2016 IL App (4th) 150131-U

NO. 4-15-0131

FILED
January 19, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
HEATHER R. LAMIE,	)	No. 13CF152
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court ruled (1) the trial court did not abuse its discretion in permitting a juror to sit on the panel; (2) it did not abuse its discretion in admitting text messages into evidence; (3) sufficient evidence was presented to find defendant guilty; (4) the State's comments in closing argument resulted in harmless error; and (5) we decline to review defendant's ineffective-assistance claim on direct appeal.

¶ 2 In June 2013, a grand jury returned a three-count indictment charging defendant, Heather R. Lamie, with first degree murder with intent to do great bodily harm (count I) (720 ILCS 5/9-1(a)(1) (West 2010)), first degree murder with knowledge of a strong probability of great bodily harm (count II) (720 ILCS 5/9-1(a)(2) (West 2010)), and endangering the life of a child (count III) (720 ILCS 5/12C-5(a)(1) (West 2010). The charges were based on injuries resulting in the May 5, 2011, death of defendant's foster child, Kianna, age four. At trial, a jury found defendant guilty of counts II and III. (Count I was dismissed by the State at the beginning

of the jury instruction conference.) In February 2015, the trial court sentenced defendant to natural life in prison. Defendant appeals, arguing (1) the trial court abused its discretion in permitting a juror to sit on the panel, (2) the trial court abused its discretion in admitting text messages into evidence, (3) insufficient evidence was presented to find defendant guilty, (4) the State committed plain error in discussing evidence and legal standards in closing argument, and (5) ineffective assistance of trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2010, defendant became the foster parent to three children, including then three-year-old, Kianna. Along with her two biological children and a fourth foster child, defendant had six children living in her home. On May 3, 2011, paramedics were called to defendant's home because Kianna was unresponsive and lying on the floor. She was airlifted to OSF St. Francis Hospital (St. Francis) for emergency surgery. The surgery required removing part of Kianna's skull to relieve pressure from brain swelling. The surgery was unsuccessful and Kianna was brain dead. On May 5, 2011, Kianna was removed from life support and died.

¶ 5 A. Juror Lestos

¶ 6 Defendant's jury trial started in September 2014. During *voir dire*, one juror, Demetrios Lestos, indicated he knew several people involved in the trial. Lestos owned a restaurant in Pontiac, Illinois, where the proceedings took place. Lestos knew a few of the witnesses from the witness list. Despite his familiarity with these people, Lestos agreed he could be fair and impartial.

¶ 7 Lestos next indicated he had known Seth Uphoff, the State's Attorney, since Uphoff was a baby. Uphoff was a periodic customer at Lestos' restaurant. Lestos stated he had never been invited to Uphoff's home and the fact he knew Uphoff would not influence him at all.

Lestos confirmed his ability to remain impartial. Defendant requested Lestos be removed for cause, which the judge denied. After the denial, defendant did not use a peremptory challenge to remove him. At the time, defendant had three remaining peremptory challenges. Defendant ultimately used her remaining peremptory challenges, and extra peremptory challenges for alternates, throughout the *voir dire* process on other jurors.

¶ 8 After the jury was selected and sworn, one juror submitted a note indicating (1) Lestos formerly baby-sat for Uphoff and (2) the judge used to mow Lestos' lawn as an adolescent. Lestos was brought into the courtroom and examined again. He denied babysitting Uphoff. However, he did recall the judge mowing his lawn around 30 years ago. Again, Lestos confirmed his prior interaction with the judge would not influence his role as a juror. The trial court permitted Lestos to continue to serve on the jury over defendant's objection.

¶ 9 B. Text Messages

¶ 10 Before the trial began, the parties disputed the admission of some text messages between defendant and her husband, Joshua Lamie. Defendant filed a motion *in limine* to prohibit the use of the text messages at trial. In it, defendant argued the messages were (1) protected by the spousal-communication privilege and (2) hearsay. The specific text message exchange at issue was:

> [8:18 a.m.] "Josh Lamie: Hows today going so far. Is she soar?
>
> Defendant: Yes teacher just called
>
> [JL]: What!? about her bruising?
>
> [D]: No she is limping
>
> [JL]: She said her leg hurt yesterday. Probably when she through herself to the floor

[D]: yes im sure it is

[D]: sorry was feeding the baby had to text one handed she just wanted to see if kianna was doing that this am if she doesn t come around at school and st [continued in next message]

[D]: op i ll go get her she is doing it for the attention she started laying it on thick at the bus stop

[8:39 a.m.] [JL]: Figured as much

***

[10:25 a.m.] [D]: yeah. finally got those cloths folded. i have about 4 -5 loads to wash still but hey, baby steps!

[JL]: Very small baby steps

[D]: wow, thanks i thought they were decent size. there were about 6 loads in this living room.

[JL]: Your doing great. Giving you a hard time. On a escort right now. Love you kid!

[10:29 a.m.] [D]: love u too

***

[11:24 a.m.] [D]: kianna had the teachers and a mother carry her around all day.

[JL]: You got to be kidding me. If she hurts that bad she can go to bed.

[D]: we have [another child's] visit today

[JL]: She can go to bed as soon as y'all get back

[D]: i plan on that

[D]: she was doing it again. i can't wait for u to have off. its just been a tough day yesterday & i think again today

[JL]: Ill have her ford the next three days. Sorry she gives you such a hard time.

[D]: its ok its not your fault its just hard to keep things in perspective sometimes i picked her up and put her in a shower and yes it is kind of cold her

[11:38 a.m.] [D]: brain needs as much stimulation as it can get right now

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[12:26 p.m.] [D]: oh my goodness, i still don't have her undercontrol. and very soon i'm going to have to cave because we have to leave.

