2014 IL App (4th) 130852-U

NO. 4-13-0852

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 16, 2014
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Edgar County |
| TERRY R. PAYTON, | ) | No. 11CF96 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Steven L. Garst, |
| | ) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, concluding (1) the automatic-transfer provision in the Juvenile Court Act did not violate defendant's constitutional rights despite his conviction for a lesser offense, (2) the trial court did not abuse its discretion in limiting the testimony from defendant's expert witness, and (3) the court's consideration of the victim's death as a factor in aggravation was so insignificant that it did not impact defendant's sentence.

¶ 2 In June 2011, the State charged defendant, Terry R. Payton, with first-degree murder after he fatally stabbed his mother, Kathie Payton. At the time of the offense, defendant was a 16-year-old juvenile, but the State transferred his case to adult court under the automatic-transfer provision of the Juvenile Court Act of 1987 (Juvenile Act) (705 ILCS 405/5-805 (West 2010)). During the February 2013 trial, defendant introduced evidence that he acted in self-defense because he suffered from battered-child syndrome. Following the trial, a jury convicted

defendant of second degree murder. In June 2013, the trial court sentenced defendant to eight years' imprisonment.

¶ 3 Defendant appeals, asserting (1) the automatic-transfer provision of the Juvenile Act violates his constitutional rights under the eighth and fourteenth amendments, particularly since he was ultimately convicted of an offense subject to discretionary transfer; (2) the trial court improperly limited the testimony of his expert witness; and (3) the court improperly considered the victim's death as a factor in aggravation. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On June 27, 2011, the State charged defendant as an adult with two counts of first degree murder pursuant to section 9-1(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(a)(2) (West 2010)), alleging defendant stabbed his mother, Kathie Payton, with a knife, knowing that such an act created a strong probability of (1) death (count I) or (2) great bodily harm (count II), thereby causing her death.

¶ 6 A. The Trial

¶ 7 On February 19, 2013, defendant's jury trial commenced. After selecting a jury but prior to the presentation of evidence, the trial court held a hearing on the State's motion seeking to bar the expert testimony of Dr. Marilyn Frey. Dr. Frey had been hired by defendant to testify that he suffered from battered-child syndrome. The State asserted Dr. Frey's conclusions and opinions were not based on any accepted principles within the field of psychology, and her opinion as to whether defendant acted in self-defense invaded the province of the jury to decide factual issues and the credibility of witnesses. The court held a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and determined Dr. Frey could testify that defendant suffered from battered-child syndrome.

¶ 8 The parties presented the following evidence at trial. Defendant and Kathie resided together in a Paris, Illinois, apartment. On June 23, 2011, defendant entered the Paris police department and told Officer Mike Henness he had stabbed his mother following a physical altercation. Upon further investigation of defendant's claim, officers discovered Kathie, deceased, lying face down on her bedroom floor.

¶ 9 1. *Defendant's Statements and Testimony*

¶ 10 When questioned by police that evening, defendant explained that he and Kathie had gotten into an argument earlier in the day. Kathie, an alcoholic, had been drinking heavily. Kathie first yelled at defendant for leaving the door unlocked the night before. A few minutes later she raised an old accusation that defendant had stolen money from her. She became so irate that she forced defendant to call the police on himself, despite his protestations of innocence. However, the police did not pursue the complaint.

¶ 11 Following the call to police, defendant said the argument escalated, and Kathie began throwing a box of garbage bags, saying she was either going to throw around the garbage bags or defendant. Defendant then grabbed Kathie's bottle of Jim Beam liquor and poured the contents down the drain. As he did so, defendant said Kathie clawed at his arms and attempted to bite him. At that point, defendant said Kathie cornered him in the kitchen. Kathie continued to scream at him, saying she was going to kill him, and she reached around him to open a cabinet that held a large knife. He said he believed she was going to grab the knife and kill him. According to defendant, Kathie had previously talked about how she could kill him and flee without being found. He then noticed a smaller knife on the counter, which he grabbed. He said he grabbed her shoulder with one hand, then stabbed her about the chest and neck seven times. Afterward, she fell to the floor. He kept repeating to police that he acted in self-defense.

