

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).

2015 IL App (4th) 130387-U

NO. 4-13-0387

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 23, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
MISOOK NOWLIN,)	No. 11CF800
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed defendant's conviction of first degree murder, concluding the trial court did not abuse its discretion in granting the State's motion to allow a detective to be seated at counsel table or in allowing him to testify after being introduced to the jury as "assisting" the State. The appellate court vacated the trial court's order denying defendant's motion to reconsider sentence as to her conviction and sentence for concealment of homicidal death and remanded with directions, finding the record void of a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 2 In September 2011, the State charged defendant, Misook Nowlin, with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) and one count of concealment of homicidal death (720 ILCS 5/9-3.4(a) (West 2010)). In December 2012, the State filed a motion to allow Detective Richard Barkes to be seated at counsel table throughout the trial, which was granted. In December 2012, prior to the start of trial, defendant pleaded guilty to concealment of homicidal death. During trial, Detective Barkes was introduced to the jury as,

"seated at counsel table with the assistant [S]tate's [A]ttorneys is a Bloomington police Detective, Mr. Rick Barkes, who **** will be assisting the attorneys throughout the trial." Detective Barkes was later called as a witness and identified several exhibits and testified to statements made by defendant. The jury found defendant guilty of first degree murder. In March 2013, the trial court sentenced defendant to consecutive prison terms of 50 years for first degree murder and 5 years for concealment of homicidal death. Later in March 2013, defendant filed a motion to reconsider sentence, arguing the sentences were excessive. In April 2013, the trial court denied defendant's motion to reconsider sentence. Defendant appealed.

¶ 3 On appeal, defendant requests this court to reverse her conviction for first degree murder and remand for a new trial because the trial court impermissibly allowed the prestige of the State's Attorney's office to artificially enhance Detective Barkes's credibility as a witness. Defendant further requests, with regard to her conviction and sentence for concealment of homicidal death, this court to remand for strict compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) because defense counsel failed to file a Rule 604(d) certificate. We affirm defendant's conviction of first degree murder, concluding the trial court did not abuse its discretion in granting the State's motion to allow Detective Barkes to be seated at counsel table or in allowing him to testify after being introduced as "assisting" the State. As to defendant's conviction and sentence for concealment of homicidal death, we vacate the trial court's order denying defendant's motion to reconsider sentence and remand to the trial court for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing.

¶ 4

I. BACKGROUND

¶ 5 On September 14, 2011, the State charged defendant by information with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) and one count of concealment of homicidal death (720 ILCS 5/9-3.4(a) (West 2010)). On September 21, 2011, the information was superseded by an indictment on all counts. The State alleged on or about September 5, 2011, defendant knowingly and without lawful justification killed Wenlan Linda Tyda, defendant's mother-in-law, a person over 60 years of age, by applying pressure to Tyda's neck and then knowingly concealed the death of Tyda with knowledge she died by homicidal means.

¶ 6 In December 2012, the State filed a pretrial motion to allow Detective Barkes to be seated at counsel table throughout the trial. Detective Barkes was the lead detective in the investigation. The State alleged, given the large number of exhibits and potential witnesses, Detective Barkes's knowledge and understanding of the evidence and witnesses would aid the State in the presentation of its case. On December 10, 2012, the trial court heard arguments on this motion. Defendant argued to allow Detective Barkes to be seated at counsel table would be prejudicial to defendant as "the State would be viewed with additional authority by virtue of Detective Barkes's office's position," and this would "give the State additional credibility." The court acknowledged the concern that having a witness in the courtroom during the presentation of other evidence may influence the witness's testimony. However, Detective Barkes was not an occurrence witness, but rather, an investigating officer. Further, the interview conducted by Detective Barkes, which the court believed to be the main subject of Detective Barkes's testimony, was recorded. This assured the court it was less likely Detective Barkes's testimony would be altered. As to prejudice by Detective Barkes simply being present, the court reasoned, "it's not unusual for jurors to understand that police officers and [S]tate's [A]ttorneys work together just as investigators often work with the defense, and I don't think that that fact in and of itself is

overly prejudicial." Therefore, the court granted the State's motion allowing Detective Barkes to be seated at counsel table.

