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2018 IL App (4th) 170832-U

NO. 4-17-0832

FILED
October 10, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HEATHER LAMIE, Defendant-Appellant.	)	Appeal from the Circuit Court of Livingston County No. 13CF152 Honorable Mark A. Fellheimer, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in denying defendant's postconviction petition and did not consider an improper aggravating factor at sentencing.

¶ 2 In October 2014, a jury found defendant, Heather Lamie, guilty of first degree murder and endangering the life or health of a child. In February 2015, the trial court sentenced defendant to natural life in prison. This court affirmed defendant's convictions and sentence on direct appeal. Defendant filed a petition for postjudgment relief and a first amended postconviction petition. In ruling on her petition for relief from judgment, the trial court found defendant was entitled to a new sentencing hearing. Following an evidentiary hearing, the court denied her postconviction petition. In September 2017, the court sentenced defendant to 38 years in prison.

¶ 3 On appeal, defendant argues the trial court (1) erred in denying her postconviction

petition alleging trial counsel's ineffectiveness and (2) considered an improper aggravating factor in sentencing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2010, defendant became the foster parent to three children, including then three-year-old Kianna. Along with her two biological children and a fourth foster child, defendant had six children living in her home. On May 3, 2011, paramedics were called to defendant's home because Kianna was unresponsive and lying on the floor. She was airlifted to the hospital for emergency surgery, which required removing part of her skull to relieve pressure from brain swelling. The surgery was unsuccessful and Kianna was brain dead. On May 5, 2011, Kianna was removed from life support and died.

¶ 6 In June 2013, a grand jury returned a three-count indictment charging defendant with first degree murder with intent to do great bodily harm (count I) (720 ILCS 5/9-1(a)(1) (West 2010)), first degree murder with knowledge of a strong probability of great bodily harm (count II) (720 ILCS 5/9-1(a)(2) (West 2010)), and endangering the life of a child (count III) (720 ILCS 5/12-21.6(a) (West 2010) (renumbered as 720 ILCS 5/12C-5(a)(1) (eff. Jan. 1, 2013))). Count I was later dismissed.

¶ 7 Defendant's jury trial began in September 2014, and the parties put on lay and expert witnesses. As we did in our order on direct appeal, we lay out the testimony to fully address the issues before us. Each witness is addressed according to the chronology of events surrounding Kianna's death. Dr. William Puga, called by the defense, was a child psychiatrist who met with Kianna. He worked at Streamwood Hospital, where Kianna was admitted and stayed for about a week in March 2011. Defendant told Dr. Puga that Kianna had aggression issues toward herself and others. Kianna told Dr. Puga she was there because she pulled her

two-year-old sister's hair and cut herself on the wrist. The cut was described as a light, superficial scratch that did not require any bandages or stitches. Kianna reported the cut did not hurt.

¶ 8 Dr. Puga noted Kianna's history with her biological parents, who physically abused her and used drugs. Her stepfather also physically and sexually abused her. Defendant reported to Dr. Puga that Kianna was acting out in preschool, was being "bossy," and was defiant. Defendant was the primary source of information for Dr. Puga. Based, in part, on Kianna's history with her biological parents and information provided by defendant, he diagnosed Kianna with mood disorder not otherwise specified and post-traumatic stress disorder. Puga maintained a working diagnosis for reactive attachment disorder as well.

¶ 9 On cross-examination, Dr. Puga viewed computerized tomography (CT) scans of Kianna's head and did not think she was capable of causing these injuries on her own. He noted she had extensive injuries all over her head. He had never seen a child with such extensive injuries. He also observed defendant was very frustrated with Kianna's behavior toward her other siblings. Defendant told Dr. Puga she had instructed her daughters to do whatever they needed to do to protect themselves from Kianna's aggression. It concerned Dr. Puga that defendant was informing her children to act aggressively against Kianna. Dr. Puga concluded Kianna was not a danger to herself or others at the time.

¶ 10 Several individuals involved in Kianna's care before May 3, 2011, testified. Dr. Rachel Wegner, Kianna's physician; Audrey Reischauser, a caseworker at a child-welfare agency; Sherry Brendalen, a counselor for Kianna; and Amanda Chandler Cleary, a caseworker for Kianna, all testified Kianna was an ordinary and healthy child. These witnesses were mandated reporters and did not suspect or report any child abuse. Reischauser described Kianna

as precocious and articulate. She engaged in challenging behaviors, such as tantrums, when visiting her biological parents. Brendalen met with Kianna on two occasions, including May 2, 2011. On that date, Brendalen saw Kianna lying on the floor of the waiting room, crying softly. In her office with Kianna, Brendalen drew Kianna's hair back into a ponytail. At that time, she noticed bruising on Kianna's right ear and right temple. When asked about the bruising, Kianna just shrugged. Cleary met with Kianna six times, four times in the foster home and twice in the office. Cleary found Kianna to be cheerful and happy. She never observed Kianna throw a fit or a tantrum nor did she ever see Kianna act aggressively.

¶ 11 Joshua Lamie is defendant's husband. On May 2, 2011, Joshua spoke with Kianna on the phone. The call was recorded in preparation for a meeting with the Child and Youth Investment Team to determine any additional services available for Kianna's care. Defendant spoke with Joshua about making the recording prior to his speaking with Kianna. In the recording, Kianna discussed hurting herself. Specifically, on the same day, she threw a fit and hurt her eye because she said she missed her biological parents. Throughout the recording, Joshua tried to figure out why Kianna would hurt herself and reassured her that nobody would hurt her. Joshua testified he never personally observed Kianna inflict her injuries or throw fits. Joshua testified he sent the text messages laid out below to defendant prior to Kianna's death.

¶ 12 Several witnesses testified to their interactions with Kianna throughout the school day on May 3, 2011. Kianna's bus driver, Corey Turner; Julie Ahern, a teacher's aide; and Ashley Richard, Kianna's teacher, all testified Kianna was normally a happy and talkative child. Turner never had a problem with Kianna acting out on the bus. They all testified about Kianna's injured leg and her quiet, depressed demeanor throughout the school day on May 3, 2011. Turner testified Kianna was not putting any weight on one leg and needed to be lifted onto the

bus and helped to her seat. After all of the children exited the bus, Turner found Kianna still sitting in her seat, not moving. He carried her off the bus and handed her to a teacher's aide, Julia Ahern.

