

No. 1-15-3555

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 13 CR 0990901
)	
)	
RODRIGO RODRIGUEZ,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Griffin and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was proven guilty of first degree murder beyond a reasonable doubt. The trial court did not err and the prosecutor did not engage in misconduct. Defendant’s sentence is not excessive. Cause remanded to trial court for defendant to raise issues with his mittimus.

¶ 2 Following a bench trial, defendant, Rodrigo Rodriguez, was convicted of first degree murder and was sentenced to a term of 85 years’ imprisonment. Defendant now appeals and argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court improperly relied on evidence from inadmissible confessions of co-defendant, Angela Petrov, in

finding him guilty; (3) the prosecutor engaged in misconduct where she argued in rebuttal that the victim's death was caused by torture akin to waterboarding; (4) his 85-year sentence is excessive; and (5) this court should order a correction of the written sentencing order to reflect only one conviction and sentence. For the following reasons, we affirm but remand to the trial court for defendant to raise the issue with his mittimus.

¶ 3

BACKGROUND

¶ 4 Defendant was tried in a simultaneous but separate bench trial with co-defendant Angela Petrov, for the murder of their five-month-old daughter Angelina Rodriguez. Both were found guilty of first degree murder. Defendant was sentenced to an extended term sentence of 85 years' imprisonment.

¶ 5 At trial, the State played the audiotape of a 911 call received by 911 operator Charles Reed on April 11, 2013, at 12:21 p.m. On the tape, a woman stated that her five-month old baby "seems to be breathing but she's not crying or moving around, she's like really stiff right now," "her arms are stuck straight and her eyes are open" and "looking straight ahead." The woman stated that she was scared because "this is not normal." An advanced life support (ALS) ambulance was dispatched to 2555 West Fitch Avenue, Apartment 109, in Chicago.

¶ 6 Paramedic Barbara Enos testified that she and her partner arrived at the above address at 12:26 p.m. where she encountered defendant at the door. He directed her inside to the living room. Defendant told her that he had just gotten home from work and "found her like that" and called 911. Paramedic Enos entered the residence and saw the baby, Angelina, lying on the couch in the living room. The baby's color was "ashen" and her skin was "cool" and she was not responsive in any way. The baby's arms "were out stiff" and her legs "were straight and her feet were pointed down." Enos explained that this is called posturing and suggests possible brain

damage. Defendant did not relate that the baby had experienced any trauma prior to finding her in this condition.

¶ 7 Dr. Halleh Akbarnia testified as an expert in the field of emergency care, advanced life support, advanced cardiac life support, basic life support and pediatric advanced life support. She treated Angelina when she arrived in St. Francis hospital in Evanston, Illinois.

¶ 8 When Angelina arrived at St. Francis, she was in “significant distress,” she was “posturing,” had a “dusky” look about her and her pupils were constricted and non-reactive. The paramedics were aiding her respiration with a valve mask which delivers 100 percent oxygen because they had found her with a “heart rate in the 60s” and with very low oxygen. A low heart rate is usually due to lack of oxygen to the brain. Non-reactive pupils suggest a head injury or lack of oxygen. “Posturing” means the arms and legs are fully extended and rigid. There were no external signs of injury or trauma. Dr. Akbarnia was concerned that Angelina had suffered some sort of head injury, lack of oxygen, or medication overdose. She was also concerned about seizure activity.

¶ 9 After Angelina was placed on a ventilator and stabilized, Dr. Akbarnia spoke with defendant who was “visibly upset.” Defendant told her that they had taken Angelina to see a physician a week prior for upper respiratory symptoms and the doctor said that everything was fine so they brought her home. Defendant was “angry” and “obviously upset” that they had taken her there. Defendant said that Angelina was normal and healthy the night before and when he got home, Petrov was putting water on Angelina and blowing on her, so they decided to call 911. Defendant denied that Angelina suffered any trauma.