¶ 7 On the same date, after the discussion on pretrial motions but prior to trial, defendant pleaded guilty to concealment of homicidal death. The trial court accepted a factual basis indicating (1) defendant was the last person seen with Tyda; (2) Tyda died of strangulation; (3) defendant wrapped the body in plastic garbage bags after stripping it naked; (4) defendant purchased a shovel and a 50-gallon tote, which defendant placed the body into; and (5) defendant ultimately provided information on where she buried the body.

¶ 8 Although the sufficiency of the evidence is not an issue on appeal, we briefly summarize the facts adduced at trial. Defendant was married to Don Wang, Tyda's son. Defendant suspected Don of having an affair. Defendant made statements to Don's employer regarding the alleged affair and accusations of theft, which led to Don being asked to leave his employment. Tyda was distraught with what defendant had done to her son and refused to speak with defendant. Defendant, wishing to explain her actions, set in motion a scheme to have Tyda meet her in a Cub Foods parking lot under the premise Tyda, who spoke Mandarin Chinese, was meeting an individual who spoke the Mandarin dialect and would be paid to drive the person to Chicago. In the early morning hours of September 5, 2011, upon arriving and realizing defendant had tricked Tyda into coming to the Cub Foods parking lot, an argument ensued. Eventually, defendant and Tyda left and went to defendant's nearby business, where the events leading to Tyda's death unfolded. Forensic evidence indicated Tyda died of strangulation, most likely by manual strangulation (use of the hands). Defendant asserted self defense. The jury found defendant guilty of first degree murder. The jury also found Tyda was 60 years of age or older at the time of her death, thereby making defendant eligible for extended-term sentencing.

¶ 9 Relevant to the issues on appeal are the introduction and testimony of Detective Barkes. At trial, Detective Barkes was introduced to the jury as, "[a]lso seated at counsel table with the assistant [S]tate's [A]ttorneys is a Bloomington police Detective, Mr. Rick Barkes, who is seated here. He will be assisting the attorneys throughout the trial." Later, Detective Barkes was called as a witness and testified as to how he first became involved in the missing-person report of Tyda and then was designated the lead detective on the case. He identified exhibit No. 362 as a recorded interview he conducted with defendant. Portions of the recorded interview and transcripts of the interview were published to the jury in open court with no objection. After publishing to the jury, Detective Barkes testified to the locations of defendant's business and a Cub Foods. He also testified, based on a previous video shown from a Cub Foods security camera, the direction of defendant's and Tyda's vehicles when leaving the Cub Foods parking lot. Finally, Detective Barkes identified exhibit Nos. 316 and 317 as two checkbooks.

¶ 10 Detective Barkes was later recalled as a rebuttal witness. He testified he conducted a walk-through of defendant's business with defendant present. Detective Barkes identified exhibit No. 373 as a portion of videotape recorded during the walk-through. That portion of the videotape was published to the jury in open court with no objection. Detective Barkes testified to additional conversations that occurred inside the business after the recording ended.

¶ 11 In January 2013, defendant filed a motion in arrest of judgment or for a new trial, contending, in relevant part, the trial court improperly permitted Detective Barkes "to be present throughout the trial, to participate in jury selection, to be seated at the prosecution table and then testify despite having heard and observed the testimony of other witnesses." In March 2013, the trial court conducted a hearing on defendant's posttrial motion and sentencing. As to her post-trial motion, defendant argued her concerns were (1) Detective Barkes's testimony was colored

by prior testimony, and (2) the presence of Detective Barkes at counsel table gave the State additional credibility. For the same reasons as addressed in granting the State's pretrial motion on December 10, 2012, the trial court denied defendant's posttrial motion. Thereafter, defendant was sentenced to consecutive prison terms of 50 years for first degree murder and 5 years for concealment of homicidal death.

¶ 12 Later in March 2013, defendant filed a motion to reconsider sentence, arguing the sentences were excessive. The record does not contain a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). In April 2013, the trial court denied defendant's motion to reconsider sentence.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant requests this court to reverse her conviction for first degree murder and remand for a new trial because the trial court impermissibly allowed the prestige of the State's Attorney's office to artificially enhance Detective Barkes's credibility as a witness. Defendant further requests, as to her conviction and sentence for concealment of homicidal death, this court to remand for strict compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) because defense counsel failed to file a Rule 604(d) certificate. We address these arguments in turn.

