 14a photo – hair

3/5/2015 PX 14b photo - hair with scale

3/5/2015 PX 15a photo - hair

3/5/2015 PX 15b photo - 2 hair strands w/scale

3/5/2015 PX 16a photo - hair

3/5/2015 PX 16b photo - hair with scale

3/5/2015 PX 17a photo - hair

3/5/2015 PX 17b photo - hair w/scale

3/5/2015 PX 18a photo - hair

3/5/2015 PX 18b photo - hair w/scale

3/9/2015 PX 70 stipulation

3/10/2015 PX 73 Disc - Interview

3/11/2015 PX 74 disc

3/3/2015 PX 101 photo - satellite image

3/3/2015 PX 101 photo - view of area victim was found

3/3/2015 PX 102 photo - female subject

3/3/2015 PX 103 photo - female subject

3/3/2015 PX 104 photo - of female subject and a cell phone

3/3/2015 PX 105 photo - female subject

3/3/2015 PX 106 close-up photo - female subject

3/3/2015 PX 107 close-up photo - female subject

3/3/2015 PX 108 photo - female subject

3/3/2015 PX 109 photo - female subject and a cell phone

3/3/2015 PX 110 photo - female subject

3/4/2015 PX 111 photo - back of female subject

3/4/2015 PX 112 photo - legs and torso of female subject

3/4/2015 PX 113 photo - upper thigh of female subject

3/4/2015 PX 114 photo - of back of female subject's legs

3/4/2015 PX 115 photo - bottom portion and shoes and legs

3/4/2015 PX 116 photo - top front portion of shoes and legs

3/4/2015 PX 117 photo - bottom of shoes

3/4/2015 PX 118 photo - outside right knee and legs

3/4/2015 PX 119 close up photo - female subject right knee with a hair

3/4/2015 PX 120 close up photo - small wound on upper thigh

3/4/2015 PX 121 photo - close up of back area of head

3/4/2015 PX 122 photo - back of right arm

3/4/2015 PX 123 photo - close up of hair on arm

3/4/2015 PX 124 photo - of scrapping on shins

3/4/2015 PX 125 close up photo - of scrapes on leg

3/4/2015 PX 126 photo - front of face of female subject

3/4/2015 PX 127 photo - bottom of shin

3/4/2015 PX 128 photo - bruise on arm

3/4/2015 PX 129 photo - scrape on left leg/shin

3/4/2015 PX 130 photo - right inside of leg/shin

3/4/2015 PX 131 close up photo - left knee area

3/4/2015 PX 132 close up photo - mouth and teeth

3/4/2015 PX 133 photo - left inside shorts and of stomach area

3/4/2015 PX 134 close up photo of SAO exhibit 133

3/11/2015 PX 151 photo - entrance point - gravel area

3/11/2015 PX 152 photo - gravel area

3/11/2015 PX 153 photo - close up of the area

3/11/2015 PX 154 photo - front door of residence

3/11/2015 PX 155 photo - end table with tablet

3/11/2015 PX 156 photo - living room / dining room area

3/11/2015 PX 157 photo - dining room area

3/11/2015 PX 158 photo - kitchen area

3/11/2015 PX 159 photo - washer and dryer area

3/11/2015 PX 160 photo - hallway area

3/11/2015 PX 161 photo - bathroom

3/11/2015 PX 162 photo - bath tub

3/11/2015 PX 163 photo – children's room

3/11/2015 PX 164 photo - master bedroom

3/11/2015 PX 165 photo - bedroom

3/11/2015 PX 166 photo - chair in master bedroom

3/9/2015 PX 171 photo - view of end table and couch

3/9/2015 PX 172 photo - view of couch and fireplace

3/9/2015 PX 173 photo - view of fireplace / dining room area

3/9/2015 PX 174 photo - 3 sport bras

3/9/2015 PX 175 photo - 2 sport bras

3/9/2015 PX 176 photo - view looking into the dining room area

3/9/2015 PX 177 photo - of shoes

3/9/2015 PX 178 photo - view of the shoe soles

3/9/2015 PX 179 photo - view looking at kitchen

3/9/2015 PX 180 photo - view looking at washer/dryer area

3/9/2015 PX 181 photo - small fragment leaf material / vegetation decay

3/9/2015 PX 182 photo - small fragment leaf material / vegetation decay

3/9/2015 PX 183 photo - view of kitchen floor with hair fibers

3/9/2015 PX 184 photo - view of kitchen floor with hair fibers

3/9/2015 PX 185 photo - view looking down at drum of washer

3/9/2015 PX 186 photo - comforter

3/9/2015 PX 187 photo - close up view of a portion of the comforter

3/9/2015 PX 188 photo - view of counter top and Clorox bottle

3/9/2015 PX 189 photo - view looking at bathroom

3/9/2015 PX 190 photo - view looking at the bathroom tub

3/9/2015 PX 191 photo - view looking at bathroom floor

3/9/2015 PX 192 photo - clothing articles behind bathroom door

3/9/2015 PX 193 photo - blue jeans

3/9/2015 PX 194 photo - damage to door

3/9/2015 PX 195 photo - close up view of damage to door

3/9/2015 PX 196 photo - view of floor with scale

3/9/2015 PX 197 photo - close up view of wood shard

3/9/2015 PX 198 photo - sports bras

3/9/2015 PX 201 photo - black coach purse

3/9/2015 PX 202 photo - black ear buds

3/9/2015 PX 203 photo - front of blue jean shorts

3/9/2015 PX 204 photo - back of blue jean shorts

3/9/2015 PX 205 photo - blue jean shorts

3/9/2015 PX 206 photo - vegetation fragment

3/9/2015 PX 207 photo - washing machine

3/9/2015 PX 208 photo - close up of arm band

3/9/2015 PX 209 photo - Puma shoes

3/9/2015 PX 210 photo - close up of a single knots on shoes

3/9/2015 PX 211 photo - black dress shoes

3/9/2015 PX 212 photo - close up of single knot

3/9/2015 PX 213 photo - close up of single knot

3/9/2015 PX 214 photo - black and gray right shoe

3/9/2015 PX 215 photo - close up of shoe

3/9/2015 PX 216 photo - double knot on shoe

3/9/2015 PX 217 photo - close up of double knot

3/9/2015 PX 218 photo - silver, red, and yellow running shoes

3/9/2015 PX 219 photo - silver, red, and yellow running shoes with double knots

3/9/2015 PX 220 photo - close up of double knot

3/9/2015 PX 221 photo - purple and black running shoes

3/9/2015 PX 222 photo - 1 box of contact lenses

3/9/2015 PX 223 photo - 2 boxes of contact lenses

3/9/2015 PX 224 photo - leaf fragment

3/9/2015 PX 225 photo - leaf fragment

3/9/2015 PX 226 photo - leaf fragment

3/4/2015 PX 231 photo - female subject

3/4/2015 PX 232 photo - top view of female subject

3/5/2015 PX 251 photo - female subject - hair

3/5/2015 PX 252 photo - female subject - dry leaf in hair

3/5/2015 PX 253 photo - female subject - dry leaf in hair

3/5/2015 PX 254 photo - right side face and front neck

3/5/2015 PX 255 close up photo of hair on neck

3/5/2015 PX 256 photo - right shoulder area

3/5/2015 PX 257 close up photo of hair

3/5/2015 PX 258 photo - right shoulder area

3/5/2015 PX 259 photo - of gray t-shirt and hair

3/5/2015 PX 260 photo - feet and shoes

3/5/2015 PX 261 close up photo of feet and shoes

3/5/2015 PX 262 photo - female subject in the autopsy room

3/5/2015 PX 263 photo - right shoe

3/5/2015 PX 264 photo - left shoe

3/5/2015 PX 265 photo - of female subject t-shirt and shorts

3/5/2015 PX 266 photo - dry leaf inside shorts

3/5/2015 PX 267 close up photo of dry leaf

3/5/2015 PX 268 female subject face

3/5/2015 PX 269 photo - female subject - chin and jaw

3/5/2015 PX 270 close up photo of exhibit photo 269

3/5/2015 PX 271 photo - right side of neck

3/5/2015 PX 272 photo - outer arm

3/5/2015 PX 273 close up photo of exhibit photo 272

