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2016 IL App (3d) 130944-U

Order filed September 2, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois.
)	
v.)	Appeal No. 3-13-0944
)	Circuit No. 11CF713
)	
GINA T. GONZALEZ,)	The Honorable
)	Kevin R. Galley,
Defendant-Appellant.)	Scott A. Shore
)	Judges, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The matter is reversed and defendant shall have a new trial in accord with the following findings:

- (1) The circuit court abused its discretion when it allowed the State to introduce a massive amount of evidence that permeated the trial but was irrelevant to the cause of the victim's fatal injury or whether defendant caused the injury,
- (2) The circuit court erred in allowing the admission of hearsay statements that did not conform to rule 804 of the Illinois rules of evidence, which preempts Section 115-10.2a of the Code; and

(3) The circuit court failed to adequately address defendant's *pro se* post-trial claims of ineffective assistance of counsel.

¶ 2 On December 29, 2011, defendant, Gina Gonzalez, was charged by information, which was later supplanted by indictment, with two counts of first-degree murder (720 ILCS 5/9-1(a)(1),(2) (West 2012)). The case was tried to a jury in Henry County. At the end of the seven day trial, the court entered jury verdicts of guilty of first-degree murder for both counts. Gonzalez was sentenced to 50 years' imprisonment, plus three years' mandatory supervised release for count I only. (720 ILCS 5/9-1 (a)(2) (West 2012)) She moved for, but was denied reconsideration of her sentence. She appeals her conviction arguing that (1) the trial court abused its discretion in allowing the State to introduce evidence tendered for the sole purpose of showing she was a bad person, (2) the trial court erred in allowing evidence of the victim's statements to her neighbor, and (3) her *pro se* ineffective assistance of counsel claims were not adequately addressed. For the following reasons, we reverse and remand.

¶ 3 **FACTS**

¶ 4 Gonzalez and the victim, Quyen Phan, were mother and daughter who lived together in a house in Marquette Heights, Illinois. Gonzalez was charged with two counts of first-degree murder (720 ILCS 5/9-1(a) (1), (2) (West 2012)) for allegedly striking Phan on December 19, 2011, knowing that: (1) the acts would cause death and (2) that the acts would cause great bodily harm.

¶ 5 **Pre-trial Motions**

¶ 6 Prior to her jury trial, Gonzalez and the State filed several motions.

¶ 7 On February 28, 2012, Gonzalez filed a *pro se* letter with the court regarding lack of access to her attorney and discovery materials. She claimed that she had only seen her attorney once and that she had not been able to view discovery materials.

¶ 8 On October 10, 2012, Gonzalez filed, *pro se*, another letter with the court complaining of her attorney's ineffectiveness and stating that she had not been shown all of the discovery materials. During a hearing on the matter, one of the defense attorneys told the court that he had made multiple attempts to visit Gonzalez so that she could review the discovery materials. He was, however, hindered in his ability to fully comply with her request to see all of the discovery materials because the amount of discovery was voluminous, it took Gonzalez approximately five minutes to read one page and under Supreme Court Rule 415 (c) (eff. Oct. 1, 1971) he was unable to leave the material with her or have a secretary sit with her while she read it. The court ordered "reasonable time [to] be dedicated to view discovery."

¶ 9 On December 12, 2012, defense counsel filed a motion requesting that Gonzalez be allowed to possess discovery material while she was in jail. The motion presented the same arguments defense counsel had previously proffered during the hearing on Gonzalez's *pro se* motion regarding the effectiveness of her counsel. Defense counsel asserted that the discovery material was voluminous and that he did not have the time available for her to review all of it at her allegedly slow reading pace.

¶ 10 On December 31, 2012, the court heard defense counsel's motion. The court stated that the Illinois Supreme Court had instituted a blanket policy barring criminal defendants from possessing discovery materials, thus precluding a case-by-case determination as to whether an individual defendant could possess discovery materials. The motion was denied.

¶ 11 Previously on September 19, 2012, Gonzalez, through counsel, had filed a motion *in limine* to bar hearsay statements her mother had made about her and to bar reference to other prior bad acts ascribed to her. She attached “Exhibit #1” describing the statements and evidence she sought to bar.

¶ 12 On October 25, 2012, the State filed a motion *in limine* seeking to admit, pursuant to section 115-7.4 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-7.4 (West 2010)), other instances of domestic violence that Gonzalez had committed against Phan. The motion sought to introduce testimony of two events, one witnessed by Brandi Buzick, a neighbor of Gonzalez and Phan, and one witnessed by Mum Le, Phan's nephew and Gonzalez's cousin. The court found allegations of these prior acts of domestic violence admissible.

¶ 13 On December 31, 2012, the State filed a motion for admission of prior statements pursuant to section 115-10.2a of the Code (725 ILCS 5/115-10.2a (West 2010)) directly attacking Gonzalez’s previously filed motion to bar the hearsay statements.

¶ 14 On February 20, 2013, the court held a hearing on the State's motions. Buzick testified that she moved next door to Phan in May 2011. Buzick stated that she would see bruising on Phan's face and arms and scratches on her chest, however, she did not ask about them until the end of July. At that time, Phan told her she and Gonzalez had gotten into a heated argument and the bruises were caused by Gonzalez. Buzick testified that Phan said her daughter was crazy and that she was afraid of her. When she advised Phan that she needed to get Gonzalez out of the house and obtain an order of protection. Phan rejected the advice because she did not want Gonzalez to be alone.