¶ 12 The next day, the police questioned defendant again, at which time he added information to his original statement. After being told the autopsy revealed blunt-force trauma to Kathie's head, defendant eventually admitted hitting Kathie's head against the concrete floor. In revising his statement, defendant added that when Kathie clawed and attacked him at the sink, he swung her away from him, at which time her head hit the wall. She then attacked him again, at which time he "put her to the ground" and hit her head against the ground three to four times. According to defendant, Kathie then rose from the ground, cornered him in the kitchen, and reached for her knife. At that point, defendant explained he stabbed her, as described during his initial interview.

¶ 13 At trial, rather than testifying he "put" Kathie on the ground, defendant stated she stumbled, at which time he softened her fall by guiding her to the ground. He then kept pushing her down when she tried to rise, which resulted in her head repeatedly hitting the floor. He said that, during this time, she was flailing, screaming, and snarling at him. When he thought she had calmed down, he stood up, but she rose immediately and cornered him in the kitchen. Then, as Kathie reached for the large knife in the cabinet, defendant stabbed her with a smaller knife from the counter. Kathie fell to the floor after he finished stabbing her. Defendant accounted for these different statements by testifying the events of June 23, 2011, occurred so quickly that he did not immediately recall everything that happened.

¶ 14 After stabbing his mother, defendant told police he left the house, walking to a nearby McDonald's restaurant and Walmart. He said he needed to clear his head. Upon his return, he dragged Kathie's body to her bedroom so a passerby would not see her on the kitchen floor. He then began cleaning the kitchen area. Defendant initially intended to try to hide the body, but ultimately decided to turn himself in to the police. He sent a text message to his friend,

Jacob Shumaker (Jake), stating, "I killed *el madre*, and I need help getting rid of the body. At about 2 we got into a fight and my dark side surged out and I stabbed her seven times after mercilessly beating the shit out of her." He also posted to Facebook, a social media website, the statement, "I'm a monster." Prior to turning himself in, defendant confessed to Colin Hollowell, a friend, that he killed Kathie, but upon seeing Colin's reaction, defendant said he was "just kidding." Colin responded, "you could probably get self-defense out of it, if that were true."

¶ 15 2. *Forensic Pathologists' Testimony*

¶ 16 Kathie's autopsy, performed by forensic pathologist Dr. Roland Kohr, revealed multiple stab wounds to her chest and neck, including one wound which perforated Kathie's lung and caused hemorrhaging. She also suffered blunt-force trauma to the head, which resulted in a skull fracture and brain hemorrhaging. Dr. Kohr testified to a reasonable degree of medical certainty that Kathie was lying down when she was stabbed based on the pooling of blood and lack of blood on her pants. He also opined Kathie was either unconscious or in a concussive state when she was stabbed due to the lack of defensive wounds on her arms. At the time of her death, Kathie's blood-alcohol concentration (BAC) level was 0.228 and her system contained hydrocodone at three times the upper limit of a prescribed dosage. Dr. Kohr agreed the drugs and alcohol in Kathie's system could have inhibited her defensive reaction to being stabbed. He also agreed Kathie was a habitual drug user and alcoholic.

¶ 17 Dr. George Nichols, a forensic pathologist for the defense, disagreed with Dr. Kohr's opinion. Dr. Nichols opined Kathie's brain lacked any injury that would have put her in a concussive or unconscious state when defendant stabbed her. He explained the injury did not reveal whether Kathie fell due to her intoxication or whether defendant shoved her onto the floor. The level of drugs and alcohol in her system would have impeded her brain's normal function

and could have caused aggression. The levels also would have inhibited her ability to feel pain, which meant she could have gotten up and moved despite receiving a blow to the head. Dr. Nichols also disagreed with Dr. Kohr's opinion that Kathie was lying down when defendant stabbed her, asserting the autopsy could not conclusively show whether Kathie was standing or lying. In her inebriated state, Kathie could have remained standing for several minutes after the stabbing. He concluded by saying nothing in the autopsy refuted defendant's version of events.