3/5/2015 PX 274 photo - bruise left upper arm

3/5/2015 PX 275 photo - of inner half arm

3/5/2015 PX 276 photo - left leg

3/5/2015 PX 277 photo - lower leg with dirt and scratch marks on legs and ankles

3/5/2015 PX 278 photo - abrasions to left knee

3/5/2015 PX 282 photo - soles of shoes

3/5/2015 PX 283 photo - of victim

3/5/2015 PX 284 photo - bra

3/5/2015 PX 285 photo - left arm pit

3/5/2015 PX 286 photo - sock on right foot

3/5/2015 PX 287 photo - of foot and hair on sock

3/5/2015 PX 289 photo - bruise on left foot

3/5/2015 PX 290 Photo - left eye

3/5/2015 PX 291 Photo - left eye

3/5/2015 PX 292 Photo - right eye

3/5/2015 PX 293 Photo - right eye

3/5/2015 PX 294 Photo - right eye

3/5/2015 PX 295 photo - lower and upper lip/teeth

3/5/2015 PX 296 photo - under surface of tongue

3/5/2015 PX 297 photo - inside nose are

3/5/2015 PX 298 photo - inside nose are

3/10/2015 PX 401 Photo-Phone

3/3/2015 PX 501 disc - video of train

3/4/2015 PX 502 Disk - video of the back of train

3/3/2015 PX 503 disc - video of train

3/10/2015 PX 504 Stipulation

3/10/2015 PX 505 Disc

3/5/2015 PX 505a photo - Paul Schennum at the bar

3/5/2015 PX 505b photo - Chad Lunsmann at the bar

3/11/2015 PX 506 stipulation

3/11/2015 PX 507 disc

3/11/2015 PX 508 stipulation

3/11/2015 PX 509 disc

3/12/2015 PX 510 Stipulation

3/12/2015 PX 511 Stipulation

3/12/2015 PX 512 Chase Bank documents - (marked SAO-1556 to SAO1645)

3/12/2015 PX 512a Chase transactions

3/12/2015 PX 512b Chase (ATM & Debit Card Withdrawals)

3/12/2015 PX 512c 1 pg - 4 transactions

3/12/2015 PX 512d Digital Video Snapshot

3/12/2015 PX 512e Close-up of digital video snapshot

3/12/2015 PX 513 Stipulation

3/12/2015 PX 514a-j Text messages

3/11/2015 PX 514ee photo - of Kathleen King

3/12/2015 PX 514EE Photo - of Kathleen King

3/10/2015 PX 515 Stipulation

3/12/2015 PX 516 Stipulation

3/10/2015 PX 518 Stipulation

3/12/2015 PX 519 Stipulation

3/12/2015 PX 520a Extraction report

3/12/2015 PX 520b Web history

3/12/2015 PX 520c User Dictionary

3/12/2015 PX 521 Stipulation

3/12/2015 PX 522a-c Firefox Web History

3/12/2015 PX 522d-h Parsed Search Queries

3/12/2015 PX 522i-CC Internet Explorer 10-11 Main History

3/12/2015 PX 523 Stipulation

3/9/2015 PX 601 1 pg - DNA profile

3/9/2015 PX 602 1 pg - Analysis test

3/9/2015 PX 603 1 pg - 1st run Analysis

3/12/2015 PX 801 photo - Kindle Silk Web History

3/12/2015 PX 802 photo - Kindle Silk Web History

3/12/2015 PX 803 photo - Kindle Silk Web History

Black Binder

2018 IL App (2d) 151112

Appellate Court of Illinois, Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Shadwick R. KING, Defendant-Appellant.

No. 2-15-1112

|

Opinion filed August 21, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Kane County, No. 14-CF-1229, James C. Hallock, J., of first-degree murder. Defendant appealed.

Holdings: The Appellate Court, Zenoff, J., held that:

trial court's grant of state's motion for disclosure of defendant's and victim's cellular telephone records and denial of defendant's motion to declare federal statute granting access to cellular records unconstitutional were "substantive rulings," for purposes of rule that motion to substitute judge as of right was required to be made before judge made substantive ruling;

there was sufficient evidence that victim's death was caused by some person's criminal agency to support conviction, and thus retrial based on evidentiary error was not barred by double jeopardy clause;

state's expert in crime scene analysis was not qualified to opine that victim died of manual strangulation;

testimony of state's expert that an experienced runner would not have dressed in garments in which victim was found related to conclusions that ordinary juror could have drawn;

trial court's error in admitting profiling testimony of state's expert was not harmless;

testimony of victim's family regarding emotional attachments to victim and reactions to victim's death were inadmissible; and

prosecutor's argument during rebuttal closing argument that it was okay for jurors to have questions regarding evidence and still convict defendant was improper attempt to define and dilute state's burden of proof.

Reversed and remanded.

Appeal from the Circuit Court of Kane County. No. 14-CF-1229, Honorable James C. Hallock, Judge, Presiding.

OPINION

JUSTICE ZENOFF delivered the judgment of the court, with opinion.

***1** ¶ 1 Defendant, Shadwick R. King, appeals his conviction of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) and sentence of 30 years' incarceration, following a jury trial in the circuit court of Kane County. Because defendant was prejudiced by the improper introduction of a former FBI profiler's "crime-scene-analysis" testimony, we reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 The common-law record, trial transcripts, photographs, and videos in evidence show the following. We will supplement the facts as necessary in the analysis section of the opinion.

¶ 4 A. The Body on the Railroad Tracks

¶ 5 On July 6, 2014, between 6:02 and 6:05 a.m., an eastbound Union Pacific freight train passed through Geneva Station. Locomotive engineer Devin Satchell saw no one on or near the railroad tracks. The tracks were surrounded by heavy brush, although there were access points at breaks in the brush.

¶ 6 An eastbound Metra passenger train traveling on track 1 approached Geneva Station at 6:36 and left it at 6:37 a.m. The train was under the Route 25 overpass when student engineer Alex Perez informed engineer Robert Soto Jr. of a "body, or something" on track 2. Perez began blowing the train's horn. Soto saw a woman lying awkwardly on the track. She had a blank stare and was not moving.

¶ 7 At approximately 6:39 a.m., the train came to an emergency stop, and crew members Dan Mongelli and Joel Cavender stepped out to investigate. Cavender observed that the woman's shirt was halfway up her back and that she did not move or breathe. Mongelli saw the woman's shirt lift, and he informed his dispatcher, "I believe this broad's still breathing." However, when he got within a foot of the woman and squatted down to look at her, he saw that she was not breathing. He determined that her shirt had lifted in the breeze. Mongelli noticed that her neck was "laid" across the track "in a perfect manner" so that an oncoming train would strike it. He also noticed a purple color around her mouth, brush (described by another witness as dried leaves and a blade of grass) in her hair, a cell phone nearby, and "spotting" on her leg. This "spotting" was later determined by paramedic Gary Grandgeorge and deputy coroner Lisa Gilbert, who also responded to the scene, to be "lividity." Mongelli realized at the scene that the woman was deceased. Mongelli and Cavender waited for the police to arrive.