[JL]: Beat her ass!

[D]: at this point I don t think that would be a good idea i m angry and I wouldn t just hurt her feelings not a good idea at the moment i m still good

[D]: but caving is going to make me even more mad

[12:40 p.m.] [D]: she just threw dog food everywhere!"

(Spelling and grammatical errors in original.)

¶ 11 Defendant placed a 9-1-1 call at 12:47 p.m., reporting her foster daughter was having a seizure. Defendant argued her own statements were not admissions. Joshua's

statements, she argued, were inadmissible hearsay. The trial court disagreed and held defendant's statements admissible as statements of a party opponent. As to Joshua's statements, the court found the statements were not hearsay because they were offered to show the effect on the listener (citing *People v. Lovejoy*, 235 Ill. 2d 97, 919 N.E.2d 843 (2009); *People v. Gonzalez*, 379 Ill. App. 3d 941, 884 N.E.2d 228 (2008); *People v. Theis*, 2011 Ill. App. (2d) 091080, 963 N.E.2d 378). Finally, the trial court found the text messages to be highly probative of defendant's state of mind around the time of Kianna's injury, which outweighed any potential prejudice. The court gave a thorough, detailed explanation for its decision, and it excluded a portion of Joshua's texting to which defendant had not responded.

¶ 12 At trial, the text-message exchange was admitted through Lieutenant Earl Dutko. Defendant maintained a standing objection to the messages as they were admitted. The trial court provided the following limiting instruction:

> "The text messages sent from Josh Lamie's cellular phone to Heather Lamie's cellular phone are not admitted for their truth and you are not to use them as evidence against the defendant *** in determining her guilt or innocence. His texts are not admitted as substantive evidence. Rather, they are only to be used by you for the limited purpose to show the effect those texts had upon the defendant, Heather Lamie, if any, only as it related to show her state of mind at or about the time the text exchange took place."

¶ 13 This instruction was given before the text messages were admitted, after they were admitted, and when instructing the jury at the end of the case. Defendant raised the admission of the text messages in her motion for a new trial.

¶ 14 C. Evidence at Trial

¶ 15 At trial, the parties put on lay and expert witnesses. Each is addressed according to the chronology of events surrounding Kianna's death.

¶ 16 Dr. William Puga, called by the defense, was a child psychiatrist who met with Kianna. He worked at Streamwood Hospital, where Kianna was admitted and stayed for about a week in March 2011. Defendant told Dr. Puga Kianna had aggression issues toward herself and others. Kianna told Dr. Puga she was there because she pulled her two-year-old sister's hair and cut herself on the wrist. The cut was described as a light, superficial scratch that did not require any bandages or stitches. Kianna reported the cut did not hurt.

¶ 17 Dr. Puga noted Kianna's history with her biological parents, who physically abused her and used drugs. Her stepfather also physically and sexually abused her. Defendant reported to Dr. Puga that Kianna was acting out in preschool, being "bossy," and was defiant. Defendant was the primary source of information for Dr. Puga. Based, in part, on Kianna's history with her biological parents and information provided by defendant, he diagnosed Kianna with mood disorder not otherwise specified and post-traumatic stress disorder. Puga maintained a working diagnosis for reactive attachment disorder as well.

¶ 18 On cross-examination, Dr. Puga viewed computerized tomography (CT) scans of Kianna's head and did not think she was capable of causing these injuries on her own. He noted she had extensive injuries all over her head. He had never seen a child with such extensive injuries. He also observed defendant was very frustrated with Kianna's behavior toward her other siblings. Defendant told Dr. Puga she had instructed her daughters to do whatever they needed to do to protect themselves from Kianna's aggression. It concerned Dr. Puga that

defendant was informing her children to act aggressively against Kianna. Dr. Puga concluded Kianna was not a danger to herself or others at the time.

¶ 19 Several individuals involved in Kianna's care before May 3, 2011, testified. Dr. Rachel Wegner, Kianna's physician; Audrey Reischauser, a caseworker at a child-welfare agency; Sherry Brendalen, a counselor for Kianna; and Amanda Chandler Cleary, a caseworker for Kianna, all testified Kianna was an ordinary and healthy child. These witnesses were mandated reporters and did not suspect or report any child abuse. Reischauser described Kianna as precocious and articulate. She engaged in challenging behaviors, such as tantrums, when visiting her biological parents. Sherry Brendalen met with Kianna on two occasions, including May 2, 2011. On that date, Brendalen saw Kianna lying on the floor of the waiting room, crying softly. In her office with Kianna, Brendalen drew Kianna's hair back into a ponytail. At that time, she noticed bruising on Kianna's right ear and right temple. When asked about the bruising, Kianna just shrugged. Cleary met with Kianna six times, four times in the foster home and twice in the office. Cleary found Kianna to be cheerful and happy. She never observed Kianna throw a fit or a tantrum, nor did she ever see Kianna act aggressively.

¶ 20 Joshua Lamie is defendant's husband. On May 2, 2011, Joshua spoke with Kianna on the phone. The call was recorded in preparation for a meeting with the Child and Youth Investment Team to determine any additional services available for Kianna's care. Defendant spoke with Joshua about making the recording prior to his speaking with Kianna. In the recording, Kianna discussed hurting herself. Specifically, on the same day, she threw a fit and hurt her eye because she said she missed her biological parents. Throughout the recording, Joshua tried to figure out why Kianna would hurt herself and reassured her that nobody would

hurt her. Joshua testified he never personally observed Kianna inflict her injuries or throw fits. Joshua testified he sent the text messages laid out above to defendant prior to Kianna's death.

¶ 21 Several witnesses testified to their interactions with Kianna throughout the school day on May 3, 2011. Kianna's bus driver, Corey Turner; Julie Ahern, a teacher's aide; and Ashley Richard, Kianna's teacher, all testified Kianna was normally a happy and talkative child. Turner never had a problem with Kianna acting out on the bus. They all testified about Kianna's injured leg and her quiet, depressed demeanor throughout the school day on May 3, 2011. Turner testified Kianna was not putting any weight on one leg and needed to be lifted onto the bus and helped to her seat. After all of the children exited the bus, Turner found Kianna still sitting in her seat, not moving. He carried her off the bus and handed her to a teacher's aide, Julie Ahern.

¶ 22 Angela Taylor, a volunteer in Kianna's class, testified Kianna cried to herself in obvious pain throughout the morning. However, Kianna did not want to go home. Taylor carried Kianna around that day and noticed a giant bruise on the whole right side of Kianna's face, from the temple on down. When she pulled Kianna's hair back in a ponytail, she did not notice any bruising around Kianna's ear. Kianna was uncommonly quiet that day. Taylor, in all of her dealings with Kianna, never saw her throw a fit or act aggressively toward herself or others.

¶ 23 Kianna's teacher, Ashley Richard, had Kianna in class five days a week from 8:10 a.m. until 11 a.m. She described Kianna as a bubbly, vibrant girl who played well with the other children. Defendant's daughter, B.L., was in the same class. Richard reported B.L. and Kianna got along well at school. On May 3, 2011, Kianna was limping and complained her leg was hurting. Kianna was not bubbly that day. Richard also noticed Kianna had a "bit lip" and a

black and blue bruise above her right eye, on the temple. Richard called defendant to report Kianna's condition, and defendant told her Kianna also had a bruise behind her ear. When Richard pulled Kianna's hair back, she noticed a black and purple bruise behind Kianna's ear. Kianna was slow moving and sad at school that day. Richard carried Kianna to the bus at the end of school.

¶ 24 Defendant testified to her experience with Kianna leading up to May 3, 2011. Defendant described Kianna as recently becoming aggressive toward her siblings and harming herself. On May 2, in particular, Kianna threw several fits at home and one immediately before counseling. Defendant claimed Kianna threw herself onto the floor, hitting either the table or chair leg, causing a bruise to her right temple. After the counseling session, Kianna was angry about not being able to play outside. According to defendant, Kianna threw herself to the floor, cutting her lip. On May 3, Kianna complained her leg hurt. Defendant was unable to see any injury on Kianna's leg but noticed she was limping when getting on the bus.

¶ 25 After school, on May 3, Kianna's brother was scheduled to meet with his biological father. Kianna did not want her brother to go because his father had sexually abused her. Kianna cried, then wet her pants. Defendant put Kianna in the shower to clean her off. In the interim, defendant stepped out of the room to tend to the other children. Shortly thereafter, defendant returned, shut off the shower, handed Kianna a towel to dry off, and left the room again. Throughout this process, defendant was texting the previously mentioned messages to Joshua Lamie. Defendant returned one more time to see Kianna crying on the floor, so she called Joshua to speak with her. He answered and spoke with Kianna. Defendant left the room for the last time and heard dog food spill. She sent the final text message to her husband about the dog food. Then defendant returned to see Kianna on the ground and called 9-1-1. Defendant

testified she never hit Kianna or attempted to physically harm her. On cross-examination, she testified Joshua never observed Kianna's fits and her frustration increased throughout May 3.

¶ 26 Ron Nettleingham was the responding paramedic to defendant's 9-1-1 call. He saw Kianna lying on the floor in the laundry room, unresponsive. Kianna had a seizure in the ambulance prior to arriving at the hospital. He delivered Kianna to Dr. Patrick Dowling at the emergency room.

¶ 27 Dr. Patrick Dowling, the emergency medicine physician who treated Kianna, testified as a witness and an expert for the State. As part of his care, he ordered a CT scan and found bleeding on and around both the left and right sides of Kianna's brain. He believed Kianna's seizure was caused by bleeding on the brain. He also noted a low body temperature, a drop in heart rate, and cessation of reflexive breathing. He noticed bruising on Kianna's right side of her face and ear, and a large "goose egg" on the backside of her skull, to the right side.

¶ 28 He was asked to give an expert opinion on the cause of Kianna's injury. He concluded the bleeding around Kianna's brain resulted from significant blunt-force trauma to the head. Dr. Dowling opined it would have taken tremendous force to cause Kianna's injuries. He went on to conclude an ordinary four-year-old child would be incapable of causing this type of injury on her own. Rather, she would have to suffer greater force than she was capable of generating on her own (*i.e.*, being struck with a bat, hit by a car, or falling from a great height). He also concluded the seizure and brain swelling were a result of blood pooling on her brain after the blunt-force trauma to her head, rather than a seizure causing the injury. Dr. Dowling, in 15 years of emergency medicine practice, had never seen the degree of trauma Kianna suffered in any child from things like throwing themselves on the floor, banging their head on tables, or even falling from monkey bars.

¶ 29 Kianna was transported to St. Francis Hospital in Peoria by helicopter. Dr. Julian Lin performed a decompressive craniotomy (removing part of her skull) to reduce brain swelling. The craniotomy failed to prevent the brain from swelling at the base of the skull, so blood stopped flowing to Kianna's brain, resulting in brain death. She was placed on life support. Kianna was removed from life support on May 5, 2011, and died.

¶ 30 Dr. Channing Petrak testified as an examining physician and expert in child-abuse pediatrics. (Dr. Petrak was board certified in pediatrics and pediatric child abuse.) She performed a thorough, head-to-toe examination of Kianna and spoke with defendant on May 3. Petrak's interview with defendant covered Kianna's medical history and the events that brought her to the hospital. Defendant reported she was going in and out of the room and, after she heard dog food spill, returned to see Kianna having a seizure, with arms and legs flailing. Petrak stated seizures do not typically cause injury, nor would arms and legs flail during a seizure. Limbs would move rhythmically, with controlled tight jerking.

¶ 31 Petrak concluded an acute injury caused Kianna's brain swelling and seizures minutes after the injury. She believed the injuries were not self-inflicted and not the result of an undiagnosed medical condition or a concussion. She noted a "short fall" (five feet or less) would not lead to a fatal head injury. (Kianna was 39 inches tall.)

¶ 32 Petrak observed bruising on the rest of Kianna's body. Bruises were found on Kianna's ankle, shins, and above both knees, as well as around her right eye and temple. She found bruising on Kianna's thighs, the backs of her legs, buttocks, shoulder, ear, and on her back. Bruises were found on Kianna's arms and the tops of her hands, the palms, and in the webbing between the thumb and index finger. None of Kianna's bruises, according to Petrak, were typical of ordinary child's play or falling over. Bruising of ears is uncommon because there is not much

blood flow in the ears. Kianna also had a bruise on her scalp that matched the curve of her ear. Dr. Petrak testified, "So the ear itself actually caused that line on the scalp, which means the ear was pushed into the scalp hard enough to cause that bruise. And an ear is not a particularly hard object or surface. So that is an unusual finding."

¶ 33 Dr. Petrak found Kianna's injury was severe and, in her opinion, could not have been self-induced. In her opinion, Kianna's injuries were inflicted and due to abusive head trauma.

¶ 34 Dr. Steven Lichtenstein performed an eye examination of Kianna on May 4, 2011. He specifically worked in pediatric ophthalmology, which is one means of establishing nonaccidental trauma. His examination of Kianna's eyes suggested she suffered "catastrophic" head trauma. Specifically, he opined this was nonaccidental head trauma. He also found this trauma was the result of a single incident, spanning a few minutes, rather than an ongoing injury. According to Lichtenstein, falling over at ground level, at Kianna's height, would not be enough to cause this type of injury.

¶ 35 Dr. John Denton, a forensic pathologist, testified about his autopsy of Kianna. Denton performed the initial autopsy on May 6, 2011. He noted a bruise on Kianna's hand and characterized it as a defensive injury. He saw bruising on Kianna's leg, shoulder, armpits, and arms. He characterized these as recent injuries from blunt-force trauma and/or grabbing under the armpits and compressing that area of skin.

¶ 36 Next, he examined multiple injuries around Kianna's head, including behind her ears. Notably, no injury was inflicted on Kianna's nose, ruling out a fall. He concluded Kianna's death was the result of a subdural hematoma (blood clot around the brain) caused by inflicted severe blunt-force trauma. Specifically, an injury to the back right side of Kianna's head caused

the subdural hematoma. The injury, he suggested, was unlikely the result of a fall. He continued to note the injury would likely have been a single blow resulting in sudden unconsciousness and possibly seizures, as opposed to long or repeated injuries to the head. Finally, he believed the injuries were not self-inflicted.

¶ 37 Dr. Janice Ophoven, called by the defense, testified as an expert in forensic pathology who focused on pediatrics. She testified based on her review of Kianna's medical records since birth, CT scans, and any other documents related to her care. She did not speak with any medical personnel involved in Kianna's care. Based on her review of Kianna's records, Ophoven concluded Kianna's death was caused by blunt-force trauma, causing an acute subdural hematoma.

¶ 38 Ophoven opined Kianna's injury, despite blunt-force trauma, could have developed over time, beginning with her lethargy and leg injury the morning of May 3, 2011. By the time she returned from school, according to Ophoven, Kianna began to have seizures as a result of more bleeding and lack of circulation to the brain. Kianna's condition upon arriving at the hospital, in Ophoven's opinion, was too advanced to be the result of a recent injury.

¶ 39 Ophoven believed the injury could have been accidental or intentional. It was also possible that Kianna's condition was the result of multiple injuries prior to May 3, 2011. In Ophoven's opinion, multiple factors surrounding Kianna's condition did not render one act of blunt-force trauma as the definitive cause of death. On cross-examination, the State attempted to undermine Ophoven's credibility and in rebuttal, it called Dr. Denton, who refuted much of Ophoven's testimony.

¶ 40 Defendant moved for a directed verdict at the close of the State's case and at the close of all the evidence. The State argued the evidence, taken in the light most favorable to the

State, showed defendant caused Kianna's death after building frustration. Defendant argued the State could not prove the precise cause of Kianna's death beyond a reasonable doubt. The trial court denied both motions.

¶ 41 D. The State's Closing Argument

¶ 42 Before either party made a closing argument, the trial court admonished the jury closing arguments were not evidence.

¶ 43 During its closing argument, the State reviewed all the evidence presented in support of its argument. It discussed jury instructions and the proof required for each element of first degree murder; specifically, the requirement to prove each element beyond a reasonable doubt and to prove defendant knew her acts would create a strong probability of death or great bodily harm.

¶ 44 As part of the State's argument, it referenced the text message, "Beat her ass," from Joshua. The State reminded the jury not to use that message as direct evidence against defendant, but to consider its impact on defendant's state of mind.

¶ 45 The State alleged defendant "snapped" and beat Kianna after building frustration. It relied on this inference to establish defendant's actions caused Kianna's death. It implied defendant's knowledge of her actions by stating, "[i]t doesn't say she intended death. No premeditated, no premeditation, not required. It's not what we have to prove." Rather, the State was required to prove defendant knew her actions created a "strong probability of great bodily harm." The bruises around Kianna's body, the State suggested, were the result of defendant beating her. Citing one of the text messages, the State characterized defendant's actions as the result of pent up anger: "I don't think that would be a good idea at this point, but once it is a good idea, then this is what happens." The State argued, at some point, while repeatedly striking

Kianna, defendant formed the knowledge her actions created a strong probability of great bodily harm. Defendant never objected to any remarks during the State's closing argument.

¶ 46 In defendant's closing argument, she discussed the text messages between the parties. She characterized the text messages as reflecting natural reactions to frustration. On rebuttal, the State again mentioned the text messages, stating:

> "Beat her ass. Doesn't that give you a pretty good indication of what it is like in that home in the context that it is taken. Do you really, really believe that people speak like that when they know it's not going to happen? Do you go to somebody and say, beat their ass if that is not what the intention is, if that is not what goes on in that place?"

Defendant did not object at any time during the State's rebuttal.

¶ 47 Prior to deliberations, the trial court provided instructions to the jury, including a limiting instruction to consider the text messages only for the effect on the listener. The jury was also instructed on judging the credibility of the evidence presented, as well as closing arguments were not evidence.

¶ 48 The jury found defendant guilty of first degree murder, count II, and child endangerment, count III. Defendant moved for a new trial and judgment notwithstanding the verdict (JNOV). In the motion for a new trial, she claimed, in part, as follows:

> "12. That the Defendant was deprived of a fair trial by an impartial jury in that jury members commented upon the evidence and witnesses in open court and had prejudged the Defendant.

13. That the verdict was the result of passion, bias and prejudice on the part of the jury."

Defendant included no mention of Juror Lestos in the posttrial motion. Defendant's motion for a new trial was denied, as was the motion for JNOV.

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant argues (1) the trial court abused its discretion in permitting Juror Lestos to remain on the jury, (2) the trial court abused its discretion in admitting text messages between defendant and Joshua Lamie into evidence, (3) insufficient evidence was presented to prove defendant guilty beyond a reasonable doubt, (4) prosecutorial misconduct occurred in the State's closing argument, and (5) trial counsel provided ineffective assistance for failing to ensure the impartiality of the jury and failing to object to the State's remarks in closing argument.

¶ 52 A. Juror Lestos

¶ 53 Defendant argues the trial court abused its discretion in allowing Juror Lestos to sit on the jury and denied defendant an impartial jury. The State responds the trial court did not err and this issue is forfeited on appeal. We agree with the State.

¶ 54 During *voir dire*, the parties may challenge jurors for cause or through peremptory challenges. *People v. Bowens*, 407 Ill. App. 3d 1094, 1098, 943 N.E.2d 1249,1256 (2011). Ordinarily, if a challenge for cause is denied, the appellate court will only review the denial if the challenging party has exercised all of her peremptory challenges. *Grady v. Marchini*, 375 Ill. App. 3d 174, 179, 874 N.E.2d 179, 184 (2007). In other words, the party challenging a juror for cause must use any available peremptory challenges if the challenge for

cause is denied. See *Bowens*, 407 Ill. App. 3d at 1100, 943 N.E.2d at 1258 (failing to use an available peremptory challenge forfeits the issue on appeal). During the initial examination of Lestos, defendant challenged Lestos' participation for cause, and the trial court denied it. Defendant did not exercise a peremptory challenge despite having three available, thus forfeiting this issue on appeal.

¶ 55 When a juror sent a note to the trial court addressing Lestos' comments after the jury had been selected, the trial judge examined him. Lestos told the court he knew the judge in addition to the State's Attorney. (The trial judge had mowed Lestos's lawn some 30 years earlier.) Despite his relationships with both parties, he committed to remaining impartial. The court allowed Lestos to remain on the jury despite defendant's request to remove him for cause.

¶ 56 Defendant further argues Lestos prevented the rest of the jury from being impartial and the trial court erred in failing to question the other jurors about Lestos's disclosure the judge used to mow his lawn. The trial court's determination of potential prejudice and impartiality of the jury are reviewed under the abuse-of-discretion standard. *People v. Harris*, 123 Ill. 2d 113, 132, 526 N.E.2d 342-43 (1988). The jury verdict will not be set aside if no prejudice results from a communication to the jury. *Id.* at 132, 526 N.E.2d at 342.

¶ 57 The parties examined Lestos with regard to his relationship with the State's Attorney and the trial judge. His relationships with the judge and State's Attorney were more attenuated than the cases cited by either party. See *People v. Harris*, 38 Ill. 2d 552, 555-56, 232 N.E.2d 721, 723 (1967) (finding no abuse of discretion where a juror maintained a close relationship with the State's Attorney); *cf. People v. Smith*, 341 Ill. App. 3d 729, 793 N.E.2d 719 (2003) (finding prejudice where one juror informed other jurors defendant was a drug dealer and gang member, which was irrelevant to the current case). Moreover, Lestos testified his

relationship to the judge and prosecutor was the extent of his communication with other jurors. He maintained his commitment to remain impartial in deciding the case. The trial court was in the best position to determine whether Lestos could still be impartial after these disclosures, and it chose to believe him. *Id*. at 737-38, 793 N.E.2d at 727. The trial court did not abuse its discretion in allowing Lestos to remain on the jury, nor did the court err in failing to question the other jurors regarding the impact of Lestos's statements on their impartiality. Lestos's statements were limited to how he knew the judge and State's Attorney and did not relate to the merits of the case.

¶ 58 B. Admitting Text Messages Into Evidence

¶ 59 Hearsay is an out-of-court statement offered for the truth of the matter asserted. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 33, 963 N.E.2d 378. An out-of-court statement that shows the effect on the listener or explains the listener's actions is not hearsay. *Id.* Hearsay rulings are evidentiary rulings reviewed under an abuse-of-discretion standard. See *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 60 The text messages sent by Joshua Lamie were found to be admissible to demonstrate the effect on the listener, defendant. The trial court's decision was not arbitrary or unreasonable. The court provided a thorough and deliberate justification for its decision. The court stated it was irrelevant whether the messages were true. Instead, the court relied on *Theis* to show Joshua's messages were necessary to demonstrate defendant's state of mind and provide context to her own statements. *Theis*, 2011 IL App (2d) 091080, ¶ 33, 963 N.E.2d 378. The court did not abuse its discretion in admitting the statements.

¶ 61 Neither did the trial court abuse its discretion in deciding the potential prejudice of the text messages. A trial court can exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011). A court's determination of the probative value versus the prejudice of a piece of evidence is reviewed under the abuse-of-discretion standard. *People v. Hanson*, 238 Ill. 2d 74, 102, 939 N.E.2d 238, 255 (2010). The trial court extensively explained its reasoning, finding the text messages more probative than prejudicial. It acknowledged nearly all evidence introduced against a defendant is prejudicial. The text messages, the court found, were highly probative, providing insight to defendant's state of mind before Kianna's death. Based on the probative value of the text messages, the court found them admissible and not unfairly prejudicial. It properly excluded another text message to which defendant did not respond. The trial court did not abuse its discretion in reaching these conclusions.

¶ 62 The trial court gave an instruction to limit any prejudice that may have resulted from the text messages. While trial courts should use Illinois pattern jury instructions (IPI) when applicable to a particular case, Ill. S. Ct. R. 451(a) (eff. July 1, 2006), if no instruction exists for the subject, the court should provide an instruction that is "simple, brief, impartial, and free from argument." Ill. S. Ct. R. 451(a) (eff. July 1, 2006). The proper use of nonpattern instructions depends on whether an ordinary juror would understand them. *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). The trial court's decision to use a nonpattern jury instruction is reviewed under an abuse-of-discretion standard. *People v. Hudson*, 222 Ill. 2d 392, 400, 856 N.E.2d 1078, 1082 (2006).

¶ 63 Here, the trial court did not have available a pattern jury instruction designed to limit the jury's consideration of the text messages or a specific hearsay issue. Instead, it

presented its own limiting instruction to counsel and requested input. The court rejected the State's proposed limiting instruction. Defense counsel did not submit a proposed limiting instruction but offered suggested modifications to the court's instruction which were accepted. Moreover, defense counsel approved the court's limiting instruction as to form. Defendant should not now be heard to complain about the court's instruction. The instruction clarified how the jury should consider the text messages. *People v. Ramey*, 151 Ill. 2d 498, 536, 603 N.E.2d 519, 535 (1992) (citing *People v. Wade*, 185 Ill. App. 3d 898, 542 N.E.2d 58 (1989)) (discussing the use of non-IPI jury instructions to clarify concepts not covered in the IPI). It provides a brief explanation the evidence was admitted to show the effect, if any, on defendant, and not for the truth of the statement. The instruction does not encourage the jury to consider Joshua's messages in place of defendant's state of mind, as defendant argues. It explicitly tells the jury to consider the text messages only for "the effect those texts had on the defendant." The trial court did not abuse its discretion in giving this instruction.

¶ 64 C. Sufficiency of the Evidence

¶ 65 Defendant challenges the sufficiency of the evidence to convict. Under the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV), a defendant must be proved guilty beyond a reasonable doubt on every element of the charged crime. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). Defendant contends her motion for a directed verdict at the close of the State's case should have been allowed. When a motion for a directed verdict is made, the court must consider whether a reasonable person could find defendant guilty beyond a reasonable doubt after considering all evidence in a light most favorable to the State. *People v. Johnson*, 334 Ill. App. 3d 666, 676, 778 N.E.2d 772, 781 (2002). A motion for a directed verdict is reviewed *de novo*. *Id.*

¶ 66 Here, the State had to prove defendant (1) killed Kianna and (2) knew her actions created a strong probability of great bodily harm (720 ILCS 5/9-1(a)(2) (West 2010)). It relied on a variety of witnesses and evidence to establish these elements by inference. Kianna's medical and foster-care workers all testified Kianna was a normal child despite some psychological issues. Any tantrums observed were normal four-year-old tantrums. Similarly, the witnesses involved with Kianna's schooling described her as a healthy and normal child. These witnesses all tended to undermine defendant's credibility and her argument Kianna's injuries were self-inflicted. The text messages were also admitted to show defendant's increasing frustration with Kianna and support the inference defendant was responsible for Kianna's death.

¶ 67 The State bolstered its case with four expert witnesses: Drs. Dowling, Petrak, Lichtenstein, and Denton. Dowling, Petrak, and Denton testified Kianna's injury was not self-inflicted. Denton and Lichtenstein opined the injury was the result of a single forceful blow to the head. Denton, Lichtenstein, and Petrak believed the injury could not result from an ordinary fall and that the amount of force used was tremendous. Collectively, this evidence discredited defendant's argument Kianna's "fits" caused her fatal injury. Instead, the State suggested defendant, the only adult present at the time, was responsible for Kianna's injury. The State also relied on Kianna's injuries all over her body to establish defendant's knowledge her acts would cause great bodily harm. Kianna had in excess of 30 bruises all over her body, some of which were defensive wounds.

¶ 68 At the close of the State's case, the trial court found evidence existed for both elements of first degree murder. The only remaining determination was the credibility of the evidence. In a light most favorable to the State, the evidence established the elements of first degree murder beyond a reasonable doubt. At this stage in the trial, no evidence contradicted the

State's argument. The State also presented evidence to rule out any reasonable alternatives, like falls, multiple long-term injuries, or self-inflicted wounds. *Cf. People v. Ehlert*, 211 Ill. 2d 192, 209-10, 811 N.E.2d 620, 629-30 (2004) (finding insufficient evidence where the State's evidence did not rule out alternatives). A reasonable trier of fact, based on the evidence here, could find defendant guilty beyond a reasonable doubt.

¶ 69 Defendant next contends the trial court erred in denying her motion for judgment notwithstanding the verdict, which the trial court determined was essentially a renewed motion for a directed verdict. Again, defendant challenges the sufficiency of the evidence. In reviewing a sufficiency-of-the-evidence claim, evidence is considered in a light most favorable to the nonmoving party. *Wheeler*, 226 Ill. 2d at 114, 871 N.E.2d at 740. Under this review, the jury's findings on credibility are given great weight. *Id.* at 115, 871 N.E.2d at 740. However, a conviction will be reversed where "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Id.* (citing *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999)). "This standard of review applies in all criminal cases whether the evidence is direct or circumstantial." *Ehlert*, 211 Ill. 2d at 202, 811 N.E.2d at 625 (citing *People v. Tenney*, 205 Ill. 2d 411, 427, 793 N.E.2d 571, 581 (2002)).

¶ 70 In defendant's case, she presented herself, Joshua Lamie, Dr. Puga, and Dr. Ophoven. Joshua testified to a recording he made with Kianna in anticipation of a team meeting to discuss services for Kianna. The taped conversation was played to the jury. In the conversation, Joshua asks why Kianna throws fits. On cross-examination, the State elicited testimony Joshua never observed any of Kianna's fits. Defendant testified to Kianna's behavior and the events on May 3, 2011. On cross-examination, the State elicited testimony about the text messages and defendant's increasing frustration with Kianna.

¶ 71 Defendant put on two experts. First, Dr. Puga testified about Kianna's time at Streamwood Hospital. On cross-examination, when shown the photographs and CT scans of Kianna's bruising and other injuries, he opined Kianna's injuries could not have been self-inflicted and noted defendant's increasing frustration with Kianna. He believed Kianna was not a threat to herself or others. Dr. Ophoven opined Kianna's injuries could have resulted from a series of events, could have been accidental, and could have developed over a long period of time. On cross-examination, the State attempted to discredit her testimony and refuted her testimony in rebuttal with Dr. Denton.

¶ 72 Considering all the evidence presented in a light most favorable to the State, the trial court correctly concluded the evidence was sufficient to convict. Dr. Puga's testimony arguably reinforced Kianna's inability to cause her injury on her own. The testimony of Joshua and defendant on cross-examination undermined defendant's argument Kianna's violent "fits" led to her injury. Finally, Dr. Ophoven's testimony, if successfully discredited by the State in the eyes of jury, would leave the jury with the State's experts' testimony. This reasonable interpretation, when added to the argument the State already made, supplied sufficient evidence to support each element of defendant's conviction beyond a reasonable doubt.

¶ 73 Defendant relies on *Ehlert* to argue the expert testimony in the State's case was insufficient to sustain defendant's conviction. In *Ehlert*, defendant claimed she miscarried a child. *Ehlert*, 211 Ill. 2d at 198, 811 N.E.2d at 623. An autopsy could not conclusively determine whether the child was miscarried. *Id.* at 199-200, 811 N.E.2d at 623-24. Other evidence also failed to establish the child was murdered by drowning or suffocation by the mother. *Id.* at 209, 811 N.E.2d 629. Defendant was convicted of murder at trial. *Id.* at 201, 811 N.E.2d at 625. The Illinois Supreme Court affirmed the appellate court's reversal of the trial

court, finding the State failed to prove the child was killed by defendant beyond a reasonable doubt. *Id.* at 209-10, 811 N.E.2d at 630.

¶ 74 Defendant's reliance on this case is misplaced. In *Ehlert*, the court's decision was based on the fact no evidence suggested the child was killed by defendant. *Id.* at 209, 811 N.E.2d at 629 (discussing a lack of support for drowning, suffocation, or ruling out natural causes). The jury was left with "inference and speculation" to determine the cause of death. *Id.* at 210, 811 N.E.2d 630. Here, the State went to greater lengths to rule out natural causes and support a significant act of violence as the cause of death. In doing so, it rebutted alternative explanations and supported the inference defendant was responsible for Kianna's death. Defendant was the only adult present when Kianna suffered the fatal blow. The evidence sufficed to support defendant's conviction beyond a reasonable doubt.

¶ 75 D. The State's Closing Argument

¶ 76 Defendant argues the State misstated the law, made unreasonable inferences, and offered hearsay evidence for the truth of the matter asserted. The State argues the issue is forfeited on appeal and not plain error. We agree with the State. "To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *Wheeler*, 226 Ill. 2d at 122, 871 N.E.2d at 744 (citing *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988)). Defendant did not object at any point during the State's closing argument or its rebuttal. In her motion for judgment notwithstanding the verdict, defendant only makes an argument with respect to the State's theory of "snapping" that led to Kianna's death. Defendant asks us, even if these arguments are forfeited, to consider them as plain error.

¶ 77 Plain error enables the court to review otherwise forfeited claims if (1) the evidence on either side is close, regardless of how serious the error is; or (2) the error is serious, regardless of how close the evidence is. *Peoplv v. Adams*, 2012 IL 111168, ¶ 21, 962 N.E.2d 410 (citing *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 479 (2005)). The closeness element is met if, after a "commonsense assessment" of the evidence in the context of the case, the court finds the evidence is closely balanced. *Id.* ¶ 22.

¶ 78 Here, the evidence is not closely balanced. The State's case is supported by the testimony of several doctors, who ruled out accident and self-injury, in conjunction with defendant's increasing frustration, as evidenced by her text messages. The State presented testimony of multiple witnesses to portray Kianna as a happy and normal child. This draws a sharp contrast to defendant's report of Kianna constantly throwing "fits" and attempting to injure herself, which only occurred in defendant's presence. Defendant's expert's testimony to the effect Kianna's death could have been an accident or the result of long-term bleeding is also unconvincing in light of the other doctors' opinions. While defendant's claims may be possible, the trier of fact was entitled to find them improbable. *Id.* (finding the evidence was not closely balanced when defendant's claim was not impossible but improbable). As a result, we find the evidence is not closely balanced for our remaining discussion of plain error.

¶ 79 Defendant claims plain error with respect to the State's characterization of the law, inferences drawn from the evidence, and remarks about the text messages. Plain error is one that "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187, 830 N.E.2d at 479-80. "Prosecutors are afforded wide latitude in closing argument." *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745. The State cannot argue any inferences beyond the evidence presented or misstate the law. *People v. Woolley*, 178

Ill. 2d 175, 209, 687 N.E.2d 979, 995 (1997). In reviewing specific statements made during closing argument, the closing argument must be considered as a whole to place the statement in the proper context. *Caffey*, 205 Ill. 2d at 104, 792 N.E.2d at 1196-97.

¶ 80 During closing argument, defendant claims error from the prosecutor's remarks defendant "snapped." These remarks, she suggests, misstate the required mental state for first degree murder because it suggests something less than knowledge is required. The State characterized defendant's actions as "snapping" on four occasions during its closing argument. The first two times, the State was discussing defendant's responsibility for Kianna's death. The subsequent references to "snapping" are made while discussing knowledge of great bodily harm under the second element of first degree murder. Other than the use of "snapped," the State argued how defendant knew her actions would cause great bodily harm. The word "snapped" only made up a small portion of the entire closing argument, which was otherwise acceptable. *People v. Hooper*, 172 Ill. 2d 64, 83, 665 N.E.2d 1190, 1198 (1996) (finding harmless error where the prosecutor's remarks were isolated). Finally, the trial court admonished the jury, before and after closing argument, that closing arguments were not evidence. *Adams*, 2012 IL 111168, ¶ 23, 962 N.E.2d 410 (considering jury instruction on closing arguments under plain error analysis). The State's word choice, if error, was harmless in light of the rest of its closing argument and the trial court's admonishment.

¶ 81 Defendant next contends Joshua Lamie's text messages were improperly argued for the truth of the matter asserted. Specifically, she cites two instances where the State references the text messages. Both parties offer arguments for and against the statements being offered for the truth of the matter asserted. Even if offered for the truth, the State's comments on the text messages did not result in a serious error. Similar to the use of "snapped," these

comments occur in only two isolated locations in an otherwise lengthy and proper argument of the evidence presented at trial. *Hooper*, 172 Ill. 2d at 83, 665 N.E.2d at 1198. The jury was also instructed about the proper interpretation of the text messages before and after they were admitted and after closing arguments. *Adams*, 2012 IL 111168, ¶ 23, 962 N.E.2d 410. Even if the statements were argued for the truth, any error was harmless.

¶ 82 Finally, defendant argues the State's errors in closing argument, collectively, resulted in error. She relies on *People v. Blue*, 189 Ill. 2d 99, 724 N.E.2d 920 (2000). In *Blue*, the Illinois Surpreme Court reversed a case where the cumulative errors resulted in plain error. *Id.* at 139, 724 N.E.2d at 941. The cumulative errors were the result of improperly admitted evidence, improperly arguing to vindicate relatives of the decedent, improperly arguing to "send a message" to all police officers, and improper attempts to admit testimony through editorialized objections. *Id.* at 126, 132, 134, 137, 724 N.E.2d at 934, 937, 939-940. In this case, the State's errors are limited to closing argument. Even then, its errors do not draw inferences from anything outside the evidence presented. Any error is not as serious as the cumulative errors arising in *Blue*. The combination of errors does not rise to the level of cumulative error warranting reversal.

¶ 83 E. Ineffective Assistance of Trial Counsel

¶ 84 Defendant finally argues ineffective assistance of trial counsel. The sixth amendment to the United States Constitution provides defendants the right to counsel, which is interpreted to mean the right to effective assistance of counsel. U.S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish that counsel was ineffective, defendant must show (1) counsel's performance was not objectively reasonable and (2) "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different." *People v. Enis*, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000) (citing *Strickland*, 466 U.S. at 687, 694). These types of claims often involve consideration of an attorney's trial strategy or potential errors committed by the attorney. *People v. Evans*, 369 Ill. App. 3d 366, 384, 859 N.E.2d 642, 655-56 (2006). Ineffective assistance is ideally determined under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)), where a record can be developed and the trial attorney can be examined. *Id.*

¶ 85 Here, defendant's arguments are based on trial counsel's failure to strike Juror Lestos with a peremptory challenge, question other jurors, or object to the State's comments during closing argument. These alleged errors could be mistakes or the result of sound trial strategy. The record on appeal does not permit a clear determination one way or the other. Accordingly, we decline the opportunity to address it here.

¶ 86 III. CONCLUSION

¶ 87 We affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 88 Affirmed.