¶ 13 Angela Taylor, a volunteer in Kianna's class, testified Kianna cried to herself in obvious pain throughout the morning. However, Kianna did not want to go home. Taylor carried Kianna around that day and noticed a giant bruise on the whole right side of Kianna's face, from the temple on down. When she pulled Kianna's hair back in a ponytail, she did not notice any bruising around Kianna's ear. Kianna was uncommonly quiet that day. Taylor, in all of her dealings with Kianna, never saw her throw a fit or act aggressively toward herself or others.

¶ 14 Kianna's teacher, Ashley Richard, had Kianna in class five days a week from 8:10 a.m. until 11 a.m. She described Kianna as a bubbly, vibrant girl who played well with the other children. Defendant's daughter, B.L., was in the same class. Richard reported B.L. and Kianna got along well at school. On May 3, 2011, Kianna was limping and complained her leg was hurting. Kianna was not bubbly that day. Richard also noticed Kianna had a "bit lip" and a black and blue bruise above her right eye, on the temple. Richard called defendant to report Kianna's condition, and defendant told her Kianna also had a bruise behind her ear. When Richard pulled Kianna's hair back, she noticed a black and purple bruise behind Kianna's ear. Kianna was sad and moving slowly at school that day. Richard carried Kianna to the bus at the end of school.

¶ 15 Defendant testified to her experience with Kianna leading up to May 3, 2011. Defendant described Kianna as recently becoming aggressive toward her siblings and harming herself. On May 2, in particular, Kianna threw several fits at home and one immediately before

counseling. Defendant claimed Kianna threw herself onto the floor, hitting either the table or chair leg, causing a bruise to her right temple. After the counseling session, Kianna was angry about not being able to play outside. According to defendant, Kianna threw herself to the floor, cutting her lip. On May 3, Kianna complained her leg hurt. Defendant was unable to see any injury on Kianna's leg but noticed she was limping when getting on the bus.

¶ 16 After school on May 3, Kianna's brother was scheduled to meet with his biological father. Kianna did not want her brother to go because his father had sexually abused her. Kianna cried and then wet her pants. Defendant put Kianna in the shower to clean her off. In the interim, defendant stepped out of the room to tend to the other children. Shortly thereafter, defendant returned, shut off the shower, handed Kianna a towel to dry off, and left the room again. Throughout this process, defendant was texting the previously mentioned messages to Joshua Lamie. Defendant returned one more time to see Kianna crying on the floor, so she called Joshua to speak with her. He answered and spoke with Kianna. Defendant left the room for the last time and heard dog food spill. She sent the final text message to her husband about the dog food. Then defendant returned to see Kianna on the ground and called 9-1-1. Defendant testified she never hit Kianna or attempted to physically harm her. On cross-examination, she testified Joshua never observed Kianna's fits and her frustration increased throughout May 3.

¶ 17 The following text-message exchange was admitted through Lieutenant Earl Dutko:

> [8:18 a.m.] "Josh Lamie: Hows today going so far. Is she soar?
>
> Defendant: Yes teacher just called
>
> [JL]: What!? About her bruising?
>
> [D]: No she is limping

[JL]: She said her leg hurt yesterday. Probably when she through herself to the floor

[D]: Yes im sure it is

[D]: sorry was feeding the baby had to text one handed she just wanted to see if kianna was doing that this am if she doesn't come around at school and st [continued in next message]

[D]: op I'll go get her she is doing it for the attention she started laying it on thick at the bus stop

[8:39 a.m.] [JL]: Figured as much

* * *

[10:25 a.m.] [D]: yeah. Finally got those cloths folded. i have about 4-5 loads to wash still but hey baby steps!

[JL]: Very small baby steps

[D]: wow, thanks i thought they were decent size. There were about 6 loads in this living room.

[JL]: Your doing great. Giving you a hard time. On a escort right now. Love you kid!

[10:29 a.m.] [D]: love u too

* * *

[11:24 a.m.] [D]: kianna had the teachers and a mother carry her around all day.

[JL]: You got to be kidding me. If she hurts that bad she can go to bed.

[D]: we have [another child's] visit today

[JL]: she can go to bed as soon as y'all get back

[D]: i plan on that

[D]: she was doing it again. i cant wait for u to have off. Its just been a tough day yesterday & i think again today

[JL]: Ill have her ford the next three days. Sorry she gives you such a hard time.

[D]: its ok its not your fault its just hard to keep things in perspective sometimes i picked her up and put her in the shower and yes it is kind of cold her

[11:38 a.m.] [D]: brain needs as much stimulation as it can get right now

* * *

[12:26 p.m.] [D]: oh my goodness, i still don't have her undercontrol. And very soon I'm going to have to cave because we have to leave.

[JL]: Beat her ass!

[D]: at this point I don't think that would be a good idea I'm angry and I wouldn't just hurt her feelings not a good idea at the moment I'm still good

[D]: but caving is going to make me even more mad

[12:40 p.m.] [D]: she just threw dog food everywhere!"

(Spelling and grammatical errors in original.)

Defendant placed a 9-1-1 call at 12:47 p.m., reporting her foster daughter was having a seizure. Ron Nettleingham was the responding paramedic to defendant's 9-1-1 call. He saw Kianna lying on the floor in the laundry room, unresponsive. He stated other children were in the car in the garage. Kianna had a seizure in the ambulance prior to arriving at the hospital. He delivered Kianna to Dr. Patrick Dowling at the emergency room.

¶ 18 Dr. Patrick Dowling testified as a treating physician and an expert for the State. As part of his care, he ordered a CT scan and found bleeding on and around both the left and right sides of Kianna's brain. He believed Kianna's seizure was caused by bleeding on the brain. He also noted a low body temperature, a drop in heart rate, and cessation of reflexive breathing. He noticed bruising on Kianna's right side of her face and ear and a large "goose egg" on the back side of her skull, on the right side.

¶ 19 He was asked to give an expert opinion on the cause of Kianna's injury. He concluded the bleeding around Kianna's brain resulted from significant blunt-force trauma to the head. Dr. Dowling opined it would have taken tremendous force to cause Kianna's injuries. He went on to conclude an ordinary four-year-old child would be incapable of causing this type of injury on her own. Rather, she would have to suffer greater force than she was capable of generating on her own (*i.e.*, being struck with a bat, hit by a car, or falling from a great height). He also concluded the seizure and brain swelling were a result of blood pooling on her brain after the blunt-force trauma to her head, rather than a seizure causing the injury. Dr. Dowling, in 15 years of emergency medicine practice, had never seen the degree of trauma Kianna suffered in any child from things like throwing themselves on the floor, banging their head on tables, or even falling from monkey bars.

