2018 IL App (4th) 150504-U

NO. 4-15-0504

FILED
February 2, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
NICHOLAS ANTHONY COMPTON,	)	No. 13CF418
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney III,
	)	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 (1) the trial court did not err in denying defendant's motion to sever, (2) defendant was not denied effective assistance of counsel when counsel allowed the admission of defendant's statements and autopsy photographs of the victim into evidence without objection, and (3) the court did not err in considering factors in sentencing.

¶ 2 In January 2015, a jury found defendant Nicholas Anthony Compton guilty of a single count of first degree murder and multiple counts of aggravated battery. At the April 2015 sentencing hearing, the trial court sentenced defendant to life in prison for first degree murder, a consecutive term of 30 years for one of the counts of aggravated battery, and two concurrent terms of 4 and 5 years for the additional counts of aggravated battery.

¶ 3 On appeal, defendant argues (1) the trial court erred by denying a motion to sever, (2) he was denied effective assistance of counsel when counsel permitted the State to admit

defendant's custodial statements to police and to admit autopsy photographs of the victim, and (3) the court erred in improperly considering an aggravating factor in sentencing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 After experiencing a seizure and suffering cardiac arrest on March 26, 2013, R.C. died of bacterial sepsis (blood poisoning) and peritonitis (inflammation of the thin tissue lining the inside of the abdomen). This was determined by the pathologist to be the result of lacerations of the pouch connecting the large and small intestine (cecum) and lacerations of the peritoneum where it attached the intestines to the back wall of the abdomen (mesentery). The cause of such injuries was blunt force trauma to the lower back. These injuries were only several of the many found on R.C.'s body. When medical personnel first arrived, they found his stomach distended and his body gaunt and pale with various notable bruises.

¶ 6 An autopsy found multiple abrasions to the back of R.C.'s head and neck, an injury to the mouth, abrasions on the sternum and chest, and numerous injuries to his back. He was found to have a honeycomb pattern of contusions on the head, multiple marks indicating blunt force trauma to the back of the head, and a hemorrhage of the left eye. He suffered a tear to the frenulum, the little piece of tissue which attaches the inner lip to the gum. His death was the result of multiple incidents of blunt force trauma to his lower back, probably inflicted 7 to 10 days before his death. During the interim, R.C.'s condition continually declined as the infection entered his bloodstream, causing severe pain, cramping, nausea, and diarrhea until eventually the blood flow to his brain ceased, causing a lack of oxygen, seizures, and ultimately death. R.C. was three years old.

¶ 7 R.C. was an active, happy, and adventurous child who liked to play. Many described him as a normal three-year-old child who enjoyed playing with his friends. He

previously suffered no major injuries. This changed, however, when defendant became R.C.'s primary caretaker while R.C.'s mother went to work. On three separate occasions, defendant texted R.C.'s mother informing her of yet another accident where R.C. sustained a visible injury. A child who had suffered few injuries prior to his association with defendant was now constantly injured. The frequent, unexplained injuries prompted R.C.'s mother to text defendant saying: "Nick idk [(I don't know)] if we can move n together just yet. I'm not comfortable with the fact that Robbie always has a new bruise every time he's w u [(with you)] & I'm not around. Especially if DCFS get involved in this[.]" Despite her expressed concern, she moved herself and R.C. into defendant's residence, which he already shared with three other people.

¶ 8 Around March 15, 2013, R.C.'s health started deteriorating. He started complaining of stomach pain, nausea, diarrhea, and vomiting. Over the next few days, he lacked an appetite and would often throw up anything he attempted to eat. In his final days, he was limited to a liquid diet of Pedialyte as it was the only thing he could keep down. At approximately 4 a.m. on March 26, 2013, R.C. suffered a seizure and cardiac arrest, and he died a few hours later.

¶ 9 Defendant and others residing in the home were asked to come to the Normal Police Department in order to be interviewed about R.C.'s death. The one-on-one recorded interview between defendant and Detective Jeremy Melville took place in one of the interview rooms at the station and was conducted off and on over a period in excess of 11 hours, beginning at 8:45 a.m. At the outset of the interview, Detective Melville offered defendant something to drink, noting he had come to the station of his own volition. Detective Melville told defendant he was not under arrest and informed him of his rights by way of a preprinted card. After being read

his rights, defendant was asked if he understood them, to which he responded in the affirmative. After speaking to defendant for about an hour, Detective Melville left the room.

