NOTICE
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2011 IL App (5th) 090545-U

NO. 5-09-0545

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 08-CF-205
	)	
FREDERICKA LYLES,	)	Honorable
	)	Milton S. Wharton,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was proved guilty beyond a reasonable doubt of drug-induced homicide and unlawful delivery of a controlled substance; her counsel's decision to admit evidence that the defendant had previously hit one of the child victims with an extension cord was a matter of trial strategy and not ineffective assistance of counsel; and the imposition of a DNA analysis fee was vacated where the defendant had already submitted her DNA after a previous conviction.

¶ 2 Fredericka Lyles appeals from her convictions for one count of drug-induced homicide and three counts of unlawful delivery of a controlled substance after a jury found her guilty in the circuit court of St. Clair County. On October 8, 2009, she was sentenced to serve prison terms of 25 years for the homicide, to be followed consecutively by three concurrent terms of 6 years on the unlawful delivery charges.

¶ 3 The defendant raises three issues on appeal. She first argues that the State failed to prove her guilty beyond a reasonable doubt of any of the charges where the evidence did not establish that the defendant gave the children the drugs, but left open

the possibility that the children gained access to and ingested the drugs on their own. She also argues that her trial counsel was ineffective in failing to object to the improper admission of evidence of a prior "bad act" by the defendant, that she had beaten one of the children with an extension cord. Finally, the defendant argues that she is entitled to a $5 credit against her $200 DNA analysis fee for the time she spent in presentencing custody. For reasons that follow, we affirm.

¶ 4 The following evidence was adduced at the defendant's jury trial. We will set forth only those facts pertinent to our disposition of the specific issues on appeal.

¶ 5 On November 24, 2007, Martez Hudson was working as a patrol officer for the East St. Louis police department. At approximately 5 p.m. on that date he was dispatched to the defendant's address with a report of a small child unconscious and not breathing.

¶ 6 When he entered the defendant's residence, he found the defendant and three young boys in the front room. In the back room was an adult male and two EMTs and a small girl lying on the floor motionless and not breathing. Hudson testified that there was trash and debris strewn in every room of the home, including a lot of rat poison pellets, several pills on the floor, and pill bottles lying around. The youngest boy in the front room was sitting on the floor between his brothers and was going in and out of consciousness. Hudson did not believe the boy was okay and notified the paramedics. Hudson asked the defendant if the boy was sick and the defendant responded that he was not. The defendant would not allow the boy to be taken to the hospital. Nevertheless, the paramedics did take the boy to the hospital.

¶ 7 Hudson was advised by Lieutenant Childress to look for pills in the residence because one of the children had told her that they had taken pills. In addition to finding pills on the floor, Hudson found pills in trash cans. Some of the pills on the

floor appeared to have been spit out. These partially dissolved pills were found in what appeared to be the children's bedroom, the back room. A crime scene technician was called to secure the scene.

¶ 8 Sergeant Andre Williams, Sr., with the East St. Louis police department, testified that on November 24, 2007, he was a member of the homicide investigation team. He responded to the defendant's address and observed the defendant and three small children in the front room. The child in the back bedroom was already dead when the paramedics arrived. The house was in disarray and appeared to have rat poison laid about the floor. There were also pills and pill bottles strewn about the house. Williams was aware that a second child had been taken to the hospital because he was not acting normally.

¶ 9 After further investigation, the police developed a theory that the defendant had given the children some kind of medication to make them go to sleep. Two white round pills were found in the back bedroom, the children's bedroom, one of which was partially dissolved and the other inscribed "5442DAN." The police never investigated the possibility that the children might have found and ingested the pills on their own. None of the pill bottles were tested for the children's fingerprints to see if they had gotten into the bottles on their own.

¶ 10 Lieutenant Caroliss Childress with the East St. Louis police department testified that she responded to the defendant's address on the night in question. She was the senior officer at the scene and so was in charge. She noticed rat poison pellets all over the house. The paramedics were attempting to take the youngest child from the defendant to take him to the hospital but the defendant would not give them the child. The child's head was bobbing but the defendant insisted he was just sleepy and would not give the child up. Childress threatened the defendant with bodily harm

and the defendant released the child. Childress drove the two remaining, surviving children to the hospital to be checked out. During this drive, the children informed Childress that they had taken some medication and that the defendant had given them the medicine, but one stated that he had spit his out in the toilet and flushed it. The other child stated that he had spit his pill out on the other side of the bed but that his sister, who was deceased, had taken hers.