¶ 20 Kianna was transported to St. Francis Hospital in Peoria by helicopter. Dr. Julia

Lin performed a decompressive craniotomy (removing part of her skull) to reduce brain swelling. The craniotomy failed to prevent the brain from swelling at the base of the skull, so blood stopped flowing to Kianna's brain, resulting in brain death. She was placed on life support. Kianna was removed from life support on May 5, 2011, and died. Dr. Channing Petrak testified as an examining physician and expert in pediatric child abuse. She performed a thorough, head-to-toe examination of Kianna and spoke with defendant on May 3. Petrak's interview with defendant covered Kianna's medical history and the events that brought her to the hospital. Defendant reported she was going in and out of the room and, after she heard dog food spill, she returned to see Kianna having a seizure, with arms and legs flailing. Petrak stated seizures do not typically cause injury, nor would arms and legs flail during a seizure. Limbs would move rhythmically, with controlled tight jerking.

¶ 21 Petrak concluded an acute injury caused Kianna's brain swelling and seizures minutes after the injury. She believed the injuries were not self-inflicted and not the result of an undiagnosed medical condition or a concussion. She noted a "short fall" (five feet or less) would not lead to a fatal head injury. (Kianna was 39 inches tall.) Petrak observed bruising on the rest of Kianna's body. Bruises were found on Kianna's ankle, shins, and above both knees, as well as around her right eye and temple. She found bruising on Kianna's thighs, the backs of her legs, buttocks, shoulder, ear, and on her back. Bruises were found on Kianna's arm and the tops of her hands, the palms, and in the webbing between the thumb and index finger. None of Kianna's bruises, according to Petrak, were typical of ordinary child's play or falling over. Bruising of ears is uncommon because there is not much blood flow in the ears. Kianna also had a bruise on her scalp that matched the curve of her ear. Petrak testified, "So the ear itself actually caused that line on the scalp, which means the ear was pushed into the scalp hard enough to cause that

bruise. And an ear is not a particularly hard object or surface. So that is an unusual finding." Petrak found Kianna's injury was severe and, in her opinion, could not have been self-inflicted. In her opinion, Kianna's injuries were inflicted and due to abusive head trauma. Dr. Steven Lichtenstein, who worked in pediatric ophthalmology, performed an eye examination of Kianna on May 4, 2011. His examination of Kianna's eyes suggested she suffered "catastrophic" head trauma. Specifically, he opined this was nonaccidental head trauma. He also found this trauma was the result of a single incident, spanning a few minutes, rather than an ongoing injury. According to Lichtenstein, falling over at ground level, at Kianna's height, would not be enough to cause this type of injury.

¶ 22 Dr. John Denton, a forensic pathologist, testified about his autopsy of Kianna. Denton performed the initial autopsy on May 6, 2011. He noted a bruise on Kianna's hand and characterized it as a defensive injury. He saw bruising on Kianna's leg, shoulder, armpits, and arms. He characterized these as recent injuries from blunt-force trauma and/or grabbing under the armpits and compressing that area of skin.

¶ 23 Next, he examined multiple injuries around Kianna's head, including behind her ears. Notably, no injury was inflicted on Kianna's nose, ruling out a fall. He concluded Kianna's death was the result of a subdural hematoma (blood clot around the brain) caused by inflicted, severe blunt-force trauma. Specifically, an injury to the back right side of Kianna's head caused the subdural hematoma. The injury, he suggested, was unlikely to be the result of a fall. He continued to note the injury would likely have been a single blow resulting in sudden unconsciousness and possibly seizures, as opposed to long or repeated injuries to the head. Finally, he believed the injuries were not self-inflicted.

¶ 24 Dr. Janice Ophoven, called by the defense, testified as an expert in forensic

pathology who focused on pediatrics. She testified based on her review of Kianna's medical records since birth, CT scans, and any other documents related to her care. She did not speak with any medical personnel involved in Kianna's care. Based on her review of Kianna's records, Ophoven concluded Kianna's death was caused by blunt-force trauma, causing an acute subdural hematoma.

¶ 25 Ophoven opined Kianna's injury, despite the blunt-force trauma, could have developed over time, beginning with her lethargy and leg injury the morning of May 3, 2011. By the time she returned from school, according to Ophoven, Kianna began to have seizures as a result of more bleeding and lack of circulation to the brain. Kianna's condition upon arriving at the hospital, in Ophoven's opinion, was too advanced to be the result of a recent injury. Ophoven believed the injury could have been accidental or intentional. It was also possible that Kianna's condition was the result of multiple injuries prior to May 3, 2011. In Ophoven's opinion, multiple factors surrounding Kianna's condition did not render one act of blunt-force trauma as the definitive cause of death. On cross-examination, the State attempted to undermine Ophoven's credibility, and in rebuttal, it called Dr. Denton, who refuted much of Ophoven's testimony.

¶ 26 Defendant moved for a directed verdict at the close of the State's case and at the close of all the evidence. The State argued the evidence, taken in the light most favorable to the State, showed defendant caused Kianna's death after building frustration. Defendant argued the State could not prove the precise cause of Kianna's death beyond a reasonable doubt. The trial court denied both motions.

¶ 27 Following closing arguments, the jury found defendant guilty of first degree murder and child endangerment. Defendant moved for a new trial and judgment notwithstanding

the verdict, both of which the trial court denied. In February 2015, the court sentenced defendant to a term of natural life in prison for first degree murder. The court found the child-endangerment count merged with the count of first degree murder.

¶ 28 Defendant appealed, arguing (1) the trial court abused its discretion in permitting a certain juror to remain on the jury, (2) the court abused its discretion in admitting text messages between her and Joshua Lamie into evidence, (3) the State presented insufficient evidence to prove her guilty beyond a reasonable doubt, (4) prosecutorial misconduct occurred in the State's closing argument, and (5) trial counsel provided ineffective assistance for failing to ensure the impartiality of the jury and failing to object to the State's remarks in closing argument. *People v. Lamie*, 2016 IL App (4th) 150131-U, ¶ 51. This court affirmed. *Lamie*, 2016 IL App (4th) 150131-U, ¶ 87. In doing so, we declined the opportunity to address the claim of ineffective assistance of counsel because the record on appeal was insufficient to make a clear determination one way or the other. *Lamie*, 2016 IL App (4th) 150131-U, ¶ 85.