¶ 10 Around 10 a.m., Detective Melville came back into the room and informed defendant R.C. had died. Defendant cried for several minutes. Defendant's cooperation with the detective continued even after defendant was informed of R.C.'s death. In that time, Detective Melville left the room at least six times, leaving defendant alone for an average of 15 to 20 minutes. During the remainder of the interview, defendant was free to take breaks from questioning in order to smoke or use the bathroom and did so at least two times. During the interview, when Detective Melville left the room, defendant waited, made no request to leave, and slept in his chair on occasion. At various times, defendant was also offered food, which he declined. Around 5:30 p.m., the tone of the interview changed from informational to accusatory, with Detective Melville questioning defendant's statements. Even when Detective Melville did so or indicated defendant's explanations did not match the physical evidence, defendant made no request to stop answering questions, leave, or for counsel. At most, he asked if he was under arrest, to which the officer responded, "I don't know. Like I said man I have plenty of people out there that I answer to. Okay? And I don't really have an answer for them." Approximately 30 minutes later, defendant asked Detective Melville, "Do I need a lawyer? Am I being arrested?" Detective Melville responded, "I'll let you know in a second."

¶ 11 Approximately 11 hours into the interview, Detective William Angus came into the room instead of Detective Melville, asking about previous instances when defendant physically disciplined R.C. Defendant volunteered to write them down and requested a pencil and paper. Defendant then said, "Look man I'd just feel more comfortable having my lawyer here, that's all." Detective Angus asked defendant to decide if he wanted a lawyer at that time,

and defendant stated, “I want a lawyer present from now on.” Once defendant clearly invoked his right to counsel, the detective left the room. Defendant was then questioned by Molly Mintus, an investigator with the Illinois Department of Children and Family Services (DCFS). After the interview with Investigator Mintus, Detectives Melville and Angus arrested defendant, and he made an unsolicited statement about a prior conviction.

¶ 12 After the interview, in March 2013, a grand jury indicted defendant on multiple counts of first degree murder (counts I to III) (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2012)) and aggravated domestic battery (count IV) (720 ILCS 5/12-3.3(a) (West 2012)). In August 2013, a grand jury indicted defendant on additional counts of aggravated domestic battery (count V) (720 ILCS 5/12-3.3(a-5) (West 2012)) and aggravated battery to a child (counts VI to XII) (720 ILCS 5/12-3.05(b)(1), (b)(2) (West 2012)).

¶ 13 The State alleged defendant committed the offense of murder when he knowingly and without lawful justification (1) with the intent to do great bodily harm to R.C., struck R.C., causing peritonitis and sepsis due to blunt force trauma of the abdomen that involved a laceration of the mesentery, thereby causing the death of R.C. (count I); and (2) struck R.C. upon the torso, thereby causing peritonitis and sepsis due to blunt force trauma of the abdomen that involved a laceration of the mesentery, knowing such act created a strong probability of death or great bodily harm to R.C., thereby causing the death of R.C. (count II).

¶ 14 The State also alleged defendant committed the offense of aggravated domestic battery when he, in committing a domestic battery, intentionally grabbed the neck of R.C., a household member of defendant (count V). Additionally, the State alleged defendant committed the offense of aggravated battery to a child when he, being a person who is at least 18 years of age, in committing a battery, knowingly caused bodily harm to R.C., a child under the age of 13

years, in that he (1) caused bruising to R.C.'s back by striking him (count VI); (2) caused a burn to the fingers of R.C. by placing the fingers of R.C. on a hot surface (count VII); (3) caused a burn to the cheek of R.C. (count X); (4) struck R.C. in the head with an object, causing a honeycomb type pattern on the head (count XI); and (5) caused a burn to the cheek of R.C. (count XII). Before trial, the State dismissed counts III, IV, V, VIII, and IX.

¶ 15 Defendant filed pretrial motions to suppress statements he made after invoking his constitutional rights and a motion to sever counts V to XIII from counts I to IV. The State conceded the motion to suppress those statements because it did not intend to use them, even though it did not believe the unsolicited comment about a prior conviction was a violation of defendant's constitutional rights.

¶ 16 In defendant's motion to sever, he argued the counts were improperly joined because they were not part of the same act or comprehensive scheme or, in the alternative, if admitted, they would create unfair prejudice to defendant. The trial court disagreed, stating the charged conduct of the aggravated batteries was admissible other-crimes evidence, and the prejudicial value was greatly diminished because of that.

¶ 17 At defendant's January 2015 jury trial, the medical examiner, Dr. John Scott Denton, detailed the nature and extent of the injuries to the victim, R.C. Using autopsy photos, Dr. Denton went through the injuries inflicted and also whether they were the result of an accident or intentional trauma. The doctor concluded by stating the cause of death was bacterial sepsis and peritonitis, which was caused by a "laceration and contusion of the cecum and the mesentery" from blunt force trauma to the child's back. The peritonitis and sepsis caused R.C. to get very sick and experience extreme pain over the course of about a week prior to his death on the morning of March 26, 2013.