¶ 15 Buzick testified that in September 2011, she helped Phan search in the house for Gonzalez's immigration card. They discovered a number of guns in the house, which they loaded

onto a cart and stored in the back of Buzick's locked garage. Phan had to get them out of the house because she feared Gonzalez would kill her. Buzick described Phan as frantic and scared.

¶ 16 On the day following Phan's discovery and removal of the guns, Buzick stated Phan came back to her house and said that Gonzalez had told her she had to bring the guns back to the house "or else." While Gonzalez was away, Phan took the guns out of the garage and back to her home. Buzick stated that her relationship with Phan became more distant after that.

¶ 17 After listening to the testimony and in light of the factors in *People v. Richter*, 2012 IL App (4th) 101025, the court allowed the State's motion to present evidence of the statement that Phan had made to Buzick.

¶ 18 On April 15, 2013, Gonzalez filed a third *pro se* letter with the court complaining again that her attorney had failed to show her all of the discovery materials. The court forwarded the letter to defense counsel. Counsel asserted to the court that it was impractical for the attorneys to sit with Gonzalez while she viewed thousands of pages of discovery material, as she allegedly took five minutes to read a single page of the discovery materials. The court denied counsel's renewed request to allow Gonzalez to possess the discovery materials.

¶ 19 At a hearing held on May 14, 2013, the court directly asked Gonzalez if she was satisfied with the efforts of her counsel. Gonzalez replied, "I am content, your honor, but I am not satisfied with counsel visiting me as required, that I need to see the discovery materials." Gonzalez said that she had not read all of the police reports and that she had not seen any of the photographs. However, she was "agreeable" to her current defense attorney's continued representation.

¶ 20 On August 6, 2013, defense counsel filed an amended Exhibit #1 adding a request to bar evidence that the police had found rifles, handguns, and ammunition in Gonzalez's closet, that

the police had found guns and ammunition in her car, and that her firearm owner's identification card (FOID card) had been revoked. In response to Gonzalez's argument that the evidence should not be admitted, the State noted that all of the weapons in the house were seized pursuant to a valid warrant. The State further argued that the guns corroborated Phan's statements to Buzick and would help establish Gonzalez's reputation for violence and aggression if she attempted to assert an argument of self-defense. The court, noting that Phan had told Buzick she had to get the guns out of the house, denied the motion.

¶ 21 During voir dire, the potential jurors were asked about their knowledge of guns.

¶ 22 Trial

¶ 23 Just prior to the commencement of the trial, the court asked Gonzalez if she was prepared for trial. She responded that she had "somewhat" of an opportunity to prepare for trial. She stated she had talked to her attorneys briefly, but that she was ready for trial.

¶ 24 At trial, Gonzalez testified on her own behalf regarding her relationship with her mother and the occurrences before and after Phan was fatally injured. She stated that on December 19, 2011, when she came in from the backyard where she had been exercising, she and Phan got into an argument when Phan complained about a pocketknife Gonzalez had left on the table. Gonzalez stated Phan told her she should not be carrying the knife or bringing it in the house. She said Phan was gesturing at her with the closed pocketknife in her left hand and a partially full, uncapped water bottle in her right hand. The two argued and Gonzalez stated that Phan threw the water bottle at her, hitting her. She said she thought Phan was going to also throw the knife. She then felt a red folding chair strike her, knocking her hat down over her face. Gonzalez stated the two struggled over the chair; she overpowered Phan; and she threw the chair to the right.

¶ 25 Gonzalez stated that at some point Phan fell, but she did not see her fall. She said she helped Phan get up, and the two sat on the floor next to the couch. She noted that Phan had a bump on the back of her head and a little cut on her lip that had not been there before the altercation. Gonzalez got ice for Phan and put it on the back of her head and neck. She stated that Phan said she did not want to go to the hospital but did have a headache. Gonzalez gave her some headache medication. She stated that Phan got up and sat on the couch.

¶ 26 After this exchange concluded, Gonzalez said she left at Phan's insistence at about 2:00 p.m. to go and pay a parking ticket. When she returned between 5:00 p.m. and 6:00 p.m., Phan was still on the couch dressed the same as when Gonzalez had left. Gonzalez testified that Phan talked with her, ate soup, and again declined her suggestion of going to the hospital.

¶ 27 Gonzalez testified that she told Phan she had to go to Indianapolis, but noted at trial that statement was a lie. She really went to Milwaukee, Wisconsin, and left the home between 9:00 p.m. and 10:00 p.m. headed there. She stated that Phan was "just sitting there" in her bed when she left and that apparently Phan had locked the screen door sometime after Gonzalez left.

¶ 28 Upon her return the evening of December 21, Phan did not answer the door. Gonzalez had called her mother 11 times and received no answer.¹ She stated she crawled through a bedroom window to gain access to the house. When she got in the house she found Phan laying in her bed, wearing different clothing from that she had been wearing before Gonzalez left. Phan

¹ The parties stipulated that Gonzalez neither made nor received any phone calls to or from Phan on December 19, 2011; Gonzalez neither made nor received any calls to or from Phan on December 20, 2011; and that Gonzalez made 11 phone calls to Phan on December 21, 2011 from between 3:36 p.m. and 11:59 p.m. Further, the statement of facts in both Gonzalez and the State's respective briefs show that Gonzalez testified to calling Phan 11 times.

was snoring very loudly, but was not responding to her. At that time, Gonzalez called 911. The record shows that Phan was snoring when the emergency personnel arrived.