¶ 29 In April 2016, defendant filed a petition for post-judgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)), arguing the sentencing statute was unconstitutional based on a violation of the Illinois Constitution's single-subject rule (Ill. Const. 1970, art. IV, § 8(d)). As the mandatory life-imprisonment requirement was void, defendant argued she was only subject to a sentencing range of 20 to 60 years in prison.

¶ 30 In July 2016, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2016)), alleging trial counsel was ineffective. The petition alleged trial counsel failed to call critical witnesses during the trial, including Analisa Greer, who worked at The Baby Fold; B.L., defendant's daughter; Cathy

Anstrom; and Patricia Johnson. Defendant claimed Greer had firsthand observations of Kianna's self-destructive behavior. B.L. was present in the home on May 3, 2011, and could have been questioned regarding what she saw and heard. Defendant stated Anstrom and Johnson both observed Kianna "strike her head extremely hard on a church pew" on or about May 1, 2011. The petition also alleged counsel was ineffective for failing to request the jury be instructed on a lesser charge of involuntary manslaughter. The trial court docketed the petition for further consideration. Defendant filed a first amended postconviction petition in January 2017, and the State filed an answer.

¶ 31 In May 2017, the trial court conducted a hearing on defendant's petitions. B.L., defendant's daughter, testified she was 11 years old. She recalled a time when Kianna "had a knife in her hand in the kitchen," which scared B.L. On May 3, 2011, B.L. "was in the living room with the other kids" and her mother, who was packing a diaper bag. Kianna was in the bathroom. B.L. testified she did not hear any loud bangs, crashes, or thuds. When B.L. had to use the bathroom, defendant took her and they found Kianna "laying on the floor." After defendant checked on Kianna, defendant called 9-1-1. B.L. testified she never met with trial counsel John Coghlan.

¶ 32 Analisa Greer, formerly a child-welfare specialist with The Baby Fold, testified she was assigned to Kianna's case. Kianna had been placed in the Lamie household with her three siblings. Greer had frequent communication with defendant regarding Kianna "hurting herself and having a lot of emotional issues." Greer mentioned there had been incidents of "head banging" and "cutting." She did not remember speaking with Coghlan.

¶ 33 John Coghlan testified he spoke with B.L., but he did not recall exactly what they talked about. He decided not to call B.L. at trial because "she was a baby" and "it did not appear

that she had any type of an independent knowledge" that would be helpful. When asked whether he and defendant discussed calling B.L., Coghlan stated "we didn't want to get [B.L.] involved in the trial." Coghlan stated he was aware of the allegations of Kianna's self-destructive behavior. He was also aware Patricia Johnson witnessed some of those behaviors, but he did not recall why she was not called to testify. Coghlan stated Greer did not testify because "she had left the State and we didn't know where she was." Coghlan did not subpoena Greer because he did not have her address.

¶ 34 Coghlan testified he and defendant had a discussion as to whether the jury should be instructed on the lesser-included offense of second degree murder. He stated there were "multiple participants in the discussion," and he could not say he was 100% certain that defendant understood the conversation. He did not recall discussing with defendant a lesser charge of involuntary manslaughter.

¶ 35 On cross-examination, Coghlan testified it was defendant's mindset throughout the entire trial process that she did not kill Kianna and did not do anything to cause Kianna's death. On redirect examination, Coghlan stated he was aware of the concept of delayed disclosure, where a child matures and can more effectively articulate a past occurrence, and agreed he probably should have interviewed B.L. as she aged to find out if she remembered more of what happened.

¶ 36 Defendant testified she informed Coghlan that Cathy Anstrom and Patricia Johnson observed Kianna fall and hit her head on a pew in church just a few days before the events of May 3, 2011. She and Coghlan "briefly" discussed having B.L. testify during the trial. When asked whether she told Coghlan she did not want B.L. to testify, she testified "if we could leave our children out of it, we would like to; but if they were necessary, then, yes."

¶ 37 Defendant stated she never had a discussion with Coghlan about instructing the jury on the lesser charge of second degree murder. She also stated she never told him she did not want an instruction on second degree murder. She was not aware she had a right to have input on instructing the jury on a lesser charge. Defendant stated she never had a discussion with Coghlan regarding involuntary manslaughter or a jury instruction on that offense. Defendant stated she would have wanted a lesser charge provided to the jury.

¶ 38 On cross-examination, defendant stated she wanted B.L. to testify "if we needed her to." Defendant agreed it was her position at trial that she did not do anything to cause Kianna's death. She also stated she wanted the lesser-included offense instruction, even though she was not in a position to admit she did anything to cause Kianna's death.

¶ 39 In regard to the petition for relief from judgment, the trial court found the prosecutor incorrectly stated the court had no discretion in sentencing defendant to a mandatory sentence of life in prison, contrary to the sentencing statute being found unconstitutional in *People v. Wooters*, 188 Ill. 2d 500, 722 N.E.2d 1102 (1999). Thus, the court found defendant should receive a new sentencing hearing commensurate with the range of sentences applicable to the offense of murder for which she was convicted.

¶ 40 As to the postconviction petition, the trial court found Coghlan's decision not to call B.L. to testify was the product of sound trial strategy. In regard to not locating or calling Greer, the court stated that, other than Greer testifying to her home visits and not seeing any problems, "all other aspects of her testimony would have been what the defendant told her and not what she (Greer) personally observed." Thus, "Greer only would have been called to say she noticed no problems within the Lamie household during her home visits and to bolster the defendant's claims that Kianna was engaging in self-injurious behavior only as seen by the

defendant and as reported to Greer."

¶ 41 In regard to the allegation of counsel's failure to communicate with defendant and ask for an instruction on a lesser-included offense, the trial court noted "[a] defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." The court stated Coghlan did not bring up the issue because defendant always denied having anything to do with Kianna's death and her trial testimony supported her position. The court found "no reason for [Coghlan] to suggest the defendant consider a lesser-included jury instruction because the defendant had always maintained her innocence from day one and consistently maintained she had nothing to do with Kianna's death." The court also stated:

> "Even if an argument could be made that [Coghlan] should have discussed with the defendant whether she should seek a jury instruction on a lesser-included or reduced charge for the jury to consider (or at least request the trial court to consider giving such a jury instruction), the evidence did not support the giving of a jury instruction on a lesser-included or reduced charge because the defendant denied any involvement whatsoever. So whether or not [Coghlan] asked for a lesser included/reduced charge instruction had no consequence on the outcome of the trial because it would not have been given anyway which is another way of saying the defendant did not suffer prejudice and has not shown that there is a reasonable probability that the result of the proceeding would have been different or that counsel's performance rendered the result of

the trial unreliable or the proceeding fundamentally unfair."