¶ 18 The jury found defendant guilty on both counts of first degree murder (counts I and II) and four counts of aggravated battery to a child (counts VI, VII, X, and XI). The jury also found defendant eligible for a life sentence because the murder was caused by "exceptionally brutal or heinous behavior, indicative of wanton cruelty." In April 2015, the trial court sentenced defendant to life in prison on count I of first degree murder (counts II and VI merged with count I), 30 years on count XI of aggravated battery, to be served consecutively, and 4 years on count VIII of aggravated battery and 5 years on count X of aggravated battery, to be served concurrently with the other sentences. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Motion to Sever

¶ 21 Defendant argues the trial court erred in denying his motion to sever the first degree murder charges from the aggravated battery charges, claiming it was unduly prejudicial. We disagree.

¶ 22 "The trial court has substantial discretion in determining the propriety of joinder. [Citations.] Its determination will not be reversed absent a showing of an abuse of that discretion." *People v. Terry*, 177 Ill. App. 3d 185, 193-94, 532 N.E.2d 568, 574 (1988). "A defendant may be placed on trial in one proceeding for separates offenses if the offenses are based on the same act or on two or more acts which are part of the same comprehensive scheme." *People v. Trail*, 197 Ill. App. 3d 742, 746, 555 N.E.2d 68, 71 (1990). "There are no precise criteria for determining whether separate offenses are part of the same comprehensive transaction." *Id*. Courts have noted some of the factors to consider are "[a] common method of operation, proximity in time and location of offenses, a common type of victim, similarity of offenses, and the identity of evidence needed to demonstrate a link between the offenses." *Id*.

When other-crimes evidence is properly admissible, "the potential prejudice to a defendant of having the jury decide two separate charges is greatly diminished because the jury is going to be receiving evidence about both charges anyway." (Emphasis omitted.) *Id.* "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***. Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 23 In the case before this court, defendant was charged with aggravated battery by committing a battery that he knew would cause great bodily harm to the victim, R.C. Defendant filed a motion to sever counts V to XIII, which alleged instances of aggravated battery, some of which occurred as early as February 22, 2013. After hearing arguments and reviewing motions by both parties, the trial court denied the motion. In coming to its decision, the court observed that the time frame between acts was short and the fact that the other counts would have been admissible as other-crimes evidence greatly diminished the prejudicial impact.

¶ 24 Our supreme court "has recognized that evidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime." *People v. Pikes*, 2013 IL 115171, ¶ 20, 998 N.E.2d 1247. As the trial court noted here, the aggravated battery counts and the single count of domestic battery sought to be severed were part of the continuing narrative of the murder and vice versa. If severed, the State would still have sought admission of the prior instances of abuse in order to show this was not a random act leading to the child's death. The State intended to present evidence of multiple instances of injury to counter any claim of mistake or accident defendant might seek to assert. The aggravated batteries were all committed while defendant was the sole caretaker of R.C., and evidence of their existence tended to show an

absence of mistake. The State also sought to introduce the bruising on R.C.'s body to highlight the extent of the injuries as well as to show the cause of death. The court also took into consideration the time frame during which these injuries were inflicted and found them to be part of the same course of conduct. As the court in *Pikes* stated, these incidents were "linked and it would be illogical for the trial court to uncouple them giv[ing] the jury only half the story." *Id.* ¶ 24. Since the other-crimes evidence was admissible, the prejudice to defendant was greatly diminished. The trial court was well within its discretion to conclude the other-crimes evidence would be admissible during the trial for murder and therefore did not abuse its discretion by denying the motion to sever the counts for trial.

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 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. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. 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 his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). " 'Effective assistance of counsel refers to competent, not perfect representation.' " *Id.* at 220 (quoting *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). Mistakes in trial strategy or tactics do not necessarily render counsel's representation defective. See *People v. Benford*, 349 Ill. App. 3d 721, 729-30, 812 N.E.2d 714, 721-22 (2004) (finding defense counsel's decision not to file a motion to suppress was a trial tactic and did not constitute ineffective assistance of counsel).

¶ 27 To establish the second prong of *Strickland*, "[a] defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). A "reasonable probability" has been defined as a probability which would be sufficient to undermine confidence in the outcome of the trial. *Id*. "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601. " 'In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.' " *People v. Bew*, 228 Ill. 2d 122, 128-29, 886 N.E.2d 1002, 1006 (2008) (quoting *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 907 (2005)).