¶ 29 Gonzalez testified that she told police that there had been a fight between her and Phan, and that her mother had fallen, striking her head, when she threw a chair at Gonzalez. She also stated she told them that it was common for her and Phan to have physical altercations and that Phan was still conscious when she had left for Wisconsin on December 19. Gonzalez said that she explained to police that visible abrasions on her hand might have come from the altercation with Phan. She testified she did not punch or kick Phan, did not hit her with the chair, and denied beating her mother to death.

¶ 30 Gonzalez further testified that she was afraid of Phan who was abusive towards her. She said that Phan's prior conviction of assault and battery did not cause her to fear Phan but cited incidents where her mother had thrown a dumbbell at her, slapped her, kicked her, pointed one of Gonzalez's guns at her, and had thrown hot coffee and tea at her. Gonzalez said she was afraid of Phan when she was tussling over the chair.

¶ 31 On cross-examination, Gonzalez acknowledged that she had a heavy bag; threw knives and exercised with daggers in the backyard; had five or seven guns in the home as well as daggers; her FOID card had been revoked; and Phan wanted her daughter's guns out of the house. Gonzalez said she would kick a mannequin, but she denied practicing martial arts. She testified she had traffic tickets, was involved in a civil lawsuit, and had a variable monthly income. She stated that it sometimes bothered her to be living with her mother.

¶ 32 Gonzalez acknowledged that she did not tell police about the altercation on Monday, December 19, the chair, or Phan hitting her with the chair at the time they first arrived at the scene on December 21. She stated that she only told them Phan fell down and that she did not

know how. She testified she did not tell them about Phan holding a knife during their December 19 altercation, and she also did not mention that her mother threw a water bottle at her.

¶ 33 The State presented evidence and testimony from various witnesses discussing the state of Gonzalez and Phan's shared home at the time Phan was found and transported to the hospital, Phan's body and injuries, statements Phan had made regarding her fear of her daughter, and prior incidents between the two.

¶ 34 Officer James Marrs, a Marquette Heights police officer, testified he was dispatched to Gonzalez's home at around 11:00 p.m. on Wednesday, December 21, 2011, with a report that a 70-year-old female was unconscious, unresponsive, and having trouble breathing. Upon arriving at the scene, Marrs met Gonzalez. He testified she told him that she and her mother had been in a "fight," a "verbal argument" around two days earlier. He noted that she said Phan threw a chair at her and then fell to the floor. Gonzalez told him that Phan passed out, "came back to," and did not know where she was. She also told him that Phan had walked to the rear bedroom when Gonzalez left the home. On cross-examination, Marrs testified Gonzalez said that Phan hit her head when she fell but she seemed okay.

¶ 35 Marrs also discussed photographs he took of Phan's injuries, which included a knee abrasion, bruises on her left breast/chest area, bruising on her right cheek, arm, and shoulder, an area on the right side of her right breast that had bruising in multiple stages of healing, and a bruise on her lower leg.

¶ 36 Firefighter Todd Fortier, assistant chief at the Marquette Heights Fire Department, testified Phan had a small blood spot on the front of her nightgown. Firefighter Michael Klausung, a volunteer firefighter at the Marquette Heights Fire Department, testified that Phan was lying on a bed with sheets soaked in urine.

¶ 37 Illinois state trooper Brandon Smick testified that he had obtained a warrant, searched the house, and taken photographs. He was advised before entering the home to look for a red folding chair that was potentially involved in the altercation. He found a red folding chair in the living room. Smick was also told that Phan had sustained injuries from blunt force trauma. He, therefore, photographed and collected dumbbells he found on the floor, and rubber coated dumbbells on a treadmill. Three baseball bats were also found, photographed and collected. In a locked closet in one of the bedrooms, Smick testified he found, photographed, and collected several guns and ammunition. He also found ammunition on the shelf and two semi-automatic pistols with two loaded magazines. Smick found a separate bag with a semi-automatic handgun, along with three loaded magazines.

¶ 38 Pursuant to the State's motion, the court admitted the pictures Smick had taken including a photo of the inside of Gonzalez's garage showing a heavy punching bag. There were no signs of criminal activity in the garage. The State asked Smick to describe the photographs for the jury and to be as specific as he could, because "some of us do not know anything about guns." Smick complied.

¶ 39 Gonzalez objected to the evidence of the guns because Phan had not been shot. The court overruled the objection.

¶ 40 Smick testified that he also obtained a warrant to search Gonzalez's car and testified as to the contents of the trunk. He found a bag with a semi-automatic handgun along with three loaded magazines. He also found high-capacity rifle magazines and a loaded semi-automatic pistol with a loaded magazine. Smick found a holstered semi-automatic pistol and stated that the holster could be worn over one's shoulder so that the weapon could be easily concealed when carrying it.

¶ 41 During a recess, Gonzalez renewed her objections to the admission of the firearm evidence that had originally been raised in her motion *in limine*. She also objected to all the pictures of the guns and the bats for the same reason alleged in her motion *in limine*. The court overruled the objections.

¶ 42 After the recess, Smick further testified that none of the evidence collected from the house or the car, including the guns and the bats, had been forensically tested for evidence such as a fingerprints, blood, hair, or DNA. He said there was no reason to examine for DNA evidence because Phan had not bled externally.

¶ 43 On redirect examination, Smick stated that there was no need to forensically analyze the firearms because guns were not involved in Phan's fatal injuries. On recross-examination, Smick acknowledged that a gun could cause blunt force trauma but agreed that the guns did not have a "lot of relevance in the case."

