IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL DISTRICT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Respondent	)	
-v-	)	**Trial Ct. No 14 CF 1229**
SHADWICK R. KING,	)	**Honorable John Barsanti**
	)	**Judge Presiding**
Defendant-Petitioner.	)	

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL

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IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL DISTRICT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	**Honorable John**
Plaintiff,	)	**Barsanti,**
vs.	)	
	)	**Judge Presiding**
SHADWICK R. KING,	)	
	)	**General No. #2014CF1229**
Defendant.	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL

NOW COMES Defendant, SHADWICK R. KING, by and through his attorneys, Kathleen T. Zellner & Associates, P.C., and moves this Honorable Court pursuant to 725 ILCS 5/116-1 for a new trial and/or to vacate judgment and enter a verdict of not guilty, and in support thereof, states as follows:

INTRODUCTION

Rather than acquitting Mr. King because of the obvious reasonable doubt as to whether this was a homicide and if so whether Mr. King was culpable, this Court clearly abused its discretion and committed reversible error on August 9, 2022 in finding Mr. King guilty of his wife's death. The State's own experts were in conflict over the cause of death; no State expert addressed the Defense experts opinions that Mrs. King died from an unrelated, independent cause, *i.e.*, sudden cardiac arrhythmic death due to binge drinking; there was no forensic evidence that connected Mr. King to the alleged crime, nor did Mr. King make any incriminating statements; and there were no eyewitnesses to any crime committed against Mrs. King.

In order for this Court to convict Mr. King it had to engage in circular reasoning to justify its result. This Court concluded that this was a homicide *because* the scene was staged and the scene was staged *because* this was a homicide. In order to connect the murder to Mr. King, this Court concluded that he was the only person who could be the stager. This Court, independently of either side, created its own motive: Mr. King suggested he and his wife consider a divorce and when she reassured him she did not want a divorce, he killed her.

In addition to the circular reasoning, this Court has made numerous legal and factual errors, ignored and overlooked material and substantive evidence, improperly relied upon the first trial transcripts and insufficient, prejudicial, and planted evidence, and demonstrated clear judicial bias by shifting the burden of proof to the Defense. This Court's opinion is a clear abuse of discretion that should be reversed because it is "arbitrary, fanciful [and] unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera,* 2013 IL 112467 ¶ 37.

STANDARD OF REVIEW

1. In a bench trial, the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in the record. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977). Where the record affirmatively indicates that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial. *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976). *People v. Williams*, 2013 IL App (1st) 111116, ¶ 125.

2. Further, when reviewing a claim of insufficient evidence in a bench trial, we presume that the trial court accurately recalled and considered all the evidence. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91 (we presume, in a bench trial, that the trial court "considered only competent evidence in reaching its verdict"); *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992)

(the trial court must consider "all of the circumstances"); *Bowie*, 36 Ill. App. 3d at 180 ("the trial judge must consider all the matters in the record before deciding the case").

3. With a claim of mistaken recall, the record contains affirmative evidence that the trial court made a mistake in its decision-making process, thereby undercutting the presumption that serves as the very foundation for the deferential standard of review in an insufficient evidence claim—that the trial court accurately recalled and considered all the evidence. *Simon*, 2011 IL App (1st) 091197, ¶ 91 (where a record contains affirmative evidence that the trial court did not accurately recall or consider crucial defense evidence when deciding judgment, defendant did not receive a fair trial); *People v. Bowen*, 241 Ill. App. 3d 608, 624 (1993)("where the record affirmatively shows the trial judge did not consider the crux of the defense when entering judgment, the defendant did not receive a fair trial"); *Bowie*, 36 Ill. App. 3d at 180 (same). As a result, the claim of mistake must be reviewed under a completely different standard of review. Instead of the highly deferential standard applied to a trial court's ruling in an insufficient evidence claim, the question of whether the record reveals that the trial court made an affirmative mistake in its decision-making process is reviewed *de novo*. *People v. Williams*, 2013 IL App (1st) 111116, ¶¶ 102-104.

4. In Mr. King's retrial, this Court made several errors warranting reversal of Mr. King's verdict, including not accurately recalling and considering crucial defense evidence, relying upon insufficient evidence and making credibility findings that are manifestly erroneous when rendering its verdict.

GENERAL LAW

5. "A trial court must consider all matters in the record before deciding the case. *Bowie*, 36 Ill. App. 3d at 180. Accordingly, a "trial court's failure to recall and consider testimony crucial to [a] defendant's defense [will result] in a denial of [his] due process rights.

Mitchell, 152 Ill. 2d at 323. "Where the record affirmatively indicates that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial." *Simon*, 2011 IL App (1st) 091197, ¶ 91. Whether a defendant's due process rights have been violated is an issue of law subject to *de novo* review by the appellate court. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

6. A defendant's conviction must be reversed where the trial court's error in considering facts not in evidence was not harmless, in light "of the overall weight of the evidence." *People v. White*, 183 Ill. App. 3d 838, 840 (1989).

7. The Fourteenth Amendment's due process clause requires the prosecution to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007); *see also People v. Johnson*, 2018 IL App (1st) 150209, ¶ 24 (". . .our review must include consideration of all of the evidence, not just the evidence convenient to the State's theory of the case."); *see also People v. Harling*, 29 Ill. App. 3d 1053 (1st Dist. 1975) (Voluntary manslaughter conviction (after bench trial) reversed. The State produced no eyewitnesses to the occurrence and defendant presented strong proof of self-defense.)

THIS COURT'S MISAPPLICATION OF THE LAW

8. This Court has ignored the burden on the State to prove its case beyond a reasonable doubt. The Fourteenth Amendment's due process clause requires the prosecution *to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt*. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007); *see also People v. Johnson*, 2018 IL App (1st) 150209, ¶ 24 (". . .our review must include consideration of all of the evidence, not just the evidence convenient to the State's theory of the case."); *see also People v. Harling*, 29 Ill. App. 3d 1053 (1st Dist. 1975) (Voluntary

manslaughter conviction (after bench trial) reversed. The State produced no eyewitnesses to the occurrence and defendant presented strong proof of self-defense.)

9. This Court erroneously applied IPI 7.15 to the Defense theory that Mrs. King died from sudden cardiac arrhythmic death due to binge drinking and concluded this would only be a contributing cause of death which would not relieve Mr. King of culpability for her death. Without waiving the overwhelming evidence that there was no strangulation, Mr. King asserts that a sudden cardiac arrhythmic death due to binge drinking would be a supervening cause that overcomes any contributing cause.

10. *People v. Nelson*, 2020 IL App (1st) 151960 is a leading case on contributing and supervening causes of death and it illustrates the error in this Court's analysis that sudden cardiac arrhythmic death due to binge drinking could never be anything more than a contributing cause of death. *Nelson* states that contributing causes are overcome by supervening causes. The State has to prove beyond reasonable doubt that Mrs. King did not die from the supervening cause of sudden cardiac arrhythmic death due to binge drinking, which is independent and unrelated to an asphyxial death by strangulation and unconnected to the defendant. A sudden cardiac arrhythmic death does not share the same findings as an asphyxial death by strangulation. (*See* **DX84 & DX86** attached as **"Exhibit 1"**).

11. Supervening cause means that the death did not result from the defendant's acts because the cause of death is independent and not connected to the defendant. Binge drinking which resulted in sudden cardiac arrhythmic death is an independent cause of death not connected to Mr. King.

12. Because the absence of a supervening cause of death is one aspect of the causation element of the offense, as our supreme court has interpreted it, the burden of proof on this issue lies with the State, as a matter of due process. *Patterson v. New York*, 432 U.S. 197,

210 (1977). IPI 7.15 states this burden explicitly. The instruction provides that "the State must prove beyond a reasonable doubt that defendant's acts were a contributing cause of the death and *that the death did not result from a cause unconnected with the defendant*." *Id.* (emphasis added). This does not mean that the defendant bears the burden of "rebutting" this "presumption" in the sense of having to prove there was a supervening cause of death. Our supreme court has never held *that*. *Nelson*, ¶ 57. As the Criminal Code stands, the absence of a supervening cause is part of an element of the crime of murder, and due process thus requires the burden of proof—more precisely, the burden of persuasion *and* the burden of production—to lie with the State; it cannot be shifted onto the defendant, by means of a rebuttable presumption or otherwise. *Id.*, ¶ 58; *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979) (rebuttable presumption that shifts burden of persuasion onto defendant on element of offense violates due process); *People v. Watts*, 181 Ill. 2d 133, 147 (1998) (rebuttable presumption that shifts burden of production onto defendant on element of offense violates due process); *see also Patterson*, 432 U.S. at 210; *Mullaney v. Wilbur*, 421 U.S. 684, 691-702 (1975) (where malice was element of murder statute, defendant could not be required to rebut presumption that the killing was with malice); *People v. Jeffries*, 164 Ill. 2d 104, 114 (1995) ("A defendant's due process rights are violated when the burden shifts to the defendant to disprove an element of the offense."). One way or the other, the burden of proof on this issue [of causation] will always lie with the State, at least in Illinois. *Nelson*, ¶ 5.

13. This Court ignored, in its opinion, that the State has failed to refute, beyond a reasonable doubt, the opinion of Dr. Kanagasundram, that Mrs. King died from sudden cardiac arrhythmia due to binge drinking. This Court specifically barred the State's expert, Dr. Smock, from offering any opinion on sudden cardiac arrhythmic death, and the State did not offer any other expert to refute Dr. Kanagasundram. (*See* Dr. Smock's June 7 PM Testimony, Pgs. 74-77, attached as **"Exhibit 2"**). Dr. Kalelkar testified that she knew nothing about the existence of Mrs.

King's EKG strip and offered no opinion on sudden cardiac arrhythmias or any other cardiac condition. The State has not proven beyond a reasonable doubt that sudden cardiac arrhythmic death from binge drinking was not the cause of Mrs. King's death. Rather, the State has attempted to shift the burden to Mr. King to prove that Mrs. King's death was the result of sudden cardiac arrhythmias as a result of binge drinking. Therefore, this Court's failure to hold the State to its burden of proof on the supervening issue of causation is not harmless error. This Court has committed reversible error by allowing the State to shift the burden of proof on causation to Mr. King. Mr. King does not have to disprove an element of the offense and requiring him to do so violates his due process rights. *Nelson*, ¶ 5.