¶ 16 A. Detective Barkes's Testimony

¶ 17 Defendant requests this court to reverse her conviction for first degree murder and remand for a new trial because the trial court impermissibly allowed the prestige of the State's Attorney's office to artificially enhance Detective Barkes's credibility as a witness. Specifically, defendant argues, by introducing Detective Barkes to the jury as, "seated at counsel table with

the assistant [S]tate's [A]ttorneys" to assist the prosecutors "throughout the trial," the trial court introduced him as an integral component of the State's Attorney's prosecuting authority. Thereafter, by allowing Detective Barkes to remain present at counsel table, hear and observe the testimony of the other witnesses, and also testify as a key State's witness and as the State's final rebuttal witness, the court improperly infringed on each of the fairness concerns underlying the advocate-witness rule and deprived defendant of a fair trial. Therefore, defendant argues the trial court abused its discretion in allowing Detective Barkes to engage in the roles of both advocate and witness.

¶ 18 In response, the State maintains the trial court properly exercised its discretion when it granted the State's motion to allow Detective Barkes to remain in the courtroom and testify. The State argues (1) the advocate-witness rule is inapplicable as it only applies to attorneys; (2) Detective Barkes did not simultaneously assume the role of prosecuting the case and acting as witness; (3) the trial court properly found the likelihood of Detective Barkes's testimony being colored by remaining in the courtroom was slight as the interview was prerecorded; (4) the trial court properly found the likelihood of Detective Barkes's testimony being given greater credibility by being seated at counsel table was unpersuasive as juries are aware police officers work with the State's Attorney in presenting cases; (5) the introduction of Detective Barkes was appropriate to notify the jury who was sitting at counsel table and why he was there; (6) defendant failed to demonstrate how she was prejudiced by the testimony of Detective Barkes; and (7) even if any error occurred, it was harmless as the evidence of defendant's guilt was overwhelming.

¶ 19 *1. Granting the State's Motion To Allow Detective Barkes To Remain in the Courtroom*

¶ 20 The first issue presented is whether the trial court abused its discretion in granting the State's pretrial motion to allow Detective Barkes to remain in the courtroom. The trial court

may permit a material witness to remain in the courtroom to assist the State's Attorney. *People v. Leemon*, 66 Ill. 2d 170, 174, 361 N.E.2d 573, 575 (1977). "This rule extends to police officers." *People v. Jones*, 108 Ill. App. 3d 880, 886, 439 N.E.2d 1011, 1016 (1982) (citing *People v. Miller*, 26 Ill. 2d 305, 307, 186 N.E.2d 317, 318 (1962)). Whether to allow an officer to remain in the courtroom rests in the sole discretion of the trial court and will not be reversed absent an abuse of discretion. *Jones*, 108 Ill. App. 3d at 886, 439 N.E.2d at 1016. "Absent a showing of prejudice by the defendant, no abuse of discretion will be found in allowing a material witness to remain in the courtroom." *Jones*, 108 Ill. App. 3d at 886, 439 N.E.2d at 1016.

¶ 21 In deciding whether to grant the State's pretrial motion, the trial court addressed the concerns of (1) having Detective Barkes's testimony influenced by other evidence, and (2) the light Detective Barkes would be presented in if permitted to be seated at counsel table. First, the court reasoned Detective Barkes was not an occurrence witness, but rather, an investigating officer. Further, the interview conducted by Detective Barkes was recorded, decreasing the likelihood his testimony would be altered. Second, the court found it would not be prejudicial for detective Barkes to simply be present as "it's not unusual for jurors to understand that police officers and [S]tate's [A]ttorneys work together just as investigators often work with the defense." Therefore, the court granted the State's motion, allowing Detective Barkes to be seated at counsel table throughout the trial.

¶ 22 The trial court's reasoning to allow Detective Barkes to remain in the courtroom was sound and within the bounds of reason and recognized principles of law. Moreover, defendant has failed to demonstrate prejudice. In *Miller*, 26 Ill. 2d at 307, 186 N.E.2d at 318, the supreme court found an opportunity to hear testimony was not enough to show prejudice. Defendant has failed to demonstrate hearing the testimony from other witnesses altered Detective

Barkes's testimony, and thereby was prejudicial. Further, "the presence of a police officer at counsel table does not result in a presumption that the defendant was prejudiced." *People v. Elliott*, 337 Ill. App. 3d 275, 282, 785 N.E.2d 545, 550 (2003). Again, defendant has failed to demonstrate how she was prejudiced by the presence of Detective Barkes at counsel table. Therefore, the trial court did not abuse its discretion in granting the State's pretrial motion to allow Detective Barkes to be seated at counsel table.