¶ 8 Geneva police sergeant George Carbray arrived on the scene at approximately 6:55 a.m. According to Carbray, the body was lying on its left side, facing west. The head and neck were positioned over the northern rail. A pink iPhone was placed against a couple of railroad spikes on the opposite side of the rail from the body. It would later be determined that there were no fingerprints on the phone.

¶ 9 The body was clad in a gray top, black running shorts with no spandex liner, and black and pink running shoes. The shorts were loose, and there were no underpants beneath them. A dried leaf was on the lower abdomen, just above the pubic area. A Maidenform underwire bra was pulled up, half exposing the breasts.

***2** ¶ 10 Carbray found no pulse. He believed that the woman had been dead for some time, but he wanted a medical opinion, so he called for paramedics. They attached a heart monitor to the body but found no heartbeat. Grandgeorge testified that the monitor detected "pulseless electrical activity," which can carry on "for some time" after a person dies. The paramedics did not make resuscitation efforts, because it appeared that the woman had been deceased for "quite some time." EMT Michael Antenore noted that the woman's skin was a "cyanotic purple" color and that the pupils were "fixed and dilated." Antenore also noted that the paramedics had mud on their shoes, due to an overnight rain, but that the woman's running shoes were clean.

¶ 11 The woman was later identified as 32-year-old Army reservist Kathleen King, defendant's wife. Their home was located 1200 to 1300 feet from where she was found. People who were in the general area of the railroad tracks between 6 and 6:30 a.m. on July 6 did not see anyone running or see any cars in nearby Esping Park. Esping Park was just north of the tracks and had walking paths providing access to the tracks. Defendant's neighbors did not see him or his SUV out between 6 and 6:30 a.m.

¶ 12 Defendant's and Kathleen's 10-year-old son, Brandon, testified that Kathleen ran in Esping Park. According to Brandon, when running Kathleen customarily wore an armband into which she tucked her iPhone. She also wore either glasses or contact lenses and earbuds. When her body was found, she was not wearing contacts or glasses. Her contacts, armband, and earbuds were found in her home during a later search.

¶ 13 B. The Fourth of July Party

¶ 14 At approximately 6 p.m. on July 5, 2014, Kathleen, defendant, and their three boys, then ages 9, 7, and 5, arrived at the home of her father, Kurt Kuester, in Elk Grove Village for a Fourth-of-July celebration. During the evening, defendant drank three or four beers, and Kathleen drank a bottle and a half of wine. According to Kathleen's younger sister Kristine, Kathleen demonstrated a maneuver to render someone unconscious, which she had learned in the Army. At about 10:30 or 10:45 p.m., Kathleen and defendant left the party. The boys stayed overnight with Kurt. According to Kristine, Kathleen did not have any injuries or bruises that night.

¶ 15 The next morning, Kristine learned from the Geneva police that Kathleen had died. At approximately 10:40 a.m. on July 6, Kristine telephoned Kurt and told him that Kathleen was dead. In a second phone call that morning, Kristine told Kurt not to allow defendant to have the boys.

¶ 16 Kurt testified that he frantically started screaming, "What are you talking about?" when Kristine broke the news to him of Kathleen's death. At about that time, defendant was approaching the front door, which Kurt thought was unusual because defendant "never" picked up the children. Kurt asked defendant, "Where is Kathleen?" Defendant replied, "We were fighting and she went running at 6:30 to clear her head." Kurt told defendant: "Kathleen is dead, Shad." Defendant bent over and said: "I didn't do anything. I didn't do anything." According to Kurt, defendant did not ask what had happened to Kathleen or where she was.

¶ 17 C. Police Interviews of Defendant

¶ 18 Elk Grove Village police officers Angela Garza and Eric Perkins responded to a call at Kurt's residence on July 6 at 11:44 a.m. Defendant told Garza that Kurt would not allow him to take his children, because Kathleen was deceased. Defendant stated that he and Kathleen had an argument over her seeing a man whom she met in the military and that defendant told her to choose between the other man and him. Then, according to defendant, Kathleen went running by the river at 6:30 a.m. Defendant stated that he came to Kurt's home to pick up the children but that no one was home, so he drove to Kathleen's grandmother's house in Chicago. He arrived between 9 and 9:30 a.m. but no one was there, so he drove back to Kurt's house. Defendant asked if Kathleen was okay. Garza and Perkins transported defendant to the Geneva police station. Garza testified that defendant was so upset and anxious that it was not safe for him to drive himself. According to Garza, 20 minutes into the ride, defendant asked how Kathleen had died, but the officers did not have those details.

***3** ¶ 19 At 1 p.m., Geneva police detectives Robert Pech and Brad Jerdee interviewed defendant. The video of the interview is in evidence. Defendant explained to the detectives that Kathleen was away in basic training from February 7 to June 14, 2014. Defendant took a leave of absence from his insurance job to take care of the children while Kathleen pursued her Army career. According to defendant, when Kathleen returned home, he learned of her relationship with a man he called "Keno," whom she met in the military. Defendant stated that he mentioned divorce but, he said, Kathleen refused to consider it. Defendant also stated that he agreed that Kathleen could move out of state with the children to be with Keno as long as she agreed that defendant could have the boys during the summer. Defendant further stated that he told Tim Casey, Kristine's fiancée, that he might miss their wedding because of marital problems.

¶ 20 Casey (Kristine's husband at the time of trial) confirmed what defendant said that he had told him. Casey also testified that he had helped cover up Kathleen's affair by lying to defendant about Kathleen's whereabouts on one occasion.

¶ 21 Defendant told Detectives Pech and Jerdee that he and Kathleen went to a bar in Geneva after they left Kurt's party the night of July 5. According to the bartender, she served defendant five bottles of Miller Lite and Kathleen four glasses of wine. A man named Chad joined the Kings and bought them each a shot. Chad testified that he did not see any bruises on Kathleen's face.

¶ 22 Defendant told the detectives that he and Kathleen left the bar at approximately 1:45 a.m. and got home at about 2 a.m. Defendant was brushing his teeth while Kathleen was texting someone on her iPhone. When Kathleen put the phone down where defendant would be sure to see the message she had written, he saw that she was sending a romantic text to Keno.

¶ 23 The record shows that the man's name was Billy Keogh. The record also shows that he and Kathleen had exchanged over 3000 text messages. In one message, Kathleen asked Keogh to marry her. Kristine was aware of her sister's relationship with Keogh and had helped Kathleen keep it from defendant.

¶ 24 Defendant told the detectives that, when he saw Kathleen's text to Keogh, he picked up her phone and texted Keogh to leave her alone. Defendant stated that he also texted Keogh that he was going to bed with Kathleen.

¶ 25 The record shows that 11 texts about defendant and Kathleen having sex were sent to Keogh from Kathleen's phone between 4:18 and 4:57 a.m. The record also shows

that, after defendant took Kathleen's phone from her that morning, she used another device to communicate with Keogh.