¶ 44 Detective Josh Shelton, a former lieutenant with the Marquette Heights Police Department, testified that Gonzalez mentioned to him that Phan was taking sleeping pills. But he had not found any such pills. He also learned from the emergency room doctors that Phan's injuries were not consistent with any kind of a fall, but had to have been inflicted. He had noticed and discussed a small red abrasion on Gonzalez's left knuckle, which she said may have occurred during the argument with Phan.

¶ 45 Shelton testified that weapons were found in the house and in Gonzalez's car. He discovered that her FOID card had been revoked and, for that reason, the firearms were taken into evidence. Upon additional questioning by the State, Shelton told the jurors that a FOID card was a "firearm owners identification card" that the State of Illinois requires persons in possession of firearms to have and that Gonzalez's FOID card had been revoked.

¶ 46 Katherine Derry, a nurse who was working at the hospital at the time Phan was admitted, testified that she observed old and new bruising on Phan. She noted that she learned Gonzalez had reported that she and Phan had a physical altercation and that her mother fell. Derry, however, speculated that someone had hit Phan.

¶ 47 Dr. J. Scott Denton, a forensic pathologist, conducted Phan's autopsy on December 23, 2011. He detailed the myriad of injuries found on Phan's body, including scrapes on her lips and bruising on her inner lip, chest, right arm, knee, and shin. He stated that the bruise on the inner surface of her lip was consistent with blunt trauma. The bruise on her right arm had bleeding beneath the skin, which resulted from ruptured blood vessels caused by blunt trauma. He added that blunt force trauma is caused by something that is not sharp, but by something round or blunt, like a table, chair, hands, or fist.

¶ 48 Denton also described the bruises near Phan's breast area as extending all the way down to the breastbone, which indicates she sustained "significant" blunt trauma to that area. The doctor added that a "sternal rub," a painful method to wake up an unresponsive person by rubbing knuckles to their sternum, could not have caused the injuries because they were "too deep and there is too much force."

¶ 49 As for Phan's internal injuries, Denton observed a skull fracture, bleeding around the brain, and "trauma to the brain itself which was severe." The bleeding beneath the scalp was caused by blunt trauma to the back of the head. There was more bleeding on the left side of Phan's head, also consistent with blunt force trauma. He also observed severe trauma to the brain itself, leading deep within the brain tissue. He summarized that the fractures and the various types and locations of bleeding in Phan's brain indicated "severe blunt trauma," which began at the location of the fracture on the back of the head and continued through the skull and into the

deeper brain tissue. He added there was "another area of blunt trauma" on the left side of her brain. Because there were two separate areas of trauma, the doctor opined that they could not have been caused at the same time, and the two areas are "inconsistent with just a simple fall." He did, however, note that a one-time fall could have caused Phan's injuries if she had hit two objects. He further testified that there were no impact wounds to the head from the butt of a gun or from a baseball bat, for example.

¶ 50 Denton opined, to a reasonable degree of forensic medical certainty, Phan had died from blunt force trauma to the head and, if she had been lucid at all, it would have been a short time after the trauma had occurred.

¶ 51 Dr. Gene Couri, the emergency room doctor who treated Phan on December 21, 2011, testified that he observed lots of bruises on her chest and shoulders. He believed those locations were "strange" places to have bruising, and suggested someone may have picked Phan up from behind and moved her. He stated that the bleeding observed around the side and middle of Phan's brain is usually the result of blunt trauma. He noted that the fracture Phan suffered at the base of her skull was in a "fairly protected area." His diagnosis was blunt force trauma to the head and body, and that the injuries were not consistent with a fall. He opined that Phan was hit by something in the back of the head. He said that Phan would not have had a lucid interval.

¶ 52 Dr. Onechang William Le testified that he examined Phan on December 22 prior to her death. He conducted a CT scan that showed findings consistent with a brain injury. Phan had multiple contusions and bleeding in her brain matter and in multiple lobes. She had a skull fracture on the back of her head and a hemorrhage on top of her brain. There was swelling around her brain and high intracranial pressure, which caused her to lose brain functions. The

doctor believed the injuries occurred within days of his examination. Dr. Le concluded that, based on the severity of traumatic brain injury, Phan was not going to survive.

¶ 53 Buzick testified consistent with her testimony at the pretrial hearing. She added that after around August or September 2011, when Gonzalez moved in with her mother full-time, she would see Gonzalez almost every morning in the backyard, throwing knives at trees and practicing with samurai swords. In September 2011, Buzick saw Gonzalez and Phan in the yard arguing. Gonzalez reached back and struck Phan "hard enough in her face that it had knocked her off balance." Buzick also noted that Gonzalez had a mannequin and would kick and punch it. Defense counsel's objection to Buzick's testimony was overruled.

¶ 54 Mum Le testified that he once went to the bank with Phan to deposit around \$110,000. However, Gonzalez told Mum Le that she believed he had Phan's money, and said that she wanted it. He stated that Gonzalez was angry and said she would "kick [his] butt" if he did not give her the money. Mum Le testified that Gonzalez worked out, always lifted weights, and "can throw a punch." He also recalled an incident at Christmas 2006, when Gonzalez and Phan had argued, and Gonzalez pushed her mother into a chair.