The court denied the postconviction petition.

¶ 42 In September 2017, defendant filed a first amended motion to reconsider the denial of the postconviction petition, which the trial court denied. Thereafter, the court sentenced defendant to 38 years in prison on count II. In October 2017, defendant filed a motion to reconsider the sentence and a second motion to reconsider the denial of the postconviction petition, both of which the court denied. This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 A. Postconviction Petition

¶ 45 Defendant argues the trial court erred in denying her postconviction petition, claiming she is entitled to a new trial based on trial counsel's ineffectiveness. We disagree.

¶ 46 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1074-75 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he or she suffered a substantial deprivation of his or her federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

> "Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. [Citation.] Thus, issues that were raised and decided on direct appeal are

barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived." *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 47 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2016).

¶ 48 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2016). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 49 If "a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the trial court denied postconviction relief following an evidentiary hearing. "Following an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be reversed unless it is manifestly erroneous." *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008). "[A] decision is manifestly erroneous when the opposite conclusion is clearly evident." *People v. Coleman*, 2013

IL 113307, ¶ 98, 996 N.E.2d 617.

¶ 50 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 51 1. *Involuntary Manslaughter and Second Degree Murder Instructions*

¶ 52 Defendant argues trial counsel was ineffective for failing to allow her to make a knowing and voluntary election to request jury instructions for involuntary manslaughter or second degree murder.

¶ 53 Our supreme court has found five decisions that ultimately belong to the defendant in a criminal case after consultation with his or her attorney, and those include: "(1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify in his [or her] own behalf; (4) whether to tender a lesser-included-offense instruction; and (5) whether to appeal." *People v. Phillips*, 217 Ill. 2d 270, 281, 840 N.E.2d 1194, 1201 (2005).

¶ 54 In *People v. Brocksmith*, 162 Ill. 2d 224, 229, 642 N.E.2d 1230, 1232 (1994), the supreme court concluded the decision to tender an instruction on a lesser-included offense belongs to a defendant rather than defense counsel. The court stated the decision is analogous to the decision to plead guilty to a lesser charge, since both decisions "directly relate to the potential loss of liberty on an initially uncharged offense." In a later decision, the court discussed the ramifications of tendering an instruction on a lesser-included offense, noting "[w]here a lesser-included offense instruction is tendered, a defendant is exposing himself to potential criminal liability, which he otherwise might avoid, and is in essence stipulating that the evidence is such that a jury could rationally convict him of the lesser-included offense." *People v. Medina*, 221 Ill. 2d 394, 409, 851 N.E.2d 1220, 1228 (2006). The Second District offered a similar take on tendering an instruction on the offense of second degree murder:

> "As with an instruction on a lesser included offense, a defendant who is charged with first-degree murder and tenders an instruction on second-degree murder risks exposure to conviction of an uncharged offense and does so in the hope that, even if the jury rejects his primary theory of the case (here, self-defense), it will convict him of a less serious offense than that charged. As with the defendant tendering an instruction on a lesser included offense, the defendant who tenders an instruction on second-degree murder has decided against an all-or-nothing strategy in favor of providing the jury with a middle way." *People v. DuPree*, 397 Ill. App. 3d 719, 734-35, 922 N.E.2d 503, 516 (2010).

¶ 55 The State relies, in part, on *People v. Morrow*, 2013 IL App (1st) 121316-U, 3

N.E.3d 464. While the decision carries a "U" designation, which normally connotes an unpublished and nonprecedential order, a review of the case reveals the First District filed it as an opinion. In that case, the defendant was on trial for first degree murder, but he testified he did not shoot the victim. *Morrow*, 2013 IL App (1st) 121316-U, ¶ 41, 3 N.E.3d 464. A jury found him guilty, and the trial court sentenced him to 60 years in prison. *Morrow*, 2013 IL App (1st) 121316-U, ¶ 45, 3 N.E.3d 464. On appeal from the denial of his request for leave to file a successive postconviction petition, the defendant argued trial counsel was ineffective for not requesting a second degree murder instruction. *Morrow*, 2013 IL App (1st) 121316-U, ¶ 56, 3 N.E.3d 464. The First District disagreed, stating, in part, as follows:

> "However, even if we determine that there was sufficient evidence to support a second-degree murder instruction, defense counsel may have concluded that a self-defense theory would have been incompatible with the theory presented, since it would require defendant to admit to the shootings. '[T]he decision of whether to submit an instruction on a lesser included offense is typically considered to be one of trial strategy that has no bearing on the competency of counsel because counsel could have reasonably believed that the instruction would have converted a likely acquittal into a likely conviction of the lesser crime.' [Citations.] Here, defense counsel made the strategic decision to argue that the State failed to prove its case, and although defendant's trial counsel argument was ultimately unsuccessful, that 'does not mean counsel performed unreasonably and rendered ineffective

> assistance.' [Citation.]" (Internal quotation marks omitted.)
> *Morrow*, 2013 IL App (1st) 121316-U, ¶ 59, 3 N.E.3d 464.

¶ 56 Like the defendant testifying he did not shoot the victim, defendant here claimed she did not harm Kianna in any way and had nothing to do with the cause of her death. At trial, defendant testified she never hit, struck, picked her up and smashed her into a wall, or did anything to physically harm Kianna. During closing arguments, defense counsel argued defendant did not beat Kianna to death. At the hearing on the postconviction petition, defendant agreed it was her position at trial that she did not do anything to cause Kianna's death. Coghlan testified it was defendant's mindset throughout the entire trial process that she did not kill Kianna and did not do anything to cause Kianna's death.

¶ 57 From defense counsel's opening statement, through and after trial, it is evident defendant was contending she had nothing to do with causing any injuries resulting in Kianna's death. Coghlan repeatedly commented about how, although it was known Kianna was severely injured, the cause of the injuries was unknown. When discussing the testimony of defendant's own expert, Coghlan argued in closing, "She told you that there was blunt force trauma, and that could have happened accidentally, that could have happened intentionally, that could have happened all sorts of ways. But there is nothing in this record that tells us how it happened."