¶ 26 According to defendant's statement to the detectives, he and Kathleen stayed up until 5 a.m. on July 6 talking about her desire to attend officers' school. Defendant denied that he and Kathleen argued about Keogh. Throughout the interview, defendant expressed that he accepted that his wife was having an affair. Defendant stated that he went to bed and slept for about an hour and that Kathleen was also in the bed. According to defendant, Kathleen went running at about 6:30 a.m. Defendant said that she usually ran by the river. Defendant stated that Kathleen was wearing black and pink running shoes but that he could not remember what else she was wearing.

¶ 27 At times during the interview, defendant was tearful. He ventured that Kathleen must have been hit by a car. One of the detectives told him that Kathleen's death was not accidental. Defendant repeatedly stated, sometimes indignantly, that he did not, and could not, have harmed her.

¶ 28 According to defendant, after Kathleen went running, he left the house to get donuts, as was his Sunday habit. At 9:30 a.m., he called and texted Kathleen to find out Kurt's phone number so that he could pick up the boys. Defendant stated that he left the house at about 9:30 a.m., waved to the neighbors, and went to Kurt's house. No one was home, so he drove to Kathleen's grandmother's home in Chicago. No one was there, so he drove back to Kurt's home.

***4** ¶ 29 One of the detectives asked defendant how he got a "fat" lip. Defendant rubbed the right side of his bottom lip but denied that his lip was "fat." At trial, Pech testified that defendant's right bottom lip was slightly swollen.

¶ 30 The detectives took defendant home, where he gave them permission to search and photograph his house. Pech described a messy house, with leaf fragments on the kitchen floor. Police again searched defendant's home on July 8, 2014, pursuant to a search warrant. Among the items collected was dried vegetation matter throughout the house and on a still-wet comforter that was in the washing machine. At trial, the State did not produce evidence forensically linking the vegetation found in the house and the vegetation that was found on Kathleen's body. During the search, police also found earbuds and an armband into which a phone could be inserted. Police also noted the presence of assorted sports bras.

¶ 31 On July 8, 2014, Pech and Jerdee conducted a second videotaped interview with defendant, this time after *Miranda* warnings. Pech informed defendant that Kathleen died of asphyxiation. Throughout the interview, the detectives presented defendant with various scenarios in which he accidentally killed Kathleen. Defendant repeatedly denied doing anything, or even being capable of harming Kathleen. Defendant denied knowing what happened to her. When Pech falsely informed defendant that his fingerprints were found on Kathleen's neck, defendant denied knowing how they got there. He suggested that he might have touched her.

¶ 32 D. The Charge and Pretrial Motions

¶ 33 On July 11, 2014, the Kane County state's attorney charged defendant by information with two counts of first-degree murder related to Kathleen's death. Following a preliminary hearing and a finding of probable cause, the case was assigned to Judge James C. Hallock. On September 15, 2014, the information was superseded by a two-count indictment for first-degree murder.

¶ 34 On July 14, 2014, the State moved pursuant to a federal statute (18 U.S.C. § 2703(d)) for an order for the disclosure of registration records pertaining to defendant's and Kathleen's cell phones for July 5 and 6, 2014. Defendant made an oral motion, which the court denied, to declare the statute unconstitutional on the ground that the fourth amendment requires a warrant rather than a court order. On July 17, 2014, the court granted the State's motion to obtain the cell phone records.

¶ 35 On July 18, 2014, defendant moved for substitution of judge as of right (725 ILCS 5/114-5(a) (West 2014)). In a written order dated September 3, 2014, the court, identified only as "Judge 42," denied the motion on the ground that Judge Hallock made a substantive ruling in denying defendant's motion to declare the federal statute unconstitutional, making the motion for substitution of judge untimely. The matter then remained in Judge Hallock's courtroom.

¶ 36 On January 15, 2015, the State filed its motion *in limine* No. 1, seeking leave to call Mark Safarik as an expert witness in crime-scene analysis. The motion stated that Safarik was a "crime scene and behavioral analyst" for a private company known as Forensic Behavioral Services. The motion further stated that Safarik had 23 years' experience with the FBI, including as a supervisor with the Behavioral Analysis Unit (BAU). Safarik had been, in the vernacular, an FBI profiler. The substance of Safarik's proposed testimony was contained in a written report that he authored, which apparently was submitted separately to the trial court but is not in the record.

***5** ¶ 37 The record shows that Safarik worked as a police officer handling violent crimes for seven years before joining the FBI. While in the FBI, Safarik attended training courses in various disciplines, including forensic pathology, death investigation, and criminal behavior.

¶ 38 The court granted the motion *in limine* over defendant's objection. In ruling that Safarik's testimony would be admissible if Safarik were qualified as an expert at trial, the court noted that Safarik's opinions would have to be rendered "pursuant to his qualifications" and that he would not be permitted to identify "the defendant as the killer by direct testimony." Nor, the court ruled, would Safarik be allowed to give profiling testimony. The court found that Safarik's "specialized knowledge" was "reliable" and "relevant" and that the general subject matter of his testimony would assist the jury to understand the evidence and to determine the facts. Specifically, the court found that the positioning of Kathleen's body on the railroad tracks was "a matter beyond the common experience of most jurors and is [a] subject of difficult comprehension."

¶ 39 E. The Trial

¶ 40 The jury trial commenced on March 2, 2015. In addition to the evidence detailed above, the following testimony was presented.

¶ 41 1. Dr. Mitra Kalelkar

¶ 42 The State called forensic pathologist Dr. Mitra Kalelkar. Dr. Kalelkar performed an autopsy on Kathleen on July 7, 2014. Dr. Kalelkar noted the clothing on the body, as described above. Dr. Kalelkar also noted that the heel of one sock was twisted around the ankle and that one of the bra straps was twisted. Dr. Kalelkar testified to the presence of antemortem (before death), postmortem (after death), and perimortem (at the time of death) abrasions and bruises, some of which were inconsistent with Kathleen having fallen or collapsed on the train tracks. Specifically, she testified that an antemortem bruise under the chin was consistent with someone's hands having been around Kathleen's neck or Kathleen having tried to pry someone's hands off her neck. Dr. Kalelkar opined that an antemortem bruise on the upper left arm was consistent with someone grabbing her. Dr. Kalelkar noted a red mark on the neck that did not contribute to Kathleen's death and a trail of saliva mixed with stomach contents on the cheek. According to Dr. Kalelkar, the stomach contained a minimal amount of brown fluid, and a toxicology report showed the presence of caffeine. At the time of the autopsy, Kathleen's blood alcohol concentration was 0.15.

¶ 43 Dr. Kalelkar filled in her autopsy protocol with "asphyxiation" as the cause of death. In her trial testimony, she expanded on that to include manual strangulation. She testified that she found petechial hemorrhages in the eyes and epiglottis mucosa [1] and that she also found focal hemorrhages at the base of the tongue. Those findings, she testified, indicate strangulation.

¶ 44 2. Mark Safarik

¶ 45 Safarik, a former police officer and FBI profiler with no medical training, testified, over objection, that the lividity on Kathleen's body was inconsistent with her having died on the train tracks. Over objection, Safarik testified to his opinion that the cause of death was manual strangulation. He enumerated possible causes of asphyxiation, reiterated the cause of death as listed by Dr. Kalelkar, and then eliminated all but manual strangulation as fitting the facts. Safarik opined, over objection, that the death scene on the tracks was staged, that Kathleen was killed in her residence, and that someone close to her, not a stranger, staged the scene. Safarik's testimony will be examined in more detail in the analysis section of the opinion.

