2013 IL App (1st) 111919-U

FOURTH DIVISION
December 19, 2013

No. 1-11-1919

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. 07 CR 20307
	)	
KIRK WILBOURN,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *HELD*: Defendant's conviction for involuntary manslaughter is affirmed because the evidence, when viewed in the light most favorable to the State, is sufficient to sustain defendant's conviction for committing a reckless act that caused his son's death; an autopsy report is not testimonial and therefore it was proper to allow a substitute medical examiner to testify to its contents; and the trial court's 13-year imprisonment sentence was proper and not excessive.

¶ 2 Defendant Kirk Wilborn[1] was convicted of involuntary manslaughter after a bench trial and was subsequently sentenced to 13 years in prison. He now appeals his conviction and sentence. Defendant challenges his conviction claiming that there was insufficient evidence to convict him and that his sixth amendment right to confront witnesses was violated when a substitute medical examiner was allowed to testify regarding an autopsy report authored by a different medical examiner. Defendant challenges his sentence claiming that the judge improperly considered the fact that the victim was his son during sentencing, when that fact was used to convict him and increase his conviction from a Class 3 to a Class 2 felony, and that the sentence was excessive. Defendant also requests that certain fees that were assessed against him be vacated. The State, in turn, requests that certain corrections be made to defendant's mittimus. For the reasons that follow, we affirm the trial court's conviction and sentence, vacate certain fees assessed against defendant, and order to clerk of the circuit court to correct defendant's mittimus to reflect a Class 2 conviction requiring two years of mandatory supervised release.

¶ 3 I. BACKGROUND

[1] The assistant state appellate defender points out that the caption in this matter reads that defendant's name is "Kirk Wilbourn" but the correct spelling of his name is "Kirk Wilborn."

¶ 4 Defendant was charged by indictment with two counts of first-degree murder. The indictment alleged that on September 18, 2007, defendant killed his five-week-old son (baby Kirk) by inflicting blunt head trauma. Following a bench trial, defendant was convicted of involuntary manslaughter of a family member and was sentenced to 13 years in prison. He now appeals his conviction and sentence.

¶ 5 Prior to trial, defendant filed a motion to suppress incriminating statements he made to the detectives while in custody. He claimed that such statements were involuntary because of his emotional state at the time they were given and due to alleged misrepresentations made to him by the detectives. Following a hearing, the trial court denied the motion to suppress finding that: (1) there was no evidence that defendant was incapable of understanding and appreciating the *Miranda* warnings he was given; (2) defendant's state of grief was insufficient to render his confession involuntary; and (3) the detectives made "no misrepresentation whatsoever" during their questioning of defendant. The case proceeded to trial. The following evidence was elicited at trial and is relevant to this appeal.

¶ 6 Alicia Cordero testified that on August 11, 2007, she gave birth to her son, Kirk Wilborn II (baby Kirk). Defendant was

baby Kirk's father. After baby Kirk was born, Cordero, defendant, and the baby moved to a small apartment in Rogers Park. At that time, in 2007, Cordero was working at a nursing home, which left defendant as the primary caretaker of baby Kirk.

¶ 7 On September 18, 2007, Cordero worked 11:00 a.m. to 8:00 p.m. Prior to leaving the apartment that morning, Cordero did not notice that baby Kirk was unusually ill or fussy. When she arrived home from work, at approximately 9:00 p.m., baby Kirk was sleeping. She checked on baby Kirk in the middle of the night because he was fussing. Baby Kirk was in a stroller at that time, which is where he slept every night.[2] At that point, Cordero noticed a bruise on baby Kirk's face, specifically on the left side of his check; she had not seen any bruises the day before. She described the bruise as small, and she did not feel the need to call the police. After changing the baby, she placed him back in the stroller and asked defendant what had happened. Defendant told her that he accidentally hit the baby in the face when he was sleeping.

¶ 8 The next morning, September 19, 2007, Cordero went to work for the day again. Prior to leaving, she checked on baby Kirk and did not notice him being unusually ill or fussy, but she

[2] The family did not have furniture at the time, so baby Kirk slept in a stroller in the closet, and defendant and Cordero slept on a pallet of blankets that they created on the floor.

could still see the bruise on his face. When she arrived home at 9:00 p.m., baby Kirk was sleeping. Around 6:00 a.m. the next morning, Cordero awoke to use the washroom. Upon realizing that baby Kirk had not cried or fussed at all, she checked up on him. He was still breathing and sleeping on his back in the stroller. She did not notice any swelling or redness in baby Kirk's face; she did not pull back to covers to look at the rest of the baby's body.

¶ 9 Later that morning at approximately 10:00 a.m., defendant went to check on baby Kirk and told Cordero to call 911. At that time, she noticed the baby was purple. The paramedics arrived and took baby Kirk and Cordero to St. Francis Hospital by ambulance, where baby Kirk was pronounced dead. Defendant and Cordero were given the news together, and they both started crying as a result. After receiving the news, defendant asked Cordero why she did not pick up baby Kirk when she woke up that morning to use the washroom. Defendant then apologized to her for hitting the baby.

¶ 10 Cordero testified that baby Kirk had received all the necessary shots and treatment prior to his death, and he had not been diagnosed with any type of illness.

¶ 11 On cross examination, Cordero testified that defendant was supportive of her pregnancy, and after baby Kirk was born,

defendant would watch and take care of the baby while she was at work. Cordero testified that defendant was a good father, but she did not know what defendant did with the baby while she was at work. Defendant had taken baby Kirk to all his scheduled doctor appointments. She further testified that the apartment they were living in had a small amount of roaches and she had seen one or two mice; for these reasons, they kept their cereal in the refrigerator. She did not know if baby Kirk had ever been bitten by any pests.

¶ 12 Detective Gillespie testified that he was assigned to investigate the death of one-month-old baby Kirk. Upon being assigned, he went to St. Francis Hospital and initially spoke with Officer Lee, the responding officer. Officer Lee informed him that he responded to a 911 call from the victim's mother who stated that the baby was not breathing and not responding. Gillespie viewed baby Kirk's body and observed that there was a little bruising and redness over the right eye, a state of rigor was present, and the baby's body was cold to the touch. Gillespie was informed by baby Kirk's doctor, Dr. Huettl, that baby Kirk was dead on arrival with lividity present in the abdomen and pelvic area.