¶ 10 Scans showed that Angelina was suffering from global anoxic injury which is “lack of differentiation in the gray/white matter,” and only occurs when “there’s a lack of oxygen to the

brain over an extended period of time.” She also suffered from cerebral edema, which is swelling in the brain. Dr. Akbarnia stated that it was impossible to determine when and for how long Angelina had been without oxygen but it was “not in the very recent past, because these kinds of symptoms don’t happen within, like, a couple of minutes.” She stated that the oxygen deprivation would have occurred “at least 3 or 4 hours prior” “but it could have been before that, too.” The injuries to Angelina’s brain were not caused by trauma or infection. She opined that the injuries were consistent with “somebody placing their hands over the victim’s mouth and nose several times, for several minutes” or by anything else that “would have shut off oxygen to the baby.” Angelina was transferred to the pediatric intensive care unit at Ann and Robert Lurie Children’s Hospital (Lurie).

¶ 11 Social worker Sheila Hickey testified that just before 3 p.m. on April 11, 2013, she was with Petrov in the emergency room at Lurie where Angelina was being treated. Defendant was not present in the emergency room. Angelina was transferred to the pediatric intensive care unit (PICU).

¶ 12 Kalyn Mahoney, a pediatric nurse practitioner at Lurie, testified that after Angelina was admitted to the PICU, Mahoney met with Petrov in order to “get an idea of what brought the child in.”

¶ 13 Julie Rakay, also a social worker at Lurie, testified that her partner, Sheila Hickey, turned the case over to her because she is part of the protective services team and she was to perform a child abuse assessment. Rakay learned that Angelina had swelling in her brain and was unresponsive. She was to interview the parents separately. She met with Petrov first. Afterwards, at about 6:45 p.m., Rakay was ready to interview defendant. Defendant “asked if he could have some time” before she interviewed him. She then saw Petrov and defendant

interacting. After denying several more requests for interviews, defendant finally agreed to be interviewed at about 9 p.m.

¶ 14 Rakay stated that defendant was irritable during the interview and gave “[s]hort, vague” answers. Defendant answered many questions with “I don’t know” or “I don’t recall” and often changed the subject. Defendant gave Rakay an incorrect birthday for himself. He told Rakay that he worked in labor and construction but gave her no details about his employment.

Defendant also told Rakay that he lived with his mother at 4647 West Addison and not with Petrov and his children, Angelina, his two-year-old son Zavian, and his six-year-old step-son Amari, at the apartment on Fitch. Defendant told Rakay that he only occasionally visited Angelina and had never taken care of her and then at another point told Rakay that he was there every day to spend time with her.

¶ 15 Defendant told Rakay that Angelina was a happy baby who had met her developmental milestones. Defendant was present in the Fitch apartment on the evening of April 10th, but left to go to work. Angelina was fine and in good health at that time. Defendant returned to the apartment the following morning at 8 a.m. He was tired from being up all night and went directly to sleep.

¶ 16 Defendant stated that he woke up at 11 a.m. and saw that Angelina was not responsive, although he could not say where she was at that time. When he found her unresponsive, he called 911. He and Petrov had made attempts to revive Angelina with cold water, a warm bath and CPR.

¶ 17 Rakay testified that defendant often changed the subject during questioning and could provide no details about Angelina’s social or developmental history or the history of the present illness. Defendant denied that Angelina had fallen, been dropped, or had any other trauma or

injury. When asked about Angelina's injury, defendant stated that he "wondered if the hospital that she got transferred from had given her some medication." Following her interview with defendant, Rakay called the Department of Children and Family Services (DCFS) and the Chicago police responded.

¶ 18 Dr. Emalee Flaherty, chief of the division of child abuse pediatrics at Lurie, and the medical director of the multidisciplinary pediatric education and evaluation consortium, testified as an expert in the field of medicine and child abuse. After Angelina was transferred to the Lurie PICU, she was treated by Dr. Kelly Liker, a fellow in child abuse pediatrics, who was being supervised by Dr. Flaherty.

¶ 19 Dr. Flaherty personally examined Angelina. Dr. Flaherty also reviewed all of the medical records from St. Francis and Lurie, lab tests, radiology reports, paramedic reports, reports from two primary care physicians, DCFS notes and the medical examiner's report. She also spoke with Dr. Liker, who had interviewed defendant and spoke with Angelina's primary care physician. Dr. Flaherty also spoke with the social workers who interviewed defendant.