¶ 55 During closing arguments, the State admitted that it did not know what instrument caused Phan's injuries. It reminded the jury that Buzick said Phan told her that she was afraid of Gonzalez, that Gonzalez was crazy, Phan was afraid of the guns in the house, and she was afraid Gonzalez would kill her. The prosecutor described what Buzick said she had observed and had been told as a pattern of abuse. The State also said that the presence of the "arsenal" was corroborative of the events that took place in September 2011.

¶ 56 The jury was informed that Phan had been convicted of the offense of aggravated battery in 2000. The jury was instructed on self-defense; first-degree murder; second-degree murder

based on unreasonable self-defense or on a serious provocation; involuntary manslaughter; and battery. It found Gonzalez guilty of first-degree murder.

¶ 57

Post-trial Motions

¶ 58

Gonzalez, through counsel, filed a timely motion for new trial. She alleged, *inter alia*, that the court erred in denying her motion *in limine* and allowing evidence related to guns, ammunition, and the revocation of her FOID card, evidence of three baseball bats in the house, testimony that Gonzalez threw knives and practiced with samurai swords in the backyard, a hearsay statement under section 115-10.2 (a) of the Code, and in refusing her possession of discovery materials. The court denied the motion.

¶ 59

On October 11, 2013, Gonzalez sent a *pro se* letter to the court complaining, in pertinent part, that she had not seen all of the discovery materials, including pictures, medical records, cell phone records, and the video of her interrogation, and that her attorneys should have subpoenaed her cell phone records, video surveillance in the hospital, and video surveillance from inside the ambulance. Gonzalez also alleged that counsel had ineffectively cross-examined Dr. Le, Phan's treating physician at OSF Hospital in Peoria, that the jury was biased, and that she should have received a change of venue.

¶ 60

On October 17, the trial court heard and denied Gonzalez's posttrial motion filed by her defense counsel. It immediately proceeded to conduct her sentencing hearing, at which point, it asked Gonzalez if she was satisfied with the services her attorney had performed on her behalf. Gonzalez said that she was not satisfied mainly because she had not seen all of the discovery materials prior to trial. She stated that there were a lot of facts that came out at trial that she should have known about. The court said that, prior to trial, it had asked her if she was satisfied with counsel's services and she "gave [the court] a response, and the court moved the case

through trial." It then pointed out its current inquiry was with regard to counsel's performance since the jury verdict was returned. Gonzalez replied that she was content with defense counsel's performance for that time. No other discussion occurred regarding Gonzalez's *pro se* letter or her contentions against her defense counsel.

¶ 61 The court sentenced Gonzalez to 50 years' imprisonment and three years' mandatory supervisory release. On October 29, 2013, she filed a motion to reconsider sentence that was denied on December 9, 2013.

¶ 62 Gonzalez timely appealed.

¶ 63 ANALYSIS

¶ 64 Gonzalez presents several arguments here on appeal. We take each in turn.

¶ 65 Erroneously Admitted Evidence

¶ 66 Gonzalez first contends that the trial court erred in admitting evidence that was not relevant to the case. She asserts that the evidence showing that she possessed guns, ammunition, and baseball bats, that she exercised with swords and knives, and that her FOID card had been revoked was only introduced to show that she was a bad person.

¶ 67 The State counters that the evidence of the guns, ammunition, and knives corroborated Buzick's testimony that Phan told her she feared Gonzalez was going to kill her, served to contradict Gonzalez's testimony that Phan attacked her, and gave a possible motive for the murder. It asserts that the evidence about Gonzalez's FOID card being revoked carried no weight whatsoever, as the jury was not informed as to why the card was revoked. The State argues in the alternative that if any error is found, it was harmless.

¶ 68 The question of whether evidence is relevant and admissible is reviewed for abuse of discretion. *People v. Hanson*, 238 Ill. 2d 75, 101 (2010). A trial court abuses its discretion when

its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by it. *People v. Smith*, 406 Ill.App.3d 747 (2010).

¶ 69 Gonzalez cites *People v. Romero*, 66 Ill. 2d 325 (1977), for the proposition that "evidence of other bad acts is inadmissible to bolster the credibility of a witness." In *Romero*, in addition to evidence regarding the charged burglary and theft from a home, testimony was presented that the defendants subsequently planned to burglarize a gun shop and were arrested and charged with trespass and possession of burglary tools outside of a "sport shop." *Id.* at 327-28. The Supreme Court held that the evidence of acts other than the charged burglary and theft was inadmissible, as those events were not relevant to prove the charged offenses. *Id.* at 331-32.

¶ 70 This case is distinguishable from *Romero* as pointed out by the State, because the evidence challenged by Gonzalez was not evidence of bad acts in the sense of other criminal activity. Rather, the court allowed the admission of evidence and testimony regarding physical items collected from Gonzalez's home that were, according to the State, related to Phan's death.

¶ 71 The State asserts the evidence was relevant and necessary to corroborate Buzick's hearsay testimony that Phan brought guns to her house because she feared Gonzalez. Several officers testified to having found and taken pictures of several guns located in the home and in Gonzalez's car. This testimony alone would have been sufficient to corroborate Buzick's testimony regarding the presence of guns in Phan's home. However, neither the existence of the guns nor their admission into evidence actually corroborates Buzick's testimony (1) that Phan brought them to her house and subsequently retrieved them because Gonzalez demanded it or (2) that Phan told her she was afraid of her daughter. Nonetheless, the trial court allowed not only that testimony but also the officer's detailed testimony regarding the types of guns and their

ammunition and admitted into evidence photos of the guns and ammunition for jurors who, according to the State prosecutor, might not understand how guns worked.