¶ 58 When discussing defendant's testimony, Coghlan said, "She told you she didn't do it. And she told you exactly what she knows about that day." He later discussed the State's burden as follows:

> "They have got to prove beyond a reasonable doubt that Heather caused these injuries. They have to prove beyond a reasonable doubt that she knew when she was causing these injuries, that the

harm would have been such that Kianna would have died or suffered such severe injuries. And they haven't done it. There is no physical evidence from that house that links her to this case."

¶ 59 Coghlan referenced the State's closing argument, where the prosecutor suggested defendant "snapped" and then severely injured Kianna, as the only suggestion of defendant's involvement to a lesser degree. However, Coghlan's comment was only to point out no such evidence existed and originated, not from defendant, but from the State. That reference is now argued, in some convoluted way, as a justification for why it was ineffective assistance of counsel to fail to pursue an instruction for either second degree murder or involuntary manslaughter. Nowhere in the jury instruction conference, closing argument, or questioning of the witnesses, did the defense suggest defendant had any involvement in the injuries to Kianna, let alone under some unreasonable belief or lesser mental state justifying either a second degree murder or involuntary manslaughter instruction.

¶ 60 In fact, at the hearing on posttrial motions, defendant for the first time mentioned second degree murder while arguing for judgment notwithstanding the verdict. At that time, Coghlan argued "the record is devoid of any type of information or evidence that indicates any type of knowledge or intent by Heather to commit any acts to cause great bodily harm."

¶ 61 More importantly, Coghlan testified at the postconviction hearing it was the consensus of defendant and her family they did not want a second degree murder instruction. In ruling on the postconviction petition, the trial court noted defendant did not even acknowledge being in the same room as Kianna when the injuries occurred. It was also noted how she turned down a plea to second degree murder prior to the start of trial, which would further support trial counsel's assertion defendant was fully opposed to a second degree instruction at trial. When

counsel does exactly as his or her client tells him to, in a manner such as this, he is not being ineffective. It is disingenuous to argue the record supports the giving of a second degree murder instruction when that clearly was not consistent with the wishes of defendant at the time. It is equally disingenuous to argue the record supports such an instruction when, in fact, it arose from the State's closing argument, which is clearly not evidence. In her brief, defendant asserts she "is not in agreement that she committed this offense, but rather is arguing through presentation of the State's same evidence that it cannot prove the requisite mental state to apply to these facts." This does not serve as a justification for finding ineffective assistance of counsel for the reasons asserted, it is simply a rehashing of defendant's posttrial motion arguing the State failed to prove its case.

¶ 62 Both second degree murder and involuntary manslaughter require a person's actions to cause the death of another, which is diametrically opposed to the defense's theory in this case. It was sound trial strategy for counsel to refrain from offering instructions on lesser offenses when doing so would completely contradict the defense's theory at trial. See *Medina*, 221 Ill. 2d at 409, 851 N.E.2d at 1228 (stating "the decision whether to tender a lesser-included offense instruction partakes of, and is unavoidably intertwined with, strategic trial calculations, matters within the sphere of trial counsel"); *People v. Walton*, 378 Ill. App. 3d 580, 589, 880 N.E.2d 993, 1000-01 (2007) ("Counsel's decision to advance an 'all-or-nothing defense' has been recognized as a valid trial strategy[.]"). We find defendant's contention on appeal challenges her counsel's trial strategy, which does not implicate the deficient performance prong of the *Strickland* standard.

¶ 63 Defendant, however, argues trial counsel failed to inform, educate, and ultimately allow her the choice of requesting an instruction for either second degree murder or involuntary

manslaughter. Thus, defendant contends counsel's decision not to submit the instruction, even if it was a matter of trial strategy, was made without her input and constituted a constitutional violation pursuant to *Brocksmith* and *People v. Williams*, 275 Ill. App. 3d 242, 247, 655 N.E.2d 997, 1000 (1995), which found reversal would be warranted if the record showed the ultimate decision not to submit an instruction was made as a matter of trial strategy by trial counsel. However, we find defendant, even if she can establish counsel's performance was deficient, cannot establish prejudice because she would not have been entitled to the lesser-offense instructions had she asked for them.

¶ 64 A person commits the offense of second degree murder when she commits the offense of first degree murder and unreasonably believes at the time of the killing that the circumstances are such that, if they existed, they would justify or exonerate the killing. 720 ILCS 5/9-2(a)(2) (West 2010). Our supreme court has noted the mental states for murder and second degree murder are identical, and thus "second degree murder is not a lesser included offense of first degree murder." *People v. Jeffries*, 164 Ill. 2d 104, 122, 646 N.E.2d 587, 595 (1995). Instead, "second degree murder is more accurately described as a *lesser mitigated offense* of first degree murder." (Emphasis in original.) *Jeffries*, 164 Ill. 2d at 122, 646 N.E.2d at 595. Here, no evidence indicates circumstances, whether reasonable or unreasonable, existed that would have justified or exonerated defendant in the murder of Kianna.

¶ 65 "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his [or her] acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he [or she] performs them recklessly." 720 ILCS 5/9-3(a) (West 2010). "A person acts recklessly when he 'consciously disregards a substantial and unjustifiable risk that circumstances exist or

that a result will follow *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.' " *People v. Perry*, 2011 IL App (1st) 081228, ¶ 29, 962 N.E.2d 491 (quoting 720 ILCS 5/4-6 (West 2004)). "Involuntary manslaughter requires a less culpable mental state than first degree murder and is therefore a lesser-included offense of first degree murder." *People v. Robinson*, 232 Ill. 2d 98, 105, 902 N.E.2d 622, 626 (2008); see also *People v. Mefford*, 2015 IL App (4th) 130471, ¶ 48, 44 N.E.3d 616.

> "Although not dispositive, certain factors may suggest whether a defendant acted recklessly and whether an involuntary manslaughter instruction is appropriate. These include: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, and the severity of the victim's injuries; and (3) whether a defendant used his bare fists or a weapon, such as a gun or a knife. In addition, an involuntary manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that defendant did not act recklessly." *Perry*, 2011 IL App (1st) 081228, ¶ 30, 962 N.E.2d 501.