¶ 20 Angelina was transferred to Lurie and treated in the PICU because she was in "severe neurological distress." In the PICU, Angelina was unresponsive, her pupils were constricted, and she was on a ventilator that was breathing for her. She had no visible signs of injuries.

¶ 21 CT scans showed that Angelina has severe, global, hypoxic ischemic brain injuries and cerebral edema. Because of the swelling, the ridges of her brain had disappeared, the ventricles of her brain were barely visible and the two halves of her brain were squeezed closely together. Her brain had begun to herniate down her spinal cord. These injuries could only be caused by lack of oxygen to the body. Continuous testing revealed that Angelina had no brain activity and that she was only being supported by machines. She was pronounced brain dead after she was

found to have lost corneal, gag and cough reflexes. She was pronounced dead on April 15, 2013, at 1:36 p.m.

¶ 22 Dr. Flaherty opined that Angelina's injuries were the result of child abuse. Neither of Angelina's parents reported or offered any illness or injury that would account for Angelina's condition. Dr. Flaherty also opined that Angelina was medically neglected due to the "significant delay in seeking care" after she was found unresponsive at 11 a.m. A later report that a hand was placed over her mouth and nose several times for up to several minutes at 3 a.m. would explain the "terrible injuries that Angelina suffered."

¶ 23 Dr. Flaherty further opined that based on her injuries, Angelina would not have been fine at 7 a.m. on April 11th because she suffered significant oxygen deprivation. Dr. Flaherty stated that, "[s]he might not have been as impaired as when she was presented to St. Francis, but she would not have been normal." Dr. Flaherty stated that she could not determine at exactly what time Angelina had been deprived of oxygen. She confirmed that "smothering would certainly cause these injuries," but stated that they could also be caused by drowning, of which there was no evidence in this case.

¶ 24 Cook County deputy medical examiner Lauren Woertz testified as an expert in the field of forensic pathology. Dr. Woertz conducted Angelina's autopsy and found no external injuries. Angelina's internal examination showed cerebral edema, anoxic encephalopathy, and asphyxiation secondary to suffocation. In her expert opinion, Dr. Woertz determined that the cause of death was asphyxiation due to suffocation and the manner of death was homicide.

¶ 25 Chicago police detective Mary Nanninga testified that she spoke with Petrov on April 12, 2013, at 12:40 a.m. in the Lurie PICU. Nanninga had learned from her partners, Detectives Kennedy and Diaz, that Angelina had suffered severe brain swelling due to a lack of oxygen for

a prolonged period of time. At 1:30 p.m. on that same day, Detective Nanninga spoke with Dr. Liker and learned that Angelina's injuries were non-accidental. Thereafter, defendant and co-defendant were placed under arrest and taken to the police station.

¶ 26 Detective Michael Kennedy testified that on April 12, 2013, at 12:40 a.m., he spoke to defendant in a conference room in the Lurie PICU. Defendant's demeanor during their conversation was "evasive" and "hostile at times." Defendant told Detective Kennedy that he slept at his home at 4647 West Addison the night of April 10, 2013. Defendant stated that he woke up early and took the bus to 2555 West Fitch, and when he arrived at about 7 a.m., he went right to bed. He did not see any of the children. He woke up a short time later to Petrov screaming. She was standing over the pack and play, a portable crib, holding Angelina. Defendant noticed that the baby did not look right and saw Petrov go to the bathroom and splash water on Angelina's face. Defendant could not recall any more details at that point and stated that he "needed to talk to [co-defendant] more, to recall any further details." The interview ended.