14. Contrary to this Court's opinion that Dr. Kanagasundram's testimony was undermined by not being aware of a few other incidents of Mrs. King drinking or Mr. King's comments about Mrs. King drinking; this testimony has nothing to do with the State's failure to present testimony from a cardiology electrophysiologist to refute, beyond a reasonable doubt, that Mrs. King cause of death was not due to sudden cardiac arrhythmias caused by binge drinking.

15. This Court has revealed a fundamental misunderstanding of the medical facts presented by Mr. King. Dr. Kanagasundram's expert medical opinion was unrefuted that Mrs. King's death was caused by her binge drinking. He testified the following about binge drinking:

> Q: Could you explain more in layperson's terms, kind of the electrician terms, what—how this electrolyte imbalance from alcohol ingestion affects the heart function?
>
> A: Yes. So the tricky thing in these patients is they have for all intents and purposes normal looking hearts. The pump is strong and, you know, they're healthy up until the moment they have a devastating event. So when they—In some patients who have an underlying predisposition, especially in the case of binge drinking, which I think is a very important subset of alcohol use. Binge drinking is kind of its own category that, if I could, at some point I'd like to talk about. Their electrolytes can change to where they can go into a sudden cardiac arrhythmia without warning. And that then leads to—although the pump is

strong, it does not get the regular signal that it needs to contract effectively, and the patient goes into cardiac arrest.

Q: Is that—In your experience in your practice, is the electrolyte imbalance caused by alcohol, is that age dependent?

A: No, it is not. In fact there is a well-known syndrome called holiday heart Syndrome. It was initially described and published in the 1970s where young people often can present with arrhythmias. They noticed the increased prevalence after long weekends or holidays. So that's how it was termed when it was initially published. But essentially we see this a lot. I practice in a university setting. We see young students often presenting with arrhythmias after acute alcohol use.

[. . .]

Q: So with this, what you're calling the metabolic derangement with the disturbance of the electrolytes, you mentioned potassium and magnesium that those levels are lowered, correct?

A: Yes.

Q: How do potassium and magnesium help the heart function? What is their role in the heart functioning?

A: So in the—the way I think about it is that potassium and magnesium are really the electrolytes that fill and bathe the cardiac cells. They're one of the most prevalent electrolytes, you know, in that system. So it's almost a bath that's needed to keep it at a steady state. We see that small perturbations in those levels lead to excitability of heart cells. Again, one of the ways we see this is, for example, in our patients who are in the hospital, it's not uncommon we will check their potassium, magnesium levels once or twice a day when they're in the hospital. We can see when it goes from the normal level of 4 to even a slightly low level of 3.4 or 3.5, their heart cells starts to throw extra beats and arrhythmias which we capture on the monitor. So the heart can be exquisitely sensitive to changes in that.

Q: Apparently alcohol in your practice and experience and research, you've isolated that as a chemical that depletes potassium and magnesium?

A: Yes.

(Dr. Kanagasundram's June 29 Testimony, Pgs. 25-29 attached as **"Exhibit 3"**).

16. Dr. Kanagasundram distinguished a cardiac death from an asphyxial death. (Dr. Kanagasunram's June 29 AM Testimony, Pgs. 118-19 attached as **"Exhibit 4"**). He testified that a sudden cardiac death is not an asphyxial death, and that the vast majority of sudden cardiac deaths are due to electrolyte imbalances, acidosis, and metabolic derangements, which are not asphyxial deaths. *Id.* Mrs. King did not die from asphyxiation which is caused by oxygen deprivation to the heart and lungs. She died from the electrical system of heart stopping. So the State's contention that Mrs. King may have been strangled at home and died from asphyxiation at the tracks has no support in medicine nor was there any expert testimony that refuted that she

died from the electrical system of her heart stopping. The State failed to prove beyond a reasonable doubt that Mrs. King did not die from a sudden cardiac arrhythmic event.

17. Dr. Kanagasundram testified that pulseless electrical activity (PEA) is electrical activity in the heart without a synchronized contraction. (Dr. Kanagasundram's June 29 AM Testimony). He testified that asystole is a flat line on an EKG strip, and even a person in flatline can be resuscitated (Dr. Kanagasundram's June 29 AM Testimony, Pg. 119, **Ex. 4**). He testified that Mrs. King had not reached asystole at the time the rhythm strip was done on her, and that "she was clearly in a PEA rhythm at that point." (Dr. Kanagasundram's June 29 PM Testimony, Pg. 7 attached as **"Exhibit 102"**). He testified on cross-examination that one would not go from "flatline to PEA" on an EKG but rather from PEA to a flatline. (Dr. Kanagasundram's June 29 AM Testimony, Pg. 95 attached as **"Exhibit 103"**).

18. This Court erroneously concluded that Dr. Kanagasundram did not connect any of his opinions to the injuries on the deceased's body. The physical injuries on the deceased's body did not cause her death, and that is undisputed by all of the experts in the case. There is no reason, in light of Dr. Kanagasundram's opinion, that he would find scrapes on Mrs. King's ankle, pinpoint hemorrhages in her eyes and throat, which are non-specific and can occur in many non-homicidal incidents, and the tiny 7.5 mm and 15 mm bruises on Mrs. King's chin to be relevant to her cause of death. These are injuries that are entirely consistent with her kneeling by the rails, vomiting and collapsing onto her left shoulder. These injuries are non-fatal and have nothing to do with Mrs. King's cause of death.

"POSSIBLE RESUSCITATION"
This Court Mistakenly Assumed that this was the Defense Theory

19. This Court misstated and misunderstood the Defense theory by assuming that the Defense argued Mr. King was not culpable for the death of Mrs. King if she could have been

resuscitated at the tracks. *See People v. Williams,* 2013 IL App (1st) 111116. The Defense theory was that the death of Mrs. King was not caused by a homicide and that Mrs. King's binge drinking caused her death.

20. This Court erroneously concluded that the purpose of Dr. Kanagasundram's testimony was to show that Mrs. King could have been resuscitated. Again, this Court seriously misunderstood the evidence; the purpose of Dr. Kanagasundram's testimony was to show that Mrs. King was alive prior to reaching the tracks and was not the victim of a homicide.

21. This Court mistakenly assumed that the State's theory was that Mrs. King could have been alive when she was moved to the tracks after having been allegedly strangled at her home. In fact, the State's theory was exactly the opposite. The State's theory was that Mrs. King was dead at home before she was moved to the tracks. The State theory was as follows:

a. Mrs. King was strangled to death at home and her deceased body was placed at the railroad tracks before 6:38 a.m. The State's witnesses testified that Mrs. King was deceased for so long that her body presented lividity, and/or had injuries that could only be post-mortem injuries, and/or was dead or "obviously deceased" once first discovered at the tracks. (Mr. Grandgeorge's June 7 AM Testimony, Pgs. 30, 34; Mr. Cavendar's June 6 Testimony, Pg. 138; Mr. Mongelli's June 6 Testimony, Pgs. 155, 165 attached as **Group Exhibit 5**"). The State vehemently asserted—through medical testimony under oath, and supporting lay testimony—that Mrs. King was not only deceased at the tracks, but had been deceased/"down" for an extended period of time (at least enough time to dress, stage, and transport her body from her house) *as evidence of Mr. King's alleged guilt*. Dr. Kalelkar's opinion was that Mrs. King's death occurred prior to being at the tracks. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 52-56 attached as **"Exhibit 6")**.

b. On her Report of Postmortem Exam, Dr. Kalelkar listed the "time between onset and death" as "minutes." (Dr. Kalelkar's Report of Postmortem Exam, **DX18d**).

c. Dr. Smock testified that brain death would have occurred within minutes after compression of the arteries ("and therefore lack of oxygen"). (Dr. Smock's June 7 AM Testimony, Pgs. 135-36 attached as **"Exhibit 7"**)

d. Officer Pech testified that the crime scene of Mrs. King's alleged murder was at the King home. (Det. Pech's June 22 Testimony, Pg. 82-83 attached as **"Exhibit 8"**).

22. Despite the State's position that Mrs. King was already deceased before getting to the tracks, ASA Sams asserted IPI 7.15, for the first time, in the State's closing argument in the

second trial, over Defense Counsel's objection. (Closing Argument Transcript, July 11, Pgs. 172-74 attached as **"Exhibit 9"**). This was entirely improper and inconsistent with all of the evidence presented by the State that Mrs. King died at her home. It appears this Court relied upon the State's assertions in its closing argument as evidence, which is reversible error since closing arguments do not present evidence that can be relied upon by the trier of fact.

"EXPERT WITNESSES"
This Court Erroneously Assessed the Expert Witnesses

This Court's Opinion on State Experts

23. This Court erroneously stated that the Defense presented 4 experts. The Defense presented 5 experts, and this Court completely ignored, in its opinion, Mr. King's expert in digital forensic analysis, Mr. Yaniv Schiff, and his expert opinions from analyzing new cell phone technology establishing that Mrs. King's phone pinged in the vicinity of the King residence at 6:23 a.m. and a second time on the tracks at 6:34 a.m., east of where Mrs. King was found. (Mr. Schiff's June 28 Testimony, Pgs. 115-16; **DX61B**; attached as **"Group Exhibit 10"**).

24. This Court found Dr. Smock to be credible based on a misapplication of the facts.

Dr. Smock's Credentials

25. On December 1, 2021, the State disclosed its intention to call Dr. Smock nearly a month after this Court's discovery cut off for expert disclosures. The State had every opportunity to reveal its intention to call an expert to refute the Defense experts yet it did not until a month before the trial had been set for January 2022 originally. This was a discovery violation.

26. On December 23, 2021, the Defense filed a motion to bar Dr. Smock and Dr. Parrish (who ultimately the State did not call in this case) from testifying. (*See* Supplemental Motion to Bar the States' Experts Testimony attached as **"Exhibit 11"**). Specific to Dr. Smock, the Defense argued that he did not have proper qualifications to testify in the numerous areas the

State was alleging he should be an expert in. Additionally, his report was deficient because his 13 conclusions had no basis or foundation and were based on speculation. His report used language such as "placed" which was barred from this trial. This Court erred in denying Mr. King's motion to bar Dr. Smock's testimony.