¶ 13 Gillespie then spoke with Cordero at the hospital, who informed him that there had been an accident with defendant on

Tuesday in which defendant was sleeping next to baby Kirk and accidentally struck him. Gillespie also spoke with defendant at the hospital, who also told him that there had been an accident with baby Kirk while he was sleeping. Defendant informed Gillespie that he woke up to the baby crying and observed that he may have hit him in the face with his elbow. Defendant stated that he had observed bruising and redness on baby Kirk's face following this accident. Gillespie also went to defendant's apartment to investigate, and testified that he did not observe any evidence of mice, roaches or other insects.

¶ 14 The next day, Gillespie went to the medical examiner's office to review the autopsy of baby Kirk with Dr. Crowns, the doctor who performed the autopsy, and Dr. Jones, the chief medical examiner who specializes in infant autopsies. During the conversation with these doctors, Gillespie observed additional bruises on baby Kirk's arms, chest, and stomach area, which he had not seen earlier. Gillespie then received a call from defendant inquiring as to the findings of the autopsy, at which point Gillespie arranged to pick up defendant and bring him to the station to discuss the autopsy. Gillespie and his partner picked up Cordero and brought her to the station as well.

¶ 15 Once at the station, defendant was placed in an interview room with a recording device, and at approximately 11:50 a.m.,

Gillespie and his partner went into the room and read defendant his *Miranda* rights. Defendant then agreed to speak with the detectives, and the conversation that occurred thereafter lasted approximately 30 minutes. During this 30-minute conversation, defendant stated that he struck baby Kirk pretty hard in the face while sleeping, and that the marks on the baby's arms were from a few days earlier when baby Kirk was being taken out of his stroller. Following this incident, defendant stated that baby Kirk was sleeping much longer, five hours at a time and through the night. At that time, Gillespie told defendant that there were inconsistencies in his story and the results of the autopsy. Defendant then stated that the day before baby Kirk's death, he had taken the baby to the beach for the day and that he had smoked a joint prior to going to bed. The next morning, he woke up and found the baby not breathing and told Cordero to call 911. He then performed CPR on the baby and after the paramedics arrived, went to the hospital with the police.

¶ 16 Gillespie again told defendant there were inconsistencies in his story and the injuries that the baby had suffered. Defendant began mumbling under his breath, after which he stated that he had been holding the baby on his lap and that the baby fell face first onto the floor. Gillespie informed defendant that this story was also not consistent with the injuries the baby had

suffered, and defendant stated that he struck the baby with his open hands. Defendant explained that he punched baby Kirk when he was sleeping and the baby began to cry. After that, baby Kirk would not stop crying and he struck the baby on both sides of his head, with an open hand. Defendant stated that he might have hit baby Kirk too hard. Defendant then stated that he hit the baby and killed the baby.

¶ 17 Gillespie spoke with defendant again at 8:20 p.m. for approximately 25 minutes. At this time, defendant again admitted that he hit the baby in the face with his fist on the right side and his open hand on the left side. Gillespie observed defendant talking to himself again during this interview, telling himself to get it together. Gillespie's partner again told defendant that there were still inconsistencies in his story, and defendant added that he also struck the baby in the chest. Defendant stated that when the baby continued to cry, he went into the bathroom, and when he came out and the baby stopped crying, he observed that the baby seemed out of breath. Defendant observed bruising on the baby's face, and he put a towel over the bruise. Defendant also observed a bruise on the baby's torso, which he also covered up.

¶ 18 Gillespie had a third conversation with defendant at approximately 9:25 p.m. At that time, Gillespie asked defendant

to tell his story again, from the beginning. Defendant stated that he hit baby Kirk in his sleep, whereafter the baby would not stop crying. Defendant then struck the baby a couple of times, one time on each side of the face. He then picked up the baby and put him on the floor. He began pushing on the baby's stomach before going to the bathroom to attempt to get himself together. After he came out of the bathroom, he observed the baby's breathing was heavy. He also stated he saw a bruise on the baby's face and put a towel over it.

¶ 19 On cross-examination, Gillespie stated that when he spoke with Dr. Crowns, Dr. Crowns stated that baby Kirk's injuries could be consistent with being struck in the face, but not being struck nonchalantly; Dr. Crowns told Gillespie that there would have to be more force to cause the injuries that baby Kirk sustained.

¶ 20 Dr. Lauren Moser testified as an expert on behalf of the State. She testified that she works for the Cook County medical examiner's office as an assistant medical examiner. As an assistant medical examiner, her job is to perform examinations on deceased persons in order to determine the cause of death. After being tendered as an expert, Dr. Moser testified that based upon her review of the records relating to baby Kirk's death, she agreed with Dr. Crowns' finding that the cause of death was blunt

trauma, homicide.

¶ 21 Dr. Moser testified that, according to the autopsy report, the baby had the following external injuries: purple bruise on the right side of the head, purple bruise on the right eyebrow, purple bruise on the left cheek, abrasion or scrape on the left arm with three more scrapes that were smaller and circular in size, a pale blue bruise on the midline of the abdomen, a purple bruise on the right forearm, and a red bruise on the right side of the back. Dr. Moser testified that there was also an internal examination of the baby's chest/abdomen and head, and that the brain and eyeballs were sent to respective specialists for testing. With respect to the head, Dr. Moser testified that the internal examination revealed that there was a bruise under the scalp on the right side of the head, the left side of the head and the left back side of the scalp. There was subdural hemorrhaging at the base, top and both sides of the brain. There was also a hemorrhage in the right optic nerve and in the soft tissue around the left eye. The internal examination also showed that there were subarachnoid hemorrhages on the right parietal lobe, the left temporal tip, the inferior aspect of the left temporal lobe, the posterior aspect of the left occipital lobe, the right temporal tip, the inferior aspect of the right temporal lobe, and the right occipital lobe of the brain. There was a

subdural hematoma tracked along the course of the spinal cord. Dr. Moser explained that subarachnoid hemorrhage is bleeding between the arachnoid space of the brain and the pia meter of the brain, which is the covering directly on the brain. Subdural hemorrhaging is bleeding inside the head between the dura and the arachnoid, which is one layer outside the subarachnoid hemorrhage, with the subarachnoid being closest to the brain. With a five-week old baby, there's usually more space between the brain and skull, and the brain of an infant is softer, with more room for it to move between the skull. In order to observe the subdural and subarachnoid injuries, the baby's scalp was reflected both anteriorly and posteriorly.

¶ 22 Dr. Moser then reviewed photographs of the deceased baby and pointed out bruises on the right side of the forehead and right eyebrow, scrapes on the left arm, and a gray/purple bruise on the left cheek. The doctor then explained that lividity is the pooling of blood in the small vessels in the body based on body positioning. If the body is face down, the blood will pool in the front of the body. Rigor refers to the stiffening of muscles postmortem, when the muscles contract. In her opinion, the injury seen on the left cheek, which had a more purple hue, was not consistent with lividity because lividity is generally more pink in color. She also stated that if the mark on the left

cheek were lividity, it would be an odd location for lividity to present itself. Thus, Dr. Moser's opinion was that the injuries on the right side of baby Kirk's face were in fact injuries and not lividity. Dr. Moser opined that the long abrasion on the baby's left arm was a scrape as opposed to any type of postmortem insect or rodent bite.

¶ 23 Dr. Moser did see some lividity on baby Kirk's back side, which lead her to believe that at some point postmortem he was positioned on his back. She further testified that the injuries to the baby's face were not consistent with someone placing his hand on the baby's face, as this would not create a sufficient amount of force to cause the injuries sustained by baby Kirk. She also testified that the baby's injuries were not consistent with falling face first onto the floor because babies are very pliable and resilient and it takes a significant amount of force to cause the injuries that baby Kirk sustained. The injuries baby Kirk sustained could be consistent with being hit on both sides of the head, depending on the force applied.

¶ 24 Dr. Moser reviewed the report from Dr. Grostern, who examined baby Kirk's eyeballs. His findings were that the baby suffered massive trauma, which supports her finding of blunt trauma to the head.

¶ 25 Dr. Moser testified that subarachnoid and subdural

hemorrhaging is indicative of blunt trauma. It was her opinion to a reasonable degree of medical and forensic certainty that the cause of death was a subdural hematoma as a result of blunt head trauma that occurred as a result of an assault or child abuse. She came to this conclusion because the injuries to the brain were significant, causing a large amount of blood to pool in the brain, which is uncommon in a one-month-old's brain unless there was a significant amount of blunt force applied to the head. Based on that reasoning, the cause of death of the baby was homicide.

¶ 26 On cross-examination, Dr. Moser stated that although Dr. Crowns noted a bruise on the left cheek, she could not see that in the photographs. She also indicated that some of the bruising noted on Dr. Crowns' autopsy in the abdomen area were also not visible in the photographs, and there were no photographs of the reflecting that was done on the abdomen. Reflecting allows the doctor to confirm the existence of a bruise based on the damage to the underlying layers of skin. Dr. Moser indicated, though, that only where there is a question as to whether a mark on the body is a bruise would she reflect the skin and take photographs of that reflection. Dr. Moser noted just because there is little visible external injury, that does not mean that there cannot be severe internal injury and visa versa.

¶ 27 Dr. Moser stated that Dr. Crowns did not sample the vitreous fluid in the eyes, which would have shown baby Kirk's electrolyte balance. Although the vitreous fluids would show dehydration if present, there are also many external factors that would show dehydration if it were severe enough, and none of those factors were indicated on the autopsy report. Dr. Moser noted that there was hemorrhaging noted around the optic nerve which is generally a sign of blunt trauma. In rare occasions, hemorrhaging around the optic nerve can be caused by CPR, if significant pressure is applied. Dr. Moser indicated that at the time of death, the baby had pneumonia.

¶ 28 Dr. Moser, in reviewing Dr. Reyes'[3] medical report of his examination of baby Kirk's brain, testified that Dr. Reyes indicated that the baby appeared to have respirator brain, even though the baby was never on a respirator. Respirator brain occurs when the brain becomes swollen and starts to decompose as a result of a lack of oxygen. In Dr. Moser's opinion, Dr. Reyes was using the term "respirator brain" to indicate the condition of the brain at death--that the brain would crumble upon manipulation--rather than that the brain was in fact affected by the baby's placement on a respirator. Dr. Moser testified that

[3] Doctor Reyes was the neuropathologist who examined baby Kirk's brain.

cerebral vein thrombosis (CVT) means there is a clot in the vessel attached to the dura inside the head. She indicated that there were no pictures that would have shown a CVT, and that Dr. Reyes indicated the presence of a blood clot but did not indicate subdural hematoma. She further indicated that Dr. Reyes simply identified a blood clot, which often occurs postmortem, and did not note any organization of the blood clot. If the clot was in fact a CVT, Dr. Moser would have expected that Dr. Reyes would have indicated that in his report.

¶ 29 The State rested and defendant moved for a directed verdict, which was denied. Defendant then presented his expert, Dr. Shaku Teas, who testified that she was a pathologist, specializing in forensic pathology. After Dr. Teas was tendered as an expert witness, she testified that based upon her review of the records relating to baby Kirk's death, it was her opinion that baby Kirk died as a result of cerebral vascular thrombosis, specifically sagittal sinus thrombosis probably secondary to pneumonia and maybe dehydration. Based upon these findings, it was Dr. Teas' opinion that baby Kirk died of natural causes.

¶ 30 Dr. Teas testified that cerebral vascular thrombosis is thrombosis of the blood vessels that traverse the cerebrum and also the sinuses which are in the brain wall. Cerebral vascular thrombosis can be a primary diagnosis or it can be secondary to

other factors such as infection, dehydration, trauma, coagulation issues or natural causes. In this case, Dr. Teas testified that it was her belief that baby Kirk died of a sagittal sinus thrombosis because there was a sagittal sinus thrombus documented in his histology report. She testified that this type of thrombus occurs as a result of genetic propensity or, in some cases, can be aggravated by other factors such as infections or dehydration. This type of thrombus could also cause subdural hemorrhages. She further testified that the pneumonia and potential dehydration that the baby suffered at the time of his death were risk factors for cerebral thrombosis or sagittal sinus thrombosis. With respect to dehydration, though, Dr. Teas noted that no electrolyte studies were done to determine whether the baby was suffering from dehydration at the time of death.

¶ 31 Dr. Teas also concluded that there were no abdominal bruises because she was unable to appreciate any from the materials she reviewed. As for the retinal hemorrhaging, Dr. Teas stated that that could have been a result of cerebral edema or thrombosis of the vessels, because such hemorrhaging is the result of increased intercranial pressure. As to the marks on baby Kirk's arms, Dr. Teas stated that her first differential diagnosis would be that those were caused by postmortem insect bites. If the bites were antemortem, they would have been accompanied by redness, and Dr.

Teas testified that she did not observe any redness. Dr. Teas also noted that lividity was present in the photographs she reviewed, and that she attributed some of the bruising indicated by Dr. Crowns to be lividity.

¶ 32 Dr. Teas testified that she did not see any blunt trauma to baby Kirk's face because she did not see any evidence in the photos and there was no underlying subgaleal hemorrhaging beneath the right forehead where there appeared to be a bruise on the surface. Rather, Dr. Teas attributed the mark over baby Kirk's right forehead to be an imperfection in his skin.

¶ 33 The parties then stipulated before the court that if Dr. Sanchez were called to testify, he would say that defendant brought baby Kirk to his office at Rogers Park Family Practice for a routine new born exam on September 5, 2007. At that visit, the baby was nineteen and a half inches, placing him at the fifth percentile; eight pounds, placing him at the 25th percentile; and the rest of the exam was within normal limits. Dr. Sanchez would further testify that he saw no signs of neglect or abuse.

¶ 34 The defense then called defendant to testify on his own behalf. Defendant testified that he met Cordero in November of 2006, and he learned that same month that she had become pregnant. He went to every prenatal appointment with Cordero. After baby Kirk was born on August 11, 2007, him, the baby and

Cordero moved into an apartment in Rogers Park. He testified that when they moved in, the apartment was infested with mice, roaches and all types of things. Because Cordero worked, defendant acted as the primary caretaker for baby Kirk, which included taking baby Kirk to all his doctor appointments.

¶ 35 On September 18, 2007, defendant testified that Cordero woke up and headed to work for 11:00 a.m. After Cordero left, defendant finished feeding baby Kirk, played with him for a while, and when baby Kirk was tuckered out, they took a nap together on the floor. After falling asleep, defendant was awakened by the baby crying. At that point, defendant noticed that his arm was across baby Kirk's face, so he pick him up and held him to his chest. Defendant did not see any bruising on the baby's face when he picked him up. After that, defendant bathed baby Kirk, fed him again and put him in the stroller. Cordero arrived home at approximately 9:30 p.m. and, upon checking up on the baby, noticed the bruise on baby Kirk's face. She asked defendant what happened, and he told her that he had accidentally hit the baby while sleeping. At that point, defendant was also able to notice the bruise. Cordero scolded defendant and told him not to sleep next to the baby anymore. Nothing unusual happened the rest of the night.

¶ 36 On September 19, 2007, after Cordero left for work,

defendant took the baby to the beach for a while, fed him as scheduled, and then brought him back to the apartment. He did not notice anything unusual about the baby that day, and the baby was still taking formula. The bruise on the baby's forehead was a little darker from the day before. Cordero came home that night as defendant was making dinner. After they had gone to bed, defendant woke up between 1 and 2 a.m., changed the baby's diaper and fed him a bottle of formula and went back to bed. The next time he checked up on the baby was when he woke up on September 20, 2007 at 10:30 a.m., which is when defendant found the baby purple and not breathing. He immediately tried to revive baby Kirk and told Cordero to call 911. The 911 dispatchers walked defendant through CPR while they waited for the paramedics to arrive. When the paramedics arrived, they immediately took baby Kirk to the hospital. Cordero was with the baby in the ambulance, and defendant followed in a police car. When they arrived at the hospital, a doctor informed defendant and Cordero that baby Kirk had died.

¶ 37 After learning that the baby had died, defendant spoke with detective Gillespie and Gillespie's partner, detective Thompson. Defendant told them that he accidentally hit the baby in his sleep, but he did not strike him that hard. Defendant saw the baby at the hospital, and other than the bruise he had seen on

his face earlier, he did not notice anything else out of the ordinary besides the fact that he was purple.

¶ 38 The next day, September 21, 2007, defendant testified that he called the police station because one of the detectives had told him to call that day to get the autopsy results. When he called, he was told that the detectives were still at the medical examiner's office. Later in the day, the detectives went to defendant's apartment and asked that defendant come to the police station. Both defendant and Cordero went to the station with the detectives. When they arrived at the station, defendant was placed in a locked interview room and read his *Miranda* rights. The detectives then began questioning defendant about what had happened. Defendant told the detectives that he accidentally hit baby Kirk while they were taking a nap together. The detectives told defendant that his story did not comport with the medical examiner's report.

¶ 39 Defendant then testified that he changed his story at the police station and told the detectives that he punched the baby twice on each side of his head. Defendant testified that he told the detectives that he hit baby Kirk because they kept telling him they knew something had happened and that he should just tell them that he hit the baby. Defendant admitted that the detectives did not threaten him or beat him in any way before he

admitted to hitting and killing his son. Defendant testified that he did not in fact hit or slap his son, and that his statement to the detectives was not true. Defendant testified that baby Kirk was his "little homie" and his "other best friend."

¶ 40 On cross-examination, defendant testified that he was the primary caretaker for baby Kirk because Cordero was at work all day. The family did not have much money, they lived in a small studio apartment with no phone, TV or any electronics, the apartment had roaches and mice, Cordero's family did not like defendant, and defendant's family did not approve of Cordero. Defendant admitted that he saw the bruise on baby Kirk's face before Cordero arrived home on the night of the 18th, but did not say anything to Cordero about the bruise until after she noticed it on her own. Defendant testified he was under a lot of stress after baby Kirk was born because of the situation he was living in. Defendant testified that even though he had previously told the detectives that after he accidentally hit baby Kirk he was telling the baby to chill, pacing around the apartment, and telling himself not to lose it and keep himself together, none of those things were in fact true. Defendant then stated that he changed his story to what the detectives suggested the story should be--that he hit the baby. The police did not tell

defendant to say that he hit the baby on each side of his head two times with his fist; according to defendant, the detectives were telling him to admit that he hit his son. Defendant admitted that he told the police that he hit the baby on both sides of the head and admitted that he demonstrated for the police how he hit baby Kirk. After the detectives left and came back, defendant testified that he told the detectives that he hit baby Kirk twice in the head, once with a closed fist and once the heel of his hand. Defendant told the police that after he hit the baby he had to go into the bathroom to calm down so that he would not do anything else to the baby. At the end of the interviews, defendant admitted that he told the detectives that he killed his son. Defendant testified that he made up the nearly two hours of videotaped comments he made to the detectives so that they would leave him alone so that he could grieve in peace the loss of his son.

¶ 41 After hearing closing remarks, the trial court judge requested a few weeks to review the testimony, and on May 6, 2011, the trial court found defendant guilty of involuntary manslaughter. In coming to this conclusion, the trial court judge made the following remarks:

> "The matter comes on my call for the Court's ruling. I've heard the testimony and I've

reviewed the testimony. I've had the benefit of the transcripts of the trial for the witnesses, I've reviewed the arguments of counsel, I've considered the testimony of all the witnesses, and in judging their credibility I've taken into account their ability and opportunity to observe, their memory and manner and demeanor while testifying, and any interest, bias, or prejudice that they may have, and the reasonableness of their testimony considered in light of all the witnesses and the evidence in this case. ***

So we have a disagreement between the experts, neither one who participated in the original autopsy, and the Court is making a determination of which opinion that I accept.

I will note parenthetically as well that when Dr. Teas testified, she did have a tendency to expound her answers and to ramble. A lot of her testimony the Court felt was more along the lines of criticism of what was not done by Dr. [Crowns], the

inability of the Cook County Medical Examiner's Office to afford her reports and diagrams and other things that she felt in her professional opinion should have been done during the course of the post-mortem that were not.

There was also some disagreement between her and Dr. Moser with regard to bruising which she believed was lividity and not bruising.

She really, in my opinion, never really explained the testimony or statements that she received in rendering her opinion that were allegedly made by the defendant, the baby's father. There was never really an explanation as to whether or not she considered that or did not consider that.

So I am at a loss as far as which expert I believe or which expert I don't believe, just based on their expert testimony alone.

I think it's problematic when you are relying on photographs because lighting can change things with photographs, which are

> very difficult. One person's interpretation of a photograph is a bruise, another person's interpretation is not a bruise.
>
> So to decide which expert I believe is one that I would rely on in this case. I've got to look at other testimony in this trial. And to begin with, I look at the testimony of the other witnesses."

The trial court judge then discussed the defendant's statements that he hit and killed his son, which he now claims were lies.

> "For that reason, because I believe [defendant] was a good father, it is just anathema to be to believe that someone who is the father that Mr. Wilborn was would in any way, shape or form admit that he struck or hurt the baby if it was not true.
>
> In my view, a person who had been portrayed as Mr. Wilborn was, the father that he was, would deny with his last breath that he had ever did anything inappropriate or wrong with that child. It defies logic and common sense that he would say that unless it wasn't [*sic*] true.

> And given the circumstances surrounding the statement, the fact that he was in tears at certain time, I believe have the statement. I believe what he told the police that he struck the baby, that, in fact, he did. And because I believe that, I believe that it corroborates the testimony of Dr. Moser.
>
> * * *
>
> So it is the opinion of Dr. Moser that I accept. I find that Mr. Wilborn did cause the death of his son, Kirk Wilborn, II."

¶ 42 On May 31, 2011, a sentencing hearing was held. After reviewing presentencing investigations by the parties and hearing arguments by the parties' counsel and defendant, the trial court judge sentenced defendant to 13 years in jail. Prior to making his determination, the trial court judge stated on the record that he:

> "considered the evidence presented at trial, considered the presentence investigation along with additions and changes made by the defense. I have considered the arguments of counsel, aggravation, mitigation, statutory

> factors in aggravation, mitigation, I have considered the financial impact of incarceration, I have considered the arguments of counsel as to what they believe is the appropriate sentence. I have considered the defendant's statements on his own behalf."

The trial court judge continued and made the following comments:

> "This certainly is a once-in-a-lifetime thing and there was some things -- but I think a son is a gift. Especially a son who bears his father's name. That is a once-in-a-lifetime thing. No sentence that I can impose upon you can change the prison you created for yourself, because you deprived yourself of a son, you deprived you father of a grandson, all the things that come with it, first day of school, little league, graduation, all the hopes and dreams. The person who was supposed to be responsible for him is the person that caused his death.
>
> I didn't find you guilty of murder but I still found your conduct and your actions

> reprehensible to a five-week-old child. You're supposed to be the one who watched out for him.
>
> I don't know what happened on September 18th. There's indications as your lawyer said that you were a good father, but something happened on September 18th and you were not a good father on that day.
>
> I think to sentence you to the amount that your lawyer asked would deprecate the seriousness, although I don't think you intentionally tried to knowingly tried to kill him, you certainly did intentionally strike him and certainly did intentionally cause his death.
>
> I think the appropriate sentence based on everything I have heard and everything I put into the record is 13 years in the Illinois Department of Corrections."

Defendant subsequently filed a motion to reconsider his 13-year sentence claiming it was excessive, and that motion was denied.

¶ 43 Defendant now appeals his conviction and sentence claiming: (1) there was insufficient evidence to convict him, (2) his sixth

amendment right to confront witnesses was violated at trial when a substitute medical examiner was allowed to testify regarding an autopsy report authored by a different medical examiner, and (3) his sentence was improper because the judge improperly considered the fact that the victim was his son during sentencing and because it was excessive. Defendant also requests that certain fees that were assessed against him be vacated. The State also requests that two corrections be made to defendant's mittimus. For the reasons that follow, we affirm the trial court's conviction and sentence, vacate certain fees assessed against defendant, and order to clerk of the circuit court to correct defendant's mittimus to reflect a Class 2 conviction requiring two years of mandatory supervised release.

¶ 44 II. ANALYSIS

¶ 45 A. Sufficiency Of The Evidence

¶ 46 Defendant appeals his conviction claiming that the State failed to prove beyond a reasonable doubt the elements necessary to convict him of involuntary manslaughter. Specifically, defendant argues that the trial court improperly believed the State's expert over the defense's expert and improperly considered defendant's confession that was later recanted at trial. For the reasons that follow, we affirm the trial court's conviction of involuntary manslaughter.

¶ 47 "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2006). "A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2006).

¶ 48 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Hall,* 194 Ill. 2d 305, 329-30 (2000). A reviewing court must determine 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. *People v. Evans,* 209 Ill. 2d 194, 211 (2004). That is, "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the

light most favorable to the prosecution." (Emphasis in original.) *People v. Collins,* 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). It is the function of the trier of fact to assess the credibility of the witnesses, decide the weight to be given to their testimony, resolve any conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Brooks,* 187 Ill. 2d 91 (1999). We will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 49 First, defendant argues that the trial court improperly believed the State's expert witness over his expert witness. Defendant claims that the State's expert, Dr. Moser, gave opinions that lacked a basis and should have been excluded because: (1) Dr. Moser's testimony was refuted by the photos, which he claims showed little external injury to the baby; (2) Dr. Moser's opinions were based on incorrect autopsy procedures; and (3) Dr. Moser failed to consider the neuropathologist's opinion that the baby had respirator brain and a blood clot. While we note that defendant has not previously challenged the expert opinions of Dr. Moser, we find that defendant's arguments with respect to her opinions to be without merit.

¶ 50 The cause of death is a question of fact, which should be left to the trier of fact. *People v. Sims*, 374 Ill. App. 3d 231, 251 (2007). It is for the trier of fact to evaluate the expert testimonies and weigh their relative worth in context. *Id.* "When the expert testimonies offer divergent conclusions, the trier of fact is entitled to believe one expert over the other [] and is not required to search out a cause of death compatible with innocence []." (Internal citations and quotation marks omitted.) *Id.* Illinois courts have noted, the credibility and weight to be given expert testimony are matters for the trier of fact, who is not obligated to accept the opinions of defendant's expert witnesses over those opinions presented by the State. *People v. Urdiales*, 225 Ill. 2d 354, 431 (2007). In fact, "[e]ven if several competent experts concur in their opinion and no opposing expert testimony is offered, it is still within the province of the trier of fact to weigh the credibility of the expert evidence and to decide the issue * * * in light of all of the facts and circumstances of the case * * *." *In re Glenville*, 139 Ill. 2d 242, 251 (1990).

¶ 51 Dr. Moser testified that internal injuries and external injuries do not always correlate, thus simply because there is not significant visible injury does not necessarily mean there is not significant internal injury. Further, every witness that

testified in this case, including defendant, admitted that they observed at least one bruise on the baby's head. In fact, one of the bruises on the baby's face had been reflected by Dr. Crowns during the autopsy and had been confirmed a bruise. Dr. Moser testified that bruises are reflected when there is a question of whether the mark is in fact a bruise, thus implying her belief that there was little to no question that the remaining marks on the baby's body were bruises. Dr. Moser also considered the neuropathologist's opinions and stated that it was her belief that when he referred to baby Kirk as having respirator brain, it was not because the baby had ever been on a respirator, but rather to refer to the condition of the baby's brain. She further testified that the neuropathologist's indication of a blood clot without any specifying details, meant that the baby suffered a blood clot and not something more serious, such as a CVT.

¶ 52 Defendant further argues that his expert, Dr. Teas, gave expert testimony that should have been credited by the trial court. However, as stated by the trial court judge, Dr. Teas' long-winded opinions focused more on what Dr. Crowns should have done during his autopsy rather than explaining her conclusion that the baby died of natural causes. Further, the trial court noted that her opinions did not comport with or even take into

account defendant's statements that he hit and killed baby Kirk. Thus, based upon all the above, the trial court was permitted to weigh the testimony of both experts, in light of all the evidence, and determine which expert he found to be credible, despite the fact that the opinions were conflicting.

¶ 53 Moreover, it was proper for the trial court judge to consider and credit defendant's incriminating statements to the detectives in determining which expert to believe. The trial court is permitted to find defendant's statements to the detectives to be more credible than the statements made in court. See *People v. Curtis*, 296 Ill. App. 3d 991 (1998) (the court found that the trial court weighed the evidence and assessed the witness' testimony and properly could have found that defendant's prior inconsistent statement was more believable than his trial testimony.).[4]

¶ 54 Here, the trial court judge noted that he credited the defendant's incriminating statements made to the detectives because he did not believe that any good father would confess to

[4] Of note, defendant's incriminating statements that were recanted at trial were properly admitted at trial pursuant to 725 ILCS 5/115-10.1 (West 2006), and defendant does not deny that he made such statements to the detectives or that he was threatened or injured in any way prior to giving the incriminating statements. Further, defendant has not appealed the trial court denial of his motion to suppress these statements within this appeal, meaning he is not challenging the trial court's finding that his statements were made voluntarily.

striking and killing his son unless it was true. The trial court judge further noted that defendant did not simply admit that he struck his child; rather, defendant went into a detailed description of how he struck his baby, what was going through his mind at the time, how he tried to calm himself down, and even demonstrated to the detectives the precise manner in which he struck baby Kirk. Thus, there is evidence in the record to support the trial court's findings that defendant's statements to the detectives are more credible than his trial testimony and further to find that such evidence supported one expert's opinions over the other expert's opinions. Accordingly, when viewing all the evidence in a light most favorable to the State, we cannot find that no other rational trier of fact could have found the essential elements of defendant's crime (involuntary manslaughter) proven beyond a reasonable double. *Curtis*, 296 Ill. App. 3d at 999.

¶ 55 B. Substitute Medical Examiner's Testimony

¶ 56 Next, defendant claims that the trial court improperly allowed a substitute medical examiner (Dr. Lauren Moser) testify regarding another medical examiner's (Dr. Kendall Crowns') autopsy report in violation of his sixth amendment right to confrontation. Although defendant admits that he did not raise this argument at trial, he claims that it may be reviewed under

the plain-error doctrine. A defendant is not entitled to review of a claimed error unless he has made a timely objection at trial and raised the issue in a posttrial motion. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). However, under the plain-error rule, codified in Supreme Court Rule 615, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. Ill. S. Ct. R. 615 (eff. 1963). A reviewing court will find plain error and grant relief only when "(1) a clear or obvious error occurred and 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) a clear or obvious error occurred and that 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." *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007). Defendant further asserts that trial counsel was ineffective for failing to raise defendant's confrontation clause claim during trial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Prior to determining whether we can review defendant's claim under the plain-error doctrine, though, we must first determine whether any error occurred in the first place.

¶ 57 Between the time defendant filed his initial appellate brief and the State filed its appellate brief, our supreme court handed down a decision that addresses whether an autopsy performed by a medical examiner can be testimonial such that it results in a violation of the confrontation clause when the author is not presented for examination at trial. In *People v. Leach*, 2012 IL 111534 (2012), our supreme court stated:

> "we conclude that under the objective test set out by the plurality in *Williams,* under the test adopted in *Davis,* and under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial. Further, an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible." *People v. Leach*, 2012 IL 111534 at ¶ 136.

More recently, the appellate court, in following the holding of

Leach, stated:

> "the autopsy report was not testimonial and its admission into evidence did not implicate [defendant's] confrontation clause rights. The purpose of the autopsy was to determine how [the decedent] died, not who was responsible. Nothing in the autopsy report linked [the defendant] to the shooting and it is only when the autopsy findings are viewed in light of [the defendant's] own statement to the police and other evidence at trial is there a connection established between [defendant] and the crime. Further, the trial court did not err in permitting someone other than the medical examiner who performed the autopsy to testify because as the supreme court stated in *Leach,* 'if the [autopsy] report was properly admitted, the expert witness's testimony cannot have violated the confrontation clause even if it had the effect of offering the report for the truth of the matters asserted therein.' [] Therefore, we find the trial court did not

> err in permitting the State to present [its expert] to testify about the results of [another doctor's] autopsy report on [decedent]. Since there was no error in the first instance, there can be no plain error. []." *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 43 (2013).

Thus, because the medical examiner's autopsy report was nontestimonial, the trial court did not commit any error by allowing the State's expert to testify regarding another medical examiner's autopsy report, and we find that defendant's sixth amendment rights were not violated.[5]

¶ 58 Moreover, even if an autopsy was improperly used at trial, which it was not, we cannot say that such a hypothetical error would be plain error as the record contains the admission of defendant that he struck and killed his son. There is further ample evidence showing that every witness who testified observed bruising on baby Kirk immediately prior to or after his death. As such, even if the autopsy was somehow improperly used at trial, which it was not, there would be no plain error because

[5] Defendant argues in his reply brief that the holding in *Leach* was incorrect and we should not follow it. However, we are bound by the decisions handed down by our supreme court. *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008)(appellate court bound to follow supreme court precedent).

defendant admitted that he struck and killed baby Kirk and there is additional evidence to corroborate this admission.

¶ 59 Further, defendant's claim of ineffective assistance of counsel is without merit here since we have already determined that any objection to the autopsy report being used at trial by counsel would have been rendered futile under *Leach*. See *People v. Lawton*, 212 Ill. 2d 285, 304 (2004) (finding an attorney's failure to make a futile objection does not constitute deficient performance).

¶ 60 C. Thirteen-Year Sentence

¶ 61 Defendant next claims that he should be given a new sentencing hearing and a reduced sentence because the trial court considered improper facts when determining a 13-year sentence was appropriate. He further argues that he should be given a new sentencing hearing because a 13-year sentence is excessive based on the facts of the case. We find that the trial court's 13-year sentence was proper, and address each of defendant's arguments below.

¶ 62 a. Factors Considered In Sentencing

¶ 63 Defendant first argues that his 13-year sentence is improper because the trial court improperly considered the fact that the victim was his son during the sentencing hearing when that fact had already been taken into consideration when his conviction was

enhanced to a Class 2 felony pursuant to section 9-3(f) of the Criminal code, which states: "[i]n cases involving involuntary manslaughter in which the victim was a family or household member as defined in paragraph (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, the penalty shall be a Class 2 felony, for which a person if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years." 720 ILCS 5/9-3(f) (West 2006).

¶ 64 Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. *People v. Ferguson,* 132 Ill. 2d 86, 96 (1989). Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing "a harsher sentence than might otherwise have been imposed." *People v. Gonzalez,* 151 Ill. 2d 79, 83-84 (1992). Such dual use of a single factor is often referred to as a "double enhancement." *Gonzalez,* 151 Ill. 2d at 85. The double-enhancement rule is one of statutory construction (*People v. Rissley,* 165 Ill. 2d 364, 390 (1995)), and the standard of review is *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004).

¶ 65 In determining the correctness of a sentence, the reviewing court should not focus on a few words or statements made by the

trial court, but is to consider the record as a whole. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). To obtain a remand for resentencing, therefore, defendant must show more than the mere mentioning of an improper fact. *See People v. Garza*, 125 Ill. App. 3d 182, 186 (1984). It is not enough that the trial court itself mentioned the improper factor during the sentencing hearing (*People v. Jones*, 81 Ill. App. 3d 798 (1980)); rather, the record must affirmatively disclose that the improper factor was considered and relied on by the trial court in imposing the sentence. *Garza*, 125 Ill. App. 3d at 186.

¶ 66 Here, while defendant took great efforts to emphasize that the trial court judge mentioned the fact that the victim was defendant's son, the trial court judge was very specific on the record that he considered all the evidence before him--the evidence presented at trial; the evidence presented during the presentence investigation along with additions and changes made by the defense; the arguments of counsel for aggravation and mitigation; statutory factors in aggravation and mitigation; the financial impact of incarceration; the arguments of counsel as to what they believe is the appropriate sentence; and the defendant's statements on his own behalf--and there is nothing in the record to indicate that the trial court judge specifically considered the fact that the victim was defendant's son in

determining defendant's 13-year sentence. Where there is no indication in the record that the trial judge placed significant weight on the alleged improper matter in determining the appropriate sentence, courts have upheld the sentences imposed. See *People v. Fort,* 229 Ill. App. 3d 336, 340-341 (1992); *Garza,* 125 Ill. App. 3d at 186; *Reed*, 376 Ill. App. 3d at 129.

¶ 67 Further, it appears that the trial court's references to the victim being defendant's son were meant to emphasize the circumstances and nature of defendant's crime; defendant was supposed to be caring for and protecting his son and, instead, his actions killed him. In *People v. Scott*, 363 Ill. App. 3d 884, 892 (2006), the defendant claimed that the trial court improperly considered the character and status of the victim, a child, by commenting that a child is "the most innocent and precious human being that could be imagined" and that "[t]his is not a situation in which it is an early-term child and it might be more a blob of tissue or something like that, that you might describe as something not discernable as a child. This is a baby that was born into a toilet and her mother cut the umbilical cord, somehow allowed this child to die with no help, no medical care." *Scott*, 363 Ill. App. 3d at 892. On review, the court held that while the trial judge's comments acknowledge the victim's status as a child, when "taken in context, [the

comments] appear to be comments on the nature and circumstances of the baby's birth and death." *Id.*; see *People v. King*, 151 Ill. App. 3d 662, 663 (1987) (courts may consider the circumstances and nature of the offense in sentencing). As such, we find that trial court's 13-year sentence was appropriate because it did not consider any inappropriate factors during sentencing and because the sentence was less than the maximum sentence that is allowed for a conviction of involuntary manslaughter of a family member (see below).

¶ 68 b. Excessive

¶ 69 The trial court's sentencing decision will not be altered on appeal absent an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 18–19 (1991). Great deference is given to the trial court's sentencing decision because the trial court is in a better position than the reviewing court to determine the appropriate sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court's sentencing decision, therefore, is presumed to be correct. *People v. Fort*, 229 Ill. App. 3d 336, 340 (1992). A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Cabrera*, 116 Ill. 2d 474, 493-94 (1987).

¶ 70 Here, defendant was convicted of involuntary manslaughter in relation to the death of his five-week-old son. He was sentenced to 13-years in prison, one year less than the maximum sentence. See 720 ILCS 5/9-3(f) (West 2006) (minimum sentence of 4 years; maximum sentence of 14 years). Because this sentence is within the statutory limits, and because it is being imposed for the death of a five-week-old baby who was struck in the head and left to die, we cannot say that the trial court abused its discretion in sentencing defendant to 13 years in prison.

¶ 71 D. Fees Assessed Against Defendant

¶ 72 Defendant requests that several fees assessed against him in connection with his conviction be vacated, specifically a $5 court systems fee, a $30 Children's Advocacy fine, a $5 electronic citation fee, and a $15 State police operations fee, totaling $55 in fees. The State agrees that these fees should be vacated as the court system fee (see 55 ILCS 5/5-1101(a) (West 2012)) and the electronic citation fee (see 705 ILCS 105/27.3e (West 2012)) do not apply to defendant's involuntary manslaughter conviction, and the State police operations fee (see 705 ILCS 105/27.3a(1.5) (West 2012)) and the Children's Advocacy Center fine (see 55 ILCS 5/5-1101(f-5) (West 2012)) are fines that were not in existence at the time defendant committed his crime in 2007. We agree with both parties and, accordingly, pursuant to

Illinois Supreme Court Rule 615(b)(2) (West 2012), order that the circuit court vacate the $55 in fees and fines that were assessed against defendant: the $5 court systems fee, the $30 Children's Advocacy fine, the $5 electronic citation fee, and the $15 State police operations fee.

¶ 73 E. Corrections In Mittimus

¶ 74 The State requests that defendant's mittimus in this matter be corrected to reflect a Class 2, rather than Class 3, conviction for involuntary manslaughter pursuant to 720 ILCS 5/9-3(f), and further corrected to reflect two years, rather than one year, of mandatory supervised release (MSR). We note that the mittimus does in fact indicate a Class 3 conviction as well as one year of MSR. "In cases involving involuntary manslaughter in which the victim was a family or household member as defined in paragraph (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, the penalty shall be a Class 2 felony, for which a person if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years." 720 ILCS 5/9-3(f) (West 2006). Further, "for a Class 1 felony or a Class 2 felony except for the offense of criminal sexual assault if committed on or after the effective date of this amendatory Act of the 94th General Assembly and except for the offenses of manufacture and dissemination of child pornography

under clauses (a)(1) and (a)(2) of Section 11-20.1 of the Criminal Code of 1961 or the Criminal Code of 2012, if committed on or after January 1, 2009, 2 years." 730 ILCS 5/5-8-1(d)(2) (West 2006). As such, we order the clerk of the circuit court to correct defendant's mittimus to reflect a Class 2 felony and two years of MSR. See Ill. S. Ct. R. 615(b) (eff. 1967); see also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("Remandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections.").

¶ 75 III. CONCLUSION

¶ 76 For the above reasons, we affirm the trial court's conviction and sentence, and order the clerk of the circuit court to vacate the $55 in fees improperly assessed against defendant (see above) and correct defendant's mittimus to reflect that he was convicted of a Class 2 felony and is required to serve two years of MSR.

¶ 77 Affirmed.