¶ 72 Additionally, the evidence of the baseball bats and the testimony regarding Gonzalez's hobby of throwing knives and practicing with samurai swords in the backyard was also irrelevant to the case. No forensic evidence was retrieved from any of the baseball bats and several of the physicians testified that Phan's injuries were not the result of the use of the baseball bats. Moreover, Phan had no injuries from any knives or swords. Nor is there any evidence that any of these items were present at the site and time of Phan's injuries so as to refute a claim of self-defense. Such evidence was irrelevant, unfairly prejudicial, erroneously allowed at trial and an abuse of the trial court's discretion.

¶ 73 We find the State's argument that there was no indication that the jury "drew some arbitrary conclusion about why Gonzalez's FOID card was revoked" also without merit. Testimony showed Gonzalez's FOID card had been revoked not that she simply did not have a card. The definition of revoke is "to officially cancel the power or effect of (something, such as a law, license, agreement, etc.): to make (something) not valid." www.merriam-webster.com/dictionary/revoke (last visited April 25, 2016). The fact that Gonzalez's FOID card had been revoked implied that she had done something wrong to get it canceled, and it is entirely reasonable to infer the jurors would have drawn such a conclusion.

¶ 74 The State's motive argument is similarly without merit. Its theory of the case was that Gonzalez had engaged in a pattern of abuse that led to her murdering her mother not that Phan's death was due to an ongoing disagreement about guns. Initially, while Gonzalez testified that Phan once pointed a gun at her, there is no evidence that the alleged pattern of abuse by Gonzalez ever involved the use of guns. Additionally, there is no evidence or indication that

there was any disagreement, or even discussion, about the guns in conjunction with the September argument. Moreover, the State does not explain how the evidence that Gonzalez possessed baseball bats, threw knives, practiced with the samurai sword, and had her FOID card revoked provided any sort of motive to murder Phan. The State has even acknowledged, as it indirectly informed the jury during closing arguments, that none of Gonzalez's guns, baseball bats, knives, or swords were involved in Phan's death and has admitted that the type of instrument that caused her death is unknown. The medical evidence presented established that Phan did not die from a gunshot, had not been shot at all, and had not been stabbed by any type of blade. The record also shows that there was no forensic analysis conducted on the guns, the baseball bats, or the dumbbells, as none of those objects was thought by the State, the police, or the physicians to have been the cause of death.

¶ 75 The State's alternative argument of harmless error, also fails. In determining if an error is harmless, the reviewing court must determine whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The State asserts that the jury was informed several times that none of the identified weapons was involved in Phan's death. It argues that Gonzalez's own testimony was the strongest evidence in the case and that any suggestion by her that Phan's fall was accidental and caused her death is belied by both her testimony and the medical evidence that indicated very significant trauma to the head and brain.

¶ 76 The State points first to Gonzalez's testimony which places her at the scene, involved in a physical struggle with a person who died two days later due to blunt force trauma. It asserts that there was no evidence of anyone else having been with Phan or having had access to her inside her home at any of the pertinent times. Additionally, the State notes that Gonzalez's testimony

showed she recognized the severity of Phan's injury because she offered to take Phan to the hospital and gave her pain medication and water when she refused to go. Gonzalez also testified that she noticed bruising on the back of her mother's head.

¶ 77 The State next refers to Dr. Denton's testimony that Phan died from blunt force trauma to the head from a blunt, round object, such as a hand, fist, or table. Dr. Denton also opined, however, that Phan's injuries could have resulted from a fall if she had struck two objects. Nevertheless, the State notes Dr. Couri's testimony that the bruising on Phan's chest was "strange," and could have resulted from someone trying to move her. It argues that this is in accord with Gonzalez's contradictory testimony that she left Phan on the floor² but two days later emergency personnel found her on a bed. The State contends it can be inferred that Gonzalez picked Phan up and took her to her bed because the physicians' testimony showed that any lucid period Phan would have had after the injury would have been brief.

¶ 78 The State further argues that Buzick's testimony still has weight regardless of whether the evidence of Gonzalez's weapons was properly admitted. Buzick testified to Phan's alleged statements that she feared her daughter and was afraid she would kill her. She stated that Phan constantly had bruising all over her body, and that she confided to Buzick that Gonzalez inflicted those injuries. Buzick also witnessed Gonzalez physically attack Phan in the yard on one occasion. The State asserts that this evidence coupled with Gonzalez's admission that a physical altercation occurred, gave the jury a glimpse into the relationship between Gonzalez and Phan and added support to its position that Gonzalez caused the injuries that led to Phan's death and did not inflict those injuries in self-defense.

¶ 79 The State also points to defense counsel's closing argument where he admitted Gonzalez's conduct contributed to Phan's death while also asserting that her actions did not constitute

² Gonzalez's testimony was that her mother was in her bed when she left for Minneapolis.

murder. Counsel argued that when Phan hit Gonzalez in the head with the chair and continued attempting to attack her with the chair, Gonzalez had the right to defend herself.

¶ 80 The testimony of Gonzalez and the medical witnesses and the corresponding evidence support a possible conclusion that Gonzalez caused the injuries that resulted in Phan's death. However, the jury's assessment of whether the injuries were inflicted accidentally, recklessly, intentionally, or in self-defense was seriously impeded by the irrelevant and unfairly prejudicial evidence that permeated the trial. Nearly every witness, including those previously highlighted by the State, was asked or volunteered testimony about the irrelevant evidence. Dr. Denton testified with respect to the impact wound not being inflicted by a bat or the butt of a gun and Buzick reported Phan's fear of leaving guns in the house and having seen Gonzalez throwing knives and swords in the backyard. Additionally, officers Smick and Shelton discussed in great detail evidence that had no bearing on the case such as the types of guns and the revocation of Gonzalez's FOID card. Indeed, during *voir dire* the jurors were questioned about their own knowledge of guns suggesting they were somehow relevant.