27. This Court further erred in not granting the Defense motion to bar Dr. Smock at trial and also in preventing an extensive *voir dire* examination of him. Dr. Smock admitted that he was a diener at autopsies, who is merely an assistant to the forensic pathologist, and thus, he is not qualified to render an opinion as to cause of death. There is no Illinois case which has allowed the expert opinion of a diener as to cause of death.

Injury Pattern Analysis

28. This Court clearly erred in concluding that the State's two experts are in agreement on cause of death and injury pattern analysis. There were significant disagreements between the State's two experts on cause of death and injury pattern analysis.

29. This Court erred in concluding that the State's two experts identified the same injuries. The first area of disagreement is that Dr. Kalelkar said there were no injuries to Mrs. King's lip. Dr. Kalelkar specifically testified "her lips do not show any evidence of injury." (Dr. Kalelkar's June 8 Testimony, Pg. 63 attached as **"Exhibit 12"**). Dr. Smock opined that there were lip injuries. (Dr. Smock's June 7 PM Testimony, Pgs. 48, 99-100, attached as **"Exhibit 13"**). Dr. Smock opined the lip injuries were caused by suffocation. (*Id.*) Dr. Kalekar opined that there was no suffocation or smothering. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 111-12 attached as **"Exhibit 14"**). Dr. Smock opined that the two chin bruises were part of the strangulation which was caused by pressure on the chin that obstructed Mrs. King's airway. (Dr. Smock's June 7 PM Testimony, Pgs. 52-53, 97-98, attached as **"Exhibit 15"**). Dr. Kalelkar said that it was "possible" that the chin bruises were caused by a struggle between the "assailant" and

the "victim." (Dr. Kalelkar's June 8 AM Testimony, Pgs. 45, 94 attached as **"Exhibit 16"**). However, she did not connect the chin bruises to any obstruction of Mrs. King's airway which would have been the result of strangulation.

30. Further, Dr. Kalelkar admitted in her testimony that Mrs. King's outer arm bruise was also consistent with her collapse onto the rail thereby negating the "medical certainty" required for her opinion that the arm bruise was caused by a "grab mark" inflicted by the perpetrator. (Dr. Kalelkar's June 8 AM Testimony, Pg. 49 attached as **"Exhibit 17"**).

31. Dr. Smock testified that Mrs. King's death was caused by suffocation and strangulation. Dr. Kalelkar said there was no suffocation. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 111-12, **Ex. 14**).

Court's Opinion on Defense Experts

Mr. Skip Palenik

32. This Court has misinterpreted and misstated Mr. Skip Palenik's testimony:

A) This Court misstated, "Dr. Palenik found a dragging mark on the side of one of the shoes. . ." (Opinion, Pg. 4). Dr. Palenik never described a "dragging mark." Mr. Palenik specifically described a "scuff mark" on the outside of the left shoe at the tip, indicating that Mrs. King was walking next to the rails and scuffed her shoe on the edge of the side of the rail where one would normally scuff their shoes while walking. Mr. Palenik testified, "These are also scuffed up though. But the only way—your Honor, you can't take a pair of my shoes, your shoes, anybody's shoes, and just set them down on something and cause the abrasion. I mean, it has to be from motion . . . . [T]his is normally done by walking forward. And it's walking in a way that you either like in do-wah-diddy, you're shuffling your feet where you're rubbing across this; or running would be a way to do it too. When you come forward, your foot goes down and you're sliding a little bit. There's always directionality to it." (Mr. Palenik's June 28 Testimony, Pgs. 118-19 attached here as **"Exhibit 18"**). Mr. Palenik also testified, "The scuff could easily —one of the best explanations for the scuff is if a person—or the shoes are upright on there and something forces them against the—not the top of the rail but the side of the rail where it's all rusty, that you could produce those . . ." Mr. Palenik analyzed the trace evidence in the scuff mark and determined it was iron oxide, which could only have come from the rail and not the ballast rock, which does not contain iron oxide. (Mr. Palenik's June 28 Testimony, Pgs. 100-01

attached as **"Exhibit 19").** Mrs. King's shoes were not in contact with the rail in her final resting position. (*See* **PX116** attached as **"Exhibit 20"**).

B) The State witnesses testified there were no drag marks at the railroad scene. (*See* Det. Pech's June 22 Testimony, Pgs. 51-52 attached as **"Exhibit 21"**)

C) This Court ignored and therefore failed to consider that Mr. Palenik testified that there were **metal flecks that came from the rail that also were embedded in the shoes**. Mrs. King's shoes were not touching the rails in her final resting place so there is no explanation for how the metal flakes became embedded in her shoes except for her walking next to the rail and touching the rail with her foot. (Mr. Palenik's June 28 Testimony, Pg. 90 attached as **"Exhibit 22"**).

D) This Court further misstated that, "The embedded objects [in Mrs. King's shoes] were not microscopically compared to the ballast rock located at the area where Mrs. King was found." (Opinion, Pg. 4). Mr. Palenik testified that he collected and analyzed ballast rock from the scene. And he analyzed the debris on the bottom of Mrs. King's shoes, and he found the mineral composition of the ballast rock to be identical to some of the debris he analyzed on the bottom of Mrs. King's shoes, and he also found other debris that matched only the iron oxide and the metal flecks from the rail and not the ballast rock. (Mr. Palenik's June 28 Testimony, Pgs. 94-95 attached as **"Exhibit 23"**).

E) This Court also misstated that, "Dr. Palenik did not testify the rock became embedded by walking but by movement of the shoe and would only require contact to become embedded." (Opinion, Pg. 4). Dr. Palenik's disclosed opinion was that the scuff mark and the trace evidence on the bottom of Mrs. King's shoes demonstrated that Mrs. King walked to the tracks. This Court sustained the State's objection to Mr. Palenik's opinion that Mrs. King was walking. This Court incorrectly stated Mr. Palenik's opinion. Mr. Palenik testified that **not mere movement** but rather, **pressure** would have resulted in the trace material discovered on the bottom of Mrs. King's shoes. Specifically, Mr. Palenik testified that Mrs. King's shoe soles indicated that they had moved across an uneven surface such as the ballast rocks, which caused an uneven wear pattern on the bottom of the shoes **caused by pressure** indicating that Mrs. King had been walking. Further, he talked about the pressure that was needed to create the morphology of the particles found on the bottom of Mrs. King's shoes as well as the abrasions indicating she had last walked on an uneven surface such as the ballast rocks were. (Mr. Palenik's June 28 Testimony, Pg. 90, **Ex. 22).**

33. This Court overlooked the significant testimony of Mr. Palenik which establishes a reasonable inference that Mrs. King was alive and moving along the tracks when her shoes collected the trace evidence he discovered on them. Therefore, there is reasonable doubt that Mrs. King was strangled to death at her house and her body was placed on the railroad tracks in

its final resting position. The State failed to refute Mr. Palenik's testimony by having its own trace expert.

34. The State waived its objection about Mr. Palenik's opinion that the microscopically observed abrasions on the bottom of Mrs. King's shoes were caused by Mrs. King **walking** on an uneven surface such as that created by the ballast rocks at the railroad tracks. (Mr. Palenik's June 28 Testimony, Pgs. 118-19, **Ex. 18**).

Dr. Arvindh Kanagasundram

35. This Court erred in its interpretation of the opinions of Defense expert Dr. Arvindh Kanagasundram. This Court stated that "Dr. Kanagasundram testified that people unused to alcohol drinking were more predisposed to Sudden Cardiac Death." (Opinion, Pg. 5). This Court attempted to discredit Dr. Kanagasundram's opinion because he "was not aware of a few other incidents of drinking and was unaware of the Defendant's comments about the Deceased drinking." (*Id.*).

36. This Court failed to recognize that Dr. Kanagasundram's opinion is not diminished by his unawareness of supposedly "a few other incidents of drinking." The two other alleged drinking events that the State presented to refute Dr. Kangasundram's opinion were a June 15, 2014 family barbecue and a June 22, 2014 Cubs game, both of which Mrs. King attended. The State's only evidence about the June 15, 2014 gathering was the testimony of Mr. Kuester, Mrs. King's father. Mr. Kuester testified he did not recall Mrs. King drinking alcohol at that event (Mr. Kuester's June 10 Testimony, Pg. 13 attached as **"Exhibit 24."**). There was no evidence presented that Mrs. King was drinking on June 22, 2014 except that she paid for something on her debit card from the Cubby Bear Restaurant but she was with a group of people and there's no proof that she was even drinking. In fact, on June 22, 2014 Mrs. King drove her children home from her father's home when she returned from the Cubs game; thus, the

reasonable inference from the fact that she was driving from Chicago to Elk Grove and then to her home in Geneva with her three young boys is that she did not consume alcohol. Therefore, the State failed to present any evidence of alcohol consumption by Mrs. King at either event or any evidence that she became ill from alcohol consumption, that would allow this Court to wholly discredit the opinion of Dr. Kanagasundram.

37. This Court ignored that Dr. Kanagasundram's opinion was based upon Mrs. King's reaction to one other incident of drinking on June 26, 2014. Dr. Kanagasundram testified that the significant prior drinking incident Mrs. King experienced at the Emerald Bar on June 26, 2014, predicted her eventual death from binge drinking which caused sudden cardiac arrhythmias. Mrs. King became very ill after consuming alcohol at the Emerald Bar. The prior drinking incidents, which **predated** June 26, 2014, are not relevant to Dr. Kanagasundram's opinion because the Emerald Bar incident on June 26, alone, demonstrated to Dr. Kanagasundram (the only cardiac electrophysiologist to testify at this trial) that Mrs. King had an impaired alcohol tolerance level as of June 26, 2014 that was predictive of her demise on July 6, 2014 from binge drinking caused by sudden cardiac arrhythmias. (Dr. Kanagasundram's June 29 Testimony, Pgs. 34-40 attached as **"Exhibit 25").**

38. Here, the ability to determine alcohol tolerance is beyond the province of common knowledge of this Court. Even if there were proof, which there is not, that Mrs. King ingested alcohol during the June 15 and June 22 events, this Court cannot assume the role of an expert cardiac electrophysiologist and determine that Mrs. King had built up the necessary alcohol tolerance level to consume 14 alcoholic drinks in a 7-hour period with no ill effects much less death. **It is reversible error for a trial judge to act as an expert.** *See People v. White,* 183 Ill. App. 3d 838 (3d Dist. 1989) (reversed where the appellate court found that the trial judge committed plain error by finding that the complainant had been cut with a knife, as he claimed,

and not by a broken bottle, as defendant claimed. The "ability to examine a cut and determine the instrument that made it is beyond the province of common knowledge.").