¶ 46 3. Dr. Larry William Blum

***6** ¶ 47 Following the denial of his motion for a directed verdict, defendant presented his case. He called Dr. Blum, a forensic pathologist, who testified that Kathleen died of a cardiac event brought on by stress, alcohol intoxication,[2] lack of sleep, and caffeine consumption. Dr. Blum opined that Kathleen was running on the railroad tracks, became unwell, sat down on the rail, and expired. According to Dr. Blum, her bruises and lividity were consistent with that scenario. Dr. Blum acknowledged Dr. Kalelkar's findings of petechial hemorrhages in the eyes and focal hemorrhages at the base of the tongue, but he opined that those findings, standing alone, did not support a conclusion that Kathleen was manually strangled. Dr. Blum also testified that Dr. Kalelkar's autopsy report was incomplete because "asphyxiation" as a cause of death was nonspecific.

¶ 48 Defendant's testimony essentially mirrored the statements that he gave to the police.

¶ 49 In rebuttal, Dr. Kalelkar testified that her autopsy findings led her to conclude that Kathleen died of asphyxiation due to pressure applied to her neck. She testified that Dr. Blum's diagnosis of a cardiac event ignored evidence of strangulation. Kristine testified in rebuttal that her family's medical history could not account for Kathleen's premature demise.

¶ 50 During the prosecution's rebuttal closing argument, the prosecutor argued that it was "okay" for the jurors to have questions about the evidence and "still convict the defendant."

¶ 51 The jury found defendant guilty of first-degree murder, and, after denying his posttrial motion, the court sentenced defendant to 30 years' incarceration. This timely appeal followed.

¶ 52 II. ANALYSIS

¶ 53 Defendant raises six arguments: (1) the court erred in denying his motion for substitution of judge, (2) the court erred in admitting Safarik's testimony, (3) the court erred in permitting Kathleen's family to dwell on their suffering at her loss, (4) the prosecution improperly defined reasonable doubt in its closing argument, (5) defendant was not proved guilty beyond a reasonable doubt, and (6) the cumulative effect of the trial errors requires reversal.

¶ 54 A. The Motion for Substitution of Judge

¶ 55 The day after the court granted the State's motion for disclosure of defendant's and Kathleen's cellular telephone records, defendant filed a motion for substitution of judge as of right, pursuant to section 114-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5 (2014)). A defendant is entitled to an automatic substitution of his or her trial judge if he or she meets the following requirements: (1) the motion is made within 10 days after the case is assigned to the judge, (2) the motion names only one judge, unless the defendant is charged with a Class X felony, in which case he or she may name two judges, (3) the motion is in writing, and (4) the motion alleges that the judge is so prejudiced against the defendant that he or she cannot receive a fair trial. *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13, 417 Ill.Dec. 847, 89 N.E.3d 766. Section 114-5 also provides for naming two judges where the offense charged may be punished by death or life imprisonment. 725 ILCS 5/114-5(a) (West 2014). Additionally, the motion must be made before the judge makes a substantive ruling. *Tate*, 2016 IL App (1st) 140598, ¶ 13, 417 Ill.Dec. 847, 89 N.E.3d 766. Where a motion for substitution of judge is improperly denied, all of the court's actions subsequent thereto are void. *People v. Klein*, 2015 IL App (3d) 130052, ¶ 79, 396 Ill.Dec. 835, 40 N.E.3d 720. We review *de novo* a ruling on a motion for substitution of judge as of right. *In re D.M.*, 395 Ill. App. 3d 972, 977, 335 Ill.Dec. 278, 918 N.E.2d 1091 (2009).

¶ 56 Here, the question is whether Judge Hallock made a substantive ruling when he (1) denied defendant's motion to declare the federal statute granting access to cellular records unconstitutional and (2) granted the State's motion for access to those records. Defendant argues that Judge Hallock ruled merely on a discovery matter that was not substantive, because it was collateral to the merits of the case. A ruling that does not go to the merits or relate to any issue of the crimes charged is not a substantive ruling. See *People v. Ehrler*, 114 Ill. App. 2d 171, 178-79, 252 N.E.2d 227 (1969).

***7** ¶ 57 The federal statute on required disclosure of customer communications or records provides that a court order for disclosure of electronic communications shall issue "only if" the governmental entity seeking such disclosure offers "specific and articulable facts" showing that there are "reasonable grounds" to believe that the contents of the records sought are "relevant and material" to an ongoing criminal investigation. 18 U.S.C. § 2703(d) (2012). In its motion, the State alleged the following facts to show "reasonable grounds": (1) Kathleen's cell phone was found near her body, (2) Kathleen was not murdered where her body was found, (3) defendant had been in possession of Kathleen's cell phone, (4) cadaver dogs alerted on the backseat of defendant's car, and (5) defendant at all times had his own cell phone with him. The State argued that those facts supported its contention that the cell phone records were necessary to pinpoint the locations of defendant and Kathleen during the relevant time periods.

¶ 58 In considering whether the State presented "specific and articulable" facts supporting its request for the records, Judge Hallock necessarily considered aspects of the merits of the case. The State's motion was not a routine motion for "court-ordered discovery," pursuant to Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001), as defendant maintains, but was brought pursuant to a federal statute limiting the disclosure of electronic communications to situations in which reasonable cause is shown. That showing depends upon the underlying facts of the case.

¶ 59 Defendant also argues that Judge Hallock's constitutional ruling was not substantive, because he ruled only on the procedural matter of whether a warrant, rather than a court order, was required. Defendant distinguishes *People v. Wilfong*, 17 Ill. 2d 373, 375, 162 N.E.2d 256 (1959), where a motion for substitution of judge was properly denied after the defendant unsuccessfully challenged the constitutionality of the statute under which he was indicted. Defendant in our case points out that he did not challenge the constitutionality of the statute under which he was charged but brought a procedural challenge to the federal statute's method of disclosure of electronic communications.

¶ 60 At oral argument, we granted the State's motion for leave to cite *Carpenter v. United States*, 585 U.S. ——, 138 S.Ct. 2206, —— L.Ed.2d —— (2018), in which the United States Supreme Court held that a warrant is required before a governmental entity can seize electronic communications pursuant to 18 U.S.C. § 2703(d). We are not persuaded of *Carpenter*'s relevance. Nevertheless, we believe that the ruling in our case was substantive. It went to the State's ability to acquire evidence to use in prosecuting defendant. Consequently, we hold that the court did not err in denying the motion for substitution of judge.

¶ 61 B. Reasonable Doubt

¶ 62 We next consider defendant's argument that he was not proved guilty beyond a reasonable doubt. Because we determine that defendant is entitled to a new trial based upon an evidentiary error, to prevent the risk of double jeopardy, we must also consider this argument. See *People v. Macon*, 396 Ill. App. 3d 451, 458, 336 Ill.Dec. 634, 920 N.E.2d 1224 (2009). When a defendant challenges the sufficiency of the evidence, the reviewing court must determine whether, viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217, 291 Ill.Dec. 686, 824 N.E.2d 262 (2005).