¶ 66 The facts in this case revealed Kianna was a four-year-old child and defendant was an adult woman. Dr. Dowling, the emergency medicine physician who treated Kianna, found the bleeding around her brain resulted from significant blunt-force trauma to her head and opined it would have taken tremendous force to cause her injuries. He also opined Kianna would

have to suffer greater force than she was capable of generating on her own, *i.e.*, being struck with a bat, hit by a car, or falling from a great height. Dr. Denton, the forensic pathologist, concluded Kianna's injuries were the result of "one catastrophic event." Further, he opined Kianna could not generate the speed or acceleration to inflict the injuries she suffered to the back of her head. Defendant's forensic expert Dr. Ophoven, however, opined Kianna's injury could have developed over time and was too advanced to be the result of a recent injury.

¶ 67 Nothing in the evidence suggested defendant's state of mind was reckless instead of knowing. Thus, any proposed instruction for involuntary manslaughter would have been rejected by the trial court because, as the court noted, "defendant denied any involvement whatsoever." As defendant cannot establish she was prejudiced by counsel's performance, her claim of ineffective assistance of counsel necessarily fails. Accordingly, we find the court's denial of her postconviction petition on this issue was not manifestly erroneous.

¶ 68 2. *Failure to Call Witnesses*

¶ 69 Defendant also argues trial counsel was ineffective for failing to call critical witnesses during her trial, including B.L., Analisa Greer, Patricia Johnson, and Cathy Anstrom.

¶ 70 "It is well established that decisions concerning whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of trial counsel." *People v. Banks*, 237 Ill. 2d 154, 215, 934 N.E.2d 435, 469 (2010). "As matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310, 688 N.E.2d 1156, 1162 (1997).

> "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a

> circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review. [Citations.] A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent. [Citation.] Counsel's strategic choices are virtually unchallengeable. Thus, the fact that another attorney might have pursued a difference strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel." *People v. Fuller*, 205 Ill. 2d 308, 330-31, 793 N.E.2d 526, 541-42 (2002).

"The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310, 688 N.E.2d at 1162.

a. B.L.

¶ 71 Defendant argues trial counsel was ineffective for failing to call B.L., who was born in March 2006 and who was present in the house when Kianna was found in the bathroom on May 3, 2011. At the May 2017 evidentiary hearing, B.L. testified she "was in the living room with the other kids" and her mother, who was packing a diaper bag. Kianna was in the bathroom. B.L. testified she did not hear any loud bangs, crashes, or thuds. When B.L. had to use the bathroom, defendant took her, and they found Kianna "laying on the floor." After defendant checked on Kianna, defendant called 9-1-1. B.L. had previously given a taped interview with the Child Advocacy Center, which could have been used to impeach her

testimony because she claimed she did not know what happened to Kianna and was actually in the car when the incident occurred.

¶ 72 Coghlan testified he spoke with B.L., but he did not recall exactly what they talked about. He decided not to call B.L. at trial because “she was a baby” and “it did not appear that she had any type of an independent knowledge” that would be helpful. When asked whether he and defendant discussed calling B.L., Coghlan stated “we didn’t want to get [B.L.] involved in the trial.” Defendant told Coghlan she would rather her children not have to testify.

¶ 73 Defendant failed to show trial counsel’s decision not to call B.L. was objectively unreasonable. At the evidentiary hearing, counsel provided multiple and legitimate reasons for not calling B.L., including her young age, her prior interview, and defendant’s wishes. The trial court found the decision not to call B.L. to testify was “the product of sound trial strategy” left to Coghlan and not defendant. The court’s finding was not manifestly erroneous.

¶ 74 b. Analisa Greer

¶ 75 In her postconviction petition, defendant argued trial counsel was ineffective for failing to call Greer to testify. Defendant stated Greer testified in a juvenile case prior to the murder trial and related firsthand observations of Kianna’s self-destructive behavior. The observations were memorialized in Greer’s report, which the trial court ruled was inadmissible due to hearsay. Defendant claimed Coghlan failed to call Greer during trial to testify about her personal observations and to lay a foundation for her report. Coghlan stated Greer did not testify because “she had left the State and we didn’t know where she was.” He did not subpoena Greer because he did not have her address.

¶ 76 At the evidentiary hearing, Greer testified she had conducted monthly visits of the Lamie home. She had frequent communication with defendant regarding Kianna “hurting

herself and having a lot of emotional issues." Greer mentioned there had been incidents of "head banging" and "cutting." She did not personally observe any of these incidents.

¶ 77 The trial court found defendant did not suffer prejudice from counsel's failure to call Greer. The court noted "Greer only would have been called to say she noticed no problems within the Lamie household during her home visits and to bolster the defendant's claims that Kianna was engaging in self-injurious behavior only as seen by the defendant and as reported to Greer." Further, along with her own testimony, defendant called Dr. Puga, who testified to admitting Kianna to a hospital based on defendant's reports of Kianna's self-destructive behavior. The court also found the testimony as to what defendant told Greer would not have been admissible.

¶ 78 Here, Greer's testimony about Kianna's self-destructive behavior would have been cumulative, which does not amount to ineffective assistance of counsel. See *People v. Jarnagan*, 154 Ill. App. 3d 187, 194, 506 N.E.2d 715, 721 (1987). Even had Greer testified, defendant cannot establish prejudice because the jury already heard the same claims from defendant herself, as well as additional testimony regarding Kianna's self-destructive behavior.

¶ 79 c. Cathy Anstrom and Patricia Johnson

¶ 80 In her postconviction petition, defendant argued trial counsel was ineffective for failing to call Anstrom and Johnson, both of whom allegedly observed Kianna strike her head "extremely hard on a church pew on or about May 1st, 2011." Defendant claimed these witnesses could have corroborated her testimony but Coghlan never interviewed them or called them at trial. However, defendant did not attach affidavits from Anstrom and Johnson to her petition. See 725 ILCS 5/122-2 (West 2016) (stating "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are

not attached"). Moreover, Anstrom and Johnson did not testify at the evidentiary hearing. Thus, we are left with nothing more than defendant's claims as to what their testimony would have consisted of. We find defendant has not established trial counsel was ineffective, and the trial court's denial of defendant's postconviction claim for ineffective assistance of counsel on this issue was not manifestly erroneous.

¶ 81 B. Aggravating Factors at Sentencing

¶ 82 Defendant argues the trial court relied on an improper aggravating factor at sentencing. We disagree.