Dr. Leon Gussow

39. Dr. Leon Gussow was the only toxicologist who testified in the trial. This Court ignored the undisputed alcohol extrapolation evidence provided by Dr. Gussow. The State had no toxicologist or any expert to refute Dr. Gussow. Dr. Gussow extrapolated that during the night into the morning hours of July 6, 2014, Mrs. King had about 14 drinks total. (Dr. Gussow's June 29 Testimony, Pg. 48 attached as **"Exhibit 26"**). Mrs. King's peak alcohol level would have been **above 0.2** and she would have been **severely intoxicated**. (Dr. Gussow's June 29 Testimony, Pg. 51, **Ex. 86B**).

40. This Court's conclusion that "the Deceased was drinking alcohol in the hours before her death" (Opinion, Pg. 6) ignores that Mrs. King was severely intoxicated and the effect of that intoxication in causing her death.

41. This Court misunderstood and misconstrued Dr. Gussow's testimony that at the time of autopsy he had extrapolated that Mrs. King still had 5 drinks in her system, resulting in a BAC of 0.15 on July 7, 2014. (Dr. Gussow's June 29 Testimony, Pg. 49 attached as **"Exhibit 28"** This Court clearly did not recognize the significance of the alcohol level of 0.15 on autopsy when it stated that it found "Dr. Gussow's testimony to be of little materiality." (Opinion, Pg. 6). The existence of five drinks in Mrs. King's system, more than 24 hours after her death, supports the Defense theory that Mrs. King had been binge drinking in the hours before her death and the severe level of her intoxication over this time period resulted in her death. Stated differently, this Court has minimized and/or ignored and/or misunderstood that the BAC of 0.15 on July 7, 2014 supports the Defense theory as to the cause of death.

42. This Court ignored Dr. Gussow's opinion that the Emerald Bar drinking incident on June 26, 2014 would make Mrs. King similarly ill, if not more ill. (Dr. Gussow's June 29 Testimony, Pg. 48, **Ex. 26**). Stated differently, this Court has ignored Dr. Gussow's opinion that Mrs. King had not developed any alcohol tolerance at the time of her death on July 6, 2014.

43. This Court failed to consider Dr. Gussow's testimony that Mrs. King's clothing disarray was the result of her severe intoxication. (Dr. Gussow's June 29 Testimony, Pgs. 52-53 attached as **"Exhibit 29"**).

Dr. Larry Blum

44. In its Opinion, this Court improperly deemed Dr. Blum not credible and relied upon the State's closing argument. This Court did not specify why Dr. Blum was not credible other than saying that "Dr. Blum's testimony changed between the two trials and some inconsistencies were documented through cross and direct examination." (Opinion, Pg. 7). The so-called changes are not impeaching because they are immaterial or they present new evidence discovered by Dr. Blum since the first trial, which significantly strengthen Dr. Blum's opinion that Mrs. King was alive on the tracks.

(1) The State argued that Dr. Blum in the first trial had said that mottling "is just a skin discoloration that you can see for any number of reasons. It is kind of indistinct, but it is not lividity." In the second trial Dr. Blum testified mottling is lividity." This is a distinction without a difference because Dr. Blum clarified that mottling is simply an early stage of lividity. The testimony of Dr. Blum has been consistent that the lividity that was present at 7:25 a.m. in Mrs. King was so faint as to be barely detectable. This is an immaterial distinction.

(2) In the first trial, Dr. Blum did not identify an injury to Mrs. King's left hip, which was in contact with the ballast rocks. But in the second trial, he did identify an injury to the left hip. Dr. Smock missed the left hip injury as did Dr. Kalelkar. This Court should not be penalizing Dr. Blum for being more competent than the State's experts in recognizing an additional injury to Mrs. King. Significantly, the left hip injury was antemortem (before death), which means this injury did not occur by someone placing Mrs. King's dead body (postmortem) on the ballast rocks. This is a significant discovery.

(3) Dr. Blum testified in the second trial that Mrs. King's body position on the tracks, with her neck hyperflexed and her torso twisted, would have impaired her oxygen flow. The State argued that Dr. Blum in the first trial had not mentioned "positional asphyxia" as a cause of Mrs. King's death. The State and presumably this Court misinterpreted Dr. Blum's testimony about the position of Mrs. King at the railroad tracks. Dr. Blum never testified that Mrs. King died as a result of positional asphyxia but simply offered the opinion that her oxygen intake would have been impaired by her body position on the tracks. This is a misinterpretation of what Dr. Blum testified to in the second trial and does not represent a change in his testimony as to the cause of death.

(4) Dr. Blum identified a small piece of emesis on the tracks next to Mrs. King's head. Dr. Blum testified that the emesis was consistent with the nacho chips that Mrs. King had ingested at the Dam Bar. This significant discovery by Dr. Blum by re-reviewing the photographs was missed by Dr. Kalelkar and Dr. Smock. Dr. Blum's testimony that dead people do not vomit is unrebutted, and this is an important discovery to establish that Mrs. King was alive at the tracks. This is a significant discovery of Mrs. King's independent activity at the tracks.

(5) The State misrepresented that Dr. Blum in the first trial "never said why [Mrs. King] died of sudden cardiac arrhythmias." (Closing Argument Transcript, July 11, Pg. 170:1-7, attached as **"Exhibit 30"**). Dr. Blum gave detailed testimony in the first trial of why Mrs. King died of sudden cardiac arrhythmias. (Dr. Blum's First Trial Testimony R2541, 2592-2603, 2631 attached as **"Exhibit 31"**). Specifically, he explained: "In my opinion she died of sudden arrhythmic death due to the adverse effects of sleep deprivation, intoxication, stress, and caffeine consumption."

(6) The State argued that the two chin injuries in **PX270** are "circular" and not linear. The State failed to recognize that the shape of the chin injuries changes over time between the scene photographs and the autopsy photographs. It is improper for the State to be providing its own expert testimony on the shape of the injuries and it is improper for this Court to be relying on the State's closing argument in its opinion regarding the chin injuries. (Closing Argument Transcript, July 11, Pg. 158:1-19 attached as **"Exhibit 32"**; *People v. McMillan*, 239 Ill. App. 3d 467, 496 (1993) (closing statements are not evidence).

(7) The State also relied upon **PX106** and **PX241** and claimed that Mrs. King's "chin is not anywhere near," the rail. (Closing Argument Transcript, July 11, Pg. 159:3-5 attached as **"Exhibit 33"**). Clearly, the State wants this Court to believe that Mrs. King's deceased body was placed on the rail, the chin was not touching the rail and the deceased body never moved from its final resting position. The State never addressed Dr. Blum's opinion that Mrs. King was alive and struggling when she collapsed from a sudden cardiac arrhythmic arrest and her chin most likely impacted the rail more than once, causing the injuries seen in **PX270**. Dr. Blum demonstrated the validity of his opinion by relying on the photographs of Mrs. King's chin injuries which showed "dirt, grit, debris" and the rail pattern in

those injuries. The photographs relied upon by Dr. Blum (**DX63w; DX63x; DX63ss)** established that Mrs. King's chin had been in contact with the rail because of the dirt, grit, debris and the rail pattern clearly visible on her chin in those photographs. The State had no explanation for the dirt, grit, debris and rail pattern on the chin injury. And the only possible explanation consistent with the State's theory that Mr. King engaged in a chin strangulation is that he had this dirt, grit, debris and rail pattern on his thumbs.

45. This Court mistakenly claimed that Dr. Blum's testimony "seemed to disregard obvious injuries on the Deceased. On at least one occasion, he claimed to not see an injury that This Court could clearly see in a photograph." (Opinion, Pg. 7). This Court does not identify this supposedly clearly observable injury. As a threshold matter, this Court has no expertise in injury pattern analysis as manifested by Dr. Blum's triple board certifications in forensic, clinical and anatomical pathology. As stated previously, this Court cannot act as an expert in matters that are "beyond the province of common knowledge." *See White,* 183 Ill. App. 3d 838 (3d Dist. 1989). Presumably this Court is referring to the tip of the tongue of Mrs. King. Dr. Kalelkar, also a triple board certified pathologist, saw no injury to the tip of the tongue of Mrs. King. It is only ASA Sams with no medical training and the substandard medically trained Dr. Smock who imagine this tip of the tongue injury and absurdly contend that "she was using her tongue to force open her mouth against her teeth to be able to breathe." Unfortunately, this Court appears to have accepted this preposterous scenario which defies common sense and a basic understanding of anatomy. The tongue could never be used to force open the mouth to allow one to breathe. It also overlooks Dr. Blum's testimony that the lip injury on Mrs. King's lower lip was caused by its contact with the rail. (Dr. Blum's July 1 Testimony, Pgs. 7-8 attached as **"Exhibit 34").**

46. This Court found that Dr. Blum's "answers to questions appeared to be blanket denials of evidence supporting the State's theory of the case." (Opinion, Pg. 7). The only example of Dr. Blum making a blanket denial of the State's evidence is when he admitted he did not rely upon or review the reports of the first responding officers' description of Mrs. King's

skin coloration because those officers had not photographed Mrs. King at the time they made their observations and thus there were no photographs to corroborate their conclusions. Dr. Blum, as a well-trained, board certified forensic pathologist, said it would be "questionable" to rely upon the officers' conclusions without these photographs. Dr. Blum relied upon the photographs that were taken at the scene from 7:25 a.m. to 8:30 a.m. of Mrs. King's body to determine her skin coloration at those times. (Dr. Blum's July 1 Testimony, Pgs. 26-28 attached as **"Exhibit 35"**).

47. This Court attempted to discredit Dr. Blum's testimony by implying that Dr. Blum's expert report contained opinions that were not his but were created by the Defense. This Court referred to the following passage from Dr. Blum's testimony in support of this proposition:

> Q: So what I showed you earlier marked as People's Exhibit 810, that was not a report written by you, is that correct?
> A: No, I did not author that.
> [. . .]
> Q: Did you author a report?
> A: I was never asked to author a formal report in this case, no.
> Q: So somebody wrote this up for you and you signed it?
> A: Well not someone, the defense.