¶ 81 No reasonable person could conclude that the jury was not influenced by the overwhelming irrelevant evidence or that the prosecution did not intend that influence to occur. The error was not harmless. The trial court improperly allowed evidence and testimony regarding guns and bats found at Gonzalez's home, her revoked FOID card, and her exercising with knives and samurai swords. The wrongly admitted evidence was pervasive and unfairly prejudicial.

¶ 82 Rule 804

¶ 83 Gonzalez has also challenged the circuit court's ruling allowing the State to introduce alleged prior statements by Phan under section 115-10.2 (a) of the Code. She asserts that Phan's statements were not admissible under this section because it was preempted by Rule 804 of the

Illinois Rules of Evidence. She further claims that section 115-10.4 of the Code provides the applicable hearsay exception for admission of Phan's statements. She argues that both rule 804 and section 115-10.4 require that the out-of-court statements must have been subject to cross-examination. Since in this case that did not occur, Gonzalez argues that the trial court erroneously admitted Phan's statements. Gonzalez claims her conviction should, therefore, be reversed and the matter remanded for new trial.

¶ 84 The State counters asserting first that Gonzalez has forfeited the issue. It argues that though Gonzalez objected to the admission of the statement under section 115-10.2a, she did not assert preemption by Rule 804 and/or that section 115-10.4 was more applicable when the State filed its motion to admit the statements. The State also argues that Gonzalez argued in her post-trial motion only that the statements should not have been admitted under 115-10.2a and again failed to assert Rule 804 and/or section 115-10.4. Thus, the State contends the issue is waived. In the alternative, the State asserts that the statements were properly admitted under section 115-10.2 of the Code.

¶ 85 It is well settled that failure to both offer a contemporaneous objection to the statements and raise the issue in a post-trial motion results in waiver. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005). The record shows and the State acknowledges that Gonzalez did raise her objection to the admission of Phan's statements at the appropriate times. The record further shows that in both her motion *in limine* against the State's motion to admit the statements and in her post-trial motion, Gonzalez objected to the admissibility of Phan's statements on the specific ground of her inability to cross-examine the declarant regarding the statements without reference to Rule 804 or section 115-10.4. An objection on specific grounds waives the right to object later on other

grounds. *People v. Barrios*, 114 Ill. 2d 265, 275 (1986). In this case, however, the substance of the objection remains the same.

¶ 86 Assuming for purposes of this analysis that Gonzalez has failed to preserve the error for review, we may still review for plain error. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). The plain error doctrine permits an appellate court to reverse on the basis of unpreserved error if either: (1) the error was “clear or obvious,” and the evidence at trial was so closely balanced that this error could have tipped the scales against the Gonzalez; or (2) the unpreserved error was “so serious” that it challenged the integrity of the judicial process and the fairness of Gonzalez's trial. *Id.* at 187. Before a reviewing court analyzes the two prongs of the plain error doctrine, our first step is to determine whether any error occurred at all. *Id.*

¶ 87 We noted in *People v. Peterson*, 2012 IL App (3d) 100514-B, ¶ 24, that:

"As a matter of separation of powers in Illinois, our supreme court has the ultimate authority to determine the manner by which evidence may be introduced into the courts. (citation) Thus, '[w]here a statute conflicts with a [supreme court] rule of evidence or supreme court decision adopting a rule of evidence, courts are to follow the rule or decision.' (citation)."

¶ 88 The State's granted motion requested that statements Phan made to Buzick be admitted pursuant to section 10.2a of the Code. (725 ILCS 5/115-10.2a (West 2012)) That section, which became effective on June 17, 2005, states in pertinent part that:

(a) In a domestic violence prosecution, a statement, made by an individual identified in Section 201 of the Illinois Domestic Violence Act of 1986 as a person protected by that Act, that is not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is

not excluded by the hearsay rule if the declarant is identified as unavailable as defined in subsection (c) and if the court determines that:

(1) the statement is offered as evidence of a material fact; and

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness includes circumstances in which the declarant:

(4) is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity." 725 ILCS 5/115-10.2a (West 2012).

¶ 89 On September 27, 2010, our supreme court adopted the Illinois Rules of Evidence, which became effective in Illinois courts on January 1, 2011. The Illinois Rules of Evidence codified the existing rules of evidence in this state including hearsay exceptions where the declarant is unavailable. Rule 804 states, in pertinent part:

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant-

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness (A) at another hearing of the same or a different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or (B) in a discovery deposition as provided for in Supreme Court Rule 212a(5).

(2) Statement Under Belief of Impending Death. In a prosecution for homicide, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal

liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. Il. R. Evid. Rule 804 (eff. Jan.1, 2011).