¶ 83 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. On appeal, we ordinarily apply an abuse of discretion standard of review to a trial court's sentencing decision. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459; see also *People v. Chester*, 409 Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118-19 (2011) (stating the standard and noting a trial court has broad discretion in imposing a sentence). However, "[t]he question of whether the trial court relied on an improper factor in imposing the defendant's sentence presents a question of law, which we review *de novo*." *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18, 99 N.E.3d 590. The defendant has the burden "to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943, 904 N.E.2d 1022, 1028 (2009).

¶ 84 In the case *sub judice*, defendant argues it was improper for the trial court to consider in aggravation the text messages between her and her husband, Josh Lamie, including, in part, the following:

> [12:26 p.m.] "[D]: oh my goodness, i still don't have her

undercontrol. And very soon I'm going to have to cave because we have to leave.

[JL]: Beat her ass!

[D]: at this point I don't think that would be a good idea I'm angry and I wouldn't just hurt her feelings not a good idea at the moment I'm still good

[D]: but caving is going to make me even more mad

[12:40 p.m.] [D]: she just threw dog food everywhere!"

(Spelling and grammatical errors in original.)

Defendant placed the 9-1-1 call at 12:47 p.m.

¶ 85 In light of the record in this case, for defendant to claim "it was improper for the Court to rely upon the Defendant's husband's actions and words in aggravation against her," as she did in section II of her brief, is at least disingenuous, if not outright perfidious, and bears comment. When the text messages were first admitted, the trial court was careful to admonish the jury as follows:

"The text messages sent from Josh Lamie's cellular phone to Heather Lamie's cellular phone are not admitted for their truth, and you are not to use them as evidence against the defendant, Heather Lamie, in determining her guilt or innocence.

His texts are not admitted as substantive evidence; rather, they are only to be used by you for the limited purpose to show the affects those texts had upon the defendant, Heather Lamie, if any,

> only as it relates to show her state of mind at or about [*sic*] the text exchange took place."

¶ 86 Then, during the hearing on posttrial motions, the trial judge noted how he had "painstakingly reviewed those issues," how he had additional time before the trial began to do so, and "I was as careful as I could to sufficiently tailor the text message exchanges that were going in that morning [of trial]." In fact, during the pretrial conference on the first day of trial, the judge made an exhaustive record regarding the admissibility of the text messages, relying, in part on the holding in *People v. Thies*, 2011 IL App (2d) 091080, which was also mentioned by this court in the order entered on direct appeal. See *Lamie*, 2016 IL App (4th) 150131-U, ¶ 60. Referencing specifically the court's finding that an out-of-court statement offered to show the effect on the listener's mind or to explain the listener's subsequent action was not hearsay, the judge here went into great detail to explain why the texts from defendant's husband were being offered solely to show their effect on defendant, as well as to show her state of mind by her response. In fact, a similar statement by defendant's husband earlier in the conversation was excluded because defendant made no response, and the judge was careful to note how Josh Lamie's comments could not be used against her. The judge also explained how the timing of the statement was important as well, since the mortal injuries were inflicted shortly thereafter. The judge noted how her statements in response could be considered evidence she was becoming frustrated and angry with Kianna shortly before she is found unresponsive. Contrary to defendant's argument, at no point did the judge indicate he considered the husband's statements substantively, nor did he allow the jury to do so, since he did provide the limiting instruction when the texts were discussed.

¶ 87 This history is relevant in light of defendant's contention here the trial court somehow considered defendant's husband's statements, substantively, at sentencing as "illustrat[ing] that the trial court relied upon a belief that the Defendant committed this offense at the suggestion of her husband."

¶ 88 At the sentencing hearing, the trial court was careful to note the sequence of events transpiring the day of Kianna's death and how defendant was expressing her frustration with Kianna's behavior that day. In its first ruling on the admissibility of the texts, the court made it clear the texts were admitted, not as substantive evidence, but to show the state of mind of defendant shortly before the child was found unresponsive and mortally injured. More importantly, before this appeal, defendant had the benefit of the explanation by the trial court of its own comments at the hearing on defendant's motion to reconsider the sentence and second motion to reconsider the denial of postconviction relief, as well as the appellate court's analysis on the direct appeal.

¶ 89 During the hearing on the motion to reconsider, the trial judge expressly addressed the argument he had "improperly considered the specific text message from Josh Lamie, in terms of using that as aggravation." The judge noted how the appellate court agreed the comments were admissible to show defendant's state of mind and to provide context to her own statements. They were considered highly probative of defendant's mental state shortly before Kianna's death. The judge went on to acknowledge how, simply because the statements had been found properly admitted by the appellate court, that did not mean the judge was free to use them improperly later in the proceedings. The judge then addressed defendant's allegation directly:

> "But I am well aware of what the use of Josh Lamie's text was in terms of the trial, and as it relates also to the sentencing issue that his statement 'Beat her ass' was not admitted as substantive evidence, but to put in context her statements and her actions, the Court finds that without that, there is no context to what she said.
>
> So, the record will speak for itself regarding my comments, but the Court's use of his three words text with an exclamation point 'Beat her ass!' was used then, and the intent has always been, and it continues today, that that portion of his statement was only being used in context of the suggestion he made to her within 20 minutes or so of the Minor receiving injuries that ultimately were fatal, and within less than 20 minutes, from 13 or 14 minutes where the dog food is thrown, and the call is placed at 12:47.
>
> So, the Court, in terms of using that language, *I am not using his language against her,* but I have to mention that in the context of her response." (Emphases added.)

The judge went on to describe how defendant's response indicated there was the possibility she would take corporal action against Kianna at some point in time, and this comment was made shortly before she was found unresponsive. The judge continued: "I have explained hopefully well enough to the Appellate Court what my intent was, and the use of his statement in the context of looking at what she said in response and how to interpret that with the proximity of time. So whether—that's his suggestion. I am not going to hold his statement against her in

terms of his suggestion, but I can certainly look at what her response was to his statement. And that's how I treated that phrase 'Beat her ass!' "

¶ 90 Counsel on appeal are free to argue whatever issues they reasonably believe are supported by the record, and they are strongly encouraged to do so in the spirit of vigorous advocacy for their clients. However, when counsel completely ignore the actual record, as well as expressly contrary statements of the trial court, in order to claim error by the court, they should be just as strongly discouraged from doing so.

¶ 91 III. CONCLUSION

¶ 92 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 93 Affirmed.