(Opinion, Pg. 7). However, this Court's opinion is inaccurate because Dr. Blum testified that the opinions contained in the report were "my opinions." (Dr. Blum's June 30 PM Testimony, Pgs. 22-23 attached as **"Exhibit 36"**). This Court seems to be seizing on the term used by Dr. Blum that his report was "prepared by the defense." It is obvious that Dr. Blum's opinions were typed up by the Defense. This Court has elevated a semantic ambiguity to the level of trying to discredit Dr. Blum.[1]

48. This Court stated, "The practice of the Defense preparing a report and asking the doctor to sign it is problematic." (Opinion, Pg. 8). This Court provides no case law support for its

[1] Ironically, this Court earlier found permissible the State's Question/Answer format of its proposed expert, David Parrish's report, which was completely authored by the State. Dr. Blum's report was merely typed out by the Defense, which Dr. Blum edited himself.

opinion. The phrasing, approach, structure and wording in the report are exclusively Dr. Blum's. All one has to do is review the nine hours of Dr. Blum's testimony to see that he using the same phrasing, approach, structure and wording that is contained in his report. Examples are:

EXAMPLE 1:

TESTIMONY:

Q: Do you have an opinion as—of course, again, to a reasonable degree of medical and scientific certainty as to the cause of Kathleen King's death?
A: I do.
Q: What is that opinion?
A: In my opinion she died of sudden arrhythmic death, which is abbreviated.

(Dr. Blum's June 30 AM testimony, Pg. 95).

OPINION

"It is my opinion, to a reasonable degree of medical certainty, that Mrs. King died most likely a sudden cardiac arrest . . . The cause of death was the major medical crisis, most likely a cardiac arrhythmia or so called "sudden arrhythmic death ('SAD')'."

EXAMPLE 2:

TESTIMONY:

Q: Is that your opinion on—you know, that this indicates some movement or not?
A: During the collapse over from—she was down on all fours when she had her major medical crisis and collapsed to the left like the injuries show, this would be consistent with that scenario."

(Dr. Blum's June 30 AM testimony, Pg. 82)

OPINION:

"She experienced a major medical crisis resulting in her collapsing to the ground on her left side into essentially the same position as discovered."

EXAMPLE 3:

TESTIMONY:

A: All those things that I talked about a couple hours ago are all consistent with that and very much discredit any theory that involves her dying at the home, being dressed, placed in a vehicle, driven there, taken out of the vehicle, and walked up to the track, and placed down. All of that is inconsistent with what I saw as far as the injuries go . . .

(Dr. Blum's June 30 AM testimony, pg. 90)

OPINION

"I will offer further opinions about the scene of Kathleen King's death being inconsistent with Kathleen King's body being placed there."

EXAMPLE 4:

TESTIMONY:

A: [T]here's a high likelihood that she scuffed her shoe, tripped and fell down ... "

(Dr. Blum's June 30 PM testimony, Pgs. 81-82).

OPINION

"It is probable that between Johnson Controls and where she was found, she stumbled and fell."

49. The opinions in the report are exclusively those of Dr. Blum's. And it is an abuse of discretion for this Court to try to discredit those opinions based on the passages it has cited.

50. The Illinois Supreme Court referred to Dr. Blum as a "highly qualified expert." *People v. King*, 2020 IL 123926, ¶ 37.

"MOTIVE" FROM THIS COURT'S OPINION

51. This Court made several findings about motive:

(1) "Although the prosecution is not required to find a motive, I find a motive was established by the evidence."

(2) "The evidence demonstrated the Defendant was angry, suspicious and believed his marriage was disintegrating."

(3) "The Defendant had a plan for the divorce, but that plan was not acceptable to the Deceased."

(4) "The Defendant did not abandon his plan in the early morning hours of July 6, 2014. By his own admission, at 5:00 a.m. he went and emptied their bank account, and planned to repair his vehicle in anticipation of leaving."

(Opinion, Pg. 8).

52. This Court's reasoning that seeking a divorce can serve as a motive for murder has been rejected in other Illinois cases. In *People v. Davis*, 278 Ill. App. 3d 532 (1st Dist. 1996)

(which this Court cited), the court determined that merely seeking a divorce is not a valid motive for murder. In so finding, the *Davis* court stated:

> If one reads the State's brief and accepts the State's argument, he or she is left with the inexorable conclusion that everyone who is a party to a divorce case has a motive to murder his or her spouse. In this day and age, when divorces are virtually commonplace, the potential for murders being committed by people getting divorces would be immeasurable. Pending divorces, however, are not ordinarily concluded by one spouse murdering the other spouse. The statistical incidents plainly do not support the State's hypothesis.

Davis at 541-42.

53. This Court flatly misstated Mr. King's testimony about his reasons for withdrawing $500 to repair his car. This Court stated that Mr. King was planning to leave. Mr. King specifically testified that he intended to repair his car *to return to work*. Mr. King was motivated solely by providing for his children in the event he and Mrs. King divorced. Again, this Court's misstatement of the record displays its bias and is an abuse of discretion.

54. It is improper for this Court to be advocating for the State by creating a motive that even the State has not endorsed. *See* Judicial Bias Section *infra*.

"MEANS" FROM THIS COURT'S OPINION

55. This Court erred in determining both Dr. Smock and Dr. Kalelkar were credible. (Opinion, Pg. 8). It is not possible that both could be credible when they are inherently inconsistent on the existence of numerous injuries; how injuries happened; and the cause of death. This Court's conclusion that Dr. Smock and Dr. Kalelkar are credible "taxes the gullibility of the credulous." *People v. Dawson*, 22 Ill. 2d 260, 264 (1961) (This Court may reverse the finder of fact's credibility determinations if the witness's testimony is contrary to the laws of nature or universal human experience); *People v. Herman*, 407 Ill. App. 3d 688 (2011) (rejecting the trial court's credibility determinations finding that the inconsistencies in the witness testimony seriously undermined the truthfulness of the assertions).

56. The appellate court, after Mr. King's first trial, stated: "While Dr. Kalelkar opined that Kathleen died of manual strangulation and also opined on the staging of the death scene, **her testimony was undermined** by the fact that she did not complete her autopsy protocol." *People v. King*, 2018 IL App (2d) 151112, ¶ 88. (emphasis added). Dr. Kalelkar did not determine the cause of death after her autopsy on July 7, 2014. In her preliminary autopsy report of July 7, 2014, Dr. Kalelkar described three findings: petechial hemorrhages of the eyes, mucosal larynx and throat. (Dr. Kalelkar's June 8 AM Testimony, Pg. 71 and **DX18C** attached as "**Group Exhibit 37**"). On August 13, 2014, Dr. Kalelkar concluded that Mrs. King died of asphyxiation. (**DX18d, Ex. 88**). Dr. Kalelkar testified that there are multiple asphyxial deaths that are non-homicidal. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 117-19 attached as **"Exhibit 38"**). Despite never making any additional findings from the original three, Dr. Kalelkar testified at Mr. King's first trial that the cause of Mrs. King's death was from strangulation. Dr. Kalelkar never issued a written report saying that Mrs. King's death was from strangulation. And in the opinion of the appellate court, as stated above, this failure to complete her autopsy protocol discredited her. This Court ignored the appellate court's finding that Dr. Kalelkar's testimony was undermined by these deficiencies.

57. This Court misstated the evidence about the injuries to Mrs. King's chin. This Court stated, "There are two clear injuries on the Deceased's neck under the chin and are situated exactly where thumbs would be placed to put pressure on the windpipe." (Opinion, Pg. 8). This Court clearly misunderstands basic human anatomy. The chin is not part of the neck. The chin is a mental protuberance. The chin appears midline on the mandible. The chin is part of the lower face. The neck is the bridge between the head and the rest of the body. It is located between the lower mandible and the clavicle. Pressure on the tip of the chin cannot cause pressure on the windpipe. The windpipe leads from the larynx to the bronchi. The windpipe is the trachea.

Pressure on the chin does not constrict breathing or the airflow in the trachea. Dr. Smock admitted that any pressure on Mrs. King's chin where the small 7.5 mm and 15 mm contusions were would not have constricted Mrs. King's ability to breathe. (Dr. Smock's June 7 PM Testimony, Pgs. 97-98, **Ex. 15**).

58. This Court improperly found that the two bruises on Mrs. King's arms were "drag marks." The evidence shows that theory is impossible. The bruise on Mrs. King's outer arm was consistent with her position on the rail; this was undisputed. Deputy Lisa Kreighbaum-Gilbert came to the scene and admitted that Mrs. King's left arm was in contact with the rail in her testimony. (Mrs. Krieghbaum's June 28 Testimony, Pgs. 54-55 attached as **"Exhibit 39"**). Dr. Kalelkar admitted the outer bruise to the left arm could have been caused by Mrs. King collapsing onto the rail. In ASA Stajadar's Direct Examination concerning Mrs. King's outer arm bruise, Dr. Kalelkar admitted the following explanation of Mrs. King "having fallen and landed" on the rail is also possible:

> Q: Would it also be true that the bruise on the outer half of her arm could be consistent with Kathleen having fallen and landed in the position as shown in People's Exhibit 111?
> A: Yes. That's *possible*.

(Dr. Kalelkar June 8 AM Testimony, Pg. 49, **Ex. 17**).

59. Additionally, there are not 1 but 2 photographs of Mrs. King's inner arm bruise (**DX20**[2] & **DX21**[3] attached as **"Group Exhibit 40"**). Mrs. King's inner arm bruise existed on July 4, 2014 when she was alive.

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[2] Photograph taken by Mr. King of Mrs. King as part of the photoshoot Mr. King took of her in celebration of her fitting into her jeans from 10 years ago since she lost weight—The photograph depicts Mrs. King's pre-existing inner arm bruise taken on July 4, 2014 at 11:27 a.m..

[3] Photograph taken by Mrs. King—a "selfie" Mrs. King took at work on July 4, 2014 at 6:07 p.m. where her inner arm bruise is also depicted.