¶ 11 Jessica Churovich was one of the paramedics who responded to the defendant's address. She described the condition of the room in which the deceased child was found as "unlivable." There was a lot of trash scattered around. There was rat poison on the floor. The child's body was already in rigor mortis, had lividity, and appeared to have been dead for some time. Churovich also observed and examined the two-year-old boy in the front room. He was very groggy and tired, and it was hard to keep him awake. He could not hold himself up or keep his head up, and his respiration rates were very low. His skin was cool and his pulse was high. His blood pressure was low. The defendant refused permission to take him to the hospital. In addition to the rat poison on the floor, Churovich noticed an open pill bottle on a table. Stephanie Williamson, the other paramedic on scene, testified consistently with Churovich.

¶ 12 Darnacio Johnson, one of the children at the scene, testified that he was nine years old. The defendant is Darnacio's aunt. On November 21, 2007, Darnacio's mother had taken him to stay at the defendant's house. He did not like to go to his aunt's house when she gave him pills. She gave him white round pills. When she handed him the pill and told him to take it, he went to the bathroom and spit it out in the toilet and flushed. The defendant told Darnacio he needed the pills because he was sick, but he was not sick. Darnacio thought the defendant had given him two or

three pills. The defendant also gave his brothers and sister some pills. Deanna, his four-year-old sister, and Deonta, his two-year-old brother, took the pills. She also gave his older brother, Johnnie, some pills and he took them. When Johnnie stated that he could not swallow the pills, the defendant told him to take them or she would "punch him in the neck." The pills made Darnacio feel funny and sick. Three or four times when the defendant gave him pills, he got dizzy and threw them up. When Deanna took the pills she fell asleep. Deonta got dizzy and could not stand up. Darnacio denied that he or his brothers or sister ever got into medicine on their own at the defendant's house. They only took medicine when the defendant told them to.

¶ 13 Defense counsel used the videotape of the police interviews with Johnnie and Darnacio to cross-examine Darnacio. Counsel played portions of the tape and then questioned Darnacio about them.

¶ 14 Johnnie McElroy, the oldest of the children involved in this incident, was 11 years of age at the time he testified at trial. He remembered November 21, 2007, when his mom dropped him off at the home of his aunt, the defendant. None of the children were sick when they arrived at the defendant's home, but they got sick when they took pills. The defendant gave pills to all of the children because she thought they were sick. The defendant placed the pills in the children's hands. The defendant gave Johnnie three pills, but she only gave Deonta, the two-year-old, one pill. Johnnie did not know if Darnacio took any pills, because Darnacio went into the bathroom. Johnnie testified that he tried to spit the pills out but he could not. When he told the defendant that he could not swallow them, the defendant threatened to punch him in the neck. She then watched Johnnie while he swallowed it and looked inside his mouth to be sure it was gone. After taking the pills, Deanna kept lying

down, Deonta was walking funny and lying down, and Johnnie started throwing up. Darnacio had thrown up at one point as well. Johnnie described the pills as small, round, and white, with an "A" on them. Johnnie denied that he or the other children took the pills on their own and insisted that they only took them when the defendant gave them pills. Again, defense counsel used the videotape of Johnnie's police interview to cross-examine him by repeatedly playing portions and then questioning Johnnie.

¶ 15 Abigail Keller, crime scene investigator for the Illinois State Police, testified to the medications and pill bottles she gathered and removed from the house.

¶ 16 Marla Spangler is a forensic scientist at the Illinois State Police crime laboratory. Her job is to analyze substances for the presence of controlled substances. She testified that morphine pills come in a variety of colors including gray, orange, and white.

¶ 17 Spangler analyzed the partially dissolved pill found in the defendant's home. The partially dissolved pill contained promethazine, which is not a controlled substance. It did not contain morphine. It is an antihistamine that can also be used as a sedative to make someone sleepy. The other pill she analyzed was prednisone, a steroid which is not a controlled substance. She did, however, analyze other pills from the house which did contain morphine. She analyzed pills containing diazepam, an antianxiety medication like Valium, that is a controlled substance. Many of the drugs other than morphine would have induced sleepiness in the children if ingested.

¶ 18 The nurses who treated Johnnie McElroy and Darnacio Johnson the night of the incident testified that the boys were a little sleepy or lethargic upon arrival but were able to answer questions and cooperate. They drew blood and urine from both

boys.

¶ 19 Stacey Moore is a nurse who treated Deonta Johnson at the hospital the night of the incident. She took blood and urine specimens from the child and also administered the medication Narcan to reverse the effects of opioid drugs in his system.

¶ 20 Christopher Long was certified and testified as an expert witness for the State in toxicology. Long testified that morphine pills come in a variety of shapes, sizes, and colors and with a variety of markings.

