2018 IL App (4th) 150507-U

NO. 4-15-0507

FILED
February 28, 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.	)	Adams County
DAVID W. MASTERSON,	)	No. 14CF683
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays, Jr.,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not abuse its discretion in denying admission of a 9-1-1 tape as an excited utterance or prior consistent statement, (2) the court did not abuse its discretion in admitting a crime-scene video that depicted the victim's body, and (3) the State presented sufficient evidence to prove defendant engaged in exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 2 In April 2015, a jury found defendant, David W. Masterson, guilty of first degree murder in the death of Jason Tournear. The jury also found defendant engaged in brutal or heinous behavior indicative of wanton cruelty. Following a June 2015 sentencing hearing, the trial court sentenced defendant to natural life.

¶ 3 Defendant appeals, asserting (1) the trial court abused its discretion by denying admission of a 9-1-1 call where he could be heard in the background describing Tournear as "violent" and a "threat"; (2) the court abused its discretion in admitting a crime-scene video that

focused on Tournear's body and irrelevant evidence; and (3) the State failed to prove defendant engaged in exceptionally brutal or heinous behavior indicative of wanton cruelty. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Information

¶ 6 In December 2014, the State charged defendant with two counts of first degree murder in the death of Tournear. Count I alleged defendant, without legal justification and with the intent to kill Tournear, struck Tournear repeatedly in the head with a lead pipe, causing the death of Tournear in a manner that constituted exceptionally brutal or heinous behavior indicative of wanton cruelty. 720 ILCS 5/9-1(a)(1) (West 2012); 730 ILCS 5/5-5-3.2(b)(2) (West 2012). Count II contained the same allegations, but without the language that his actions were exceptionally brutal or heinous behavior indicative of wanton cruelty. 720 ILCS 5/9-1(a)(1) (West 2012). Defendant disclosed that he intended to assert a claim of self-defense.

¶ 7 B. The Jury Trial

¶ 8 Defendant's jury trial commenced in April 2015, at which time the jury heard the following evidence.

¶ 9 1. *Michael McQuerry*

¶ 10 Michael McQuerry testified he was one of defendant's neighbors in their apartment complex. In the evening of December 13, 2014, defendant asked McQuerry for help in moving a washer and dryer into defendant's apartment. When McQuerry went to defendant's apartment, Tournear was asleep on the couch in defendant's living room. After moving the washer and dryer, McQuerry observed Tournear was awake and sitting in a living-room chair near the entryway of the apartment.

¶ 11 McQuerry returned to his apartment that he shared with his girlfriend, Melissa Raymond. Within about five minutes, defendant again appeared at McQuerry's apartment and asked if McQuerry could assist Tournear in calling for a ride. When McQuerry entered defendant's apartment, Tournear was still sitting in the living-room chair**.** Defendant and McQuerry attempted to coax a phone number from Tournear, but Tournear could not provide them with a complete phone number. According to McQuerry, Tournear was drunk, mumbling, and appeared unable to rise from the chair. McQuerry testified that defendant said he wanted Tournear out of the home or defendant would "f*** him up."

¶ 12 McQuerry returned home but, a couple of minutes later, defendant appeared for a third time, saying he killed Tournear. McQuerry went with defendant to the apartment, where he discovered Tournear bludgeoned in the same chair and in the same position he had been in when McQuerry was last in the apartment. McQuerry then dialed 9-1-1 for emergency services.

¶ 13 2. *Melissa Raymond*

¶ 14 Melissa Raymond, McQuerry's girlfriend, testified McQuerry helped defendant move a washer and dryer. Within minutes of McQuerry returning home, defendant again appeared at the apartment, asking to use McQuerry's phone to procure a ride for Tournear, who was intoxicated. According to Raymond, defendant said he would bash Tournear's head in if Tournear did not leave.

¶ 15 McQuerry took his phone to defendant's apartment and came back a few minutes later. Within a couple of minutes of arriving, defendant returned to McQuerry's apartment carrying a metal pipe, saying that he "bashed" Tournear's head in and killed him. Raymond and McQuerry went to defendant's apartment. From her position in the doorway, Raymond could

see Tournear's body in the living-room chair. Raymond described defendant's demeanor as "excited" and "scared," like he was "frantic" and experiencing a "rush."