¶ 63 Defendant asserts that Dr. Kalelkar's testimony, contradicted as it was by Dr. Blum, was insufficient to prove that Kathleen's death was a homicide. The *corpus delicti* in a murder case consists of two essential elements: (1) the fact of death and (2) the fact that the death was caused by the criminal agency of some person. *People v. Jones*, 22 Ill. 2d 592, 595, 177 N.E.2d 112 (1961). Here, Dr. Kalelkar testified that Kathleen died as a result of asphyxiation due to manual strangulation. Dr. Blum disagreed, testifying that Kathleen's death resulted from a cardiac event, that is, natural causes. When confronted with a "battle of the experts" (see *People v. Smith*, 253 Ill. App. 3d 443, 446-47, 191 Ill.Dec. 648, 624 N.E.2d 836 (1993) (classic battle of the experts is different experts examining roughly the same information and arriving at opposite conclusions)), it is for the trier of fact to evaluate each expert's testimony and weigh its relative worth in context. *People v. Sims*, 374 Ill. App. 3d 231, 251, 312 Ill.Dec. 124, 869 N.E.2d 1115 (2007).

***8** ¶ 64 Here, aside from contrasting the testimony of the two experts, defendant also maintains that Dr. Kalelkar did not complete her autopsy protocol with

"any indication" of the cause of death, calling it only "asphyxiation." That determination, defendant argues, is too equivocal to support a conclusion that the manner of death was homicide. Defendant relies on *People v. Ehlert*, 211 Ill. 2d 192, 285 Ill.Dec. 133, 811 N.E.2d 620 (2004), which also involved an opinion rendered by Dr. Kalelkar.

¶ 65 In *Ehlert*, the defendant was convicted of the first-degree murder of her newborn child. *Ehlert*, 211 Ill. 2d at 194, 285 Ill.Dec. 133, 811 N.E.2d 620. The issue was whether the child was born alive. *Ehlert*, 211 Ill. 2d at 194, 285 Ill.Dec. 133, 811 N.E.2d 620. Dr. Kalelkar performed the autopsy, found no unusual cause of death, and later told a police officer that she could not tell for sure whether the baby was born alive. *Ehlert*, 211 Ill. 2d at 199, 285 Ill.Dec. 133, 811 N.E.2d 620. She left blank the space on the death certificate where she would normally fill in the manner of death and instructed the police to investigate further. *Ehlert*, 211 Ill. 2d at 199, 285 Ill.Dec. 133, 811 N.E.2d 620. After the police advised her of their investigation, which included witnesses' statements, she concluded that the baby had been born alive. *Ehlert*, 211 Ill. 2d at 199, 285 Ill.Dec. 133, 811 N.E.2d 620. Dr. Kalelkar then filled in the manner of death on the certificate as "homicide." *Ehlert*, 211 Ill. 2d at 208, 285 Ill.Dec. 133, 811 N.E.2d 620. At trial, however, Dr. Kalelkar testified that the manner of death could have been natural causes. *Ehlert*, 211 Ill. 2d at 209, 285 Ill.Dec. 133, 811 N.E.2d 620. The appellate court reversed the defendant's conviction, and our supreme court affirmed, holding that there was reasonable doubt as to the defendant's criminal agency. *Ehlert*, 211 Ill. 2d at 209-10, 285 Ill.Dec. 133, 811 N.E.2d 620.

¶ 66 *Ehlert* is inapposite. Here, contrary to defendant's contention, Dr. Kalelkar did not equivocate on the cause or manner of death. "Asphyxiation" certainly encompasses a killing (see Webster's Third New International Dictionary 130 (1993)), and at trial, relying on her autopsy findings, the doctor was clear and specific that Kathleen's neck had been compressed. Accordingly, we conclude that any rational trier of fact could have found that Kathleen's death was caused by some person's criminal agency. Consequently, we also hold that retrial is not barred by double jeopardy.

¶ 67 C. Safarik's Testimony

¶ 68 As noted, the trial court granted the State's motion *in limine* No. 1, allowing Safarik's testimony over defendant's objection. We will not reverse a trial court's ruling on a motion *in limine* absent an abuse of discretion. *People v. Holman*, 257 Ill. App. 3d 1031, 1033, 196 Ill.Dec. 457, 630 N.E.2d 154 (1994). Also, the court made evidentiary rulings during Safarik's testimony. The admission of evidence is within the trial court's sound discretion and will not be reversed unless that discretion was clearly abused. *Snelson v. Kamm*, 204 Ill. 2d 1, 33, 272 Ill.Dec. 610, 787 N.E.2d 796 (2003).

¶ 69 Safarik testified that, as director of Behavioral Services International, he conducts "analyses and interpretations" of complex violent crime scenes and violent crimes to "understand essentially what happened in the crime, how it happened[,] and why the events unfolded the way that they did." Safarik testified that he also conducts "equivocal death evaluations" in cases where the "manner of death is not well established." According to Safarik, the Kane County State's Attorney's Office asked him to examine the evidence from the scene where Kathleen's body was found, to determine (1) whether the scene was staged, (2) the offender's risk level, (3) a general offender motive, and (4) the "behavioral manifestations at the scene," meaning the offender's *modus operandi*, ritual behavior, and staging behavior.

***9** ¶ 70 Safarik testified that he typically reviews crime reports, criminal investigation reports, crime scene photographs, autopsy protocols, autopsy photographs, diagrams and sketches of the crime scene, and witness statements. He also reviews any toxicology reports. If he needs the information, Safarik will ask to see the statements of witnesses who talked to the police about the victim's habits. Safarik testified that he will also consider, as he did in the present case, an accused's statements, if they contribute to an understanding of the timeline of events leading up to a murder. In the present case, Safarik considered Brandon's statements as to where Kathleen usually ran and the app on her iPhone that recorded that she usually ran in Esping Park, but not near the railroad tracks.

¶ 71 From his review of the case, Safarik concluded the following: (1) Kathleen did not usually run on the railroad tracks; (2) defendant's statement to police that Kathleen left the house to go running at 6:30 a.m. was inconsistent with the lividity present on her body less than

half an hour later, when the death-scene photographs were taken, which indicated that she died prior to 6:30 a.m.; (3) the lividity on Kathleen's right leg was inconsistent with her position on the railroad tracks; (4) if she had been running, her shorts would have been tied and not loose; (5) the absence of an undergarment or a liner in Kathleen's running shorts was inconsistent with her being out for a run; (6) because Kathleen had "fairly large" breasts, running in an underwire bra would have been painful; (7) Kathleen had a large selection of sports bras, so she would not have been running in an underwire bra; (8) the presence of the underwire bra was inconsistent with defendant's statement that Kathleen possessed running gear; (9) Kathleen's twisted bra strap would have been "very uncomfortable" and was inconsistent with the way she would have put on the bra; (10) there was no sexual motive to the crime, because Kathleen's bra was covering half her breasts; (11) it was unlikely that Kathleen would have put on her left sock with the heel twisted toward the top of her foot; (12) a clump of hair in her right sock was inconsistent with the way a person would dress herself; (13) Kathleen was not wearing an armband, which was inconsistent with witnesses' statements that she wore one when running; (14) the absence of earbuds was inconsistent with witnesses' statements that Kathleen listened to music while running; (15) the leaf material on Kathleen's body was inconsistent with that in the area where the body was found; (16) Kathleen's iPhone was placed on the tracks by someone; (17) a trail of dried saliva mixed with blood running down Kathleen's cheek was inconsistent with the way her head was positioned on the tracks, indicating that she was on the tracks after the saliva had dried; (18) Kathleen was moved onto the tracks after she died in a different location; (19) Kathleen died as a result of manual strangulation; (20) a red mark on Kathleen's neck was consistent with hands having been around her neck; (21) a bruise under Kathleen's chin was consistent with someone having strangled her; (22) every form of asphyxiation except manual strangulation was ruled out; (23) Kathleen's injuries were inconsistent with a fall on the tracks; (24) scrapes on Kathleen's shins were postmortem because there was no blood; (25) Kathleen was incapacitated by alcohol and did not see the attack coming; (26) the attack came on very quickly; (27) strangers do not stage crime scenes; (28) a staged crime scene indicates that the killer was someone close to the victim; (29) the offender attempted to make Kathleen's death look like an accident; (30) the leaf material found on Kathleen's body was from her residence; and (31) based on the timeline defendant gave to the police, Kathleen was killed in her residence.