¶ 18 3. *Defendant's Text Messages*

¶ 19 The State introduced numerous text messages sent by defendant to his friend Jake. In March 2011, defendant wrote he had previously tried "physical persuasion" with his mother, but she tried to put him in jail. In April 2011, defendant sent a text message stating, "I'm going to kill her," and that he was going to "legit snap. I'm sick of that alcoholic." On June 20, 2011, during a conversation with Jake, defendant wrote, "We might have mother to bury if she doesn't stop whining about a tape case I don't have."

¶ 20 4. *School Staff's Testimony*

¶ 21 Staff members at defendant's school testified Kathie frequently called the school and demanded to speak with defendant. During these calls, Kathie was agitated or irate, and she would call defendant names and curse at office staff. Staci Garzolini-Skelton, the school's academic counselor, testified she called the Department of Children and Family Services (DCFS) after Kathie said she (1) could use an electric knife to cut defendant's legs off, and (2) would slit defendant's throat if he touched her medication. After an investigation, DCFS determined the complaint was unfounded. At trial, defendant said he had spoken with DCFS investigators on multiple occasions, but nothing ever happened.

¶ 22 The school's social worker, Jo Ellen Henson, testified, in March 2011, she spoke with defendant. Defendant expressed concerns over his thoughts about harming Kathie. He said he would use his bare hands to harm Kathie because using a weapon would be wrong. Defendant admitted he had taken $10 from Kathie and struggled with his act of deceit. However, defendant testified he met with the school social worker because he was afraid he might need to use force against his mother's escalating aggression, not that he had thoughts of harming her.

¶ 23 5. *Community Members' Testimony*

¶ 24 Defendant's neighbors and members of the community testified they witnessed Kathie hitting or screaming at defendant on numerous occasions. Additionally, defendant frequently stayed with neighbors when Kathie locked him out of the house. The same neighbors described defendant as peaceful and respectful, even during confrontations with Kathie. On one occasion, Kathie told a neighbor she kicked defendant out of the home but later changed her story to say defendant ran away.

¶ 25 6. *Dr. Frey's Testimony*

¶ 26 After the trial court conducted a *Frye* hearing and ruled Dr. Frey could provide expert testimony regarding battered-child syndrome, it clarified the nature of her permitted testimony. The court stated Dr. Frey could testify regarding the symptoms of battered-child syndrome, whether defendant exhibited those symptoms, and the effect of those symptoms; however, the court said she could not testify that defendant was telling the truth or that he acted in self-defense. Though Dr. Frey could testify that defendant's behavior was consistent with battered-child syndrome, she could only rely on facts in evidence at trial, not merely on the version of events provided by defendant during the evaluation process.

¶ 27 During the trial, Dr. Frey testified that she administered numerous diagnostic tests to defendant, which supported her diagnoses that defendant suffered from (1) anxiety, (2) dissociative traits, and (3) battered-child syndrome as a subset of posttraumatic-stress disorder. The tests indicated defendant exhibited elevated signs of hypervigilance and family conflict. Her evaluation also indicated defendant and his mother were codependent, a clinical feature of battered-child syndrome.

¶ 28 Dr. Frey testified defendant suffered from battered-child syndrome, a subset of posttraumatic-stress disorder. She explained that children suffering from battered-child syndrome do not feel anger toward their abuser; rather, they both love and fear their abuser. Abusive parents, who fear abandonment, would engage in physical or emotional abuse to maintain control. Dr. Frey explained that Kathie's exertion of control over her son by repeatedly calling his school to demand a conversation with him was consistent with defendant suffering from battered-child syndrome.