¶ 28 1. *Police Interview Statements*

¶ 29 Defendant argues his trial counsel was ineffective for failing to file a motion to suppress his statements to police because he did not voluntarily, knowingly, and intelligently waive his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree.

¶ 30 The State does not argue defendant was not in custody but maintains his questioning was preceded by a knowing and intelligent waiver of *Miranda* after having been properly admonished. Although an analysis of the circumstances surrounding defendant's presence is not necessary for a determination of his custodial status, aspects of it evince the voluntary nature of his statements and his knowing and intelligent waiver.

¶ 31 The mere fact he continued to speak with Detective Melville for almost 11 hours supports the conclusion defendant was there voluntarily. Detective Melville had mentioned at the

outset how defendant came to the station of his own volition. Throughout the interview, breaks were taken, and defendant was permitted to smoke or use the restroom. The record reflects no outward appearance of custody, such as handcuffs.

¶ 32 During the entire interview, until defendant was arrested and booked, only one police detective was present at a time. Shortly after defendant asked if he needed a lawyer and inquired about his status, in response to continued questioning by Detective Melville, defendant requested paper and pencil, offering to write down the previous instances of physical discipline. He then changed his mind and decided he would prefer to have an attorney present. Questioning by the detectives ceased, and defendant then answered some questions put to him by the DCFS investigator, which are not at issue here.

¶ 33 Defendant's behavior indicates he was voluntarily waiving his rights and agreeing to speak with the police. He chose when to answer and chose when to stop answering the detectives' questions. He evinced his intention to stop answering by expressly requesting the presence of counsel, exactly as he had been advised under *Miranda*.

¶ 34 A defendant may waive his *Miranda* rights if the waiver is made "voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). First, the court must determine if the relinquishment of the right was voluntary or "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id*. Second, the court must determine the waiver was made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*. "Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, 'including the background, experience, and conduct of the accused.' " *People v. Braggs*, 209 Ill. 2d 492, 515, 810 N.E.2d 472, 487 (2003) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

¶ 35 To establish deficient performance in a motion to suppress, a defendant must show a reasonable basis for the motion that his counsel overlooked and was not simply a trial tactic. Interestingly, defense counsel moved to suppress the statements made after defendant invoked his *Miranda* right to an attorney but none of the statements made before the invocation. From this record, it is just as reasonable to posit counsel chose to file a motion for the part of the statement he could clearly show was in violation of *Miranda* and made the tactical decision to refrain from filing such a motion for the portion of the statement he could not prove to be involuntary or violative of defendant's fifth amendment rights. Trial counsel may choose to refrain from filing suppression motions he knows he cannot win, and that decision does not render his representation ineffective.

¶ 36 Citing *People v. Alfaro*, 386 Ill. App. 3d 271, 306, 896 N.E.2d 1077, 1107 (2008), defendant contends *Miranda* warnings are undermined where the officer characterized the warnings as a matter of procedure. In that case, the court considered a situation where the police officers engaged in a "question first, warn later" approach. *Id*. The officers failed to tell the defendant that his previous statements before the warnings could not be used against him, making his waiver less voluntary. Moreover, the court found one of the officers "minimized the impact of the warnings by stating he was administering them 'just for formality.' " *Id*. The case before us is distinguishable.

¶ 37 Assuming *arguendo* defendant could satisfy the deficient-performance prong, defendant would be unsuccessful in showing prejudice. Here, Detective Melville read *Miranda* warnings to defendant at the beginning of the interview. While he said it was part of the police department's policy to read the *Miranda* warnings, he asked defendant if he understood his rights and defendant said he understood. Over the course of the interview, defendant spoke to

detectives for over 10 hours, during which he was given multiple breaks, including breaks to smoke or just sleep. While he asked the officer how long he had to stay, he arrived on his own volition, was told he was not under arrest, and was also told his other friends who were interviewed had left the station. He knew initially he was free to leave and knew he did not have to talk, but he instead chose to remain and speak to the officers. It is clear defendant had full awareness of both the nature and consequences of abandoning his *Miranda* rights. Near the end of the interview, when defendant volunteered to write down his instances of physical discipline of the child, he decided instead to invoke his rights by requesting an attorney. Defendant's counsel at trial was also aware the entire interview was audio- and video-recorded, allowing the trial court to observe defendant's demeanor and listen to the conversation. These observations could lead one to conclude defendant was fully aware of his rights, willingly spoke with the officers over a 10-hour period, and chose to assert his rights when he decided it was time to do so. Defendant cannot satisfy the prejudice prong because he cannot show he would have succeeded in suppressing his statements.