60. Contrary to this Court's opinion that the two bruises are a "drag mark," both the arm bruises are visibly different in color—the logical inference being that they occurred at separate times. (*See* Dr. Blum's July 1 Testimony, Pgs. 15-17 attached as **"Exhibit 41").** Additionally, the pressure marks of the outer arm bruise run in the wrong direction for the bruise to have been caused by someone grabbing Mrs. King from behind, which is what the State claimed. (*See* **DX18bb).** *See People v. Naylor*, 229 Ill. 2d 584 (2008) (Although defendant was convicted in a bench trial, and the trial court in a bench trial is presumed to disregard incompetent evidence, the presumption is rebutted where the record affirmatively shows that incompetent evidence was considered.). Here, the State presented no evidence to refute the pre-existing arm bruise of Mrs. King. All the State did to attempt to rebut the photos of the apparent pre-existing inner arm bruise of Mrs. King taken on July 4, 2014 was argue that there really were not bruises in the photos because the bruise in Mr. King's cell phone photo appears to be touching Mrs. King's shirt and there is one photo Mrs. King took in her car from an angle that does not show the bruise. Does this Court really believe Mr. King doctored the photo after allegedly killing his wife and having his phone immediately seized? This is "fanciful" thinking that should not be elevated to competent evidence.

"OPPORTUNITY" FROM THIS COURT'S OPINION

61. In this Court's "Opportunity" Section of its Opinion, it mistated that, "At 5:02 a.m. the Defendant is on video getting gas." (Opinion, Pg. 9). Mr. King did not get gas until later that morning around 7:45 a.m. (Mr. King's June 27 Testimony, Pg. 64 attached as **"Exhibit 42"**). Further, this Court misstated that, "The Defendant is observed in video at 8:52 a.m. attempting to obtain $40.00 from at ATM, which he knew would be declined, and buying donuts at 8:56 a.m. for people not at home." (Opinion, Pg. 9). This is incorrect. Mr. King went to the Jewel for donuts like he normally did on Sundays. He went there at 8:52 a.m. He did not attempt to obtain

$40 dollars. During the 5:03 a.m. trip to the ATM, he withdrew $500 and then tried to withdraw an additional $40 for repairs for his car. This Court erroneously assumed that Mr. King repaired his car "in anticipation of leaving." (Opinion, Pg. 8). The undisputed testimony is that Mr. King planned to repair the oxygen sensor in his car (and other minor repairs) and return to work. (Mr. King's June 27 Testimony, Pg. 88 and **DX40** - Mr. King's July 8, 2014 Interview Transcript, Pgs. 63-64 attached as **"Group Exhibit 43");** *see also* **PX74** - Mr. King's Interview on July 8, 2014 played for this Court.

62. This Court failed to rule out anyone else that could have attacked Mrs. King after she left her house. Assuming Mrs. King left her house with her phone at approximately 6:25 a.m., there was a 13 minute time gap before she was spotted on the tracks at 6:38 a.m. This Court cannot with its timeline establish that it is only Mr. King that could have caused the death of Mrs. King and deposited her on the railroad tracks. Train Engineer Soto testified that he saw a man in the Esping Park parking lot standing next to a red car, obviously not the Dodge Durango. This was the only unidentified male in the vicinity of the park. This Court cannot rule out this unidentified man as being the alleged perpetrator if there was a homicide.

63. Further, this Court ignored the fact that Mrs. King was obviously not afraid of Mr. King harming her because after he had already taken her phone, she was still at home messaging Billy Keogh at 5:14 a.m. from her house. She did not attempt to flee at all after Mr. King had already taken her phone.

Yaniv Schiff - Forensic Data Expert

64. Crucially, this Court ignored the cell phone ping evidence presented by Defense expert, Yaniv Schiff. The Defense's unrefuted forensic data expert dramatically reduced the timeframe for the State's version of events to have occurred and created reasonable doubt about the State's efforts to connect Mr. King to Mrs. King's death. This Court's obvious bias towards

the State is demonstrated by the fact that the State also forgot to mention the cell phone pings in its closing argument. This Court tracked the State's closing argument very closely in its Opinion.

65. Mr. Schiff performed an extraction on Mrs. King's phone and presented two cell phone location pings that were generated because of new software which did not show these in the State's extraction report. The 6:23 a.m. ping placed the phone in the vicinity of the King home; the 6:34 a.m. ping placed Mrs. King's phone east of where she was ultimately found somewhere near the brush path by the Johnson Control building. As the State witnesses testified, the access point at the Johnson Control Building was not accessible by a vehicle. (Mr. Grandgeorge's June 6 Testimony, Pgs. 89-90; Det. Pech's June 22 Testimony, Pg. 39 attached as **"Group Exhibit 44").**

66. The location of the 6:34 a.m. ping makes it even more improbable that Mr. King carried Mrs. King's 150-pound body and her cell phone across Esping Park on foot and cut through the bushes at the Johnson Control building access point and carried Mrs. King's body at least 200 feet west and placed and positioned Mrs. King on the tracks in 4 minutes between 6:34 a.m. to 6:38 a.m. and escaped undetected. This Court never addressed the new cell phone data pings. The State had no response to this new data. The State's theory defies logic and common sense. This Court has blatantly ignored this evidence which creates reasonable doubt about the State's entire theory.

67. The fact of Mrs. King's faint lividity, depicted in photographs after 7:25 a.m., reflecting her exact position on the incline of ballast rocks, the fact of her lack of rigor mortis as late as 8:10 a.m.; the fact that the train conductor reported his observation of Mrs. King breathing at 6:48 a.m.; the fact that Mrs. King was still warm to the touch at 7:22 a.m.; the fact that Mrs. King had steady cardiac electrical activity at 7:13 a.m. until 7:30 a.m. when the heart rate monitor nodes were taken off of her before she ever flatlined, are all undisputed facts that

support that Mrs. King suffered from an event that occurred at the tracks and not at her residence. This Court's conclusion that "the window of time for the event was between 5:14 a.m. on July 6, 2014 and 6:38 a.m. on July 6, 2014" is manifestly erroneous. (Opinion, Pg. 9). The event causing Mrs. King's demise occurred *after* she reached the railroad tracks of her own accord.

"STAGING" FROM THIS COURT'S OPINION

68. When the Illinois Supreme Court reversed Shadwick King's murder conviction in January 2020 it made several important findings:

> (1) "The evidence of guilt [of Mr. King] was ***not overwhelming***." *People v. King*, 2020 IL 123926, ¶ 26, (emphasis added).
>
> (2) The opinions of crime scene analyst Mark Safarik were "either beyond his qualification or involved conclusions that the jurors easily could draw for themselves without any expert assistance." *Id.*, ¶ 26.
>
> (3) "[S]ignificant portions of Safarik's testimony went far beyond the field of "crime scene analysis," which is Safarik's undeniable field of expertise . . . . [T]he State tendered Safarik as 'an expert in crime scene analysis," and the trial court accepted that tender after finding Safarik 'a qualified expert to testify within the area of crime scene analysis.' The problem is that, after laying this foundation, the State then elicited opinions from Safarik on such matters as the cause and manner of Kathleen's death, whether the lividity on Kathleen's body was consistent with her positioning on the railroad tracks, whether certain injuries and abrasions found on Kathleen's body were sustained before or after her death, whether Kathleen's injuries were consistent with her having fallen on the tracks, and whether leaves found on Kathleen's body were consistent with leaves found in and around the Kings' home. Not one of these matters falls within the scope of 'crime scene analysis' . . . . *Id.*, ¶ 36.
>
> (4) "There is nothing in Safarik's experience, background, or training that suggests any specialized knowledge of these matters sufficient to qualify him as an expert. Safarik is undoubtedly an expert in criminal investigation and crime scene analysis. But that is hardly the same thing as being an expert in forensic pathology or botany, both of which are scientific fields into which Safarik's testimony repeatedly transgressed." *Id.*

69. The State has substituted Dr. Smock for Mr. Safarik to render opinions to shore up an inherently weak and flawed prosecution. In Dr. Smock's report, submitted to this Court, he stated, "these pieces of evidence, and others are indicators of a body being moved from one

location to another and a body being dressed by someone else." Further, he wrote, "Mrs. King's injuries are not consistent with a fall and are consistent with her body being placed at the scene" and "the location of [Mrs. King's] abrasions is consistent with being dragged." This theory came precisely from Safarik's conclusions in Mr. King's first trial, including "Kathleen was moved onto the tracks after she died in a different location;" "Kathleen's injuries were inconsistent with a fall on the tracks;" and "scrapes on Kathleen's shins were postmortem because there was no blood." *See King*, 2020 IL 123926, ¶ 17.

70. This Court's decision must be based on matters within the trial record. *See Bowie*, 36 Ill. App. 3d at 180. Stated differently, this Court cannot consider matters outside of the trial record. This Court admitted to reading all of the first trial transcripts "a number of times" and "was intending to deny any openings in this matter" because of this. Specifically, this Court stated:

> [S]peaking of openings, I've read the transcript in this case previously a number of times. I know the general idea of what was presented in the initial trial in this matter. I was intending to deny any openings in this matter. But I'll give each of you a few minutes, and I mean a few minutes, I mean like five minutes to tell me something you want me to know about the case. I know this may be tried differently this time than the last time, so maybe that is something we need to do. But I'm not going to put a timer on you, but I want to keep this relatively short. Because as I said, I think I'm pretty well conversant with the facts of this case as they were presented previously.

(June 6 AM Transcript, Pgs. 7-8 attached as **"Exhibit 45"**). This Court explicitly stated that it was intending to deny opening statements because it already had read the first trial transcripts "a number of times." (Pg. 7; **Ex. 45**). In a bench trial, the judge is limited to the record developed during the trial before him. *People v. Nelson*, 58 Ill. 2d 61 (1974); *People v. Jackson*, 409 Ill. App. 3d 631 (1st Dist. 2011). The presumption that the trial judge sitting as trier of fact considered only admissible evidence in making his decision can be rebutted through affirmative evidence in the record. *Id.* A successor judge may rely on transcripts of a prior trial where the

witnesses who testified in the prior trial are not available or where the parties agree to stand on transcripts of the prior proceedings. *Anderson v. Kohler,* 376 Ill. App. 3d 714 (2nd Dist. 2007). The parties in the instant case did not agree to stand on the transcripts of Mr. King's prior trial.

71. This Court obviously relied upon the first trial transcripts and impermissible testimony in reaching its decision on August 9, 2022. For example, this Court concluded that the scene was "staged" despite the State's witnesses in the second trial never mentioning staging and one State's witness flatly denying staging. (Officer Hann's June 9 PM Testimony, Pg. 6 attached as **"Exhibit 46"**). This Court improperly concluded as follows:

> I find the body of Kathleen King and her phone were staged in that position at and on those railroad tracks. The body, specifically the neck and the phone were placed in the one spot where all the evidence of manual strangulation and information from the phone would be destroyed. The placement is not accidental but purposeful.