***10** ¶ 72 Defendant argues that Safarik was improperly allowed to give an opinion as to the cause of death in a close case where the cause and manner of death were contested by two well-qualified, board-certified, forensic pathologists. Defendant additionally contends that Safarik improperly opined on matters that were within the ken of the jurors when he testified that the death scene was staged. Defendant asserts that Safarik essentially gave the State's closing argument.

¶ 73 Expert testimony such as Safarik's falls under the general rubric of "crime scene analysis," which involves the "gathering and analysis of physical evidence." See *Simmons v. State*, 797 So.2d 1134, 1151 (Ala. Crim. App. 1999). Here, the State also proffered Safarik as an expert in the cause and manner of death as well as the habits or characteristics of people who stage crime scenes. Profiling evidence usually involves a witness describing common practices, habits, or characteristics of a group of people. *People v. Vasser*, 331 Ill. App. 3d 675, 687, 264 Ill.Dec. 498, 770 N.E.2d 1194 (2002). Thus, Safarik also proffered profiling evidence.

¶ 74 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. Under the guise of expert "crime scene analysis," Safarik basically offered his subjective opinion that the State's evidence was sufficient to convict defendant. As the State admitted at oral argument, the purpose of Safarik's testimony was to "plug the holes" in the State's case.

¶ 75 Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) provides that, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "Crime-scene analysis" testimony does not rest on scientific principles. *Simmons*, 797 So.2d at 1151; *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002). Rather, it is based on "specialized knowledge" and offers "subjective observations and comparisons based on the expert's training, skill, or experience." *Simmons*, 797 So.2d

at 1151. Therefore, such testimony is not subject to the test outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923). *Simmons*, 797 So.2d at 1151.

¶ 76 We first consider defendant's argument that Safarik was not competent to testify to Kathleen's cause of death. Defendant asserts that an expert's opinion cannot exceed the area of his or her expertise, relying on *People v. Perry*, 229 Ill. App. 3d 29, 170 Ill.Dec. 823, 593 N.E.2d 712 (1992). In *Perry*, the defendant was convicted of killing her infant son by lying on top of him and smothering him with a pillow. *Perry*, 229 Ill. App. 3d at 30-31, 170 Ill.Dec. 823, 593 N.E.2d 712. The appellate court reversed that conviction and remanded for a new trial where the State's pathologist opined that the child's death was not an accident, because a sleeping mother would not roll on top of an active child without the child making its distress known. *Perry*, 229 Ill. App. 3d at 32, 170 Ill.Dec. 823, 593 N.E.2d 712. The court held that the pathologist's expertise did not extend to determining the ability of a sleeping mother to "feel" her child. *Perry*, 229 Ill. App. 3d at 33, 170 Ill.Dec. 823, 593 N.E.2d 712. While we agree that an expert cannot express an opinion on a subject beyond his or her qualifications (see *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 784, 267 Ill.Dec. 125, 776 N.E.2d 262 (2002) (mechanical engineer with 35 years' experience could not testify to the cause of a collision)), the question here is whether the cause of a person's death is the subject of only expert medical testimony or whether a lay person can so opine.

***11** ¶ 77 The rule in Illinois is that medical testimony is not necessary to prove the cause of death where the facts proved are such that every person of average intelligence would know from his or her own knowledge or experience that a wound was mortal. *Waller v. People*, 209 Ill. 284, 288, 70 N.E. 681 (1904); *People v. Davidson*, 82 Ill. App. 2d 245, 250, 225 N.E.2d 727 (1967). Thus, in *Davidson*, the coroner's testimony that the victim was dead, coupled with other testimony establishing a criminal agency causing her death, was sufficient to sustain the murder verdict, notwithstanding the lack of medical testimony as to the cause of death. *Davidson*, 82 Ill. App. 2d at 250, 225 N.E.2d 727. In *Jones*, a *corpus delicti* case (*supra* ¶ 63), the evidence of the cause of death was sufficient without medical testimony where the evidence showed that the defendant shot the victim, the victim fell and was found lying in a pool of blood, and the victim was immediately removed to a mortuary. *Jones*, 22 Ill. 2d at 597, 177 N.E.2d 112.

¶ 78 Here, medical evidence of the cause of Kathleen's death was necessary, because a lay person of average intelligence would not know what killed her. She was found lying on the railroad tracks, not breathing or moving. There were no gunshot wounds or stab wounds. The body was warm, and there was no immediate evidence of foul play. Consequently, Safarik—no 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—was not qualified by knowledge, skill, experience, training, or education to opine on the cause and manner of Kathleen's death. See *Snelson*, 204 Ill. 2d at 24, 272 Ill.Dec. 610, 787 N.E.2d 796 (expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education to render an opinion).

¶ 79 For the court to allow Safarik to opine that Kathleen died of manual strangulation was especially egregious where defendant disputed Dr. Kalelkar's conclusion as to Kathleen's cause of death and presented his own equally well-qualified forensic pathologist to testify that she died of natural causes. Through Safarik's inadmissible testimony, the State essentially "broke the tie" by presenting a second opinion to corroborate Dr. Kalelkar's. We hold that Safarik's opinion as to the cause of death was so highly prejudicial that we must reverse defendant's conviction.

¶ 80 We also note that it was beyond Safarik's expertise to opine on the effects of lividity. As a veteran of violent-crime-scene investigations, Safarik could doubtless identify the presence of lividity. However, whether it was consistent or inconsistent with the position of Kathleen's body on the railroad tracks was appropriate testimony for a forensic pathologist, as lividity correlates to the cause and manner of death. See *People v. Legore*, 2013 IL App (2d) 111038, ¶ 6, 374 Ill.Dec. 701, 996 N.E.2d 148 (forensic pathologist pinpointed time of death in part by analyzing lividity on victim's body).

¶ 81 In the same vein, Safarik should not have been permitted to testify that the vegetation on Kathleen's body came from her home, because such an opinion was beyond his expertise and the State presented no evidence of such a correlation. To be admissible, an expert's opinion

must have an evidentiary basis, or else it is nothing more than conjecture and guess. *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864, ¶ 72, 410 Ill.Dec. 30, 69 N.E.3d 255.