¶ 29 According to Dr. Frey, defendant's acts after stabbing his mother—cleaning up the blood, walking to Walmart, buying food, text messaging a friend—were consistent with dissociative reaction following trauma. Moreover, defendant (1) calling himself "bad" or a "monster" and (2) defending his mother despite her alleged abuse, was consistent with battered-child syndrome.

¶ 30 With respect to Dr. Frey's testimony about defendant's act of stabbing Kathie, the trial court sustained several objections. When defendant asked Dr. Frey hypothetical questions about defendant's mental condition, Dr. Frey (1) repeatedly introduced facts from her report that were not in evidence, (2) opined defendant experienced "terror" when that fact was not in evidence, and (3) testified defendant lived in fear of being imminently killed.

¶ 31 The court sustained the State's objection to Dr. Frey stating "all the terror of what [defendant] had experienced would affect him." The court also sustained an objection to defendant's question as to whether "anybody, battered child or no, have responded *** in the same way?" as speculative and invading the province of the jury. When asked how an individual suffering from battered-child syndrome would react differently from someone who was not, Dr. Frey offered her own hypothetical, stating that a person whose life is threatened will "naturally self-protect out of pure fear." She then went on to say that a person who suffers battered-child syndrome, "and has the imminent fear of being killed, the terror is going to start coming out. And the after-behavior will be a raw response, rather than any thinking." The court struck Dr. Frey's answer for assuming facts not present in defendant's proposed hypothetical. The court then sustained the State's objection to defendant's question of whether a person confronted with defendant's situation and suffering from battered-child syndrome would experience fear.

¶ 32 The jury received instructions regarding the charged offense of first degree murder and also received instructions and a verdict form for lesser offense of second degree murder. In support of the instruction for second degree murder, the trial court also permitted defendant to tender a self-defense instruction. Following deliberations, the jury found defendant guilty of second degree murder.

¶ 33 B. Posttrial Motions

¶ 34 On March 29, 2013, defendant filed a motion for judgment of acquittal or, in the alternative, for a new trial, asserting (1) the State failed to prove him guilty of second degree murder beyond a reasonable doubt, (2) defendant's defense was prejudiced when the trial court sustained portions of Dr. Frey's expert testimony, (3) his defense was prejudiced by the court's decision to allow the State to impeach Dr. Frey's omission of an explicit diagnosis of "battered-

child syndrome," (4) his defense was prejudiced when the court sustained the State's objections to evidence that Kathie threatened school personnel with violence, and (5) the autopsy photos that reflected the work of the autopsy surgeon were more prejudicial than probative.

¶ 35 In May 2013, defendant filed a motion requesting the trial court sentence him in juvenile court, as he was not convicted of first degree murder. Defendant argued that if the sentencing hearing proceeded in adult court, he would be deprived of due process and equal protection, as he was unable to challenge the transfer proceedings for the second degree murder charge. In July 2013, the court denied defendant's motions.

¶ 36 C. Sentencing

¶ 37 1. *Presentence Investigation Report*

¶ 38 In July 2013, the probation office filed a presentence investigation report. At the time of the hearing, defendant had been released from custody on a $10,000 bond and resided with the Holley family. Defendant had no past criminal history. Prior to his arrest, defendant smoked marijuana on "rare occasions" to relax and help "relieve quite a bit of stress." He consumed "less than a sip" of alcohol on two occasions several years before but refrained from drinking more; he did not like "how it affected [his] mother" because "alcohol destroyed [his] mother and others [he] cared about."

¶ 39 While in school, defendant described himself as having more acquaintances than friends, but he did go to classmates' houses for movies, video games, and listening to music.

¶ 40 Defendant's father, Stephen Lye, is English and resides in the United Kingdom. His parents were married from 1993 to 1998, and a court granted Kathie custody of defendant when Lye could not attend the custody hearing due to being deported. Lye was self-employed in the United Kingdom, where he resided with his fiancée and their two children. Lye also had

another child, defendant's half-sister, who resided in Edgar County. Defendant and his local half-sister maintained contact through the years, including during defendant's incarceration. Throughout his childhood, defendant maintained weekly contact with Lye, despite his mother's objections; however, their conversations were short due to Kathie being "always present loudly voicing her objections." Defendant also reported a close relationship with his paternal grandparents despite their residence in England. Kathie's daughter, defendant's older half-sister, resided with her father after Kathie lost custody. Defendant stated he communicated with her regularly.