¶ 16 3. *Officer Darla Pullins*

¶ 17 Officer Darla Pullins of the Quincy Police Department was nearby when she received the emergency dispatch and arrived within a minute of the call. When she arrived, defendant flagged her down. According to Officer Pullins, defendant had an excited demeanor.

¶ 18 When she entered defendant's apartment, Officer Pullins observed Tournear to be dead in a living-room chair with a severe head wound. Defendant said he did not mean to kill Tournear, that it was an accident, and he reacted in self-defense because Tournear had a knife. Defendant showed the pipe to Officer Pullins and admitted he struck Tournear with it. Officer Pullins noted the pipe had blood on the end of it and observed extensive blood spatter in the living room.

¶ 19 After defendant was placed under arrest, he told Officer Pullins that Tournear was intoxicated, broke a light, and refused to help defendant clean up the shattered glass. Defendant also stated six or seven times that Tournear refused to leave. He further said Tournear had a knife and bullied him.

¶ 20 4. *Detective Eric Johnson*

¶ 21 Detective Eric Johnson testified he filmed a video of the crime scene, which was admitted without objection and played for the jury. Detective Johnson narrated parts of the video. The video was about 25 minutes in length and was filmed at night, shortly after the incident occurred. The video started outside the apartment, then moved into the main floor of the home, and also examined the upper story (where no evidence was recovered). On the main floor, Detective Johnson spent approximately two minutes focusing closely on Tournear's body and the

head wounds. The video also panned over Tournear's body on several occasions while moving throughout the main floor. Tournear appeared in the periphery of the video for a total of about one minute over the course of the 25-minute video. The video also focused on the extensive blood spatter in the living room, brain matter found on the living-room floor, and the pipe recovered from the living room table. Detective Johnson also pointed out the broken light in the kitchen and the presence of a knife in Tournear's pocket. Detective Johnson verified the apartment had only one entrance, and the video reflected the living-room chair with Tournear's body was near the door.

¶ 22 Detective Johnson interviewed Raymond, but he did not recall her telling him that defendant threatened to kill or injure Tournear if Tournear refused to leave the house.

¶ 23 5. *Emily Pezzella*

¶ 24 Emily Pezzella, a crime-scene technician for the Quincy Police Department, testified she collected evidence from the scene, including a 28-inch metal pipe, bone fragments, brain matter, and a knife recovered from Tournear's pocket. She also photographed suspected blood spatter throughout the living room.

¶ 25 6. *Detective Adam Gibson*

¶ 26 Detective Adam Gibson spoke with defendant at the scene. Defendant pointed out the metal pipe and admitted hitting Tournear with it. Detective Gibson then walked outside of the apartment with defendant, at which time defendant admitted hitting Tournear with the pipe three or four times because Tournear was bullying him and refusing to leave.

¶ 27 Detective Gibson then took defendant to the nearby police station. According to Detective Gibson, defendant was calm, but his speech was "accelerated" and "jittery." Defendant then proceeded to provide Detective Gibson with his version of events.

¶ 28 According to defendant, he initially became angry with Tournear after Tournear broke a light. After breaking defendant's light, Tournear stumbled outside to urinate but fell outside. Defendant brought Tournear back inside and then went to McQuerry's apartment to ask about using the phone to procure a ride for Tournear. McQuerry left after unsuccessfully attempting to obtain a phone number from Tournear. At that point, defendant said Tournear kept coming up to him, saying, "[W]hat are you going to do?" Defendant explained he "snapped out." Defendant then picked up a pipe and began hitting Tournear to ensure he "don't get me, too." Defendant said he hit Tournear five or six times with the pipe, and Tournear, who was intoxicated, fell into the chair.

¶ 29 Although defendant originally told Detective Gibson that Tournear bullied him, he later stated, "He wasn't bullying me, he was getting on my nerves, he was pissing me off." According to defendant, Tournear had a knife but he "wasn't worried about that knife" and he did not feel threatened by it. Upon further questioning, defendant admitted he struck Tournear first and that Tournear did not pull his knife out or otherwise strike defendant. However, defendant said Tournear was acting aggressively. Defendant said he told Tournear to leave or "shit was going to get stupid."

¶ 30 Defendant then said he would probably never get out of prison after this "stunt." According to Detective Gibson, defendant demonstrated no remorse, but instead lamented that Tournear ruined defendant's chair by bleeding all over it.

¶ 31 7. *Dr. Scott Denton*

¶ 32 Dr. Scott Denton, a board-certified forensic pathologist, testified he examined Tournear's body. According to Dr. Denton, Tournear died from blunt-force trauma to the head after being struck numerous times—about a dozen distinguishable blows—on the left side of his

head. Dr. Denton examined the metal pipe and determined Tournear's injuries were consistent with being struck by the pipe. Dr. Denton noted that Tournear was struck with such force that the pipe drove pieces of his skull into his brain and tore off brain matter. The severity of the impact was also shown by the blood vessel and tissue damage away from point of impact, such as the injuries to the blood vessels in Tournear's eye. According to Dr. Denton, the injuries appeared to result from someone swinging the pipe as hard as possible.

¶ 33 Based on the horizontal nature of the blows, the point of impact, and the blood spatter pattern, Dr. Denton opined Tournear was seated at the time he was struck and that he did not move. This opinion was further supported by the absence of defensive wounds on Tournear, which indicated Tournear did not see the blow coming or was too slow to react due to his inebriation. Dr. Denton noted Tournear's blood-alcohol concentration was 0.269, which might have made Tournear either unconscious or sleepy, or given him difficulty in controlling his muscles. At the same time, he acknowledged Tournear could have been belligerent or attempting to pick a fight.

¶ 34 8. *Sergeant Brian Curran*

¶ 35 Sergeant Brian Curran, a corrections officer in the Adams County jail, testified defendant admitted hitting Tournear in the head with a pipe because Tournear refused to leave. Defendant also lamented that Tournear bled all over defendant's chair. According to Sergeant Curran, defendant said he was "happy" to look into Tournear's eyes and watch him die.

¶ 36 While defendant was in the jail, he engaged in recorded conversations with friends and family. Portions of the recorded calls from December 18, 2014, and December 26, 2014, were played for the jury. During the first call, while reviewing his parole-violation paperwork, defendant said the papers stated "I had a friend over, got irritated with him, and beat

him over the head with a pipe." He insisted he did not invite Tournear over; rather, Tournear showed up. During the second call, defendant said he was "glad the little b**** is dead" and he "should have butt-f***** him after I beat his brains in."

¶ 37 9. *Defendant*

¶ 38 Defendant testified that on December 13, 2014, he returned home around 5:30 p.m. Shortly thereafter, Tournear knocked on his door. Defendant described Tournear as loud, yelling, and intoxicated. Tournear also continued drinking from a small bottle of vodka. Defendant observed Tournear was wearing a pair of pants with holes, which revealed a steak knife sticking out of his pocket.

¶ 39 Defendant said he was working in the kitchen when Tournear walked in and kicked a light, shattering it on the floor. Tournear initially stood in the glass, refusing to move. Tournear then sat at the kitchen table while defendant cleaned up the glass and continued with his work in the kitchen.

¶ 40 After a few minutes, defendant left to enlist McQuerry's help in moving a washer and dryer into his apartment. At the time, Tournear was relaxing on the couch, and defendant thought he would go to sleep. After he finished moving the washer and dryer, defendant observed Tournear stumble into the kitchen and out the door, leaving a path of urine in his wake. Defendant shut the door, leaving Tournear outside to urinate. When he discovered Tournear was lying on the ground outside shortly thereafter, defendant allowed him back inside. According to defendant, Tournear was moving of his own volition. Defendant coaxed Tournear into sitting in the living-room chair while he called someone to give Tournear a ride home. Defendant went to McQuerry's apartment and asked for help in placing the call, but after Tournear refused to provide a phone number, McQuerry left.

¶ 41 Defendant testified Tournear's failure to cooperate made him angry. At the time, defendant was standing in the living room while Tournear was seated in the living-room chair, which meant Tournear was between defendant and the door. When defendant said he would enlist help in removing Tournear from the home, Tournear stood from the chair and said defendant "wasn't going anywhere." When defendant tried to leave, Tournear shoved him in the face. Defendant said this action made him feel enraged and trapped. Defendant therefore grabbed the metal pipe next to the chair and demanded Tournear allow him to leave. Again, Tournear refused to let him pass. As Tournear stepped toward him, defendant started swinging the pipe.

¶ 42 Defendant stated he hit Tournear once, at which time Tournear fell back into the chair. Tournear grabbed defendant's belt buckle and pulled defendant down on top of him, so defendant swung the pipe at Tournear three to four times to free himself. However, defendant admitted he "blacked out" with rage and could not recall how many times he actually struck Tournear. As soon as he freed himself, defendant said he ran to McQuerry's apartment to ask for help.

¶ 43 On cross-examination, defendant initially said he did not recall denying that Tournear bullied him, but he then agreed he told Detective Gibson he did not feel threatened by Tournear. He also admitted he did not tell police that Tournear grabbed him by the belt and pulled him into a chair, nor did he tell police that Tournear brandished a knife or hit him first. He further agreed there was no disarray in the living room to indicate a struggle. Defendant responded he could have told the detective anything he wanted but chose not to tell him everything.

¶ 44 Defendant admitted he had three prior convictions: a 2008 theft conviction, a 2010 conviction for threatening a public official, and a 2013 aggravated-battery conviction.

¶ 45 10. *Recording of 9-1-1 Call*

¶ 46 Following his testimony, defendant sought to introduce a recording of McQuerry's 9-1-1 call. Defendant could be heard in the background of the call. When the dispatcher advised that someone should press a clean towel to Tournear's head wound, defendant could be heard saying, "He's violent. I'm not getting nowhere near him. He's a threat." Defendant sought to introduce the call to demonstrate his prior consistent statement to rebut the State's implication during his cross-examination that he had recently fabricated his self-defense claim. The State objected. The State noted the statement was not an excited utterance, nor should the trial court admit the prior consistent statement. The State argued defendant had a motive to give a false statement—to prevent his own arrest—and that evidence of his self-defense claim had already been admitted through the various officers' testimony. The court agreed with the State's position, stating, "I think it's a prior consistent statement and that it's therefore inadmissible based on arguments of counsel." The court allowed defendant to provide the 9-1-1 call as an offer of proof for the record.

¶ 47 11. *Jury Verdict*

¶ 48 Following the presentation of evidence, the jury found defendant guilty on both counts of first degree murder. In doing so, the jury also made a finding that defendant's actions constituted exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 49 C. Posttrial Proceedings

¶ 50 In May 2015, defendant filed a posttrial motion, arguing, in part, that the trial court abused its discretion in denying admission of the 9-1-1 call as a prior consistent statement. The court denied the motion.

¶ 51 Following a June 2015 sentencing hearing, the trial court sentenced defendant to an extended term of natural life based on the jury's verdict that he engaged in exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-5-3.2(b)(2) (West 2012).

¶ 52 This appeal followed.

¶ 53 II. ANALYSIS

¶ 54 On appeal, defendant argues (1) the trial court erred by denying admission of McQuerry's 9-1-1 call, (2) the court erred by admitting the crime-scene video, and (3) the State failed to prove beyond a reasonable doubt that defendant's actions constituted exceptionally brutal or heinous behavior indicative of wanton cruelty. We address these arguments in turn.

¶ 55 A. The 9-1-1 Call

¶ 56 Defendant first asserts the trial court erred by refusing to admit McQuerry's call to 9-1-1, during which defendant, in the background, expresses his refusal to press a towel to Tournear's wound claiming Tournear is "violent" and a "threat." Defendant argues two different grounds upon which the call should have been admitted: as an excited utterance and as a prior consistent statement.

¶ 57 1. *Excited Utterance*

¶ 58 Defendant contends the trial court should have admitted the 9-1-1 call as an excited utterance. Initially, the parties dispute whether this issue was properly raised before the trial court. Defendant notes, in objecting to admission of the 9-1-1 call, the State argued defendant's statement was not an excited utterance. The State, in turn, asserts defendant never

addressed the excited-utterance exception to the hearsay rule but, instead, specifically stated it sought to introduce the statement for rebuttal purposes only.

¶ 59 Regardless of whether defendant raised the excited-utterance issue before the trial court, defendant failed to raise the issue in a posttrial motion. Thus, the issue is deemed forfeited. A defendant must make a timely objection and preserve the issue in a posttrial motion to avoid forfeiture. *People v. Kitch*, 239 Ill. 2d 452, 460, 942 N.E.2d 1235, 1240 (2011). However, we may consider a forfeited claim where the defendant demonstrates plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). If an error occurred, we will only reverse where (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error"; or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* We therefore turn to whether the court's decision to deny admission of the 9-1-1 call based on the excited-utterance hearsay exception constituted an error.

¶ 60 The excited-utterance exception to the hearsay rule applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ill. R. Evid. 803(2) (eff. Apr. 26, 2012). To qualify as an excited utterance, "(1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must be an absence of time for the declarant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence." *People v. Williams*, 193 Ill. 2d 306, 352, 739 N.E.2d 455, 479 (2000). The finding that the declarant made an excited utterance is based on the totality of the circumstances, with

consideration for the time elapsed since the underlying incident, the nature of the incident, the mental and physical condition of the declarant, and the presence or absence of self-interest. *Id.* "The critical inquiry is whether the statement was made while the excitement of the event predominated." (Internal quotation marks omitted.) *Id.* at 353.

¶ 61 The trial court's decision regarding the admissibility of evidence will not be overturned absent an abuse of discretion. *People v. Cookson*, 215 Ill. 2d 194, 204, 830 N.E.2d 484, 490 (2005). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1, 5 (2009).

¶ 62 Defendant argues that the circumstances demonstrate his statement in the background of the 9-1-1 recording was an excited utterance. First, defendant contends the occurrence—his altercation with Tournear—was a sufficiently startling event to produce a spontaneous and unreflecting statement. Second, defendant asserts there was an absence of time for defendant to fabricate a statement, as only a few minutes passed between McQuerry leaving defendant alone with Tournear at the apartment, the incident, and defendant asking McQuerry to call for help. Raymond testified, at the time, defendant was frantic, scared, and excited, as though experiencing a "rush" of adrenaline. Finally, defendant argues his statement related to the circumstances of the occurrence when he blurted out his refusal to help Tournear because Tournear was violent and a threat.

¶ 63 Although defendant failed to preserve this issue in the trial court, the record demonstrates the court had the opportunity to consider the 9-1-1 call as an excited utterance

because the State objected to admitting the statement as an excited utterance. Rejecting the admission of the 9-1-1 call as an excited utterance was not an abuse of discretion.

¶ 64 As the State argued, the evidence adduced at trial demonstrates defendant had a strong self-interest in asserting Tournear was violent and threatening. The State also noted, at the time, Tournear was either dead or close to death, providing further evidence that defendant's statements were made in self-interest. In denying admission of the call, the court relied "upon arguments of counsel," which would have presumably considered any arguments regarding the excited-utterance exception. Because the court could have reasonably determined defendant's statements were made in his own self-interest, we conclude the court's failure to apply the excited-utterance exception was not so arbitrary, fanciful, or unreasonable as to constitute an abuse of discretion.

¶ 65 2. *Prior Consistent Statement*

¶ 66 Defendant also asserts the trial court abused its discretion in refusing to admit the 9-1-1 call in rebuttal as a prior consistent statement.

¶ 67 Generally, "a witness may not be rehabilitated by admitting former statements consistent with his trial testimony." *People v. Heard*, 187 Ill. 2d 36, 70, 718 N.E.2d 58, 77 (1999). "An exception to this rule exists where there is a charge that the witness recently fabricated the testimony or that the witness has a motive to testify falsely." *Id.* The purpose of admitting these statements is to rehabilitate the witness's credibility and will not be admitted as substantive evidence. *People v. Stull*, 2014 IL App (4th) 120704, ¶ 99, 5 N.E.3d 328. Again, we will not overturn the trial court's decision regarding the admission of evidence absent an abuse of discretion. *Cookson*, 215 Ill. 2d at 204.

¶ 68 The issue here is whether the State claimed defendant recently fabricated his theory of self-defense. "[E]vidence is admissible that [the witness] told the same story before the motive came into existence or before the time of the alleged fabrication." *People v. Clark*, 52 Ill. 2d 374, 389, 288 N.E.2d 363, 371 (1972). Thus, the nature of defendant's statement is crucial to our inquiry.

¶ 69 In this case, defendant sought to introduce his statements from the 9-1-1 call that Tournear was "violent" and a "threat" to rebut the State's argument that defendant's testimony—that Tournear prevented him from leaving the home, brandished a knife, hit him first, and yanked defendant's belt until defendant fell—was recently fabricated. However, we fail to see how the 9-1-1 call rebuts the State's claim of recent fabrication. The State did not argue defendant's self-defense claim was recently fabricated. In fact, both Officer Pullins and Detective Gibson testified that defendant told them he acted in self-defense.

¶ 70 Instead, the State challenged as a recent fabrication the specific facts—that Tournear prevented him from leaving the home, brandished a knife, hit him first, and yanked defendant's belt until defendant fell—defendant admitted he raised for the first time in his trial testimony. The 9-1-1 call therefore does not rebut the State's challenge of recent fabrication.

¶ 71 Through the 9-1-1 call, defendant sought to bolster his credibility as to the self-defense claim by admitting a prior consistent statement. Because the State did not challenge defendant's claim of self-defense as a recent fabrication, defendant had no legal basis to introduce a prior consistent statement in rebuttal. Accordingly, the trial court did not abuse its discretion in denying admission of the 9-1-1 call as a prior consistent statement.

¶ 72 B. The Crime-Scene Video

¶ 73 Defendant next contends the trial court improperly admitted the crime-scene video. Specifically, defendant argues the eerie video needlessly focused on Tournear's head injury and irrelevant evidence.

¶ 74 Although defendant did not raise this issue before the trial court, he now asks us to review this issue for plain error. In the alternative, he asks us to conclude defense counsel's failure to raise the issue constituted ineffective assistance of counsel. We begin by addressing plain error.

¶ 75 As noted above, to prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565. To demonstrate error, defendant must show the trial court's decision to admit the crime-scene video was an abuse of discretion. *Cookson*, 215 Ill. 2d at 204.

¶ 76 Where evidence is otherwise relevant, the trial court must weigh whether the evidence is "so prejudicial and so likely to inflame the jurors' passions that their probativeness is outweighed." *People v. Kitchen*, 159 Ill. 2d 1, 35, 636 N.E.2d 433, 448 (1994). In dealing with evidence such as photographs or, in this case, a video, "prejudice" is defined as "an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror." (Internal quotation marks omitted). *People v. Decaluwe*, 405 Ill. App. 3d 256, 268, 938 N.E.2d 181, 191 (2010).

¶ 77 Defendant argues the video was "so prejudicial as to inflame the jurors' passions" due to the eerie quality of the video, which was recorded at night with low lighting and no sound. Moreover, the video included a walkthrough of the home, even areas not relevant to the case, all while Tournear was dead in the chair. The video also included a close examination of the body.

¶ 78 The video has strong probative value. First, the video shows the layout of the home, which helped the jury to better understand witness testimony regarding their various locations, including defendant's statements that Tournear's position effectively blocked defendant's exit from the home. Second, the video demonstrates the position of Tournear's body in the chair and the degree of his injuries, including the extent of the blood spatter and brain matter discovered in the living room. Third, the video shows the position of the metal pipe in the living room as well as the knife sticking out of Tournear's pocket.

¶ 79 As the State points out, photographic evidence is admissible to prove a number of facts: (1) the extent of the injuries and the force needed to inflict them; (2) the position, condition, and location of the body; and (3) the manner and cause of death to corroborate a defendant's confession and aid in understanding the testimony of a pathologist or other witnesses. *Heard*, 187 Ill. 2d at 77. Although a video recording may provide more of an "eerie" quality than photographs, a still image could not provide the same context for the widespread bloodshed and the layout of the apartment as the video provided.

¶ 80 The question then becomes whether the prejudicial impact outweighs the probative value of the video. As to defendant's argument that the video was "ever focused" on Tournear's body, our review of the 25-minute video reveals that less than 2 minutes of the filming focused closely on Tournear and his injuries. He also appeared in the periphery of the video on several occasions—in totality, for one minute—with most brief appearances resulting from the camera panning from one room to another. The remaining 22 minutes focused on the crime scene itself, starting outside the home and then moving throughout the inside of the home, recording blood spatter and focusing on items of potential evidentiary value. It is therefore

reasonable to conclude the video has no undue tendency to suggest a decision on an improper basis.

¶ 81 Given that the central issue for the jury to determine was whether defendant acted in self-defense, the video provided necessary context and information about the crime scene to aid the jury as it considered the credibility of defendant's self-defense claim. Moreover, the video served to (1) corroborate defendant's confession and contention that Tournear had a knife, and (2) assist the jury in understanding the testimony of the forensic pathologist and other witnesses. The probative value therefore outweighs any prejudicial impact of the video.

¶ 82 We conclude the admission of the video was not an abuse of discretion. Because the admission of the video was not an abuse of discretion, defendant has failed to demonstrate plain error or that his attorney was ineffective for failing to object to the admission of the video.

¶ 83 C. Reasonable Doubt

¶ 84 Finally, defendant asserts the State failed to prove beyond a reasonable doubt that his actions in killing Tournear constituted exceptionally brutal or heinous behavior indicative of wanton cruelty, which made defendant eligible for an extended-term sentence of natural life.

¶ 85 To impose an extended-term sentence, the State must prove beyond a reasonable doubt that the defendant's actions constituted exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-5-3.2(b)(2) (West 2012); see also *People v. Holman*, 2014 IL App (3d) 120905, ¶ 62, 20 N.E.3d 450. Our approach is the same as it is when we consider whether the evidence proves a defendant guilty of a crime beyond a reasonable doubt. We ask whether, in the light most favorable to the State, any rational trier of fact could have found the essential elements of the extended-term factor beyond a reasonable doubt. *Holman*, 2014 IL App (3d) 120905, ¶ 62.

¶ 86 To justify the application of the extended-term factor, the State must prove defendant's conduct was "(1) exceptionally brutal or heinous[,] and (2) indicative of wanton cruelty." *Id.* ¶ 63. According to Illinois Pattern Jury Instructions, Criminal, No. 28.03 (4th ed. Supp. 2011), which was provided to the jury in this case, "The word 'brutal' means cruel and cold-blooded, grossly ruthless or devoid of mercy or compassion. The word 'heinous' means enormously and flagrantly criminal, hatefully or shockingly evil or grossly bad. The term 'wanton cruelty' means consciously seeking to inflict pain and suffering on the victim of the offense."

¶ 87 There are several factors courts may consider in determining whether a defendant's actions constituted exceptionally brutal or heinous and indicative of wanton cruelty. *Holman*, 2014 IL App (3d) 120905, ¶ 63. These factors include:

> "[1] whether the offense was premeditated, [2] whether the defendant was provoked to act, [3] the senseless nature of the act, [4] the number of wounds inflicted, [5] the danger created by the act, [6] the extent of the injury inflicted, [7] whether the defendant exhibited remorse, [8] whether the defendant inflicted prolonged pain or torture, [9] whether defendant shot the victim at close range, and [10] whether defendant inflicted mental suffering on the victim." *Id.* ¶ 63.

However, we are not limited to these characteristics and must, instead, evaluate the facts surrounding the present case. *People v. Nester*, 123 Ill. App. 3d 501, 504-505, 462 N.E.2d 1011, 1014 (1984).

¶ 88 The parties do not dispute defendant killed Tournear. Rather, the issue was whether defendant acted in self-defense. Defendant argues *People v. Rodriguez*, 275 Ill. App. 3d 274, 655 N.E.2d 1022 (1995), is instructive. In *Rodriguez*, the defendant struck the victim, a three year old, three times in the abdomen after the child soiled her pants. *Id.* at 290. The child died shortly thereafter. *Id.* The reviewing court found no evidence of torture or premeditation; rather, the court concluded the defendant was provoked to anger, "albeit irrationally and indefensibly." *Id.* Accordingly, the court found the fact that the defendant killed a child was insufficient to warrant the trial court's finding of exceptionally brutal or heinous behavior indicative of wanton cruelty. *Id.* at 291.

¶ 89 *Rodriguez* is readily distinguishable. First, we note *Rodriguez* predates *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which now requires all factual issues, including those related to extended-term sentencing, be presented to the jury. Accordingly, *Rodriguez* pertains to the trial court's sentencing, not a jury's verdict, and a different standard of review applies. Second, the defendant in *Rodriguez* hit a child in the abdomen three times whereas, here, defendant struck an inebriated man 12 times in the skull with a metal pipe with enough force to fracture the skull and leave blood spatter and brain matter throughout the living room.

¶ 90 Despite the fact that we consider every case based on its unique circumstances, defendant argues, like in *Rodriguez*, he was provoked to anger by Tournear's continued presence in his apartment, but that the killing was not premeditated. We reject this argument, as premeditation is not a prerequisite for finding a defendant acted with exceptionally brutal or heinous behavior indicative of wanton cruelty. See *People v. Lewis*, 334 Ill. App. 3d 993, 1007, 779 N.E.2d 490, 501-02 (2002). Defendant also argues he was acting in self-defense when Tournear blocked his exit and brandished a knife and therefore did not engage in exceptionally

brutal or heinous behavior indicative of wanton cruelty. However, in evaluating the totality of the circumstances, the jury rejected defendant's version of events, as it was contradicted by his prior statements and the forensic evidence.

¶ 91 Further, defendant asserts there is no evidence of torture or gratuitous violence to support that he was "consciously seeking to inflict pain and suffering on Tournear." In making this argument, defendant relies on his self-defense argument that he was only attempting to free himself. As noted above, the jury rejected this argument. There was sufficient evidence to suggest defendant intended to inflict pain and suffering on Tournear if he refused to leave based on defendant's own statement to police and Raymond's testimony that defendant threatened to "f*** [Tournear] up" if he refused to leave. Defendant then returned to his apartment and struck Tournear in the head 12 times with a metal pipe, which the jury could have found to be a conscious effort on defendant's behalf to inflict pain and suffering.

¶ 92 Defendant also argues the fact that he sought medical care showed his regard for human life, in contrast to other cases where the defendants either prevented or did not pursue medical care for their victims. See, *e.g.*, *Holman*, 2014 IL App (3d) 120905, ¶ 64 (the defendant prevented the victim from calling an ambulance); and *People v. Cox*, 113 Ill. App. 3d 136, 137, 446 N.E.2d 1280, 1281 (1983) (the defendant did not seek medical attention until after her child died from the injuries). The fact that defendant sought medical care is not dispositive of the jury's finding, as each case must be decided based on its unique circumstances.

¶ 93 Additionally, defendant argues that the severity of the wounds should not be considered because "[a]ll murders are brutal and heinous to a certain degree." *People v. Andrews*, 132 Ill. 2d 451, 466, 548 N.E.2d 1025, 1032 (1989). However, in this case, the severity of the wounds—the repeated striking of Tournear— demonstrates defendant's actions

were devoid of mercy, required extreme force, and were gratuitously violent, which is sufficient to support the extended-term sentence. See *People v. LaPointe*, 88 Ill. 2d 482, 501, 431 N.E.2d 344, 352-53 (1981), *People v. Ratzke*, 253 Ill. App. 3d 1054, 1071, 625 N.E.2d 1004, 1016 (1993).

¶ 94 Defendant fails to acknowledge some of the other factors that weighed in favor of his conviction, such as the number of wounds inflicted, the extent of the injury, the senseless nature of the act, and whether the defendant exhibited remorse. *Holman*, 2014 IL App (3d) 120905, ¶ 63.

¶ 95 Defendant struck Tournear at least a dozen times in the head. The forensic pathologist testified the lack of defensive wounds on Tournear's hands indicated he made no attempt to defend himself and was likely either unconscious or too inebriated to act. The forensic pathologist further opined the nature of the wound—12 strikes to the same portion of Tournear's head—indicated Tournear was seated throughout the attack. The blood spatter pattern also indicated Tournear was seated throughout the attack. Defendant told police he hit Tournear with the pipe because he was angry Tournear refused to leave the apartment. Thus, the evidence supports a finding that the attack was senseless in nature. Moreover, the strikes to Tournear's head were so severe that (1) his skull was pressed into his brain, (2) brain matter was recovered from the living-room floor, and (3) blood spatter was all over the living room walls. Finally, defendant demonstrated no remorse for his actions. In fact, he lamented the fact that Tournear bled on defendant's chair and told Sergeant Curran that he was "happy" to look into Tournear's eyes and watch him die.

¶ 96 These facts are more than sufficient to support a finding that defendant's actions were cruel and devoid of mercy, hatefully or shockingly evil, and sought to inflict pain and

suffering on Tournear. We therefore conclude the State presented sufficient evidence for the jury to find beyond a reasonable doubt that defendant engaged in exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 97 III. CONCLUSION

¶ 98 Based on the foregoing, we affirm the trial court's judgment. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 99 Affirmed.