¶ 82 Next, we consider defendant's contention that the remainder of Safarik's testimony was prejudicial because it consisted of conclusions that the jurors could draw for themselves. A requirement of expert testimony is that it will assist the trier of fact in understanding the evidence. *Snelson*, 204 Ill. 2d at 24, 272 Ill.Dec. 610, 787 N.E.2d 796. Expert testimony addressing matters of common knowledge is not admissible unless the subject matter is difficult to understand and explain. *People v. Lerma*, 2016 IL 118496, ¶ 23, 400 Ill.Dec. 20, 47 N.E.3d 985. Evidence is beyond the ken of the average juror when it involves knowledge or experience that the juror lacks. *People v. Mertz*, 218 Ill. 2d 1, 72, 299 Ill.Dec. 581, 842 N.E.2d 618 (2005). Here, Safarik testified to conclusions that the ordinary juror could draw: an experienced runner would not have dressed in the garments in which the body was found; Kathleen would not have left her contacts, earbuds, and armband at home when she went running; she would not have been running on the railroad tracks when her habit was to run in the park; and she would not have put on a sock with the heel twisted to the top of her foot. We agree with the Superior Court of New Jersey's conclusion in *State v. Lenin*, 406 N.J.Super. 361, 967 A.2d 915, 925 (2009), that none of this type of testimony should have been admitted.

***12** ¶ 83 In *Lenin*, the court held that Safarik's testimony about the "characteristics of the victim and the crime scene" was inadmissible because he was "simply testifying about logical conclusions the ordinary juror could draw from human behavior." *Lenin*, 967 A.2d at 927. The court also held that behavioral-science testimony, such as Safarik's, must be evaluated under the test for admission of scientific evidence. *Lenin*, 967 A.2d at 926. We disagree with the latter holding, because, as discussed, we believe that the better view is that crime-scene-analysis testimony is not scientific. See *Simmons*, 797 So.2d at 1151.

¶ 84 Further, in our case, Safarik ventured beyond "crime scene analysis" into profiling when he testified to the characteristics of persons who stage crime scenes. Profiler testimony has been excluded by other states' supreme courts as unreliable. *Mertz*, 218 Ill. 2d at 72-73, 299 Ill.Dec. 581, 842 N.E.2d 618. In *Mertz*, our supreme court declined to opine on the admissibility of such evidence, holding that any error in admitting a profiler's testimony comparing three distinct crime scenes, with a view as to whether they could be connected, was harmless because police officers had testified to the similarities that they had observed. *Mertz*, 218 Ill. 2d at 73-74, 299 Ill.Dec. 581, 842 N.E.2d 618. The court emphasized that the profiler did not explicitly opine that the defendant committed the uncharged offenses that the profiler had studied. *Mertz*, 218 Ill. 2d at 72, 299 Ill.Dec. 581, 842 N.E.2d 618.

¶ 85 Here, in testifying that a staged scene indicates that the killer is someone close to the victim, Safarik indirectly, but pointedly, identified defendant as Kathleen's killer, because, under the circumstances, no one else fit that profile. Our case is more like *People v. Brown*, 232 Ill. App. 3d 885, 174 Ill.Dec. 316, 598 N.E.2d 948 (1992), than *Mertz*. In *Brown*, the First District held that the defendant, who was charged with possession of a controlled substance with intent to deliver, was prejudiced by profiling testimony regarding the violent habits of drug sellers. *Brown*, 232 Ill. App. 3d at 898, 174 Ill.Dec. 316, 598 N.E.2d 948. The court noted that the testimony "consisted of a complete profile of a drug dealer which corresponded to the circumstances surrounding [the] defendant's arrest." *Brown*, 232 Ill. App. 3d at 899-900, 174 Ill.Dec. 316, 598 N.E.2d 948.

¶ 86 Trial courts are obliged to balance the probative value of expert testimony against its prejudicial effect. *Lerma*, 2016 IL 118496, ¶ 23, 400 Ill.Dec. 20, 47 N.E.3d 985. Here, the court performed this analysis in ruling on the State's motion *in limine* No. 1, as it precluded Safarik from directly identifying defendant as the killer or giving profiling testimony. Yet, at trial, Safarik was permitted to say indirectly what he could not say directly. We follow *Brown* and hold that such profiling evidence is inadmissible.

¶ 87 The State argues that the admission of Safarik's testimony was harmless error, because (1) he drew conclusions that the jurors could have drawn on their own and (2) his testimony was cumulative. In *Mertz*, the court held that the admission of profiling testimony was harmless because "any inferences drawn by [the profiler] were commonsense ones that the jurors no doubt had already drawn for themselves." *Mertz*, 218 Ill. 2d at 74, 299 Ill.Dec. 581, 842 N.E.2d 618. That reasoning does not apply in our case, where one of the claimed errors

is that Safarik's testimony was inadmissible precisely because it was within the knowledge of the average juror. Ironically, the court's discussion in *Mertz* supports defendant's argument.

¶ 88 We also reject the argument that Safarik's testimony was cumulative. While Dr. Kalelkar opined that Kathleen died of manual strangulation and also opined on the staging of the death scene, her testimony was undermined by the fact that she did not complete her autopsy protocol. As the State forthrightly conceded at oral argument, Safarik's testimony was designed to "plug the holes."

***13** ¶ 89 Also, unlike in *Brown*, where the error was found to be harmless, the 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. Consequently, we hold that it was prejudicial error to grant the State's motion *in limine* No. 1 and to permit the testimony at defendant's trial.

¶ 90 On retrial, the arguments that defendant raises concerning evidence of Kathleen's family's suffering and the State's rebuttal closing argument are likely to arise, so we briefly address them.

¶ 91 Kristine testified that she was close to Kathleen (that Kathleen was like her mother) and that Kathleen had shopped for Kristine's wedding gown. Kristine described how upset she was when she was told of Kathleen's death and that she was pacing and crying. Kurt testified that he was frantic and screaming when he heard the news of Kathleen's death. The court overruled defendant's objections to this testimony. While some reference to the victim's family is proper and inevitable (*People v. Campos*, 227 Ill. App. 3d 434, 449, 169 Ill.Dec. 598, 592 N.E.2d 85 (1992)), evidence that dwells on the victim's family is unduly prejudicial. *People v. Bernette*, 30 Ill. 2d 359, 371, 197 N.E.2d 436 (1964). Here, the evidence of the family's emotional attachments and reactions went beyond anything that was relevant and was introduced solely for its emotional impact. On retrial, such testimony is inadmissible.

¶ 92 In his rebuttal closing argument, the prosecutor told the jurors that it was "okay" for them to have "questions" about the evidence and still convict defendant. The prosecutor gave an example of a permissible question dealing with what point of access defendant took to get the body onto the railroad tracks. He then reiterated that the jurors could have questions, "as long as those questions don't amount to a reasonable doubt." This argument was an improper attempt to define and dilute the State's burden of proof (see *People v. Evans*, 2016 IL App (3d) 140120, ¶ 59, 406 Ill.Dec. 175, 60 N.E.3d 77 (prosecutor's rebuttal remarks improperly conflated the beyond-a-reasonable-doubt standard with a question of whether the defendant's actions were reasonable, lessening the State's burden of proof)), and nothing close to it is permitted on retrial. It is well established in Illinois that "reasonable doubt" needs no definition. *People v. Amos*, 46 Ill. App. 3d 899, 902, 5 Ill.Dec. 538, 361 N.E.2d 861 (1977).

¶ 93 III. CONCLUSION

¶ 94 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and the cause is remanded for a new trial.

¶ 95 Reversed and remanded.

Justices Jorgensen and Schostok concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2018 IL App (2d) 151112, 2018 WL 4001855

Footnotes

1 The epiglottis is cartilage that projects upward behind the tongue. Webster's Third New International Dictionary 763 (1993).

2 Dr. Blum testified that Kathleen's blood alcohol concentration was 0.26 at its peak.

2018 IL App (2d) 151112

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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

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. On May 29, 2019, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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

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