72. There was no evidence presented in this trial that "the neck and the phone were placed in the one spot where all the evidence of manual strangulation and information from the phone would be destroyed" but this Court, in its opinion, claimed the crime scene was staged and only Mr. King had access to the evidence to stage the crime scene. There is insufficient evidence in the second trial record that Mrs. King's neck and phone were placed in the "one spot" to be destroyed. No witness testified that the neck and phone were in that position. Mrs. King's neck and phone were not destroyed by being in that position, and this opinion, which was rendered by ASA Sams for the first time in his closing argument, was not evidence but mere speculation. There was no evidence supporting the "staging" proposed by ASA Sams for the first time in his closing argument. This Court cannot rely upon the State's closing argument because that is not evidence. The first trial judge improperly allowed Mark Safarik to testify about staging, and it is Safarik who came up with the theory that the placement of Mrs. King's phone indicated "staging." *People v. King*, 2020 IL 123926, ¶ 38; (R1335). Clearly, this Court's opinion became

infected by reading the first trial testimony on staging. This was a violation of Mr. King's due process right to a fair trial.

73. A simple viewing of the photographs that were admitted into evidence demonstrates that the train would not have destroyed Mrs. King's phone and would have traveled over the phone without damaging it. **(PX241)**. There are many easier ways to destroy a phone, such as tossing it into the Fox River. Even if Mrs. King's cell phone had been destroyed, all of the data *would be preserved and is recoverable*. Destroying a device does not destroy the information contained therein. (*See* **PX514**, Pg. 2, indicating Mrs. King had icloud).

74. Secondly, Mrs. King could see that there were no trains coming on the southernmost tracks. As a long-time resident of that area and runner in that area, she would know that the Chicago bound commuter train ran on the north side of the tracks. Most importantly, the train video introduced by the State (**PX503**) demonstrates that Mrs. King could have seen the 6:38 a.m. train coming towards her on the northside of the tracks.

75. This Court erroneously concluded that "the only person to possibly benefit from staging is the defendant." This Court ignores there is reasonable doubt this was a homicide. This Court ignores there is reasonable doubt the scene is staged. This Court ignores the reasonable doubt that Mr. King committed any crime. This Court's conclusion is without any basis in the evidence.

76. This Court erroneously stated that the Defense's theory was that Mrs. King had fallen on the tracks as a result of sudden cardiac death. The Defense never claimed the injury pattern on Mrs. King was the result of her "falling after suffering a cardiac death." The Defense's theory was that Mrs. King became ill, knelt down by the rail, and **collapsed** onto it after setting her phone down, as corroborated by the rust-like substance on her thumb which would have made contact with the rusty part of the rail when she set her phone down, and after vomiting up

the food particle on the rail. This Court did not consider the Defense's theory and did not address the debris on Mrs. King's thumb or the emesis on the tracks.

77. Dr. Kalelkar admitted that all of Mrs. King's clothing disarray, except for her twisted bra, could have been the result of her intoxication. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 82-83 attached as **"Exhibit 47"**). However, Officer Hann agreed in his testimony that the twist in Mrs. King's bra could have been the result of intoxication. (Officer Hann's June 9 AM Testimony, Pgs. 19-20, attached as **"Exhibit 48"**). The only thing Dr. Kalelkar could not fathom was the one twist in Mrs. King's bra because she had never seen that before in all her cases, including cases of violent sexual homicides where the bra was torn. (Dr. Kalelkar's June 8 AM Testimony, Pg. 105 attached as **"Exhibit 49"**). If Dr. Kalelkar had taken the time to look at the photos from the King residence, which she admitted she had not, she would have observed that Mrs. King had twists in her other bras which is more a reflection of Mrs. King's maintenance of her bras then some slip up by a stager dressing her. (*See i.e.*, **PX175; PX198)**

78. This grasping at bras staging theory is undermined by the undisputed facts that no reasonable person would agree that a scene was staged to look like an accident because the body dressed as a jogger was placed on railroad tracks, with clear visibility in both directions. No reasonable person would believe this scene would fool anyone. Joggers do not jog on railroad tracks. No reasonable person would believe that someone with a BAC of 0.15 at autopsy who had consumed 14 alcoholic drinks in 7 hours went jogging a few hours later. No reasonable person would believe the only way to destroy the phone would be to prop it up vertically many inches below where the train makes contact with the rail and hope the train would hit it. No reasonable person would believe a person could escape after carrying a 150-pound dead body across Esping Park undetected in broad daylight and then climb through the bushes at the Johnson Control Building east of where the body was placed in full view of the oncoming train.

No reasonable person would believe the police would not examine the suspect's shoes for iron oxide since all of the officers and EMS responders had iron oxide on their shoes from walking on the tracks. The sheer ridiculousness of the staging theory is illustrated by the fact that no train hit Mrs. King and no train hit Mrs. King's phone. Mrs. King was spotted on the tracks within 4 minutes of her last cell phone ping. Mrs. King, by going up on the tracks, was spotted faster than any 911 call from her phone could have activated an EMS team. That point is illustrated by the undisputed fact the EMS team had an extremely difficult time reaching Mrs. King. It was a much wiser decision for her, because of her medical emergency, to go up on the tracks and stand on the rails opposite where the train was coming to signal for help. She was discovered in 4 minutes. Unfortunately, Mrs. King collapsed before the train reached her. Tragically, the CPR-trained train personnel did not render any assistance to her. The EMS responders, in violation of the Southern Fox Valley EMS Manual made no effort to provide CPR or give her epinephrine pursuant to their policy. (**DX6a; DX6b**).

79. As stated above, this Court has clearly abused its discretion in determining that the railroad scene was staged. This Court's reasoning is "arbitrary, fanciful [and] unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

"THE DEFENDANT" FROM THIS COURT'S OPINION

80. In this Court's section called "The Defendant," it misstates that Mr. King did "social media postings" "inconsistent with [his] testimony at trial and his statements to police." (Opinion, Pg. 9). Mr. King did not do any social media postings; no such evidence was presented and the evidence that was presented showed that Mr. King had very limited knowledge on navigating social media like Facebook. Further, this Court's statement that "his statements and testimony, at times, are inconsistent with the facts elicited from the records of computer searches,

telephone records and other evidence" (Opinion, Pg. 10) is refuted by the facts. The State, on cross-examination, asked Mr. King about times of text messages sent and photos taken and asked Mr. King what the metadata demonstrated regarding the timing of certain electronic device activity from 8 years ago. It is highly unlikely that Mr. King would have been able to recall, without his memory being refreshed, the exact times of text messages and photos taken. The State made no effort to refresh his recollection.

81. Mr. King volunteered information to the police that they would not otherwise possessed such as (1) Mr. King had asked Mrs. King to contemplate divorce and he had written her a note regarding custody arrangements for the children and she declined his offer; (2) the existence of Mrs. King's text messages to a male named Billy Keogh that Mrs. King met in Army basic training; (3) Mr. King had accessed Billy's Facebook page from Mrs. King's Facebook on several occasions; (4) Mr. King did not keep tabs on Mrs. King and only considered divorcing her after he learned that she had lied to him and been at a Cubs game with Billy and arrived home at 2:00 a.m., eight hours after her agreed upon arrival time; (5) in his opinion, Mrs. King was not suicidal and had no enemies—claims which would be much more consistent with someone who had committed a murder and was trying to deflect blame.

82. This Court abused its discretion in concluding that "Mr. King was planning a drastic change, which his wife would not accept." That was not the State's theory. This Court has come up with its own theory, which is totally improper and an abuse of discretion, that Mr. King was motivated to murder his wife because she did not want a divorce. *See People v. Davis*, 278 Ill. App. 3d 532 (1st Dist. 1996).

"FINDINGS" FROM THIS COURT'S OPINION

83. This Court's finding that "Kathleen King died of asphyxiation due to pressure applied to her throat and mouth" (Opinion, Pg. 10) is contrary to the evidence. The State's

expert, Dr. Kalelkar testified that there were no injuries to Mrs. King's neck. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 95-98 attached as **"Exhibit 50")**. Dr. Kalelkar testified that Mrs. King did not die of suffocation or smothering and that she had no injuries to her mouth, and she did not identify any injuries to the tip of her tongue. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 62, 66, 112 attached as **"Exhibit 51")**.

84. This Court's finding that "the body of Kathleen King was dressed and placed upon the railroad tracks to suggest she had an accidental death and to destroy evidence of the actual cause of her death" (Opinion, Pg. 10) is unreasonable. None of the evidence was destroyed, so this "finding" is pure speculation. In fact, Mrs. King was found within 4 minutes after her cell ping east of where she was found. Neither her cell phone nor her body was destroyed by a train. The State would have had to present an expert to testify that the cell phone and "other evidence would be destroyed" had a train run over them, which it did not. The State photos of much of the "evidence" would have undisputedly survived because only Mrs. King's neck was on the rail. Her hands, especially her nails, would have survived to be tested for Mr. King's DNA; the most important, potentially incriminating source of evidence would have survived to be tested. Her entire body from the neck down would have provided trace evidence if she had contact with Mr. King. Her clothing including her bra clasp and shoe laces could have been swabbed for Mr. King's touch DNA. Further, there is an erroneous assumption in this Court's finding that the trains were operating on the south side of the tracks that morning where Mrs. King was found. They were not. There is also an erroneous assumption that Mrs. King could not see the train on the opposite of the tracks coming towards her. She could. This Court visited the scene and knows that Mrs. King's view looking from the west would have been clear and unobstructed. This Court's finding that the scene was staged to look like an accidental death

is arbitrary, fanciful and unreasonable to the degree that no reasonable person would agree with it. *People v. Rivera,* 2013 IL 112467 ¶ 37.

85. In finding that Mrs. King was dressed, this Court ignored the evidence that Mrs. King was found wearing her shorts identically to how she was wearing similar shorts on a different occasion prior to her death shown in a photo: the shorts had a very short drawstring which was untied in a photo taken on June 19, 2014. (**DX14** attached as **"Exhibit 52"**). Also, this Court ignored the evidence that Mrs. King's shoes were single laced when she was found, just like she had tied the exact pair of Asic shoes in a photo from June 19, 2014. (**DX13**, shown to Officer Hann on cross but not admitted into evidence). Neither the untied drawstring on Mrs. King's shorts or the single laced shoelaces have any evidentiary value in demonstrating that someone else dressed her. Rather, they are proof that Mrs. King dressed herself.