¶ 27 Detective Kennedy then spoke with Dr. Liker who informed him that Angelina's injuries were not accidental. Defendant was arrested at 3:30 p.m. and taken to Area North headquarters. Detectives Kennedy and Nanninga interviewed defendant at 5:15 p.m. and defendant waived his Miranda rights. Defendant stated that he recalled additional information about what happened. He said that on the night of April 10th, he was looking for work in the area of Milwaukee and Pulaski. He was unable to find any so he went home to sleep at 4647 West Addison, where he lived with his mother. The next morning, he took a bus to the Fitch apartment and went to bed. He did not see any of the children but woke up a short time later to the sound of Petrov giving Angelina a bottle. He went back to sleep and woke up again at 11 a.m. to the sound of Petrov

screaming. He saw Petrov holding Angelina over the pack and play and then watched her go into the bathroom and splash water on Angelina's face. Defendant said that Angelina was "stiff" with a "red and blue face." Defendant told Petrov to put the baby on the bed. Defendant did not hear her breathing so he began chest compressions. After he stopped, he heard a "slight heart beat." He told Petrov to call 911 and waited for the ambulance to arrive. When Detective Kennedy confronted defendant with the delay in calling the ambulance, defendant stated that he could not recall any more details.

¶ 28 After speaking with Petrov's family members and other detectives, Detective Kennedy, along with Detective Green, interviewed defendant again. The detectives confronted defendant with information they learned from Petrov's family and from Petrov. At that time, defendant admitted that he was at the Fitch apartment on the evening of April 10, 2013, and that he did actually live there. Defendant stated that he and co-defendant were drinking alcohol after they put the children to sleep between 8:30 p.m. and 9:00 p.m. Defendant woke up at 11 a.m. on April 11, 2013, to Petrov holding the baby, who was stiff, over the pack and play. Defendant gave the same account about what happened after that as he had give in his prior interview.

¶ 29 Detectives Kennedy and Green interviewed defendant again in the early morning of April 13, 2013, and confronted defendant with additional information they had received. Defendant told the detectives that he was worried about the potential charges against him, "if it was a child abuse case, he could beat it; and if he didn't, he would only have to sit for about six years." Defendant told detectives that "if Angelina were to die, he would be looking at murder" and that he could not sit in jail for 40 years. Defendant expressed concern for the other two children and stated that "he needed to be truthful about what happened."

¶ 30 Defendant then told the detectives that he and Petrov started drinking at about 4 p.m. on April 10, 2013. All three kids were put to bed between 8:30 p.m. and 9 p.m. In the early morning hours of April 11, 2013, he wanted to have sex with Petrov when Angelina started to cry. Petrov picked the baby up, gave her a bottle and changed her diaper. Angelina continued to cry even as Petrov cradled her while sitting on the bed. Defendant then took Angelina from Petrov, put her on the bed and “cupped his hand and put it over Angelina’s mouth for approximately 30 seconds.” Angelina’s body went limp. Defendant demonstrated for the detectives how he cupped his hand and placed it across his mouth blocking the nostrils. He stated that he gripped Angelina’s mouth and nose with a “tight” grip. Defendant stated that Angelina was gasping for air and began to cry even louder. Defendant then placed his hand over Angelina’s mouth again and held it there for another 30 seconds. Defendant acknowledged that Angelina could not breathe and that her head was “thrashing back and forth.” Her body eventually went limp. Defendant then put Angelina back in her pack and play and had sex with Petrov. Defendant then fell asleep.

¶ 31 Petrov got up early to get one of the children to school while defendant remained in bed. Petrov came back to bed and they both went back to sleep. He woke up at 11 a.m. to Petrov screaming and saw her take Angelina to the bathroom and splash water on her face. Petrov was yelling that the baby “wasn’t right and wasn’t breathing.” Defendant told Petrov to put Angelina on the bed and began chest compressions. Petrov called 911 and defendant went outside to meet the ambulance.

¶ 32 When he was asked why he lied earlier, defendant said that “he was scared and wasn’t sure if Angelina was to live, he would be looking at a child abuse case; but if she were to die, he would be looking at murder.” He also stated that while they were at St. Francis, he told Petrov

that “they needed to stick to a similar story, so they could both avoid going to jail.” The story they agreed on was the story that defendant told detectives about not living at the Fitch apartment and coming over in the morning.

¶ 33 Shortly after this interview, ASA Groebner interviewed defendant with Detectives Kennedy and Green. Defendant gave substantially the same account he had given in his previous interview where he stated that he wanted to have sex with Petrov but Angelina would not stop crying so he took Angelina from Petrov and he smothered Angelina twice for 30 seconds by placing his hand over her mouth and nose, cutting off her oxygen supply. Defendant declined the detectives request to memorialize his statement stating he “couldn’t trick on himself like that.”

¶ 34 The State entered Angelina’s birth certificate into evidence showing that her date of birth was November 8, 2012, along with other exhibits. The State rested. Defendant’s motion for a directed verdict was denied and defendant rested his case without presenting any evidence.

¶ 35 After finding defendant guilty of murdering his child, the court sentenced defendant to 85 years’ imprisonment.

¶ 36 ANALYSIS

¶ 37 Defendant argues that he was not proven guilty of murdering Angelina beyond a reasonable doubt because neither the medical testimony nor his confession established that his actions caused Angelina’s death.

¶ 38 When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not

reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Rather, we "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011).

¶ 39 Defendant has not challenged his confession in any way. Defendant does not dispute that the evidence established that he smothered Angelina twice, twice depriving her of oxygen in the hours before she was discovered unresponsive due to a lack of oxygen. Defendant does not dispute that Angelina's death was caused by a lack of oxygen to her body. Defendant merely argues that the State failed to prove causation because there are other means by which Angelina could have been deprived of oxygen in the time frame after defendant smothered her and before she was found unresponsive at 11 a.m..

¶ 40 Defendant's reliance on *People v. Ehlert*, 211 Ill. 2d 192 (2004), to support his position that the medical testimony in this case cannot, on its own, establish causation is misplaced. In *Ehlert*, the defendant was convicted of the first-degree murder of her newborn child. *Id.* at 194. Dr. Kalelkar performed the autopsy, found no unusual cause of death, and later told a police officer that she could not tell for sure whether the baby was born alive so she left blank the space on the death certificate where she would normally fill in the manner of death and instructed the police to investigate further. *Id.* at 199. After the police advised Dr. Kalelkar of the results of their investigation, which included witnesses' statements, she concluded that the baby had been

born alive and then filled in the manner of death on the certificate as “homicide.” *Id.* at 208. At trial, however, Dr. Kalelkar testified that the manner of death could have been natural causes. *Id.* at 209. The appellate court reversed the defendant’s conviction and our supreme court affirmed, finding that the State failed to prove that the child was killed by the defendant beyond a reasonable doubt. *Id.* at 209-10.

¶ 41 *Ehlert* is inapposite because the court’s decision in *Ehlert* was based on the fact that there was no evidence to suggest that the child was killed by the defendant. *Id.* at 209 (discussing the lack of evidentiary support for drowning, suffocation, or ruling out natural causes). The *Ehlert* jury was left to speculate as to the cause of death. *Id.* Here, Dr. Woertz testified unequivocally that Angelina’s internal examination showed cerebral edema, anoxic encephalopathy, and asphyxiation secondary to suffocation. In her expert opinion, Dr. Woertz determined that Angelina’s cause of death was asphyxiation due to suffocation and the manner of death was homicide. Dr. Flaherty also opined that Angelina’s injuries were the result of child abuse and that defendant’s act of placing his hands over Angelina’s mouth and nose two times for 30 seconds would explain the extent of her injuries.

¶ 42 There is no dispute that the scientific evidence supports the finding that Angelina’s injuries and ultimate death were caused by a lack of oxygen to her body. Both Dr. Akbarnia and Dr. Flaherty testified that Angelina suffered from a global anoxic injury caused by lack of oxygen and that there were no visible signs of trauma. Dr. Woertz, the medical examiner, testified that in her expert opinion, Angelina died due to asphyxiation, which is a lack of oxygen.

¶ 43 The direct medical evidence in this case established that smothering, or placing one’s hands over the victim’s mouth and nose several times can cause lack of oxygen to the body.

Both Dr. Akbarnia and Dr. Flaherty testified that defendant's admitted actions, placing his hand over Angelina's mouth and nose several times, would certainly explain Angelina's injuries.

¶ 44 The evidence further established that Angelina was smothered by defendant in the early morning hours of April 11, 2013, which was consistent with the progression of Angelina's injuries. Dr. Akbarnia testified that she could not determine the exact time that Angelina was deprived of oxygen. However, she could say based on the symptoms Angelina presented with that it was most certainly not in the "recent past, because these types of symptoms do not happen within, like, a couple of minutes." Dr. Akbarnia opined that Angelina would have been deprived of oxygen hours before, given the amount of swelling in Angelina's brain that she observed. Dr. Akbarnia agreed that the injuries could have happened at at least 7 a.m. on April 11, 2013, but could have happened before that. Dr. Flaherty also stated that she could not determine the exact time that Angelina was deprived of oxygen, but based on Angelina's symptoms, it could not have happened after 7 a.m. Dr. Flaherty based this opinion on the fact that Angelina suffered severe injury to her brain and would already be demonstrating some of the effects of the oxygen deprivation at 7 a.m., although she would not have been as impaired. Dr. Flaherty opined that Angelina being smothered at 3 a.m. would explain the extent of her injuries.

¶ 45 Although defendant states that there were other circumstances that could have caused Angelina to suffer a lack of oxygen during the relevant timeframe, there was no evidence that Angelina suffered from any illness, injury or drowning. Defendant offered no explanation to medical personnel or police, other than his act of smothering Angelina, which would have explained how Angelina presented with symptoms of severe oxygen deprivation. Dr. Flaherty testified that there was no evidence to support that Angelina suffered any illness, injury or drowning. Dr. Flaherty also ruled out the possibility that Angelina had been put to sleep face

down or “any SIDS sort of situation” because Angelina was old enough to be put to sleep face down because she could roll over. Dr. Flaherty, based on her expert opinion and with a reasonable degree of medical certainty, determined that Angelina’s injuries were not accidental but were due to child abuse. Angelina could not have injured herself and there was no explanation to support other circumstances that would explain the injuries suffered.

¶ 46 In addition to all of the medical evidence to support his conviction, defendant repeatedly lied to those he spoke with about where he lived, his whereabouts and what he knew about Angelina’s injuries, which demonstrates his consciousness of guilt. Defendant was proven guilty beyond a reasonable doubt of the murder of Angelina. We will not retry the defendant or substitute our judgment for that of the trier of fact. *Jackson*, 232 Ill. 2d at 281. Viewing the evidence in the light most favorable to the State, it is clear that the evidence overwhelmingly supports defendant’s conviction for first degree murder. Defendant admitted to smothering Angelina twice after she awoke crying as he was trying to have sex with Petrov. Angelina died as a result of the lack of oxygen she suffered due to defendant’s actions.

¶ 47 Defendant argues that the trial court improperly relied on evidence from the inadmissible confessions of Petrov to find him guilty. Defendant urges that despite the severance, the court made two statements in finding defendant guilty that expressly relied on facts only found in Petrov’s confessions. Specifically, defendant complains that the court stated that the court relied on evidence that: (1) defendant “stifl[ed] Angelina in order to engage in sexual intercourse; and (2) that defendant placed his hand over Angelina’s mouth and nose three times for 30 seconds rather than two times.

¶ 48 The State argues that defendant has forfeited these issues by failing to object at trial and to raise the issues with specificity in his posttrial motion. We agree. *People v. Enoch*, 122 Ill. 2d

176, 186 (1988) (forfeiture occurs when a defendant fails to object at trial and fails to include an issue in his motion for a new trial). Defendant urges us to review this issue for plain error.

¶ 49 The plain-error doctrine permits a court of review to consider error that has been forfeited when either,

“(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, ‘regardless of the strength of the evidence.’ (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant.” *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

However, we must first determine whether an error actually occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 50 We find that no error occurred here. Defendant’s motive for suffocating Angelina is irrelevant. However, the court is allowed to make reasonable inferences from the evidence presented (*People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992) (the trier of fact to resolve is allowed to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts), and did not have to consider Petrov’s statements to reasonably infer that defendant smothered Angelina because he wanted to have sex with Petrov.

