SIXTH DIVISION
November 23, 2011

No. 1-09-3619

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 1766 (2)
	)	
JAMILLE BROWN,	)	The Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Cahill concurred in the judgment.

O R D E R

¶ 1 *Held:* The defendant was properly convicted of first-degree murder based on accountability where the autopsy photograph introduced into evidence was not gruesome and no plain error occurred based on three instances of alleged prosecutorial misconduct. The sentence imposed was well within the discretion of the circuit court. The defendant's mittimus was corrected.

¶ 2 Defendant Jamille Brown was convicted by a jury of aggravated vehicular hijacking,

armed robbery and first-degree murder arising from the death of a free lance cab driver who was shot and had his vehicle stolen along with money kept in a wallet stored in the glove box of the vehicle. The defendant was in the company of her boyfriend and another female. The defendant's boyfriend and father of her child shot the cab driver in the upper leg, which severed an artery leading to his death by blood loss. The defendant contends her right to a fair trial was violated when a "gruesome" autopsy photograph was published to the jury and allowed to be taken into the jury room during deliberations; she also contends the prosecutors engaged in misconduct by eliciting "irrelevant and inflammatory" evidence and arguing in such a manner as to "inflame the passions of the jury." The defendant also contends a sentence of eight years above the minimum was excessive. We find the autopsy photograph was not gruesome; the prosecutors did not engage in misconduct, and the sentence imposed was not excessive. We affirm.

¶ 3 BACKGROUND

¶ 4 On December 27, 2005, the defendant was arrested for the first-degree murder of Abimola Ogunniyi, a freelance cab driver using his own vehicle. Ultimately, the defendant, along with Elliott Peterson, a person the defendant identified as her boyfriend, and Joyce McGee, were indicted for first-degree murder, armed robbery, and aggravated vehicular hijacking. On October 5, 2009, the defendant and McGee were tried in separate proceedings; the defendant was tried by a jury; McGee elected a bench trial. The proceedings were simultaneous, but severed. Many of the facts are not disputed. We present only those facts necessary to give context to the issues the defendant urges before us.

¶ 5 The evidence established that on December 22, 2005, the victim was dispatched to a nonexistent address on Chicago's southside, where he was unable to locate the caller in need of a taxi. Upon a second call to the dispatcher, the victim picked up three passengers, the defendant and her two codefendants. He was asked to take the three to the 96th Street and Pulaski.

¶ 6 According to the defendant's videotaped statement, the three had agreed to rob an armored truck. In order to carry out their plan, they needed a vehicle to follow the armored truck before executing the robbery. They decided to hijack a cab to get the needed vehicle. Codefendant McGee called the livery service twice from her cell phone to arrange for a cab.

¶ 7 Before the three left codefendant Peterson's apartment, the defendant saw Peterson arm himself with a weapon whose length she approximated by using her hands and noted it had wood on it. The victim was killed by a shotgun blast. When the cab reached the requested destination, McGee told the victim to go the rear of the residence by way of the alley. Once in the alley, Peterson put his weapon to the victim's head and had him get out of the car. The two exited on the driver's side of the car. Peterson instructed the victim to remove his clothing. In the meantime, the defendant and codefendant McGee also exited the car on the passenger side of the car. According to the defendant, the victim was taking off his blue jean jacket when "all I heard was a pah." The defendant stated Peterson shot the victim from a distance of about three feet and the victim fell in the snow.

¶ 8 After clearing the cab of some items, the three reentered with the defendant driving. The defendant saw Peterson place the shotgun into what she described as a "book bag." The defendant identified a shotgun depicted in a photograph as the same gun she saw Peterson

possess and use on the victim.

¶ 9 The three abandoned the cab. Before leaving the cab, the defendant saw Peterson remove a "black box" from the glove box and throw it away. Peterson also removed $200 to $300 from a wallet that was also in the glove box. The three walked in the direction of a bus stop on 95th Street near Christ Hospital. On their way, the defendant and McGee entered a Walgreen's store and purchased a candy bar with a $20 bill Peterson took from the wallet. A videotape of the purchase was shown to the jury. The three took a bus to Peterson's apartment.