¶ 21 Long's laboratory performed toxicology tests on blood and urine specimens taken from each of the four children. Long was asked by the police to test the samples for morphine and benzodiazepines. Johnnie McElroy's urine showed morphine at 3.3 micrograms per milliliter. That is a large amount of morphine and would support a conclusion of a significant concentration in the blood. Morphine would show up in urine for three to five days after it was ingested; in the blood it is eliminated in 24 to 48 hours.

¶ 22 Darnacio Johnson had morphine in his blood at a level less than 0.05 micrograms per milliliter and in his urine at 2.2 micrograms per milliliter.

¶ 23 Deonta Johnson's blood showed morphine at 0.87 micrograms per milliliter, which is a very significant dose. Morphine can be fatal at 0.2 micrograms per milliliter. Morphine was present in Deonta's urine at greater than four micrograms per milliliter. Deonta also had hydromorphine and oxycodone present at 0.1 and 0.2 micrograms per milliliter.

¶ 24 Deanna Johnson had large amounts of morphine present in her blood and her urine. The level of morphine in Deanna's system was clearly in the fatal range.

¶ 25 Raj Nanduri is the pathologist who performed the autopsy on Deanna Johnson's

body. The autopsy showed no anatomical cause of death. The body showed signs of lividity and rigor mortis. These signs usually start to appear two to four hours after death. Deanna died from acute morphine intoxication.

¶ 26 The State rested. The defendant moved for a directed verdict based on the insufficiency of the evidence. The motion was denied. The defendant rested without putting on any evidence.

¶ 27 In closing argument, defense counsel argued that the defendant did not give the children the morphine pills but that the children found and ingested the pills on their own. Defense counsel admitted that the defendant was guilty of endangering the lives of the children because she left the morphine pills out where the children could get them. He argued that what Johnnie and Darnacio said about being given pills by the defendant might be true because the partially dissolved pill that was tested by the crime laboratory was an antihistamine, a cold pill. The defendant might have given the children antihistamine pills, but she did not give them morphine pills. He theorized that the children were playing with the morphine pills and ingested them and that when Deanna did not wake up, they decided to blame the defendant. He explicitly argued that Johnnie and Darnacio were lying. Defense counsel pointed out that Johnnie and Darnacio stated that the defendant had given them a round, white pill, which the antihistamine pill was; however, the only morphine pills found in the house were gray and orange. Defense counsel acknowledged that there was an empty morphine prescription bottle found in the house and that morphine pills do come in white.

¶ 28 The defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that she "delivered" or gave the children morphine pills where it leaves open the possibility that the children got into the morphine and ingested it

themselves out of curiosity. Johnnie and Darnacio testified that the defendant gave them round, white pills, yet none of the morphine pills found in the house were white. Accordingly, the defendant argues, she did not give the children morphine pills.

¶ 29 Indeed, the defendant argues, one of the children testified that the defendant gave him a round, white pill, which he put in his mouth but later spit out on the floor. A partially dissolved white and "roundish" pill was recovered from the floor and analyzed. It was an antihistamine. The defendant points out that, although the State presented evidence that an empty morphine prescription bottle was found in the defendant's house, and that morphine pills come in a variety of colors, it did not present evidence that any pharmaceutical company actually manufactured white morphine pills during the relevant time period.

¶ 30 The defendant further argues that it defies common sense to believe that anyone prescribed such high doses of morphine as were found in the house would have carelessly allowed them to be given to children and then spit out and thrown away, or vomited up. The defendant points out that none of the prescription bottles were tested for fingerprints to see if the defendant's, or the children's, fingerprints were on them.

¶ 31 The State counters that the two older children, Johnnie and Darnacio, testified unequivocally that they did not take any pills on their own, that they only took pills when the defendant gave pills to them. The children testified that the defendant gave them pills on the day in question and that the pills made them dizzy and nauseous. It is undisputed that all of the children had morphine in their systems. They took no pills other than those given to them by the defendant. Therefore, the defendant "delivered" morphine to the children.

¶ 32 With respect to the color of the pills, the State points out that an empty

morphine prescription bottle was found in the house, which could have contained round, white morphine pills, all of which were consumed by the children. It is also possible that Johnnie and Darnacio were mistaken about the color of the pills the defendant gave them. However, if, as the defendant contends, the children were lying that the defendant had given them the pills, and in truth they had ingested the pills on their own, it is far more likely that they would not have been mistaken about the color of the pills. There is no doubt that the children had morphine in their systems.

¶ 33 A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261. On judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. *Collins*, 106 Ill. 2d at 261. The credibility of the witnesses and the weight to be given their testimony are determinations that are exclusively within the province of the jury. *Collins*, 106 Ill. 2d at 261-62. Similarly, it is for the jury to resolve any conflicts in the evidence. *Collins*, 106 Ill. 2d at 262.