¶ 41 Defendant said Kathie previously worked at various jobs before becoming injured. At that time, she began to receive disability benefits and became addicted to painkillers, such as Hydrocodone and Xanax. She also began consuming alcohol daily. Defendant reported the combination of drugs and alcohol caused Kathie to "behave angrily and erratically" which caused him emotional anxiety and fear. He estimated Kathie's behavioral changes started when he was in sixth grade. After that time, he was required to prepare his own meals, wash his own laundry, and do the family grocery shopping. Defendant recalled several occasions in which Kathie threatened to kill him or threatened physical harm. As he grew older, he said she would actually follow through with physical violence, prompting numerous visits from DCFS. However, he was never removed from the home. It was also common for his mother to lock him out of the home—usually for only one night, but for as long as a week. She would also threaten to send him to England to live with his father but would not follow through when defendant indicated that was what he wanted to do.

¶ 42 In spring 2011, Kathie attempted to coordinate with DCFS to have defendant enrolled in Oblong Christian Children's Home following her allegation that he stole money from her. However, those arrangements never came to fruition.

¶ 43 Defendant was a sophomore in high school at the time he was charged with this offense. He continued his education while in juvenile detention, where he was described as "an excellent student" whose "work is nothing short of exemplary," noting he "puts forth great effort." In October 2012, he completed the education requirements necessary for a general equivalency degree (GED). Prior to his incarceration, defendant (1) received medals for academic achievement, (2) qualified for the state regionals in "running" three times, (3) participated in school plays, (4) was elected student council vice president his sophomore year, (5) participated in scholastic bowl, and (6) was an active member in his church youth group. He expressed a desire to explore a career in software technology.

¶ 44 Defendant reported no mental health issues or difficulty in controlling his anger. The fitness examination indicated he had no mental condition that would render him unfit or insane. He described himself as being in good physical health.

¶ 45 2. *Evidence Presented at Sentencing Hearing*

¶ 46 In aggravation, the State relied on the evidence presented at trial and the contents of the presentence investigation report. Kathie's sister, Jan Bruno, read from her victim-impact statement in which she beseeched defendant to tell the truth and get back on the right track, saying his friends made the situation worse and kept him from accepting his responsibility. The State recommended the court deny probation and sentence defendant to 16 years' in the Illinois Department of Corrections (DOC).

¶ 47 During the sentencing hearing, defendant presented significant evidence in mitigation, such as his (1) support from the community, (2) upstanding behavior while incarcerated, (3) employment, (4) interest in maintaining employment and seeking education, (5) youth, and (6) lack of prior criminal history. Cindy Patrick, an administrative assistant at defendant's high school, testified defendant was respectful and intelligent. She said staff at the school called DCFS on defendant's behalf more than a dozen times. At one point, the school scheduled counseling for defendant, but Kathie subsequently cancelled it. Defendant asked the school not to intervene because it caused more trouble at home.

¶ 48 Teresa Dennis testified defendant had been working at her shop for the week preceding the sentencing hearing. She described defendant as an excellent, polite worker, despite working in a hot and messy environment, and defendant could keep the job as long as he wanted it.

¶ 49 James Sanders, a correctional officer for the Edgar County sheriff's office, testified he had consistent contact with defendant for the year preceding the trial while defendant was incarcerated in the county jail. Sanders described defendant as a model inmate with no disciplinary problems.

¶ 50 Adonna Bennett, a member of the community who met defendant after his arrest, testified she visited defendant on weekends while he was incarcerated and observed the trial. While on bond, Bennett helped defendant obtain identification and his driver's license. She also saw him daily as he played with her grandson or swam in her pool. She described defendant as respectful and helpful.