This rule of evidence clearly addresses hearsay evidence and when a witness is unavailable as is the subject of section 115/10.2a of the Code. Section 115-10.2a allows for admission of a statement when it is offered as evidence of a material fact and is more probative of the point for which it is offered³ than any other evidence the proponent can procure with reasonable efforts and where the interests of justice will best be served by admission of the statement into evidence. 725 ILCS 5/115-10.2a (West 2010). The adverse party need only be made aware of the other party's intent to admit the hearsay statement at trial and the declarant's name and address for the court to allow its admission. 725 ILCS 5/115-10.2b (West 2010). However, under Rule 804, in order to qualify for admission the statement must have been subject to cross-examination, made under a belief of impending death, made against the declarant's interest, related to personal or family history, or where the unavailability of the declarant was procured in order to keep the declarant from testifying. Ill. R. Evid. 804 (eff. Jan. 1, 2011). Because there is a conflict with respect to the requirements for admissions of the unavailable witness' statement, the supreme court's later adoption of Rule 804, which occurred prior to this

³ Though not argued by the parties, we pause to address our uncertainty of whether the statements provided by Buzick were in fact relevant thus warranting the question of whether a hearsay exception is applicable. As noted in the text, Buzick's statements concerning the guns were clearly irrelevant as to whether Gonzalez actually murdered Phan because a gun was not found to have been the cause of Phan's fatal injuries. Buzick's statements concerning Phan's alleged fear of her daughter, in our opinion, would also be irrelevant under *People v. Floyd*, 103 Ill. 2d 541, 547 (1984), because such hearsay statements "serv[e] no purpose other than to create the inference that defendant [is] guilty of murder." Phan's state of mind at the time she allegedly uttered her fear of Gonzalez to Buzick was with respect to removing the guns from the house and had no bearing on whether she feared Gonzalez would harm her in general. See *Guski v. Raja*, 409 Ill. App. 3d 686, 700 (2011).

case's inception (*C.f. Villa, 2011 IL 110777, ¶ 81*(Burke, J. specially concurring)), preempts section 115/10.2a of the Code.

¶ 91 The trial court's application of this improper statute caused it not to make the appropriate findings for admission of the statements under Rule 804. Moreover, the record does not support that the statements met any of qualifying admission criteria pursuant to the rule. Thus the trial court erred in allowing the statements into evidence. Because we have discussed how the evidence is closely balanced in the previous issue, the error in this issue was not harmless. Further upon remand, the court is instructed to determine the admissibility of the testimony in accord with the requirements of Rule 804.

¶ 92 Ineffective Assistance of Counsel

¶ 93 Gonzalez's final argument on appeal is that remand is necessary for the trial court to adequately address her *pro se* claims of ineffective assistance of counsel. Though this issue is now moot because of our earlier holdings, we discuss briefly the trial court's obligations when presented with issues of ineffective assistance of counsel in post-trial proceedings.

¶ 94 Whether a trial judge failed to conduct adequate inquiry into defendant's post-trial allegations of ineffective assistance of counsel is an issue we review *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003). When a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. *Id.* at 77. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Id.* at 78. However, if the allegations show possible neglect of the case, new counsel should be appointed. *Id.* The new counsel would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. *Id.* The primary concern for the reviewing

court is whether the trial court conducted an adequate inquiry into defendant's allegations of ineffective assistance. *People v. Johnson*, 159 Ill. 2d 97, 125 (1994). At this initial inquiry a discussion of the alleged claims is permissible and usually necessary and trial counsel may answer questions and explain the facts and circumstances of the allegation. *Moore*, 207 Ill. 2d at 78.

¶ 95 Gonzalez asserts that the trial court failed to conduct a more specific inquiry into her post-trial claims to determine whether they justified the appointment of new counsel. The State contends that remand is not necessary, arguing that, though the trial court did not specifically address Gonzalez's claims of ineffective assistance, such claims either lacked merit or involved trial strategy.

¶ 96 We do not agree with these assertions and find that the State misses the mark here just as it had "missed the mark" in *People v. Moore*, 207 Ill. 2d 68, 80 (2003). In that case, the supreme court specifically stated that:

"[T]his is not a question of whether the trial court should have considered defendant's motion "more fully." Rather, the trial court did not consider defendant's motion at all. "While defendant's claims may be without merit, the trial court should have afforded the defendant the opportunity to specify and support his complaints. In short, the defendant's motion was precipitously and prematurely denied. (citation)" *Id.*

¶ 97 Here, Gonzalez argued in her *pro se* motion that she had not seen all of the discovery materials; that her attorneys should have subpoenaed her cell phone records, video surveillance at the hospital, and video surveillance from inside the ambulance; that counsel had ineffectively cross-examined Dr. Le; that the jury was biased; and that she should have received a change of

venue. She attempted to argue during her sentencing hearing – which occurred immediately after her posttrial motion hearing that addressed only the posttrial motion filed by her defense counsel – that she was not satisfied with counsel and that she had not seen all of the discovery materials prior to trial. She stated that there were a lot of facts that came out at trial that she should know about. The court made no inquiry into her claims. Rather, it found that Gonzalez had expressed satisfaction with counsel's services prior to trial, thus allowing the trial to proceed. We agree with Gonzalez, however, that this finding did not adequately address all of her ineffective assistance of counsel claim.

¶ 98 Accordingly, we conclude that the trial court erred in failing to conduct the necessary preliminary examination as to the factual basis of Gonzalez's allegations against her appointed trial counsel.

¶ 99 Based on our analysis of the first two issues, we reverse the conviction of Gina Gonzalez for first degree murder and remand the cause for a new trial.

¶ 100 CONCLUSION

¶ 101 The judgment of the circuit court of Tazewell County is reversed and the case is remanded for new trial in accord with the findings of this order.

¶ 102 Reversed and remanded.