¶ 34 Viewing all of the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The jury heard all of the evidence and had the opportunity to observe the witnesses and evaluate their credibility and determine the weight to be given their testimony. We will not substitute our judgment for that of

the jury in the case at bar.

¶ 35 We turn now to the defendant's second argument on appeal: that her trial counsel was ineffective in allowing the entire videotape of Johnnie McElroy's police interview to be played for the jury where that tape included Johnnie's statement that the defendant had previously whipped him with an extension cord. The defendant argues that evidence of prior bad acts by the defendant is irrelevant and inadmissible and prejudicial to the defendant. The defendant argues that her counsel should have ensured that the improper comments were redacted from the videotape or, at the least, that a limiting instruction was given to the jury.

We note that at trial, defense counsel stipulated to the admissibility of the *entire* videotape, without redaction, as a matter of trial strategy. On the record, prior to trial, the prosecutor and defense counsel represented to the court that they wanted to enter into a stipulation that the videotape would be allowed to be played to the jury in its entirety. Defense counsel explicitly stated that this was "a matter of my trial strategy." He further stated, "It's important for me to be able to use the tapes in various ways and so I'm willing to enter into this stipulation so I don't have to cut the tapes, I plan to use them as well." A written stipulation to this effect was filed of record. Defense counsel did not reveal of record what his trial strategy was that required admission of the videotapes without redaction. Nevertheless, it is well-settled that an attorney's decisions regarding trial tactics or strategy are matters of professional judgment to which a review of counsel's competency does not extend. *People v. Cordevant*, 297 Ill. App. 3d 193, 200 (1998); *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001). Accordingly, we cannot conclude that defense counsel's representation fell below that level of professional conduct required by our constitution. In any event, we do not believe the defendant was prejudiced by admission of Johnnie's videotaped statement that the defendant had whipped him with an extension cord. In order to establish ineffective

assistance of counsel, the defendant must show that his counsel's unprofessional errors were so serious that there is a reasonable probability that, but for the unprofessional errors, the outcome of the proceeding would have been different. *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001). In light of the evidence of the deplorable and dangerous conditions in which the defendant was keeping the children, evidence that she had on occasion whipped Johnnie with an extension cord could not have had much impact on the jury. There is no reasonable probability that admission of this evidence changed the outcome of the proceeding.

¶ 36 Finally, the defendant argues that she is entitled to an additional $5-a-day credit against her $200 DNA analysis fee for the time she spent in presentencing custody. Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2010)) provides for the collection of blood, saliva, or tissue for DNA analysis from anyone convicted of any felony. It further provides that anyone so convicted shall pay a DNA "analysis fee" of $200. 730 ILCS 5/5-4-3(j) (West 2010). This DNA "analysis fee" has been held to be a fine within the meaning of section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)). *People v. Long*, 398 Ill. App. 3d 1028, 1034 (2010). Section 110-14 (a) provides that any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction shall be allowed a credit of $5 for each day so incarcerated. 725 ILCS 5/110-14(a) (West 2010). The amount credited may not exceed the amount of the fine. 725 ILCS 5/110-14(a) (West 2010).

¶ 37 The State agrees that the DNA analysis fee is a fine and that had it actually been imposed on the defendant, she would be entitled to a credit of $5 for each day spent in presentencing custody. The State argues, however, that the defendant was not assessed such a fine in this case because she had already submitted a specimen for

DNA analysis after a previous conviction.

¶ 38 At the defendant's sentencing hearing, the only reference to this DNA analysis fee was when the circuit court stated: The Defendant will be given credit for time served, both in St. Clair County Jail and while being evaluated at the Department of Human Services. *She'll be ordered to submit to DNA analysis if she's not already done so*. All other costs and fees will be ordered waived. The court would hereby enter judgment on the sentence." (Emphasis added.) The written judgment order stated: "Def [*sic*] to submit & pay 200.00 D.N.A. analysis to D.O.C. if not already done. All other fees waived." The State points out that the defendant's presentence investigation report indicates, "Information obtained from the Illinois State Police DNA Database reveals the defendant DOES HAVE A DNA SAMPLE ON FILE which was received May 17, 2007." The State argues that the defendant has failed to establish that the fine was ever assessed against her because the record indicates that she had previously submitted a specimen for DNA analysis.

¶ 39 We hereby vacate that portion of the circuit court's sentencing order which imposed a conditional DNA analysis fee on the defendant. The record shows that the defendant had already submitted her DNA to the Illinois State Police in accordance with section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2010)). Under such a circumstance, no DNA analysis fee was intended to be imposed against the defendant. In any event, the defendant was in presentencing custody for more than 40 days, for each of which days she is entitled to a $5 credit against the $200 fine. No fine is due.

¶ 40 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed in part and vacated in part.

¶ 41 Affirmed in part and vacated in part.