¶ 23 2. *Allowing Detective Barkes To Testify After Being Introduced to the Jury as "Assisting" the State*

¶ 24 The second issue is whether the trial court abused its discretion in allowing Detective Barkes to testify after being introduced to the jury as "assisting" the State. Defendant asserts by allowing Detective Barkes to testify after being introduced as an integral part of the prosecuting authority, the court infringed on the fairness concerns expressed under the advocate-witness rule and deprived defendant of a fair trial.

¶ 25 The advocate-witness rule "articulates the professional impropriety of assuming the dual role of advocate and witness in a single proceeding." *United States v. Johnston*, 690 F.2d 638, 642 (7th Cir. 1982). This rule "bars attorneys from assuming a dual role as advocate and witness in the same proceedings," and "is particularly pertinent to prosecutors in criminal cases because of the sensitive role they assume as the government's representative in the court[room]" (Emphasis added.) *People v. Blue*, 189 Ill. 2d 99, 136, 724 N.E.2d 920, 940 (2000).

The fairness concerns underlying the advocate-witness rule are as follows: "(1) as an advocate for the government, the prosecutor's objectivity as a witness could never be assured; (2) the prosecutor's credibility is automatically (and unfairly) enhanced by the prestige and authority of the prosecutor's office; (3) the dual role of witness and advocate assumed by a prosecutor might confuse the jury; and (4) the rule reinforces the adage that the appearance of propriety is as vital to

the operation of our judicial system as actual propriety." *Blue*, 189 Ill. 2d at 137, 724 N.E.2d at 940 (citing *Johnston*, 690 F.2d at 643).

¶ 26 The bar against preventing a prosecuting attorney from testifying in a criminal case in which he is engaged may be relaxed if, in the discretion of the trial court, such testimony is necessary. *People v. Janes*, 138 Ill. App. 3d 558, 567, 486 N.E.2d 317, 323 (1985). A reviewing court will not overturn that determination absent an abuse of discretion. *Janes*, 138 Ill. App. 3d at 568, 486 N.E.2d at 323. Generally, even if error is found in allowing a prosecutor to testify and advocate, the defendant must demonstrate prejudice to justify reversal. *Janes*, 138 Ill. App. 3d at 568, 486 N.E.2d at 323-24 (citing *People v. Langdon*, 91 Ill. App. 3d 1050, 1056-57, 415 N.E.2d 578, 583-84 (1980)). However, regardless of the strength of the evidence of defendant's guilt, the court may act on plain error if the error is of such gravity as to threaten the integrity of the judicial process. *Blue*, 189 Ill. 2d at 138, 724 N.E.2d at 941. To make this determination, we must ask "whether a substantial right has been affected to such a degree that we cannot confidently state that defendant's trial was fundamentally fair." *Blue*, 189 Ill. 2d at 138, 724 N.E.2d at 940-41.

¶ 27 Defendant asserts, although Detective Barkes was a police detective and not a prosecuting attorney, he was presented as an integral part of the State's Attorney's prosecution team by being introduced to the jury as, "seated at counsel table with the assistant [S]tate's [A]ttorney" and "assisting the attorneys throughout the trial." After being presented as part of what the defendant describes as the "prosecution team," Detective Barkes was allowed to serve as a key witness in the trial. Defendant argues this dual role lent an improper aura of credibility to Detective Barkes's testimony in violation of the advocate-witness rule. Allowing Detective Barkes to assume this dual role allegedly (1) undermined his ability to act as an objective wit-

ness, (2) allowed the prestige and prominence of the prosecution team to artificially enhance his credibility as a witness, and (3) potentially confused the jury as to whether Detective Barkes was testifying in the capacity of an advocate or a witness.

¶ 28 Defendant has failed to present any authority applying the advocate-witness rule to witnesses other than attorneys. Nonetheless, even if, *arguendo*, we entertain defendant's argument to apply the advocate-witness rule to nonattorneys, we would deny defendant's request for the application in her case for several reasons.