¶ 51 John Holley testified defendant was residing with him while on bond. Defendant and Holley's daughter had attended school together. While on bond, defendant always arrived

home prior to curfew, attended church with the family, and was generally warm and friendly. Holley helped defendant obtain counseling services and expressed his willingness to continue providing housing and other support for defendant.

¶ 52 Defendant then made a statement in allocution. He said he felt horrible for his mother's death but reiterated he acted in self-defense. He said he forgave his mother for the "bad days," and said that attending church has helped him to find answers. He was trying to adjust to the community and felt more part of it than ever. He then stated he wished his mother had gotten help and it hurt that she would never be able to find help. According to defendant, he had nightmares about his mother returning to kill him but also dreamed that she had forgiven him. His hope was to live the best life he could in her memory. Counsel for defendant implored the court to impose probation or in the alternative, sentence defendant to the statutory minimum of four years in DOC.

¶ 53 3. *Defendant's Sentence and Postsentencing Motion*

¶ 54 Following the sentencing hearing, the trial court sentenced defendant to 8 years' imprisonment with credit for 729 days previously served. In September 2013, defendant filed a motion to reconsider his sentence, requesting the court either reduce his prison sentence or sentence him to probation. In his argument, defendant asserted the court placed too much emphasis on the manner of Kathie's death and erred in refusing to sentence him under the Juvenile Act.

¶ 55 This appeal followed.

¶ 56 II. ANALYSIS

¶ 57 On appeal, defendant asserts (1) the automatic-transfer provision of the Juvenile Act violates his constitutional rights under the eighth and fourteenth amendments, particularly

since he was ultimately convicted of an offense subject to discretionary transfer; (2) the trial court improperly limited the testimony of his expert witness; and (3) the court improperly considered the victim's death as a factor in aggravation. We address defendant's assertions in turn.

¶ 58 A. Constitutionality of the Automatic-Transfer Provision

¶ 59 Defendant first asserts the automatic-transfer provision of the Juvenile Act violates his constitutional rights under the eighth and fourteenth amendments of the United States Constitution. U.S. Const., amends. VIII, XIV. We review the constitutionality of a statute under a *de novo* standard of review. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 200, 909 N.E.2d 783, 795 (2009). We begin by presuming the statute is constitutional. *Id.* "To overcome that presumption, the party challenging the statute must clearly establish a constitutional violation." *Id.*

¶ 60 Defendant concedes this court has already ruled the automatic-transfer provision constitutional under the eighth and fourteenth amendments in *People v. Pacheco*, 2013 IL App (4th) 110409, 991 N.E.2d 896, *pet. for leave to appeal granted*, No. 116402 (Sept. 15, 2013); nevertheless, he asks us to reconsider our position. However, during the pendency of this appeal, the supreme court issued its opinion in *People v. Patterson*, 2014 IL 115102, which is largely dispositive of defendant's claim.

¶ 61 In *Patterson*, the State charged the 15-year-old defendant with aggravated criminal sexual assault, an offense subject to the automatic-transfer provision. *Id.* ¶ 5; 705 ILCS 5405/5-130 (West 2008). After his transfer to adult court, a jury found the defendant guilty of three counts of aggravated criminal sexual assault. *Id.* On appeal, the defendant raised several of the same challenges to the automatic-transfer provision at issue here. The supreme court

rejected the defendant's eighth-amendment argument, holding the automatic-transfer provision was not punitive in nature, but rather served as a procedural mechanism for determining where the defendant's case should be tried. *Id.* ¶ 105. The *Patterson* court similarly rejected the defendant's fourteenth-amendment challenge, which, like the present case, relied upon *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). The court found no persuasive basis to reconsider its decision in *People v. J.S.*, 103 Ill. 2d 395, 469 N.E.2d 1090 (1984), which upheld the automatic-transfer provision on fourteenth-amendment grounds. *Patterson*, 2014 IL 115102, ¶ 98.