¶ 51 Defendant admitted that he, in the early morning hours of April 11, 2013, wanted to have sex with Petrov when Angelina started to cry. Petrov picked the baby up, gave her a bottle and changed her diaper. Angelina continued to cry even as Petrov cradled her while sitting on the bed. Defendant then took Angelina from Petrov, put her on the bed and “cupped his hand and put it over Angelina’s mouth for approximately 30 seconds.” Angelina’s body went limp. Defendant stated that Angelina was gasping for air and began to cry even louder. Defendant then placed his hand over Angelina’s mouth again and held it there for another 30 seconds. He demonstrated how he cupped his hand over her mouth and cut off the air supply to her nostrils. Defendant acknowledged that Angelina could not breathe and that her head was “thrashing back and forth.” Her body eventually went limp. Defendant then put Angelina back in her pack and play, had sex with Petrov and fell asleep. Based on the medical evidence and the expert testimony, as well as defendant’s confession to the police, it was reasonable for the trial court to infer that defendant smothered Angelina because he wanted to have sex with Petrov and Angelina was thwarting his efforts. There is no evidence in the record to support defendant’s claim that the trial court improperly relied on Petrov’s statements in finding defendant guilty.

¶ 52 Although Petrov did state that defendant smothered Angelina three times, rather than the two times that defendant admitted to, the court’s statement about defendant smothering Angelina three times does not necessarily establish that the court improperly relied on Petrov’s confession and therefore committed error. We presume that the trial court, in a bench trial, considered all competent evidence, and only competent evidence. *People v. Simon*, 2011 IL App (1st) 091197,

¶ 91. Defendant admitted to suffocating Angelina twice by putting his hand over her nose and mouth two times, cutting off her air supply for 30 seconds each. Whether defendant smothered Angelina two times or three times is immaterial where the total oxygen deprivation admittedly

caused by defendant was enough to cause Angelina's death in the opinion of the medical experts and the pathologist.

¶ 53 Even if the court's statement amount to error, the error does not amount to plain error.

As discussed, the medical evidence, in addition to the statements made by defendant, along with the expert testimony, against defendant was overwhelming. In addition, the court's comments do not amount to plain error under the fundamental fairness prong. To meet that test, the error must be "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. The claimed error here does not rise to that level.

¶ 54 Defendant also argues that the prosecutor committed blatant misconduct where she argued in rebuttal that Angelina's death was caused by torture "akin to waterboarding," without evidentiary support and contrary to the law. Defendant acknowledges that he has forfeited this issue by failing to object at trial and failing to include this issue in his motion for a new trial. *Enoch*, 122 Ill. 2d at 186. However, defendant urges us to review this issue for plain error.

¶ 55 The plain-error doctrine permits a court of review to consider error that has been forfeited when either, "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 187. We must first determine whether an error actually occurred. *Lewis*, 234 Ill. 2d at 43.

¶ 56 Courts allow prosecutors great latitude in making closing arguments. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987). A prosecutor may comment on the evidence and all reasonable inferences from the evidence. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Even if the statement is found to be improper, it

will be considered prejudicial only where defendant can show that the jury would have reached a contrary verdict had the improper statements not been made. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 38.

¶ 57 There is a conflict regarding the correct standard for reviewing a prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), our supreme court suggested that we should review this issue *de novo*. In *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), however, the court suggested that we should review this issue for an abuse of discretion. We need not take a position in this case, as defendant's claim fails under either standard.

¶ 58 The prosecutor's remark that defendant's act of suffocating his five-month-old daughter was similar to or "akin to torture or waterboarding" was not only a proper comment on the evidence, but a permissible analogy. We note that the State charged in count 3 of the indictment that it was seeking an extended term sentence on the basis that defendant's actions were *inter alia* brutal and heinous indicative of wanton cruelty. Brutal or heinous behavior "generally involves prolonged pain, torture, or premeditation." *People v. Nitz*, 219 Ill. 2d 400, 418 (2006). See also *People v. Patterson*, 192 Ill. 2d 93, 145 (2000) (torture includes the use of a typewriter cover to simulate suffocation); see also www.britannica.com/topic/waterboarding, last visited 9/12/19 ("Waterboarding, also called water torture, simulated drowning, interrupted drowning, and controlled drowning, method of torture in which water is poured into the nose and mouth of a victim who lies on his back on an inclined platform, with his feet above his head. As the victim's sinus cavities and mouth fill with water, his gag reflex causes him to expel air from his lungs, leaving him unable to exhale and unable to inhale without aspirating water.").