¶ 29 First, defendant contends because the advocate-witness rule applies to prosecutors and Detective Barkes was introduced as assisting the prosecutors, Detective Barkes was a member of the prosecution team and not merely an investigator in the police force. Therefore, defendant alleges, "[i]t is reasonable to conclude that the jurors saw [Detective] Barkes in that light" and the fairness concerns underlying the advocate-witness rule are equally applicable. Detective Barkes was introduced as, "[a]lso seated at counsel table with the *assistant [S]tate's [A]ttorneys* is a Bloomington *police Detective*, Mr. Rick Barkes, who *** will be assisting the attorneys throughout the trial." (Emphases added.) The court clearly distinguished the parties by the roles of "police detective" (witness) and "assistant [S]tate's [A]ttorneys" (advocates). Contrary to defendant's argument, and consistent with the trial court's decision in allowing Detective Barkes to be seated at counsel table, we find it is reasonable to conclude the jurors would accept the roles of the parties as the court indicated, making the fairness concerns underlying the advocate-witness rule irrelevant in this case.

¶ 30 Second, even if, *arguendo*, we had found the advocate-witness rule applies because a juror would likely consider Detective Barkes as part of the "prosecution team," defendant has failed to demonstrate Detective Barkes in fact acted as an advocate for the State. Although

Detective Barkes used his knowledge acquired during his investigation in assisting the prosecution to maintain organization of the exhibits and witnesses throughout the trial, the record does not indicate Detective Barkes advocated on behalf of the State. Simply introducing Detective Barkes and informing the jury of his purpose for being present does not rise to the level of advocating on behalf of the State.

¶ 31 Finally, even if, *arguendo*, we had found (1) the advocate-witness rule applies because a juror would likely consider Detective Barkes as part of the "prosecution team," and (2) Detective Barkes did in fact advocate on behalf of the State, defendant has failed to demonstrate prejudice or that "a substantial right has been affected to such a degree that we cannot confidently state that defendant's trial was fundamentally fair." *Blue*, 189 Ill. 2d at 138, 724 N.E.2d at 940-41. Defendant argues introducing Detective Barkes as assisting the State (1) undermined his ability to act as an objective witness, (2) allowed the prestige and prominence of the prosecution team to artificially enhance his credibility as a witness, and (3) potentially confused the jury as to whether Detective Barkes was testifying in the capacity of an advocate or a witness. However, defendant does not present any evidence to demonstrate prejudice to support these arguments or contest the trial court's previous rationale jurors would understand State's Attorneys and police officers often work together. Further, defendant has failed to demonstrate a substantial right has been violated that would prevent us from finding defendant's trial was fair.

¶ 32 For these reasons, the trial court did not abuse its discretion in allowing Detective Barkes to testify after being presented as "assisting" the State. Having found no error in allowing Detective Barkes to testify, we need not address the State's argument to invoke the harmless-error doctrine to dispose of claims of error with a *de minimis* impact on the outcome of the case. *Blue*, 189 Ill. 2d at 137-38, 724 N.E.2d at 940.

¶ 33

B. Rule 604(d)

¶ 34 Defendant further requests this court to remand for strict compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) because defense counsel failed to file a Rule 604(d) certificate. Specifically, defendant asserts because she challenged her five-year sentence on the guilty plea conviction for concealment of homicidal death, defense counsel was required to file a certificate in compliance with Rule 604(d), and as the common-law record is void of any certificate, this court should remand. The State agrees.

¶ 35 Rule 604(d) mandates, for an appeal to be taken where a judgment is entered upon a plea of guilty, a defendant must file in the trial court either a motion to reconsider the sentence or a motion to withdraw the plea of guilty and vacate the judgment within 30 days. Rule 604(d) further states, "The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). When defense counsel fails to file a Rule 604(d) certificate, the remedy is "a remand for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing." *People v. Lindsay*, 239 Ill. 2d 522, 531, 942 N.E.2d 1268, 1274 (2011). The record on appeal does not include a certificate in compliance with Rule 604(d). Therefore, as to defendant's conviction and sentence for concealment of homicidal death, we vacate the trial court's order denying defendant's motion to reconsider sentence and remand to the trial court for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a

new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing.

¶ 36

III. CONCLUSION

¶ 37 For the reasons stated, we affirm defendant's conviction of first degree murder, concluding the trial court did not abuse its discretion in granting the State's motion to allow Detective Barkes to be seated at counsel table or in allowing him to testify after being introduced as "assisting" the State. As to defendant's conviction and sentence for concealment of homicidal death, we vacate the trial court's order denying defendant's motion to reconsider sentence and remand to the trial court for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 38

Affirmed in part and vacated in part; cause remanded with directions.