¶ 62 *Patterson* addressed the constitutionality of the automatic-transfer provision in the context of a defendant who is charged with and convicted of an offense subject to automatic transfer. Defendant asserts an additional basis for a finding of unconstitutionality in this case is the fact he was sentenced as an adult in spite of being convicted of a non-excluded offense.

¶ 63 In *People v. King*, 241 Ill. 2d 374, 948 N.E.2d 1035 (2011), our supreme court held that even where the minor was charged with first degree murder but later convicted of attempted first degree murder, the minor was properly sentenced as an adult, despite the fact that attempted first degree murder was not subject to the automatic-transfer provision. *Id.* at 386-87, 948 N.E.2d at 1041. In reaching this holding, the court analyzed section 5-130(1)(a) of the Juvenile Act (705 ILCS 405/5-130(1)(a) (West 2010)), which excludes the juvenile adjudication of a first-degree-murder charge when the minor is over the age of 15, and, instead, requires the State to prosecute the minor as an adult. *King*, 241 Ill. 2d at 378-79, 948 N.E.2d at 1037. The statute also provides, "[t]hese charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." 705 ILCS 405/5-130(1)(a) (West 2010). See *King*, 241 Ill. 2d at 379, 948 N.E.2d at 1037. The supreme court concluded that because the

defendant's attempted-first-degree-murder conviction arose from the same incident as the first-degree-murder charge, sentencing the defendant as an adult was appropriate. *Id.* at 386-87, 948 N.E.2d at 1041. In *People v. Toney*, 2011 IL App (1st) 090933, ¶ 44, 957 N.E.2d 939, the appellate court, relying on the reasoning set forth in *King*, held the trial court properly sentenced the minor as an adult on his second-degree-murder conviction because the conviction arose out of his charge for first degree murder. The reasoning in *King* and *Toney* applies to the present case, as defendant's second-degree-murder conviction arose from the same incident as the first-degree-murder charge. Accordingly, we conclude defendant failed to demonstrate a violation of his due-process rights.

¶ 64 B. Battered-Child Syndrome Expert Testimony

¶ 65 Defendant next asserts the trial court committed reversible error by limiting the testimony of Dr. Frey regarding battered-child syndrome, which deprived him of his sixth amendment right to a fair trial. U.S. Const., amend. VI. In weighing expert testimony, the court must balance the probative value of the testimony with the danger of unfair prejudice. *People v. Becker*, 239 Ill. 2d 215, 235, 940 N.E.2d 1131, 1142 (2010). Testimony from a qualified expert is considered necessary if the subject matter is beyond the understanding of the average juror and the testimony would aid the jury in reaching a verdict. *Id.* Where the proponent of the evidence is the defendant, the court must ensure any ruling does not interfere with the constitutional right to present a defense. *People v. Minnis*, 118 Ill. App. 3d 345, 355, 455 N.E.2d 209, 217 (1983). The court's ruling on the admissibility of evidence, including expert testimony, will not be overturned absent an abuse of discretion. *Becker*, 239 Ill. 2d at 234, 940 N.E.2d at 1142.

¶ 66 Specifically, defendant asserts the trial court erred in limiting Dr. Frey's testimony regarding whether a victim of battered child syndrome would experience a unique type of fear

under the circumstances. Defendant posits that because Dr. Frey's excluded testimony on this issue went to the heart of whether Terry's belief that his mother could either kill him or do great bodily harm to him at the time of the confrontation was reasonable, defendant was deprived of evidence supporting defendant's defense that he acted in self defense.

¶ 67 While we agree such evidence could bolster defendant's self-defense claim, the trial court did not preclude defendant from eliciting such testimony. The problem arose when Dr. Frey attempted to amend the hypothetical to include facts not in evidence. Related to this issue, defendant presented this initial question to Dr. Frey:

> "I want you to assume that there was a physical fracas between the two; that she went to the floor; that he was in a corner; that she reached over his head to a cabinet where a large chef's knife was stored; that he grabbed a convenient steak knife and stabbed her a number of times with that knife.
>
> Is there anything in that scenario that you can say to the jury that the fact he, in your opinion, suffered from battered child syndrome that would have altered or changed his behavior from a person who was not suffering from battered child syndrome?"