¶ 10 The defendant concluded her statement by acknowledging that she had been treated well by the police. The defendant reiterated that what she had stated was the truth. A detective responded: "You know the only thing that upsets me? *** What really *** upsets me is this poor guy was laying there bleeding and the three of [you, not one of you] *** called 911."

¶ 11 The jury found the defendant guilty of aggravated vehicular hijacking, armed robbery and first-degree murder. The jury specially found that first-degree murder was committed by the use of a firearm. Following the denial of posttrial motions, the defendant was sentenced to 28 years for first-degree murder with an additional 15 years based on the use of a firearm.

¶ 12 ANALYSIS

¶ 13 The defendant raises three issues. She contends she was deprived of a fair trial by the introduction of a "gruesome autopsy photo." She also raises several instances of alleged prosecutorial misconduct. Finally, she contends her sentence of 43 years was excessive. She also points out, and the State agrees, that the mittimus must be corrected to reflect a single conviction of murder

¶ 14 The State responds that the trial judge properly exercised its discretion to permit the jury to see the autopsy photo of the shotgun wound to the victim's upper leg that severed the femoral artery resulting in the victim's death by blood loss. The State disputes the claimed instances of prosecutorial misconduct. Finally, the State contends the trial judge considered all factors in mitigation and aggravation in reaching the sentence of 43 years, a sentence which cannot be found to be an abuse of discretion.

¶ 15 The Autopsy Photograph

¶ 16 The parties agree that review of the publication of the autopsy photograph is subject to an abuse of discretion standard. *People v. Terrell*, 185 Ill. 2d 467, 495 (1998). The abuse of discretion standard is "the most deferential standard of review available with the exception of no review at all." *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). Thus, a "trial court cannot be said to have abused its discretion if reasonable persons could differ as to its decision." *In re Adoption of D.*, 317 Ill. App. 3d 155, 160 (2000).

¶ 17 The circuit court should decline to admit a photograph when its prejudicial impact outweighs its probative value. *People v. Mercado*, 333 Ill. App. 3d 994, 1001 (2002). However, competent evidence is not subject to exclusion merely because it may arouse the jury's feelings of horror or indignation. *People v. Driskel*, 224 Ill. App. 3d 304, 315 (1991). "[W]here photographs are relevant to establish any fact in issue *** they are admissible in spite of *** [their] gruesome nature." (Internal quotations marks omitted.) *People v. Fierer*, 124 Ill. 2d 176,

193 (1988).

¶ 18 Peterson shot the victim in the upper leg after the cab driver was ordered out of his vehicle. Given the location of the gunshot, an autopsy photograph was published to demonstrate to the jury the femoral artery that was severed by the gunshot blast. The circuit court described the single autopsy photograph, which the defendant contends is gruesome, as a "garden variety morgue photo[]." We agree. The autopsy photograph at issue, State's Exhibit 49, does not inspire either horror or repulsion. It is a medical photograph of only the victim's leg, with medical probes visible to show the damage to the victim's severed blood vessels. The single autopsy photograph could in no way arouse the passions of the jury so as to unduly prejudice the defendant. *Fierer*, 124 Ill. 2d at 193. As the supreme court noted, "[t]he major bulwark against prejudicing the jury is the sound discretion of the trial judge." (Internal quotations marks omitted.) *Id.* Based on our review of the autopsy photo, we agree with the circuit court that the autopsy photograph was not gruesome.

¶ 19 We also agree with the State's other reason for the admission of the photograph. "[It] is reasonable to infer that a shotgun blast to the leg is not the typical gunshot wound where a jury would think someone could or would die from." Thus, the photograph was necessary to illustrate to the jury the nature of the injury. Nor does the defendant's claim that "there was no dispute over [the victim's] death" provide her any support for her position that the photograph should not have been admitted. As the defendant acknowledges, the contested issue was "Brown's accountability for [the cab driver's] death." However, before the dispositive issue of accountability of the defendant could be addressed by the jury, the jury had to determine the

nature of the crime that Peterson committed. See *Fierer*, 124 Ill. 2d at 193 ("Although there was no dispute over the cause of victim's death, issues of self-defense and the defendant's mental state were vigorously contested[, which made the photographs of some relevance to those issues.]"). The autopsy photograph was properly admitted for that purpose. *Id.*

¶ 20 We also agree that the photograph aided the jury in understanding the medical examiner's testimony. We follow *People v. Richardson*, 401 Ill. App. 3d 45, 53 (2010), cited by the State, that explicit medical photographs may be admitted where "autopsy photographs were relevant to illustrate [the medical examiner's] testimony of the extent of the victim's injuries, the manner of death, and the [shooter's] intent."

¶ 21 The circuit court did not abuse its discretion in allowing the autopsy photograph to be published to the jury via a large screen or in allowing the photograph to go, with the other evidence, into the jury room. The extent of the victim's injuries was properly presented to the jury by the medical examiner's testimony and the autopsy photograph, which we find not be gruesome.

¶ 22 Alleged Prosecutorial Misconduct as Plain Error

¶ 23 The defendant asserts three instances of prosecutorial misconduct: (1) the introduction of what she characterizes as "inflammatory weapons"; (2) eliciting a personal opinion from the interrogating officer and exceeding the scope of direct examination of a defense witness; and (3) mentioning the victim and his family "repeatedly" during closing argument.

¶ 24 The State responds that none of the raised errors was preserved below, which precludes review except under plain error. The State asserts no showing of plain error under the first prong

is possible given the facts of this case and the claimed instances of prosecutorial misconduct fail to demonstrate plain error under the second prong.

¶ 25 The defendant concedes review is available under plain error only and further acknowledges that review "under the second prong is proper." To support plain error, the defendant claims the alleged misconduct in this case was so pervasive that it "created a pattern of unfairness." The defendant cites two supreme court cases in support: *People v. Blue*, 189 Ill. 2d 99 (2000), and *People v. Johnson*, 208 Ill. 2d 53, 64 (2003).

¶ 26 Under the second prong of plain error the defendant must demonstrate that the claimed error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. Prejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 27 The defendant first contends the State should never have introduced the contents of a "black bag" recovered from Peterson's apartment. The bag contained "a bottle of charcoal lighter fluid, two beer bottles filed with a clear liquid and covered in tin foil, a white rag, tape, and three steak knives." In her videotaped statement to the police, the defendant stated she saw Peterson conceal the weapon in what appeared to be a "book bag" immediately after the shooting while they were still in the alley. The police executed a search warrant of Peterson's apartment looking for the shotgun and recovered a "black bag" with contents as described above. Nothing in the bag was given much attention by the prosecution during the trial. The defendant acknowledges that the "steak knives" were mentioned a single time during closing argument. Our review of the

record convinces us that the introduction of the bag with its contents did not undermine the fairness of the defendant's trial or challenge the integrity of the judicial process. "A reviewing court will grant relief under the second prong of the plain error rule only if the error is so fundamental to the integrity of the judicial process that the trial court could not cure the error by sustaining an objection or instructing the jury to disregard the error." *People v. Vargas*, 174 Ill. 2d 355, 363-64 (1996). We reject the defendant's contention that the introduction of the contents of the "black bag" fell within the confines of a second prong plain error. See *People v. Slywka*, 365 Ill. App. 3d 34, 52-53 (2006) ("[W]e have reviewed the alleged errors in the context of the record, and find none rises to the level of plain error so as to have deprived the defendant of a fair trial.").

¶ 28 The defendant next contends that the videotaped statement of the defendant should have been redacted to eliminate a single comment by one of the interrogating detectives: "You know the only thing that upsets me? *** What really *** upsets me is this poor guy was laying there bleeding and the three of [you, not one of you] *** called 911." Once again, this comment, while clearly presented to the jury in the course of the defendant's videotaped confession, played little role in the State's case. No mention of it was made during the State's closing argument. We decline the defendant's invitation to elevate this isolated comment, never objected to by the defendant, as so invasive to the fairness of her trial that it must vitiate the jury's guilty verdict, a verdict consistent with the overwhelming evidence. Once again the claimed error does not approach a second prong plain error entitling the defendant to a new trial based on nothing more than that the purported error occurred. *Slywka*, 365 Ill. App. 3d at 52-53.