¶ 38 2. *Admission of Autopsy Photographs*

¶ 39 Defendant argues his trial counsel was ineffective for allowing the admission of autopsy photographs of the victim. We disagree.

¶ 40 "The decision to admit photographs into evidence is left to the discretion of the trial judge." *People v. Brown*, 172 Ill. 2d 1, 40, 665 N.E.2d 1290, 1308 (1996). Valid reasons for the admission of photographs include: "to prove the nature and extent of injuries and the force needed to inflict them, the position, condition, and location of the body, and the manner and cause of death, to corroborate a defendant's confession, and to aid in understanding the testimony of a pathologist or other witness." *Id*. at 41. "If photographs are relevant to prove facts

at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probativeness is outweighed." *Id.* "If evidence has sufficient probative value, it may be admitted despite its gruesome or inflammatory nature. [Citations.] Competent evidence should not be excluded merely because it may arouse feelings of horror or indignation." *People v. Degorski*, 2013 IL App (1st) 100580, ¶ 100, 998 N.E.2d 637. "When a photograph serves no purpose other than to inflame and prejudice the jury, however, it must be excluded." *People v. Christen*, 82 Ill. App. 3d 192, 197, 402 N.E.2d 373, 378 (1980).

¶ 41 In the case before this court, the photographs of the victim's body showed each external injury for the separate counts of aggravated battery, the extent of the injuries overall, and the ultimate cause of death. The State called Dr. Denton, the pathologist and author of the autopsy report, to testify. During his testimony, he used both the gross external examination and the internal examination photographs to demonstrate and explain his evaluation of the multiple injuries R.C. suffered and how they led to his ultimate opinion regarding causation.

¶ 42 Dr. Denton described how the autopsy photographs taken during the internal examination revealed the nature and extent of bruising. They also showed injuries which were not otherwise visible during the gross external examination, as well as the cause of death. Two photographs were used to show bruises under the victim's scalp consistent with blunt force trauma. An autopsy photograph revealing surgical incisions on the child's back were referenced as confirmation of the presence of bruising. These were contrasted with nonbruised areas to show the difference. A biopsy of the bruised tissue also revealed the bruise caused the peritonitis, which ultimately led to the child's death. Another image indicated bruising along the ribs and underneath the fat tissue and muscle, consistent with severe blunt trauma. One photograph showed bruising on R.C.'s intestines and cecum, and another, the inflammation of the intestines

caused by peritonitis. Both aided the doctor in his discussion of how the disease affected R.C. over time, eventually leading to his death. Dr. Denton relied upon each of the photographs, referenced at trial, to exhibit the severity of the internal injuries suffered by R.C. before his death. Those displaying undamaged areas were used specifically to demonstrate the localization of the most severe trauma on R.C.'s back. The last photograph of R.C.'s internal organs was used by the State to show how all the trauma came from injuries to the back. The only internal examination photograph not discussed, exhibit No. B-34, was a photograph of the ribs, which showed bruising of the ribs and was admitted without objection as to foundation by the defense. Further, all the autopsy photographs were given to the jury without objection by defense counsel.

¶ 43 Autopsy photographs by their very nature will be gruesome or difficult for some to view. However, each of the photographs in this case was highly probative and aided the doctor's testimony. The external photographs displayed the location of the incidents of physical abuse and served as the external physical evidence of what ultimately caused R.C.'s death. The photographs of the internal organs aided the jury in understanding the doctor's testimony regarding the nature and extent of the injuries R.C. suffered as well as the resultant internal effects on the organs and immune system that led to his death. The only photograph out of 41 shown to the jury, which was not discussed, was not such that its presence alone would serve to inflame the passions of the jury. See *Christen*, 82 Ill. App. 3d at 197. It was also relevant as physical evidence of an element the State was required to prove for one of the counts of aggravated battery.

¶ 44 Since the autopsy photographs would have been admissible over an objection or a motion *in limine*, defense counsel's performance cannot be seen as deficient. Thus, defendant cannot show his counsel was ineffective.

¶ 45 C. Factor in Aggravation

¶ 46 Defendant argues the trial court improperly considered that he caused or threatened serious harm as a factor in aggravation. The State argued the court may consider the nature and extent of each element of the offense and look at the extent of injuries that exceeded the level of harm needed to meet the definition of great bodily harm during sentencing, citing *People v. Saldivar*, 113 Ill. 2d 256, 497 N.E.2d 1138 (1986), and *People v. Rader*, 272 Ill. App. 3d 796, 651 N.E.2d 258 (1995). In his reply brief, defendant agrees with the State and concedes the court's consideration was proper under *Saldivar* and *Rader*. Thus we need not address this issue.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed.