2016 IL App (1st) 132673-U

FIFTH DIVISION
November 4, 2016

No. 1-13-2673

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 15404
	)	
SHERRY HARTISON,	)	
	)	Honorable
Defendant-Appellant.	)	Steven J. Goebel,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where: (1) the evidence was sufficient to find defendant guilty beyond a reasonable doubt; (2) defendant was not denied a fair trial; and (3) defendant's sentence was not excessive.

¶ 2 Following a jury trial, the circuit court of Cook County convicted defendant Sherry Hartison of first degree murder after her boyfriend, Allan Penny, died as a result of burns he sustained over 75% of his body. Defendant was sentenced to 45-years' imprisonment in the

Illinois Department of Corrections. On appeal, defendant asserts: (1) the evidence of intent was insufficient to find her guilty beyond a reasonable doubt of first degree murder; (2) she was denied a fair trial where one of the jurors appeared to be sleeping during closing arguments and did not comprehend English; (3) the prosecutor made improper and prejudicial remarks during closing argument which denied her a fair trial; and (4) her sentence is excessive. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 According to the State's charging instrument, on July 2, 2010, defendant burned the victim Allan Penny by pouring gasoline on him and setting him on fire. He died three weeks later. The State ultimately tried defendant on three counts of first degree murder: (1) intentional murder in violation of section 9-1(a)(1) of the Code of Criminal Procedure of 1963 (Code) (720 ILCS 5/9-1(a)(1) (West 2010)); (2) knowing or strong probability of murder in violation of section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2010)); and (3) felony murder based on the commission of aggravated arson in violation of section 9-1(a)(3) of the Code (720 ILCS 5/9-1(a)(3) (West 2010)).

¶ 5 At trial, a number of witnesses testified on behalf of the State. Their testimony indicated the following. On July 2, 2010, defendant, who also went by the name Lisa Baywood, lived on the 3100 block of West Washington Boulevard in Chicago, Illinois, with her boyfriend, the victim. Defendant and the victim resided in a multiunit building with three units on the first floor. Defendant and the victim resided in the middle unit on the first floor while Garry Bray (Bray), his fiancée Betty Herring (Herring), her daughter Shaunta Herring (Shaunta), and Shaunta's one-year old daughter, resided in the front unit. Aaron Gunter (Gunter), the owner of the building, resided on the second floor.

¶ 6 Herring testified that on the morning of July 2, 2010, she overheard defendant and the victim arguing about money and heard defendant say to the victim, "Okay m*** f***, you gone die today." While Herring testified on cross-examination that defendant and the victim argued "just about" every day, she further testified it was "unusual" for the defendant to say this particular phrase.

¶ 7 According to defendant's friend Michelle Bridgeforth (Bridgeforth), at approximately 2:30 p.m. on the day in question she telephoned defendant because her truck had run out of gasoline a few blocks away from defendant's residence. Defendant informed Bridgeforth she had a gasoline can that Bridgeforth could borrow. Bridgeforth walked to defendant's home, picked up the gasoline can (which contained an inch of gas), filled up her truck, and proceeded to the gas station. After filling up her truck with gasoline, Bridgeforth replenished the can with the same amount of gasoline that she had borrowed and returned it to defendant. Bray and Herring both testified that around 3 p.m. they observed a woman exit a truck with a gasoline can walking toward the entrance of the building. Bridgeforth testified she then drove to work.

¶ 8 Shaunta testified that at approximately 3 p.m. she heard defendant yell, "You're gonna die today, m*** f***." Shaunta then heard the victim crying for help. Herring testified she also heard the victim yelling for help and when she opened her apartment door she observed smoke coming from the victim's apartment. Herring alerted her family members to the fire and she, Shaunta, and Shaunta's daughter, proceeded to exit the building via the front porch. Bray, who had been sitting on the front porch, testified he observed defendant exit the building through the front door and run away. Shortly thereafter, defendant returned to the front porch, informed Bray that the victim was inside the apartment, and ran away. Bray, Herring, and Shaunta each observed defendant run down the street towards the corner of Washington and Albany and enter

the passenger side of Bridgeforth's truck.

¶ 9 Bray, having been alerted by Herring and defendant, testified he ran into the victim's apartment and observed the victim laying on the kitchen floor naked and on fire. Bray obtained water to extinguish the fire, put a blanket around the victim, took the victim into the bedroom, but ultimately had the victim sit on the front porch. According to Bray, the victim kept saying, "Lisa, fire, hot." Herring testified she asked the victim, "Al, did Lisa do that? He said, no. I said Al, did Lisa do that? And he shook his head and said, yeah." Herring, however, denied telling officers that the victim repeatedly stated, "Lisa didn't do it."

¶ 10 While these events were taking place, Bridgeforth, who was on her way to work, decided to circle back around to get something to eat. As she was stopped at a stop sign at the corner of Washington and Albany she observed defendant running down the street calling her name. Defendant entered the passenger side of Bridgeforth's vehicle and "said she set the Old Man on fire." Defendant further informed Bridgeforth that "she had splashed gasoline on him trying to get him to give her some money and that she didn't light no match." Regarding the gasoline, defendant told Bridgeforth "it just went up." Defendant declined to seek medical attention for her own burns and Bridgeforth dropped defendant off at 16th Street and Drake Avenue. Neither of them contacted authorities regarding the fire.

¶ 11 After defendant fled the scene, the first responders arrived. One of those first responders was Kristyn McClearn (McClearn) of the Chicago Police Department. According to McClearn, the victim informed her that "my girlfriend Lisa set me on fire." Diane Szala (Szala), an ambulance commander for the Chicago Fire Department, testified that when she asked the victim what had happened, the victim responded that "gasoline was thrown on him, and the house was set on fire." When Salza asked the victim who was responsible he replied, "She." Szala further

testified that the victim was severely burned on his face, neck, chest, back, legs, and in the groin area.

¶ 12 George Mac (Mac), a fire marshal employed by the Chicago Fire Department was another first responder. He testified as an expert in the field of fire and arson investigations on behalf of the State. Mac first testified regarding the standards set forth by the National Fire Protection Association (NFPA). According to Mac, there are four different causes or origins of a fire (1) natural, (2) accidental, (3) incendiary, and (4) undetermined. Relevant to this case, Mac testified that "incendiary" means "an open flame igniting something where there is no accidental process that happened to start the fire." When a fire is incendiary the scene where the fire started is usually the most damaged because it burns there for the longest period of time. If started by using a liquid combustible (such as gasoline), there will be a distinct pattern from the liquid because "it is burning at a certain temperature and it leaves a distinct mark on the floor from wherever the footprint of that liquid is." Mac further testified that a fire can be started when the vapors of the combustible liquid ignite before the actual liquid gets burned. According to Mac, gasoline vapors are heavier than air so they "would usually sink to the floor or they would be fairly close *** to the actual surface that you poured it on."

¶ 13 As part of his investigation, Mac conducted interviews of the other first responders to determine whether there was a forced entry, whether anyone was injured, and how the fire was extinguished. Upon entering the apartment, Mac observed a large burn pattern on the kitchen floor that appeared to be caused by an ignitable liquid. He also detected an odor similar to gasoline. Mac examined the appliances in the kitchen as well as the utilities in the building to determine whether they were the cause of the fire. Regarding the gas range, Mac opined that it was not the cause of the fire because "there was no damage, no burn patterns on it indicative of

showing it as the source." Moreover, the stove's pilot light was three feet off of the ground and, according to Mac, gasoline vapors would not usually rise to that level. The refrigerator also was "fairly unscathed by the fire" because, had electrical arching occurred, the appliance would be damaged. This is because flammable items near where the arching could have occurred would have ignited causing a burn pattern or melted wiring. Accordingly, Mac ruled out both the gas range and the refrigerator as competent ignition sources of the fire. Mac opined to a reasonable degree of scientific certainty that the cause of the fire was "an open flame ignition source to the vapors of a combustible liquid or ignitable liquid."

¶ 14 On cross-examination, Mac testified that the vapors emitted from an ignitable liquid that was distributed in a vertical position would stay very close to the liquid "depending on how absorbent the material it is thrown on is, but it would continue to off gas very close to the surface and then it would slowly drop as it off gasses. It's heavier so it would just sink to the ground and then just pool." Vertical vapors from human skin would have an ignitable range of an inch away from the skin. Absorbent clothing would have a similar range for a longer period of time because it holds the fuel at a certain level.

¶ 15 Mac further testified on cross-examination that the kitchen was only the "approximate" point of origin of the fire, not an "exact" point of origin of the fire. Mac acknowledged that there was fire damage to both the kitchen and the bedroom, but that he believed the damage to the bedroom was due to the fact the victim went into the bedroom to get away from the fire. In addition, Mac testified that the extent of the fire damage was "minimal" because it did not extend beyond the kitchen and bedroom of the middle unit. Mac further testified that while no matches were discovered, a lighter which was not damaged was found on a table in the kitchen.

¶ 16 On redirect, Mac testified that in this scenario the gas range and the refrigerator were not

competent ignition sources of the fire. Additionally, there was no evidence which would indicate that the bedroom was the point of origin of the fire.

¶ 17 Officer Terrance McKitterick (McKitterick), an evidence technician, also responded and assisted by photographing the scene and recovering evidence, including a green lighter discovered on the kitchen table which he packaged and inventoried. Julie Wessel (Wessel), a forensic scientist specializing in the area of latent fingerprint analysis and employed by the Illinois State Police Forensic Science Center, testified as an expert and opined that there were no suitable latent fingerprints discovered on the lighter.

¶ 18 Sergeant Ernest Cato (Cato) of the Chicago Police Department testified that on July 2, 2010, he was working with a partner, Detective Doreen Velasquez (Velasquez), when they received this assignment. He was not able to interview the victim on that date. Three days later, on July 5, 2010, Cato attempted to interview the victim at Stroger Hospital, but was unable to do so because the victim was being intubated. While at the hospital, Cato arranged to have photographs taken of the victim's injuries. The photographs, which were admitted into evidence, indicated burns to his torso and extremities.

¶ 19 Cato first spoke with defendant on July 11, 2010, over the telephone. Cato inquired if defendant needed medical attention, to which defendant answered affirmatively. Upon locating defendant, Cato noticed she had severe burns on her lower legs. Cato immediately transported her to Stroger Hospital for medical attention. After defendant obtained treatment she was transported to the police station and was thereafter interviewed by Cato and Velasquez.

¶ 20 According to Cato, defendant stated that on the morning of July 2, 2010, she and the victim smoked crack cocaine and then they both attempted to go to the bank so the victim could cash his monthly benefits check (the victim would typically provide a portion to defendant each

month). Defendant, however, was not able to get on the train, so the victim went to the bank alone. While the victim was gone, defendant continued to smoke crack. When the victim returned, he called defendant and told her to meet him at a vacant lot. When she arrived at the vacant lot, the victim gave her some money to purchase beer. Defendant purchased the beer, but was angry because she believed the victim was "playing games with the money." Defendant and the victim then walked home.

¶ 21 After defendant and the victim had arrived home, defendant spoke with Bridgeforth on the phone. Defendant asked Bridgeforth to take her to pay her phone bill. Bridgeforth agreed, but indicated she needed gasoline. Defendant told Bridgeforth she had a gasoline can. Bridgeforth stopped by, picked up the gasoline can and left. While Bridgeforth was gone, defendant and the victim had a conversation. Defendant asked the victim for more money, but the victim refused. Defendant became angry and told the victim that she "would burn his m*** f*** a*** up."

¶ 22 Thereafter, Bridgeforth returned the gasoline can with approximately one dollar's worth of gasoline inside, but she did not enter the apartment. Defendant continued to demand the victim give her money and the victim continued to refuse. Defendant then took the remaining gasoline in the can and "started splashing it throughout the apartment" and she "splashed the victim with the gas." The victim screamed that gasoline was in his eyes and ran to the kitchen door. Defendant, however, prevented the victim from leaving by pushing the door closed. Defendant relayed to Cato that, at that moment, "she was so angry she may have lighted a lighter but she doesn't remember."

¶ 23 According to defendant, the victim was then on fire. Defendant, whose legs were on fire, jumped on top of the kitchen table and said, "oh, man, we're gonna die in here." Defendant then

ran out of the apartment, down the street, and into Bridgeforth's vehicle. Defendant admitted to Cato that she told Bridgeforth that she threw gasoline on the victim, but that she did not light him on fire.

¶ 24 In addition to the events of July 2, 2010, defendant informed Cato that she had previously beat up the victim, thrown hot water on him, and attempted to scare him by igniting an aerosol spray can in his direction. Cato further testified that on July 24, 2010, the victim died at which time the matter became a homicide investigation. Cato was never able to interview the victim.

¶ 25 On cross-examination, Cato testified that defendant never said she set the victim on fire or put a lighter or match to him.

¶ 26 Maria Augustus (Augustus), an assistant State's Attorney with the Cook County State's Attorney's Office, testified regarding taking defendant's statement on July 12, 2010. After Augustus advised defendant of her constitutional rights, defendant affirmatively stated she understood her rights and stated she wanted to speak to Augustus. Thereafter, defendant chose to make a typewritten statement. The entire text of defendant's written statement was admitted into evidence and published to the jury.

¶ 27 Defendant's written statement contained more details than the account she provided to Cato. Defendant's written statement indicated that the victim would typically provide her with $150-$200 each month from his benefits check. Defendant believed that on July 2, 2010, the victim was "playing games" with the money and it made her angry. Later, Bridgeforth called and the victim asked Bridgeforth if she could take defendant to pay her phone bill. Bridgeforth agreed, but while on her way to defendant's home ran out of gasoline. Defendant told Bridgeforth she had a gasoline can. Bridgeforth picked up the can and left. While Bridgeforth was gone, defendant continued arguing with the victim.

¶ 28 When Bridgeforth returned, she gave defendant the gasoline can and left again. At that time, defendant was angry and poured the gasoline on the bed because she "wanted to burn it anyway because it had bed bugs on it." The victim was sitting at the kitchen table when defendant then poured gasoline on his chest. The victim screamed that he could not see and went to the kitchen door and unlocked it. Defendant, however, did not want the victim screaming for help in the hallway, so she closed the door and locked it. Defendant's written statement further indicated that she "was so angry that she could have lighted a lighter but she's not sure." The victim was then covered "head to toe" in fire. Defendant jumped on the kitchen table and realized her legs were on fire. Defendant then ran out of the apartment, "banged" on the door of the front apartment and told them to call the fire department "because the old man was on fire."

¶ 29 The victim further indicated in her written statement that the victim had a history of "piecing" money off to her. As a result, defendant "would use certain tactics to scare him into giving her the money." Sometimes defendant "would throw hot water on him, but she didn't think the water was hot enough to burn him." Other times, she would physically fight with him or "threaten to burn his a*** up." Defendant further stated that "her latest tactic was to spray aerosol hair spray and light the hair spray with a lighter to cause a fire just to spook him." According to defendant, however, the hair spray tactic was not working anymore because it no longer scared the victim.

¶ 30 Dr. Marta Helenowski (Helenowski) of the Cook County Medical Examiner's Office testified as an expert in the field of forensic pathology. Helenowski opined, based on the victim's medical file including investigation reports, the postmortem examination, and photographs, that the victim's cause of death was "sepsis due to thermal burns, due to gasoline fire." The victim had sustained partial thickness burns over 75 percent of his body; was in the

hospital for three weeks and, due to the burns, contracted sepsis, bronchopneumonia and had pulmonary and cerebral edemas. Helenowski further opined that the victim's manner of death was by homicide. On cross-examination, Helenowski clarified that homicide means that the victim died as a result of someone else and did not infer any state of mind or intent of the other individual involved.

¶ 31 The State further presented evidence that defendant had previously threatened to burn the victim. Bray testified that three years ago he overheard defendant and the victim arguing and then heard the victim, yell "Don't pour that grease on me." Bray notified Gunter, the landlord of the building, who went downstairs and knocked on the door of the victim's apartment. Defendant answered the door holding a pot of hot grease. Bray knew it was a pot of grease because of the odor it was emitting. Gunter, the landlord of the building, similarly testified that he had previously observed defendant standing over the victim with a pot in her hand while the victim was screaming.

¶ 32 The State rested. Defendant moved for a directed verdict, which was denied.

¶ 33 Defendant's first witness in her case-in-chief was Detective John O'Donnell (O'Donnell) of the Chicago Police Department, Bomb and Arson unit. O'Donnell testified he responded to a fire on July 2, 2010, and spoke with Herring. According to O'Donnell, Herring told him that the victim kept saying, " 'Lisa didn't do it[.]' "

¶ 34 At trial, defendant first testified regarding her relationship with the victim. She and the victim would "help each other," *i.e.*, defendant would "get money on the streets and [the victim] had his social security check." In the past, the victim would give her a lump sum of $100 to $200 from this check, but over the years he kept reducing the amount until it was only $20 to $30. This upset defendant.

¶ 35 Defendant and the victim had an acrimonious relationship. Defendant admitted she "threatened him just about every day" and the couple argued "[a]ll the time." Defendant further admitted she had tossed tap water on the victim and had threatened him with room temperature grease in a pot. As time went on, the intensity of her threats increased and one time she threatened the victim with an aerosol can she had ignited.

¶ 36 On July 2, 2010, she came home after prostituting and smoked cocaine. She then woke the victim up and they drank alcohol and smoked cocaine together. The victim informed her that he was going to cash his check so he could pay her telephone bill. They decided she should go with him, but she could not get on the train. When she returned home, she smoked some more cocaine. At some point, the victim called her and she went to meet him. The victim, who was disabled and walked with the aid of a cane, gave her money to purchase beer and cigarettes. Defendant purchased the items, but when she exited the store she became upset because the victim told her he would start walking home and he had not done so. This, on top of the fact he would not give her money and that their home was infested with bedbugs, angered defendant.

¶ 37 At home, the two smoked cocaine again, but were not arguing. Defendant then spoke with Bridgeforth on the phone. Bridgeforth came by defendant's apartment to get money defendant owed her and thereafter took defendant to pay her telephone bill.

¶ 38 Later in the day, Bridgeforth called defendant and asked to borrow a gasoline can. Bridgeforth obtained the can and left. Subsequently, defendant and the victim began arguing. At the time Bridgeforth returned the gasoline can defendant testified "I was raging. I just started –I looked, when I walked in, I looked at the bed and the bed bugs was on the bed, just crawling everywhere. And I think that made me even madder. And I started dashing the bed with what was left in the gas can, the bed, the chair, and a few plates in the [bed]room."

¶ 39 She went into the kitchen and "splashed what was left in the gas can" on the victim who was sitting at the kitchen table. The victim screamed and said, " 'It's in my eyes, it's in my eyes.' " The victim tried to get out of the kitchen door, but she locked it because she did not believe he was hurt and did not want him screaming in the hallway. Defendant then gave the victim a towel to wipe his eyes and they started talking at the kitchen table. The victim then walked past the refrigerator to go into the bedroom. As he did so, defendant turned her back to him and she "remember[ed] thinking that I wanted a cigarette" but did not remember if she lit a cigarette. Then she heard "this big whoosh" coming toward her from behind. The sound caused her to jump up onto the table. That is when defendant noticed her legs were on fire. Defendant exclaimed, " 'Oh man, oh man, we going to die up in here.' " After she extinguished the fire on her legs, she ran out of the kitchen. As she ran past, defendant observed the victim sitting on the bed in the bedroom because the front door was open. Defendant did not stop to help him because she was scared. She did, however, knock on Bray's door and told them the house was on fire and that the victim was still inside. Defendant left the building and "began to walk down Washington toward Albany" when she noticed Bridgeforth's vehicle was "sitting at the stop sign there." Defendant got into Bridgeforth's vehicle and was dropped off at 16th and Drake.

¶ 40 According to defendant she did not know whether or not she lit a lighter. She loved the victim and did not intend to kill him, but she did intend to scare him.

¶ 41 On cross-examination, defendant testified that on July 2, 2010, she knew gasoline was flammable and that fire could kill an individual. She did not think gasoline would do anything to bedbugs unless she set fire to the mattress. Defendant further testified that she "was still angry" but "was not as mad" when she entered the kitchen. Defendant acknowledged that she could have put the gasoline can down at that time, but instead brought it into the kitchen, walked

towards the victim, and poured gas on him. Although she was not "raging" at the time, she wanted to scare him into thinking she was going to set him on fire "[b]ecause he hadn't given me any money yet." Defendant further testified she did not smell gasoline on the victim nor did she smell gasoline in the apartment at all.

¶ 42 On redirect, defendant testified she "didn't know anything about [gasoline] vapor."

¶ 43 Dennis Smith, the president and principle fire investigator for Premiere Fire Consulting Services, LLC, testified as an expert in the field of fire and arson investigation as well as an expert in investigative methodology. Smith first explained to the jury the NFPA standards he was required to follow when determining the origin and cause of a fire. He then opined, based on his review of all the documentary materials including police reports, fire department reports, medical examiners reports, interviews, photographs, sketches, that the origin of the fire was "somewhere within those two rooms," *i.e.*, the kitchen and the bedroom. Smith explained that gasoline evaporates and the gasoline vapors migrate. Consequently, the boundaries of the two rooms were the maximum area in which the vapors could expand. Smith further explained that while the vapors could migrate throughout the two rooms, only under certain conditions would ignition take place. For ignition to occur the gasoline vapors would have to be concentrated enough to be within the "flammable range" of a competent ignition source. According to Smith, there were two competent ignition sources directly in the area where the gasoline was located, the gas range and the refrigerator. Smith, however, could not opine as to which of those appliances was the source of the ignition as there was not enough information to make this determination within a reasonable degree of certainty. Smith further opined the fire in this instance could only be classified as undetermined because the ignition source, either the gas range or the refrigerator, is unknown and he did not have a sufficient level of certainty to form an

opinion.

¶ 44 In addition, Smith testified that there would be no damage to the stove because "there is nothing there to burn." The ignition source provides the ignition, but the fire would burn the vapors back to the fuel source and would not damage the stove. Regarding the refrigerator, Smith testified he would not expect it to be damaged because "[t]here is no body of research anywhere that I know of that if something ignites a vapor that there will be some kind of manifestation" of damage at the ignition source. To demonstrate his points, Smith presented videos of controlled tests to the jury. In one of the videos, gasoline was poured near a water heater that was 18 inches off of the ground. Approximately 18 minutes later, the water heater pilot light ignited the gasoline vapors which burned back to the pool of gasoline.[1]

¶ 45 Smith further testified he disagreed with Mac's opinion as to the origin of the fire because Mac "narrowed the origin too closely to the location of the pool fire on the floor rather than that it could be anywhere where the vapors had been." He further disagreed with Mac's determination that the ignition source was an open flame, as such a determination was "simply speculation." Lastly, Smith did not agree with Mac's classification of the fire as incendiary because the ignition source is unknown and there is no evidence of intent to start a fire.

¶ 46 On cross-examination Smith acknowledged that he did not interview anyone or visit the scene of the fire. He also made no efforts to examine the lighter, although he did acknowledge that it "would be nice to know" if the lighter worked because "[t]hen you could eliminate it" as the ignition source of the fire. While Smith had observed that the lighter was present on the kitchen table in the photographs he reviewed, he did not believe it was a competent ignition source because "it's only competent if it's used" and he cannot say whether or not it was used in this instance.

[1] The video is not included in the record on appeal.

¶ 47 Smith also noted that there was no documentation or photographic evidence that the mattress was damaged, accordingly nothing in the materials he reviewed verified defendant's statement that she poured gasoline on the mattress. Smith further testified that he did not know whether an individual could tell by listening which direction a flame was moving. Additionally, Smith acknowledged that if there was dust, lint, or paper in the area of the ignition source it was possible for those items to catch on fire.

¶ 48 The defense rested. In rebuttal, the State presented documentary evidence that defendant had previously been convicted of two felony offenses of prostitution and one felony offense of possession of a controlled substance.

¶ 49 In closing arguments, the State maintained that defendant intentionally set fire to the victim as evidenced by: (1) her prior abusive and threatening conduct toward him; (2) her words that she was going to "burn his a** up" and that he "would die today"; and (3) that she was aware that gasoline was flammable and could burn an individual. In response, defense counsel argued that defendant did not intentionally set the victim on fire as she was unaware that gasoline vapors were flammable and that her actions that day were merely reckless.

¶ 50 After hearing closing arguments, the trial court provided the jury with instructions for both first degree murder and involuntary manslaughter. The jury was further instructed specifically on the three different counts of first degree murder for which defendant was on trial. The jury deliberated and returned a general verdict of guilty, thus the jury did not indicate under which first degree murder theory it found defendant guilty. Thereafter, defendant filed a motion for a new trial, which was denied.

¶ 51 At sentencing, the State reviewed the facts of the case and defendant's criminal history. The prosecutor stated that defendant previously: (1) plead guilty in 1996 to felony robbery

where defendant struck that victim in the face and was sentenced to three years' imprisonment; (2) plead guilty in 2000 to felony aggravated battery and robbery and was sentenced to four and half years' imprisonment; (3) was convicted in 2004 and 2005 of felony prostitution and was sentenced to one year imprisonment on each offense; (4) was convicted of possession of a controlled substance in 2005 and was sentenced to 18 months' imprisonment; and (5) was convicted of 11 misdemeanors, mainly for prostitution. The State also presented evidence regarding defendant's aggressive and abusive behavior towards the victim. Namely that in 2007 the police were twice called to the victim's residence after it was reported that defendant struck him causing him injuries. In one instance it was reported by the victim that defendant used a stick to beat him about the head, chest, and arm because the victim would not give defendant cigarettes. The State requested the trial court impose a "very, very lengthy sentence."

¶ 52 In mitigation, defense counsel argued defendant acted recklessly and did not contemplate that her conduct would lead to the victim's death. Defense counsel further argued that because of defendant's social history, *i.e.*, the fact she was prostituting at age 13 and addicted to cocaine, demonstrated defendant was not capable of "pull[ing] herself up by her own bootstraps." Defense counsel emphasized defendant's remorsefulness and reminded the court that any sentence imposed would effectively be a life sentence due to defendant's age.

¶ 53 The trial court allowed defense counsel to read defendant's handwritten statement in allocution for the record. In her statement, defendant informed the court that she was one of 10 siblings, all of whom are now addicted to drugs. She was raised only by her mother, witnessed domestic violence, and was sexually abused starting at the age of 8. As a result of the abuse, she ran away from home at the age of 13 and shortly thereafter learned that she could exchange sex for a place to live and became addicted to crack cocaine. Defendant expressed regret and

remorse over the incident and stated she would never have done anything had she known it would have endangered the victim's life. Defendant, however, took responsibility for the victim's death and admitted she acted selfishly.

¶ 54 After considering all the factors in aggravation and mitigation, the arguments of counsel, defendant's statement, the live witnesses, the presentence investigation report, and defendant's age (46), the trial court sentenced defendant to 45 years' imprisonment in the Illinois Department of Corrections. In so sentencing defendant, the trial court emphasized defendant's childhood as relayed in the presentence investigation report and by defendant. The trial court also noted that defendant obtained her GED in 2012 while incarcerated which, according to the court, "does point out to the Court the Defendant can do things when she wants to and sets her mind to do things." The trial court further considered defendant's drug addiction and her successful completion of a drug treatment program while she was incarcerated and noted, "So again Defendant can if she tries conform and actually knows right and wrong and can improve herself if she wants to." The trial court also took into consideration that "burning to death is a horrific death" and defendant's repeated history of violence against the victim. Referencing defendant's own words, the trial court agreed that "sorry is not enough" and that her apology was "too little too late." The trial court further noted that defendant did not initially take responsibility for her actions because she ran away from the scene and hid for a week. The trial court expressed that it understood that defendant had a horrible life, but that she knew the difference between right and wrong and made the decision to pour the gasoline on the victim.

¶ 55 Thereafter, defendant's motion to reconsider the sentence was denied. This appeal followed.

¶ 56 ANALYSIS

¶ 57 On appeal, defendant contends: (1) the evidence of intent was insufficient to find her guilty beyond a reasonable doubt of first degree murder; (2) she was denied a fair trial where one of the jurors appeared to be sleeping during closing arguments and did not comprehend English; (3) the prosecutor made improper and prejudicial remarks during closing argument which denied her a fair trial; and (4) her sentence is excessive. We address each argument in turn.

¶ 58 Sufficiency of the Evidence

¶ 59 Defendant first contends that the State failed to prove her guilty of first degree murder beyond a reasonable doubt. According to defendant, the evidence demonstrated that she committed involuntary manslaughter when she recklessly caused the victim's death.

¶ 60 Supporting defendant's conviction, the State argues that, viewed in the light most favorable to the prosecution, the evidence at trial demonstrated that: (1) defendant used escalating threats to coerce the victim to give her money, including setting fire to an aerosol can; (2) neighbors heard her threatening the victim the day he died that she was going to "burn his a*** up"; (3) defendant admitted she told the victim that his "m*** f*** a*** would die today"; (4) defendant admitted she threw gasoline on the victim; (5) defendant knew gasoline was flammable and that if set on fire it could kill; (6) defendant locked the kitchen door when the victim yelled that gasoline was in his eyes; (7) the fire ignited quickly after she splashed gasoline onto the victim; (8) defendant told Bridgeforth that she "set the old man on fire"; (9) defendant fled the scene and did not alert the authorities about the fire; and (10) the victim told investigators and neighbors that defendant set him on fire. All of this, the State argues, makes it neither improbable nor irrational for a jury to convict defendant of first degree murder.

¶ 61 When reviewing challenges to the sufficiency of the evidence in a criminal case, the

relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime upon which the defendant was convicted beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A reviewing court will not retry a defendant when considering a sufficiency of the evidence challenge. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that observed and heard the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Accordingly, a jury's findings concerning credibility are entitled to great weight. *Id.* Although the trier of fact is responsible for assessing the credibility of the witnesses and weighing the testimony, the trial court's determination is not conclusive. *Smith*, 185 Ill. 2d at 542. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Id.*

¶ 62 Defendant was charged with first degree murder under sections 9-1(a)(1) and 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) as well as under a theory of felony murder based on aggravated arson (720 ILCS 5/9-1(a)(3) (West 2010)). Felony murder aside, a person is guilty of the offense of first degree murder when he or she kills an individual without lawful justification if, in performing the acts which cause the death, he or she intends to kill or do great bodily harm or knows that his or her acts created a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2010). On the other hand, a person commits involuntary manslaughter when he or she unintentionally kills another individual without lawful justification and his or her acts which cause the death are likely to cause death or great bodily harm and are performed recklessly. 720 ILCS 5/9-3 (West 2010).

¶ 63 The basic difference between first degree murder and involuntary manslaughter is the

mental state that accompanies the conduct resulting in the victim's death. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Involuntary manslaughter requires a less culpable mental state than first degree murder. *Id.* The mental state for murder is knowledge, while the mental state for involuntary manslaughter is recklessness. *People v. Givens*, 364 Ill. App. 3d 37, 44 (2005). A person is said to have knowledge when she is consciously aware that her conduct is practically certain to cause a particular result. *Id.* (citing 720 ILCS 5/4-5(b) (West 1998)). A person acts recklessly when she "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** 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 2010). "In general, a defendant acts recklessly when [s]he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur." *DiVincenzo*, 183 Ill. 2d at 250. Recklessness, therefore, typically involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *Id.*

¶ 64 In this case, it is undisputed that defendant performed the acts which caused the victim's death. The only issue is the mental state with which defendant performed those acts. Because a defendant's mental state is not commonly proven by direct evidence, it may be inferred from the surrounding circumstances, including the character of the defendant's acts and the nature of the victim's injuries. *People v. Garcia*, 407 Ill. App. 3d 195, 201 (2011). Generally, the question of whether a defendant acted intentionally, knowingly, or merely recklessly is a question to be resolved by the trier of fact. *Givens*, 364 Ill. App. 3d at 44. The trier of fact's determination, however, is not conclusive. Rather, we must reverse a conviction where, after reviewing the evidence and giving due consideration to the fact that the jury had the opportunity to observe and

hear the witnesses, we are of the opinion that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. *Smith*, 185 Ill. 2d at 541.

¶ 65 Defendant asserts that the evidence at trial established her actions were reckless because she splashed gasoline on the mattress, around the apartment, and onto the victim while angry and high on crack cocaine. Defendant maintains the evidence demonstrated she only intended to scare or threaten the victim as she typically did when he refused to give her money. Specifically, defendant points to her testimony that she provided the victim with a towel to wipe off the gasoline he said had gotten into his eyes, even though she believed he was exaggerating. Defendant further points to her testimony that she did not know gasoline vapors could ignite. In addition, defendant asserts there was no evidence establishing beyond a reasonable doubt that she held a lit lighter close enough to the victim to ignite the gasoline.

¶ 66 Defendant mainly relies on *People v. Jones*, 404 Ill. App. 3d 734 (2010), to support her argument that her conduct was not intentional, but reckless. We find *Jones* to be distinguishable. In *Jones*, the defendant was found guilty after a bench trial of two counts of first degree murder, intentional and knowing. *Id.* at 741. The evidence at trial established that the defendant came home from work to find his girlfriend and the victim, whom he did not know, inside the defendant's home. *Id.* at 735-36. The defendant pursued the victim outside of his home and began beating the victim about the head and body with his fists. *Id.* at 740. Shortly thereafter, the victim fell to the ground and the defendant was observed by his neighbor holding the victim down with his foot. *Id.* at 737. The defendant's foot was placed between the victim's chest and chin. *Id.* at 737. After the defendant removed his foot from the victim, eyewitnesses observed that the victim was still breathing and his lips were quivering. *Id.* at 736, 737. The defendant left the scene not knowing the victim had died. *Id.* at 740-41. The medical examiner testified

that the victim died from asphyxiation due to compression of the neck from an assault. *Id.* at 738. The medical examiner further testified that it would take a minimum of 4.4 pounds of pressure to cause the victim to asphyxiate by compression of his jugular vein resulting from someone standing up and applying pressure to the area of the victim's neck. *Id.* at 739.

¶ 67 On appeal, the defendant argued that the State failed to prove him guilty of first degree murder beyond a reasonable doubt and that the evidence demonstrated that he committed involuntary manslaughter when he recklessly caused the victim's death. *Id.* at 741. The *Jones* court agreed with the defendant and held that the evidence was insufficient to support a first degree murder conviction. *Id.* at 750. The reviewing court concluded that, "The evidence presented at trial does not support an inference that a layperson such as defendant knew or should have known that applying 4.4 pounds of pressure for at least one minute was sufficient to cause [the victim] to asphyxiate or that this pressure need not have been applied directly to the jugular vein but instead could have been applied to the soft tissue on the front or side of the neck." *Id.* at 747. The *Jones* court further held that the defendant's actions in leaving the victim on the ground while he was still breathing were "inconsistent with the mental state for first degree murder." *Id.* at 749. The *Jones* court pointed to the evidence presented at trial which established that when the defendant left the scene he had no reason to believe that the victim was going to die or that he had suffered great bodily harm. *Id.* The reviewing court found defendant's testimony was corroborated by his neighbor's testimony that the victim was still alive and possibly drank some water from a hose. *Id.* The *Jones* court concluded that the State's evidence was, however, sufficient to establish the defendant acted recklessly to cause the victim's death and reduced the degree of the offense from first degree murder to involuntary manslaughter. *Id.* at 750.

¶ 68 In contrast, defendant here was aware that her actions caused the victim to suffer great bodily harm, as she testified she observed the victim engulfed in flames from "head to toe." Furthermore, defendant knew that gasoline was flammable and could cause great bodily harm or death. Conversely, the *Jones* defendant was unaware that applying 4.4 pounds of pressure to a person's jugular vein could cause death. While defendant here testified that she was unaware that gasoline vapors were flammable, we do not find that argument would necessarily compel a jury to find her not guilty of first degree murder where the other circumstantial evidence as set forth by the State indicates otherwise. See *People v. Saxon*, 374 Ill. App. 3d 409, 418 (2007).

¶ 69 We find *People v. Price*, 176 Ill. App. 3d 831 (1988), to be instructive. While we acknowledge that the issue on appeal in *Price* was whether the trial court erred in failing to provide the jury with an involuntary manslaughter instruction (see *id.* at 836), the matter is significantly factually similar and relevant to the case at bar. In *Price*, the defendant was found guilty of first degree murder after intentionally setting fire to his home knowing children were inside. *Id.* at 832. The evidence at trial revealed that after arguing with family members the defendant told his next-door neighbors and son that he would "burn [the house] down first" before he would let his son back into the house. *Id.* at 833. Later that evening, the defendant's wife called the police because the defendant kept demanding that she and the children leave. *Id.* After the police left, the defendant continued to demand that the family leave the house and was observed by the defendant's wife and son packing a garment bag and leaving. *Id.* at 834. Shortly thereafter, the defendant's wife heard the defendant ask the next-door neighbor for " 'the big gas can' " and the defendant left again. *Id.* A short time later, the defendant's wife observed defendant pouring gasoline onto the kitchen floor from a can. *Id.* The defendant informed her that, "I am going to burn all you mother f[***]s up." *Id.* The defendant's wife ran out of the

house and observed smoke and fire coming from the home. *Id.* The defendant drove away from the scene. *Id.* The children who were inside the home perished. *Id.*

¶ 70 At trial, the defendant admitted he told his wife that he was " 'going to burn this mother f*** down' " and that he retrieved a gas can from a neighbor. *Id.* at 835. Defendant testified that he did not intend to harm the children and that he had spent too much time and money remodeling the house to destroy it. *Id.* Defendant further admitted to spreading the gasoline in the house, but did not believe the gasoline would ignite. *Id.*

¶ 71 During a jury instruction conference at the close of the trial, the trial court denied defendant's request for an instruction of involuntary manslaughter. *Id.* at 835-36. The jury ultimately found defendant guilty of aggravated arson and murder. *Id.* at 836.

¶ 72 On appeal, the defendant maintained that the trial court's refusal to provide the tendered involuntary manslaughter instruction denied him a fair trial. *Id.* In considering whether the defendant was so deprived, the *Price* court reviewed the evidence to determine whether it was sufficient to support the defendant's contention that he acted recklessly in performing the actions which caused the deaths of the children. *Id.* at 837-38. The *Price* court found that the defendant's statement that he did not intend to harm the children and the house was not sufficient to support an involuntary manslaughter instruction. *Id.* at 838. In addition, the *Price* court observed that the defendant's conduct, before and after the fire, "negates defendant's statements that he did not intend to harm the children or damage the house." *Id.* at 837. The court pointed to the defendant's statements prior to the fire that he was going to "burn this mother f*** down" and that he admitted arguing with the family and purchasing gasoline. *Id.* In addition, the *Price* court acknowledged that the defendant was aware the children were home when he began deliberately pouring gasoline throughout the house. *Id.* The *Price* court further observed that

the defendant failed to warn anyone in the home about the fire and failed to notify the authorities regarding the fire. *Id.* Rather, the defendant "got into his car and left the scene." *Id.* Thus, the evidence presented at the trial established the defendant acted with the requisite mental state to be convicted of first degree murder. *Id.* at 836.

¶ 73 Here, defendant's conduct before and after the fire similarly negates her testimony that she did not intend to harm the victim or set the apartment on fire. Before the fire, defendant admitted she told the victim that "his m*** f*** a*** would die today." Herring and Shaunta both testified that on the day of the fire they heard defendant make similar threats. Defendant also admitted that after arguing with the victim she poured gasoline on the mattress, about the bedroom, and on the victim. The testimony established defendant's conduct was deliberate. Further, defendant was aware that the victim was disabled and walked with the aid of a cane and attempted to block his escape from the apartment after she had thrown gasoline on him by locking the kitchen door.

¶ 74 Moreover, after the fire began, defendant failed to initially warn the other residents about the fire. While defendant testified she "banged" on Bray's apartment door and alerted him of the fire, neither Bray nor any of his family members testified to hearing defendant do so. In fact, Shaunta testified she was notified of the fire by Herring. Although Bray testified that defendant told him that the victim was still inside the apartment, she only did so after she had already run around the building. Bray further testified, as did Herring and Shaunta, that defendant ran away from the fire and into Bridgeforth's truck. Then, once in Bridgeforth's truck, defendant failed to contact the police or the fire department regarding the fire. Just as in *Price*, rather than assist the victim or her neighbors, defendant fled the scene.

¶ 75 As a reviewing court, our role is merely to determine whether any rational trier of fact

could have found that the knowledge element of the first degree murder charge had been proven beyond a reasonable doubt. See *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). Viewing the evidence in this case in the light most favorable to the State, as we are required to do, we believe that a rational trier of fact could have so found. See *id.* at 280. The evidence of defendant's knowledge, although circumstantial in this case as it often is (see *DiVincenzo*, 183 Ill. 2d at 252), was not so improbable, unsatisfactory, or inconclusive as to leave a reasonable doubt of defendant's guilt. See *Smith*, 185 Ill. 2d at 542. As the trier of fact, the trial court was in the best position to determine whether defendant had the requisite mental state for first degree murder as alleged in the indictments. *DiVincenzo*, 183 Ill. 2d at 252. Accordingly, we find the evidence at trial was sufficient to prove defendant guilty beyond a reasonable doubt of first degree murder. See *People v. Pollard*, 2015 IL App (1st) 130467, ¶ 29.

¶ 76 Juror Issues

¶ 77 Defendant further maintains that the trial court wrongly denied her requests to question juror DeLeon after closing arguments and jury polling. Specifically, defendant asserts that DeLeon (1) appeared to be sleeping during closing arguments and (2) did not understand the question posed during the polling process which defendant argues indicates DeLeon did not comprehend English. We first address our standard of review.

¶ 78 Defendants have the constitutional rights to be tried by a fair and impartial jury and to due process. U.S. Const. amends. VI and XIV. A juror who is inattentive for a substantial portion of a trial has been found to be unqualified to serve on the jury, and violates due process. *People v. Jones*, 369 Ill. App. 3d 452, 455 (2006). "When faced with possible juror misconduct, it is within the sound discretion of the trial court whether to reopen *voir dire*, and we review the trial court's actions for an abuse of that discretion." *Id.*

¶ 79 We now consider defendant's first argument that the trial court abused its discretion when it failed to question juror DeLeon after closing arguments to determine whether DeLeon had been sleeping. We observe that "courts have taken the view that the party claiming error from an inattentive or sleeping juror must demonstrate that the juror 'failed to follow some important or essential part of the proceeding.' " *People v. Gonzalez*, 388 Ill. App. 3d 566, 576 (2008) (quoting *United States v. Tierney*, 947 F.2d 854, 868 (1991)).

¶ 80 Following closing arguments, defense counsel requested a sidebar; however, no court reporter was present. Thus, after the jury retired to deliberate, defense counsel recounted the sidebar in the presence of the court reporter:

> "[Defense Counsel]: After the State's rebuttal closing argument, I did ask for a sidebar. We did not have the court reporter present. I did want to alert the Court and the State as to the fact that juror Gilda DeLeon *** she was sitting in the back row I believe in the middle seat, about the third seat from the left. And I did notice during [defense counsel's] closing argument, the start of that argument at 12:13 p.m. she had her eyes closed, her head on her hand and she certainly remained in the position for several minutes.
>
> She did open her eyes periodically and more so as [defense counsel's] voice got louder, but I did just want to alert the Court as to that as well as the State. I did want her to be questioned as to the fact—as to whether she had in fact nodded off and missed any of the arguments, whether it was from the Defense or the State.
>
> THE COURT: All right. And the record should reflect I was watching all the jurors very carefully as well and Ms. DeLeon was the third seat from the left in the back row. And I was watching her. And as long as we are going over this, we should just

> probably put of record too that Ms. DeLeon was the one who did make a brief gasp shall I say when the picture of [*sic*] was shown, and she also did that when the gas can was shown.
>
> She is the same juror. I was watching her and my opinion was she was paying attention. She might not have enjoyed the argument is my personal opinion or agreed with the argument, but in no way, shape or form did I notice Ms. DeLeon was sleeping or not paying attention to the argument. My interpretation of her actions was she didn't like the argument. And that's just my interpretation. The Court did feel she was paying attention and that she was in fact alert."

¶ 81 Defendant, relying on the cases of *People v. Silagy*, 101 Ill. 2d 147 (1984) and *Jones*, asserts that the trial judge should have questioned DeLeon regarding whether or not she had fallen asleep. In *Silagy*, defense counsel informed the court that she had observed the juror in question "periodically dozing during the trial." *Silagy*, 101 Ill. 2d at 170. The trial court, however, stated it had seen " 'no evidence as stated by Defense counsel' " but nonetheless examined the juror. *Id.* Upon examination, the juror indicated he did not fall asleep and the court denied the defendant's motion to dismiss the juror. *Id.* In contrast, the trial judge in this case stated that he had been "watching all the jurors very carefully" including DeLeon. *Id.* While the trial court stated that in his "personal opinion" DeLeon "might not have enjoyed the argument or agreed with the argument," and the trial court ultimately found that DeLeon had not been sleeping and was paying attention. *Id.*

¶ 82 In *Jones*, the record demonstrated that the trial judge was aware that the juror in question had been "half asleep during almost entire proceeding" and alerted both counsels to this fact. *Jones*, 369 Ill. App. 3d at 453. Based on these circumstances, the reviewing court held that the

trial court had a duty to undertake further inquiry to ensure the defendant received a fair trial. *Id.* at 456. In this case, however, the record reflects that the trial judge was watching the jurors and did not believe DeLeon had fallen asleep or was inattentive. Accordingly, the circumstances in this case are not similar to the circumstances in *Jones* and thus we cannot say that the trial court had an affirmative duty to *sua sponte* reopen *voir dire*.

¶ 83 We conclude the trial court did not abuse its discretion when it declined to question DeLeon. The record demonstrates the trial court was keenly aware of the attentiveness of the jurors and explicitly found that DeLeon was not asleep or not paying attention to the closing argument. See *id.* at 455 ("[I]t is within the sound discretion of the trial court whether to reopen *voir dire*."). Defendant has failed to demonstrate that DeLeon had fallen asleep or was not otherwise paying attention to a substantial portion of the trial or that DeLeon failed to follow an essential part of the proceedings. See *Gonzalez*, 388 Ill. App. 3d at 577. While defendant further argues that the trial court erred by failing to question DeLeon regarding whether she had improperly formed an opinion about the case, we find no support in the record that the trial court abused its sound discretion. Moreover, while defendant raised an objection to DeLeon's attentiveness, defense counsel failed to object to the trial court's statement that it believed DeLeon merely "didn't like the argument." Consequently, we find this portion of defendant's argument to be waived. See *Silagy*, 101 Ill. 2d at 171.

¶ 84 Defendant further maintains that DeLeon's inability to function as a competent juror was also evident during jury polling. After the jury returned its verdict, the trial court advised the jurors that its clerk would ask them each the question, "Was this then and is this now your verdict?" to which each juror would respond with either a "yes" or a "no." The clerk then began to poll the jury. When juror Gail Leon was polled, both she and juror Gilda DeLeon responded,

"Yes." Then, when it was DeLeon's turn to answer the question the following occurred:

"THE CLERK: Gilda DeLeon–

MS. DELEON: Yes.

THE CLERK: –was this then and is this now your verdict?

THE COURT: All right. You answered a little quick. I know we have a Leon and a DeLeon. I know you answered to that. Was this then and is this now your verdict, Ms. DeLeon?

Re-read the question. She answered already though.

THE CLERK: Gilda DeLeon, was this then and is this now your verdict? Was this then and is this now your verdict?

MS. DELEON: I'm sorry. He tell me?

THE COURT: No. Just answer the question.

MS. DELEON: I am sorry. I don't understand. I am sorry. You repeat, please?

THE COURT: Re-read it.

THE CLERK: Was this then and is this now your verdict?

MS. DELEON: I am so sorry. I am nervous or I don't know what happened. I don't understand. He tell me the answer, the only answer?

THE COURT: No, he can't tell you the answer. The verdict that was read, is that your verdict, yes or no? The verdict that was read in court.

MS. DELEON: In the book, yes.

THE COURT: Thank you."

Thereafter defense counsel requested that the trial court question DeLeon to clarify the polling question and stated, "It would appear that she has a language problem that was not evident

before." The trial court denied defense counsel's request stating, "At this time I think she understands sufficiently. I am not going to bring her out again."

¶ 85 After hearing arguments from the parties regarding defendant's posttrial motion, the trial court again addressed this issue, stating:

> "As to the juror, Miss Gilda DeLeon, the Court wants to make certain findings and that is in the – obviously jury selection will speak for itself as well, questions that she asked were – was asked and the answers that she gave and that is that in my opinion she was attentive during the jury selection. She answered appropriately. She answered the questions with a complete understanding of English in my opinion based on the questions I asked her. Neither side, neither the Defense nor the State, made any objection to Miss DeLeon or even suggested that she did not understand or have a sufficient comprehension of the English language. Perhaps Spanish language is her main or first language but the Court also looked at her while the trial was going on as I looked at all the jurors and I even made certain statements that I told both sides that I observed her do during the trial. I pay very close attention to the jurors during trial and it's my opinion that Miss DeLeon was paying very close attention to this trial, that she was not sleeping at all as alleged in your motion. We discussed that at a sidebar as well. It is just my humble opinion she did not agree with or like the arguments that were being made and she was not sleeping. That's my opinion. She did understand English. And again as I pointed out to both sides neither side in my opinion either thought she did not understand English until obviously she had difficulty with the end question because no one brought it to my attention and I certainly did not believe that. And no argument was made prior to that last question saying that she did not understand English. And I think I pointed out to both sides that

she did make a slight gasp when the pictures were shown and additionally when the gas can was shown. And she was paying as I stated very close attention to this trial and she did understand English."

¶ 86 On appeal, defendant contends that DeLeon's responses demonstrate that she did not understand the question the clerk posed and that her response also suggests that she struggled with English. Defendant points to DeLeon's "stilted answers" such as "You repeat, please" and "He tell me the answer" to demonstrate DeLeon did not understand the proceedings. Defendant argues that the trial court's failure to question DeLeon was not harmless as the jury heard technical and conflicting expert and that the evidence was closely balanced. Defendant does not argue that there were any errors during the polling process, but that the trial judge should have reopened *voir dire* to determine if DeLeon was a competent juror.

¶ 87 Defendant relies on *People v. Hayes*, 319 Ill. App. 3d 810 (2001), and *People v. Carrilalez*, 2012 IL App (1st) 102687, to support her position that the trial court should have similarly questioned DeLeon regarding her competency with English and replaced her with an alternate juror. We initially observe that while the juror in *Hayes* informed the trial court after deliberations that he did not understand English, the issue on appeal in *Hayes* was whether the trial court followed the proper procedure when it replaced the juror with an alternate juror after the alternate juror had been excused and deliberations had already begun. *Hayes*, 319 Ill. App. 3d at 815. Similarly, in *Carrilalez*, after deliberations had commenced a juror informed the trial court that her first language was Spanish and that she had a " 'language problem' " that prevented her from understanding all of the case and from rendering a decision. *Carrilalez*, 2012 IL App (1st) 102687, ¶ 43. As in *Hayes*, the question on appeal in *Carrilalez* was whether the trial court abused its discretion when it replaced a juror with an alternate juror after deliberations

had commenced. *Id.* ¶ 44. Thus, we find both *Hayes* and *Carrilalez* to be inapplicable to the case at bar.

¶ 88 There is, however, a notable distinction between the case at bar and *Haye*s and *Carrilalez*. In the cases relied upon by defendant, it was the jurors themselves who, after deliberation commenced, informed the trial court of their lack of understanding English. *Hayes*, 319 Ill. App. 3d at 814; *Carrilalez*, 2012 IL App (1st) 102687, ¶ 43. Here, the record demonstrates that the jurors deliberated and reached a unanimous verdict. At no point during deliberations did DeLeon or any other member of the jury for that matter inform the trial court that DeLeon did not understand English. Such a unanimous verdict suggests that DeLeon was able to understand the testimony and evidence presented at trial and perform her duties as a member of the jury. See *Gonzalez*, 388 Ill. App. 3d at 579.

¶ 89 Moreover, the record reflects that during jury polling the clerk asked juror Leon, "Was this then and is this now your verdict?" to which both Leon and DeLeon responded, "Yes." While the record demonstrates DeLeon inaccurately believed her name was called by the clerk, it further indicates that she was not initially confused by the question posed and ultimately answered yes when her name was called again. The purpose of jury polling is to ensure that the juror has an "opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings of the jury room." (Internal quotation marks omitted.) *People v. Bennett*, 154 Ill. App. 3d 469, 476 (1987) (quoting *People v. Kellogg*, 77 Ill. 2d 524, 527-28 (1979)). Here, the record reflects that the trial court provided DeLeon with ample opportunity to express her disagreement with the verdict and to inform the court with any issues she had in reaching that verdict and DeLeon expressed none. Furthermore, the trial court had the opportunity to question DeLeon during *voir dire* and at no point did it or either counsel indicate

that DeLeon could not understand English. Accordingly, we cannot say the trial court abused its discretion when it declined to reopen *voir dire* to inquire into whether DeLeon understood English based on her responses during jury polling.

¶ 90 Closing Arguments

¶ 91 Defendant next contends the prosecutor made several statements to the jury that misstated both the facts and the law during closing arguments.

¶ 92 Initially, the parties disagree about the proper standard of review. Defendant asserts the proper standard of review in this instance is *de novo*. The State, on the other hand, notes that the standard of review for this issue is unclear, as our supreme court has applied both the abuse of discretion standard and the *de novo* standard. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (utilizing *de novo* standard of review to determine whether claimed improper arguments were so egregious as to warrant a new trial); *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (employing an abuse of discretion standard). While it is not clear if a prosecutor's comments during closing arguments are reviewed *de novo* or for an abuse of discretion (see *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32; *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010); *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008)), we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this matter would be the same under either standard.

¶ 93 The State is afforded wide latitude in making closing arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *Nicholas*, 218 Ill. 2d at 121. Comments made during closing argument are not improper if they were invited by the defense and comments made during closing arguments must

be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43. "The standard of review applied to arguments by counsel is similar to the standard used in deciding whether a plain error was made: comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 82. Thus, reversal is warranted only if the prosecutor's remarks created "substantial prejudice." *Wheeler*, 226 Ill. 2d at 123; *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice.").

¶ 94 Defendant asserts that the State made four comments which misstated the law or the facts of the case and that these repeated misstatements created a pattern of unfairness that denied her a fair trial.

¶ 95 The first alleged improper remark occurred when the State was discussing what evidence the jury would have available in the jury room. The prosecutor remarked that, "Some video from 1993 of a fire that burned from a water heater, not evidence." Defense counsel objected and requested "that the jury be instructed." The trial court sustained the objection and the State continued its argument stating, "You will only take back what's been testified to and any physical evidence."

¶ 96 We find the prosecutor's alleged improper remark was cured by this subsequent statement along with the trial court's instructions prior to closing arguments where the trial court admonished the jury that, "What the lawyers say during closing arguments are not evidence and should not be considered by you as evidence. If a lawyer makes a statement that is not based on the evidence or reasonable inferences to be drawn from the evidence, that statement should be

disregarded." See *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 36 ("The trial court may cure any errors by giving the jury proper instructions on the law to be applied, informing the jury that arguments are not evidence, or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark."). We further find that, taken in context, this remark failed to prejudice defendant as there is no indication in the record that the demonstrative video was admitted into evidence and consequently the video would not be available to the jury in the jury room. See *id.* ¶ 40 (finding no error where the State correctly argued that a police report was not evidence).

¶ 97 The second alleged improper remark occurred during the State's discussion of Smith's testimony. In context, the remark was, "Even Dennis Smith, the Defense's own expert, said the direction of flames after igniting with vapors, the direction cannot be determined from hearing it. It's more of a visibility. Even he said her testimony is incredible." Defense counsel's objection to this comment was overruled as the trial court found that the prosecutor may so argue. We decline to find any error in this remark as the prosecutor was merely comparing defendant's testimony to Smith's testimony. Defendant testified that prior to viewing the flames she heard a "whooshing" sound coming from behind her; however, Smith testified that an individual would not be able to hear the direction of the flames after the vapors were ignited. The prosecutor was merely commenting on the evidence presented and the reasonable inferences drawn therefrom when comparing defendant's testimony to Smith's. "If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities." *People v. Hart*, 214 Ill. 2d 490, 520 (2005). When it is clear that the testimony of a defendant and that of the witnesses cannot both be true "[t]he prosecutor may ask a jury to compare the defendant's story with that of other witnesses to decide what actually

happened." *People v. Washington*, 101 Ill. App. 3d 409, 413 (1981). Thus, we find this comment was proper given the evidence established at trial.

¶ 98 The other allegedly improper remarks occurred during the State's rebuttal argument when the prosecutor stated: (1) "When she poured the gas, she was responsible for the murder. As soon as she poured it on him, she was possible [*sic*] for the murder;" and (2) "Luckily for you, you are not bound by these procedural rules that the NFPA has. Those don't apply to you at all. They have no place in this courtroom when you are deliberating." Defense counsel objected to both statements. The trial court overruled the first and sustained the second. Regardless of whether either of these comments were misstatements of the law, we find they failed to prejudice defendant where the jury was shortly thereafter informed by the trial court of the law that applied to this case. See *Herndon*, 2015 IL App (1st) 123375, ¶ 36. The jury was also provided with written jury instructions which set forth the law and informed the jury what it was to consider.

¶ 99 After reviewing these comments in their proper context, we cannot agree with defendant's contention that the prosecutor engaged in prejudicial misconduct such that defendant was deprived of a fair trial. Any alleged errors were mitigated when the trial court both advised the jury that comments made during closing arguments are not evidence and when the trial court sustained defendant's objections. See *People v. Hampton*, 387 Ill. App. 3d 206, 222-23 (2008). Moreover, as previously discussed, the evidence against defendant was compelling and sufficient to prove her guilty beyond a reasonable doubt of first degree murder. Since the trial court properly sustained objections to half of these comments and instructed the jury that the closing arguments are not evidence, and in light of the evidence presented, we do not believe that the jury would have reached a different verdict had these comments not been made. See *id.*

¶ 100 Sentence Excessive

¶ 101 Lastly, defendant argues her sentence was excessive where she essentially received a *de facto* life sentence. Defendant further asserts that the trial court considered mitigating factors to be aggravating factors such as the fact she earned her GED, completed a drug program, and suffered from a drug addiction and did not consider her rehabilitative potential. In addition, defendant contends the trial court rejected her expressions of remorse.

¶ 102 "It is well-settled that a trial judge's sentencing decisions are entitled to great deference and will not be altered on appeal absent an abuse of discretion." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007); *People v. Snyder*, 2011 IL 111382, ¶ 36. "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *Jackson*, 375 Ill. App. 3d at 800. Here, defendant received a 45-year sentence for first degree murder. The sentencing range for first degree murder is 20 to 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2014). This court has recognized that, so long as a defendant's lengthy prison sentence is not otherwise an abuse of discretion, it will not be found improper merely because it arguably amounts to a *de facto* life sentence. *People v. Martin*, 2012 IL App (1st) 093506, ¶ 50. Thus, while the trial court arguably sentenced defendant to a *de facto* life sentence, defendant's 45-year sentence was still within the statutory range.

¶ 103 Defendant next contends the trial court did not properly consider certain factors in mitigation such as her education, drug treatment, and drug addiction. Specifically, defendant argues that "the judge considered [defendant's educational endeavor] negatively, stating that Sherry earning her GED 'does point out to the Court that Defendant can do things when she wants to and sets her mind to doing things.' " In addition, defendant asserts the trial court "dismissed" defendant's previous completion of a drug treatment program "commenting that it showed that [defendant] 'can improve herself if she wants to,' instead of demonstrating that she

has rehabilitative potential."

¶ 104 The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). "[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Accordingly, the reviewing court "must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 105 The record belies defendant's assertion the trial court did not consider her education, drug treatment, and drug addiction as mitigating factors. Before sentencing defendant, the trial court heard arguments from both sides and considered defendant's statement, the State's evidence, the mitigating factors, the live witness testimony, and the presentence investigation report. Defendant takes issue with some of the trial court's statements regarding her obtaining a GED and completing a drug treatment program. However, when these statements are read in context, it is clear the trial court did not abuse its discretion. The trial court made these statements while discussing the presentence investigation report in depth and the presentence investigation report itself contained several mitigating factors. It is well settled that "a trial court's examination of a

presentence investigation report which recites several mitigating factors is 'in itself, a basis for finding that defendant's [rehabilitative potential] was considered.' " *People v. Parker*, 192 Ill. App. 3d 779, 789 (1989) (quoting *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981)). Furthermore, "We presume the sentencing court considered mitigation evidence when it is presented." *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53.

¶ 106 Moreover, the trial court is not required to give greater weight to a defendant's potential for rehabilitation or to the mitigating factors than the seriousness of the offense. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001); *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55 ("Since the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, and the presence of mitigating factors neither requires a minimum sentence nor precludes a maximum sentence."). The offense in the instant case was very serious. In sentencing defendant, the trial court observed "there's no question here that in my mind you lit the lighter and that ultimately set [the] victim on fire, based also on your deliberate actions of pouring the gasoline on him. He did cry out in pain. You then closed the door before you lit the lighter." In addition, the evidence at trial established that the victim suffered second degree burns over 75% of his body and was in a drug-induced coma for three weeks until he expired. Accordingly, we reject defendant's contention that the trial court did not consider the mitigating factors and her rehabilitative potential.

¶ 107 Defendant also maintains the trial court disregarded her remorse when it characterized her statements as being "too little too late." The trial court stated in relevant part:

> "I heard in your statement that you said sorry is not enough. I agree. It's not. It's too little too late. The fact that you ran away and hid also for a period of time, a week,

> shows a complete lack of taking responsibility for your actions. And although I do agree a lot with what – some of what [defense counsel] said, certainly you did have a horrible life, you had a horrible growing up, horrible childhood, but there comes a point in everyone's life, and I believe in your life as well, that you clearly know the difference between what's right and what's wrong and you make a conscious decision at that point to improve yourself."

Taken in context, however, it is apparent that the trial court considered her remorse in conjunction with the seriousness of the offense. Additionally, the trial court here expressly considered defendant's age and determined, after weighing the factors in aggravation and mitigation, that a sentence of 45 years was appropriate. In light of the severity of the crime charged, defendant's background, and factors in aggravation and mitigation, we cannot say that defendant's sentence was manifestly disproportionate to the nature of the offense. Accordingly, the trial court did not abuse its discretion in imposing such a sentence. See *Martin*, 2012 IL App (1st) 093506, ¶¶ 50, 53 (holding the trial court did not abuse its discretion in sentencing the defendant to an arguably *de facto* life sentence).

¶ 108 CONCLUSION

¶ 109 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 110 Affirmed.