Following various objections based on the form of the question and assuming facts not in evidence, the court allowed the following question to stand. Defendant then posed the following question:

> "What differences are there in the scenario that I gave you in my hypothetical, what differences are there between the

response of someone suffering battered child syndrome and

someone not suffering from battered child syndrome?"

Instead of outlining differences such as some type of "special terror" that someone suffering from battered child syndrome would experience, Dr. Frey began to give her own hypothetical which included facts not contained in the original hypothetical presented to her. Appropriately, the court sustained the State's objection. Similar exchanges occurred throughout Dr. Frey's testimony.

¶ 68 In the end, Dr. Frey testified defendant suffered from battered-child syndrome and that his actions, generally, on the day of Kathie's murder were consistent with that diagnosis. That information was sufficient for a jury to rely upon in determining whether defendant acted in self-defense. However, due to Dr. Frey's attempts to alter the scenario offered and utilize facts not in evidence, the trial court did not abuse its discretion in limiting Dr. Frey's testimony.

¶ 69 Accordingly, we conclude the trial court did not violate defendant's sixth-amendment right to present a defense or abuse its discretion by limiting some aspects of Dr. Frey's testimony.

¶ 70 C. Sentencing

¶ 71 Finally, defendant contends the trial court erred by improperly considering the victim's death as a factor in aggravation.

¶ 72 The State concedes the trial court improperly considered Kathie's death and we accept the State's concession. See *People v. Dowding*, 388 Ill. App. 3d 936, 942, 904 N.E.2d 1022, 1028 (2009) ("a factor inherent in the offense should not be considered as a factor in aggravation at sentencing"). However, the State asserts the court's consideration of Kathie's death was so insignificant that it did not lead to a greater sentence. We agree.

¶ 73 We typically review the trial court's sentencing order for an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). However, in instances where the court considers an improper factor, if we are able to discern from the record that the consideration of the improper factor was "so insignificant that it did not lead to a greater sentence," the sentence may stand. *People v. Bourke*, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983). Whether a finding was "insignificant" must be drawn from a review of the record. *Id.*

¶ 74 In imposing defendant's sentence, the trial court stated that it considered (1) the statutory factors in aggravation and mitigation, (2) the testimony of Dr. Frey, (3) letters from community members submitted on defendant's behalf, and (4) the evidence presented at the sentencing hearing. The court noted defendant was very young with no history of prior delinquency. Additionally, the court considered that defendant had obtained his GED and obtained employment.

¶ 75 A review of the record reveals the trial court gave appropriate consideration to the extensive evidence in mitigation. In fact, the strength of the evidence in mitigation persuaded the court to reject the State's recommendation of 16 years' in DOC. The record also makes clear, the primary focus of the court in considering the evidence in aggravation was the particularly violent manner in which the defendant brought about his mother's death, the force employed, and the content of defendant's text messages, all of which stood in stark contrast to the person described by those who testified on behalf of the defendant.

¶ 76 For the offense of second degree murder, defendant faced a possible sentence of 4 to 20 years' imprisonment if the court rejected probation; therefore, defendant's sentence was within the permissible sentencing range. See 730 ILCS 5/5-4.5-30 (West 2010). That the case constituted defendant's first offense does not automatically require the court to consider a

minimal sentence. See, *e.g.*, *People v. Tatum*, 181 Ill. App. 3d 821, 826, 537 N.E.2d 875, 878 (1989) (the court is not required to choose minimum sentence for a first offender). Rather, the court was required to consider the factors in aggravation and mitigation in fashioning an appropriate sentence. *Id.*

¶ 77 Accordingly, our review of the record leads us to conclude the court's improper consideration of Kathie's death was so insignificant that it did not lead to a greater sentence.

¶ 78 III. CONCLUSION

¶ 79 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 80 Affirmed.