¶ 59 In addition, this was a bench trial. There is little likelihood that the trial court was

impermissibly swayed by this comment. The trial court, as the trier of fact, is presumed to follow the law and we are not persuaded that the experienced trial judge was prejudicially influenced by this isolated statement.

¶ 60 Even if the prosecutor's comment could be considered error, no plain error occurred. As discussed, the evidence against defendant was overwhelming. In addition, the prosecutor's comments do not amount to plain error under the fundamental fairness prong. To meet that test, the error must be "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. The error here does not rise to that level.

¶ 61 Defendant argues that the trial court erred in imposing an 85-year sentence where defendant was not extended term eligible. Specifically, he claims that even though the aggravating factor of Angelina's age, being under 12, was established, the trial court only relied on the aggravating factor of brutal or heinous behavior indicative of wanton cruelty, which he argues was not established.

¶ 62 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). The potential for rehabilitation need not be given any greater weight

than the seriousness of the offense. *People v. Sharpe*, 216 Ill. 2d 481, 525 (2005). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 63 Count 3 of the indictment indicated that the State was seeking an extended term sentence based on two aggravating factors: that the victim was under the age of 12 and that Angelina's death resulted from exceptionally brutal and heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-3.2(b)(2), (3)(i) (West 2016). Defendant claims that the trial judge imposed an extended term sentence based solely on the fact that his actions were wanton cruelty.

¶ 64 There is no question that the trial court did not abuse its discretion in imposing an extended term sentence based on Angelina's age. The evidence established beyond a reasonable doubt that Angelina was under the age of 12 when she was murdered by defendant. The State admitted Angelina's birth certificate into evidence showing that she was born November 8, 2012. Even without considering all of the testimony regarding Angelina's age, her birth certificate alone supports defendant's extended term sentence. "A trial court need find only a single statutory factor in aggravation to impose an extended sentence." *People v. Hopkins*, 201 Ill. 2d 26, 39 (2002). Whether the court properly found that the crime was brutal and heinous is immaterial. *People v. Hopkins*, 201 Ill. 2d 26, 39 (2002). "If the sentence is justified by the record, the absence of specific findings is not fatal." *People v. Pugh*, 325 Ill. App. 3d 336, 347 (2001). Because the single factor that the victim was under the age of 12 was a sufficient basis to impose an extended term sentence, we cannot find an abuse of discretion.

¶ 65 As we have already determined that defendant’s argument regarding the prosecutor’s comment regarding torture and water boarding during rebuttal argument is without merit, we need not consider this argument as it relates to defendant’s sentencing.

¶ 66 Finally, defendant argues that the mittimus should be corrected to reflect only a conviction and sentence on count 3 for first degree murder. Defendant concedes that he did not raise this issue in the trial court.

¶ 67 This issue is governed by Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019), which was adopted after defendant filed his brief. Rule 472 sets forth the procedure in criminal cases for correcting certain sentencing errors, including “[e]rrors in the imposition or calculation of fines, fees, and assessments or costs,” “[e]rrors in the application of per diem credit against fines,” “[e]rrors in the calculation of presentence custody credit,” and “[c]lerical errors in the written sentencing order.” Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019). The rule provides that, in criminal cases, “the circuit court retains jurisdiction to correct” the enumerated errors “at any time following judgment ***, including during the pendency of an appeal.” Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019). Additionally, “[n]o appeal may be taken” on the ground of any of the sentencing errors enumerated in the rule “unless such alleged error has first been raised in the circuit court.” Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019).

¶ 68 More recently, our supreme court amended Rule 472 by adding paragraph (e) (Ill. S. Ct. R. 472(e) (eff. May 17, 2019)), which provides: “In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.”

¶ 69 Defendant’s appeal was pending on March 1, 2019. Thus, pursuant to the provisions of

Rule 472, we remand to allow defendant the opportunity to file a motion to correct any errors contained in the mittimus.

¶ 70

CONCLUSION

¶ 71 In light of the foregoing, we affirm defendant's conviction and sentence but remand to the trial court to allow defendant the opportunity to file a motion to correct the mittimus.

¶ 72 Affirmed; remanded for consideration of defendant's motion to correct the mittimus.