¶ 29 The second part of the second instance of plain error concerned the State's cross-examination of the defendant's mother, the only witness presented by the defendant. The line of cross-examination concerned whether the defendant informed her mother, when they spoke by cell phone shortly after their return to Peterson's apartment, of what occurred between Peterson and the cab driver. The circuit court sustained the defendant's objection as beyond the scope of direct examination. The mother denied ever talking to the defendant by cell phone. It was the defendant's statement to the police that made mention of a phone call she received from her mother after returning to Peterson's apartment following the shooting. During closing argument, the State relied on the defendant's statement that she received a phone call from her mother, to highlight the absence of any conversation between the two about the crime itself, which reflected on her complicity for the crime.

¶ 30 Though the issue is framed before us as improper cross-examination by the State, the defendant's objection to the line of questioning was sustained. The general rule is that sustaining an objection cures any prejudice from improper questioning. *People v. Brooks*, 172 Ill. App. 3d 417, 422, (1988) (sustaining an objection cures potential prejudice). However, if improper testimony is elicited before an objection can be interjected, prejudice may still arise from stricken testimony. See *People v. Fletcher*, 156 Ill. App. 3d 405, 412 (1987); *People v. Brown*, 113 Ill. App. 3d 625, 629 (1983).

¶ 31 We are aware of no case where prejudice can arise from the question itself. Nor do we accept that the State's closing argument based on the defendant's statement that she received a cell phone call from her mother, to the extent it may be considered as an extension of this claim,

rises to the level of a second prong plain error. Once again, the defendant has made no showing of an error, based on the facts she presents to us, that is so serious that it challenged the integrity of the judicial process. *Slywka*, 365 Ill. App. 3d at 52-53.

¶ 32 Finally, the defendant claims the State's mention of the victim and his family during closing argument impermissibly aroused the sympathy and passions of the jury. The defendant provides us with a two-paragraph excerpt of the State's closing argument, which she contends deprived her of a fair trial. We reject her claim that the argument constituted error. It was well within the province of the jury to be reminded of the victim of the defendant's crimes during its closing argument. The two paragraphs of the closing argument, which the defendant claims constituted prosecutorial misconduct, simply fail to prove her claim of error, much less second prong plain error. *Slywka*, 365 Ill. App. 3d at 52-53.

¶ 33 In sum, not a single claim by the defendant of alleged prosecutorial misconduct rises to the level of second prong plain error. Absent such a showing, the issues remain forfeited. *People v. Brown*, 388 Ill. App. 3d 1, 11 (2009)

¶ 34 Sentence Imposed

¶ 35 Finally, the defendant contends the sentence of 43 years imposed upon the defendant by the circuit court constituted an abuse of discretion. Upon conviction, the defendant faced a minimum sentence of 35 years, a minimum of 20 years for murder, with an enhancement of 15 years based on the use of a weapon. We are presented with no authority that a sentence eight years above the minimum can be an improper exercise of the vast discretion a circuit court has in imposing a sentence following a murder conviction. We reject the defendant's claim that an

abuse of discretion occurred here where no improper aggravating factor was alleged to have been considered. See *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008); *People v. Alexander*, 381 Ill. 2d 205, 213 (2010).

¶ 36 CONCLUSION

¶ 37 The autopsy photograph published to the jury via a large screen and provided to the jury with the other evidence during its deliberations was not gruesome. Its introduction did not deprive the defendant of a fair trial. The claimed instances of prosecutorial misconduct did not rise to the level of second prong plain errors. The circuit court acted within its discretion in imposing a sentence of 43 years, when the minimum sentence was 35. We affirm, but correct the mittimus to reflect a single conviction of murder.

¶ 38 Affirmed; mittimus corrected.