86. Further, there is no evidence that Mrs. King went running. There were no witnesses to her running; she wore none of her running accessories; and the Defense did not claim that she went running. The undisputed evidence presented by the State (Dr. Kalelakar and Officer Hann) and the Defense ruled out staging and provided the obvious and reasonable explanation that Mrs. King was intoxicated as the condition of her clothing reflected.

87. Thus, this Court's findings are a clear abuse of discretion.

INSUFFICIENT EVIDENCE OF THE *CORPUS DELICTI*: THE FACT OF DEATH

88. The corpus delicti in a murder case consists of two essential elements: (1) the fact of death and (2) the fact that the death was caused by the criminal agency of some person. *People v. Jones*, 22 Ill. 2d 592, 595 (1961).

89. The fact of death was never established by the State because it failed to prove beyond a reasonable doubt that Mrs. King was a homicide victim. The unrefuted evidence

showed that Mrs. King suffered a medical event from binge drinking which caused sudden cardiac arrhythmias which led to her death.

There is reasonable doubt that Mrs. King was deceased when she was discovered at the railroad tracks

90. The scene was declared a crime scene within a minute after Sergeant Carbray's arrival at 7:07 a.m. (Sgt. Carbray's June 6 Testimony Pgs. 55-56 attached as **"Exhibit 53"**). At 7:13 a.m., when many of the State's witnesses were already on the scene and Mrs. King's EKG reading was taken, Mrs. King's heart function, as determined by Dr. Kanagasundram, was about 40 electrical events or beats per minute.[4] (Dr. Kanagasundram's June 29 AM Testimony, Pg. 67 attached as **"Exhibit 54"**). The nodes were taken off of her body at 7:30:25 a.m. (after she was pronounced dead at 7:22 a.m.), but even then, there was no flatline (asystole) shown on her EKG as is required by the Southern Fox Valley EMS Protocol for pronouncing death. (**DX3**-Mrs. King's EKG Strip attached as **"Exhibit 55"**).

91. Mrs. King was not obviously dead as defined by EMS protocol,[5] nor had she reached asystole (flatlined). Although many of the State's witnesses stated that at some point after they arrived at the scene, they had observed lividity on Mrs. King's leg, which was as a

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[4] Dr. Kanagasundram's testimony on Page 67 of the June 29th transcript was the following:

> So then, your Honor, it comes to a simple point of math. In terms of if you have one event every 1.4 seconds, you divide 60 by 1.4 and you end up with around 40 electrical events or beats per minute. So this to me represents a cardiac rhythm at 40 beats a minute.

[5] Irreversibly dead patients are those found to be non-breathing, pulseless, asystolic and have any of the following injuries and/or long term indications of death:

> *Decapitation, thoracic/abdominal transection, rigor mortis without hypothermia, profound dependent lividity, trauma where CPR is impossible, decomposition, mummification, putrefaction, incineration, frozen state, massive cranial/cerebral destruction*

(**DX6b** - Triple Zero Patient Protocol, **Ex. 56**)

result of the pressure from her lying on an incline at the railroad tracks (as illustrated by the photographs taken at the scene from 7:25 a.m. to the removal of her body).

92. Mrs. King did not present with "profound lividity" and she did not meet any of the other criteria for classification as an "obvious death" as required by the Southern Fox Valley EMS Protocol (**DX6b** attached as **"Exhibit 56"**). Lividity is the pooling of blood after death and reflects the exact position of the body at death. Mrs. King's body demonstrated a lividity pattern, in the lower limbs, that could only occur from her lying on an incline. This simple medical fact rules out that she died in a prone or supine position on her kitchen floor.

93. Because of these undisputed facts, every single State witness employed by Kane County who had involvement in this investigation or the treatment of Mrs. King at the scene had potential civil liability for the wrongful death of Mrs. King. Therefore, these witnesses were biased in favor of the State.

The State's expert Dr. Kalelkar was not credible

94. Mrs. King's cause of death was undetermined by Dr. Kalelkar after she performed her autopsy on July 7, 2014. Dr. Kalelkar made three findings: "(1) Petechial hemorrhage laryngeal mucosa & epiglottic mucosa; (2) Petechial hemorrhage in eyes; (3) 2 small 0.1 hemorrhage at base of tongue." (*See* Preliminary Report Form (Pathologist), **DX18C, Ex, 37B**). Dr. Kalelkar could not state the cause of death from her autopsy findings alone. It was undetermined "pending toxicology" and "pending police investigation." The toxicology report came back at the end of July of 2014 with a BAC 0.15. On August 13, 2014, despite making no new findings other than the original three, Dr. Kalelkar changed the cause of death to "asphyxia," which encompasses non-homicidal deaths, but left the "due to" portion of the report blank, not specifying any homicidal cause of death.

95. Dr. Kalelkar's finding of "asphyxia due to ____" is deficient and does not support the conclusion that the manner of death was homicide. *See People v. Ehlert*, 211 Ill. 2d 192, 811 N.E.2d 620(2004)(where the defendant's conviction was reversed where Dr. Kalelkar, again, was the forensic pathologist who conducted the autopsy and testified for the State, initially could not determine the cause of death until police advised her of their investigation).

96. The higher courts have specifically addressed the credibility of Dr. Kalelkar in this case: The Second District in its opinion after Mr. King's first trial stated: "While Dr. Kalelkar opined that Kathleen died of manual strangulation and also opined on the staging of the death scene, **her testimony was undermined by the fact that she did not complete her autopsy protocol**." *People v. King*, 2018 IL App (2d) 151112, ¶ 88. (emphasis added) (opinion attached)

97. On September 11, 2014, that is, 65 days after Mr. King's arrest, the manner of death in this case was declared a homicide. There were no new pathological findings by Dr. Kalelkar other than the original three findings: "(1) Petechial hemorrhage laryngeal mucosa & epiglottic mucosa; (2) Petechial hemorrhage in eyes; (3) 2 small 0.1 hemorrhage at base of tongue." (*See* Preliminary Report Form (Pathologist), **DX18C, Ex. 37B**). The three original findings are non-specific and are attributable to many non-homicidal deaths. Mr. King's arrest and prosecution for first degree murder, without any medical findings that this was a homicide, violated Mr. King's due process rights.

98. Suddenly, Dr. Kalelkar's three nonspecific findings transformed into her opinion given in the first trial that Mrs. King had died from strangulation. Dr. Kalelkar, by her own admission, never documented that Mrs. King died a homicidal death from strangulation. It was not until Dr. Kalelkar's testimony in March of 2015 that "strangulation" was ever mentioned.

(Dr. Kalelkar's June 8 AM Testimony, Pg. 119, **Ex. 38**). Undoubtedly, Dr. Kalelkar's sudden revelation at the first trial discredited her testimony with the Second District.

99. Dr. Kalelkar did not become more credible in her testimony at the second trial. She was questioned about her opinion that the erythema (red line) on Mrs. King's neck "could have been" from a ligature but she admitted that "anything could cause erythema" and "at this point, I don't know what instrument was used." (Dr. Kalelkar's June 8 AM Testimony, Pgs. 95-96, **Ex. 50**). Dr. Kalelkar's opinions were riddled with reasonable doubt because she could not opine anything to a reasonable degree of medical certainty; rather her responses were "it's possible;" "don't know," "could be" when asked questions on direct and cross examinations. Below are examples of reasonable doubt in Dr. Kalelkar's testimony: In ASA Stajadar's direct examination about Mrs. King's chin injuries, the following was asked and answered:

> Q: Once more showing you People's Exhibit No. 269, Doctor, I want to ask you, based on your training and experience, if a victim was being strangled by an assailant and the victim tried to pry the assailant's hands off of the victim's throat, could the victim's own hands or knuckles have caused those contusions?
> A: Yes. That's *possible.*
> Q: Could the contusions also have been caused by the assailant's thumbs or knuckles?
> A: That's also a *possibility.*

(Dr. Kalelkar June 8 AM Testimony, Pg. 45, Ex. 16). In ASA Stajadar's Direct Examination concerning Mrs. King's erythema, Dr. Kalelkar testified the following:

> Q: Is that injury consistent with a person being strangled?
> A: Yes, it is *possible*. If—sometimes a soft ligature can leave a mark such as that.

(Dr. Kalelkar June 8 AM Testimony, Pg. 47). In ASA Stajadar's Direct Examination concerning Mrs. King's outer arm bruise, Dr. Kalelkar admitted the defense's experts explanation is also possible:

> Q: Would it also be true that the bruise on the outer half of her arm could be consistent with Kathleen having fallen and landed in the position as shown in People's Exhibit 111?

A: Yes. That's *possible*.

(Dr. Kalelkar June 8 AM Testimony, Pg. 49). When asked on direct about Mrs. King's left leg scrapes, Dr. Kalelkar testified Mrs. King's outside left leg injury was antemortem (agreeing with the Defense):

Q: And looking specifically at the outside of the ankle on the left leg, can you tell whether that injury was inflicted before or after Kathleen died?
A: It appears to be inflicted before she died because there's some hemorrhage in there.
Q: And could that be consistent with falling in the position shown in 106 or consistent with her being deceased before she was seen in picture 106?
A: That's—*that's possible*.

(Dr. Kalelkar June 8 AM Testimony, Pgs. 51-52). Further, Dr. Kalelker testified:

Q: And what do you notice on her upper lip?
A: On the upper lip, there is a spot of mucous.
Q: Is that also consistent possibly with saliva?
A: *Could be* saliva, yes.

(Dr. Kalelkar June 8 AM Testimony, Pg. 64). On cross-examination, Dr. Kalelkar answered questions that were undisputed fact equivocally as such:

Q: But prior to her death, the BAC level could have been higher?
A: *Could have been*, yes.

(Dr. Kalelkar June 8 AM Testimony, Pg. 107). On cross-examination, she answered:

Q: And I just want to be clear that your opinion is not that this is a ligature strangulation, correct?
A: At this point, *I don't know* what instrument was used. That is correct.
Q: And you have testified previously, that it was a manual strangulation?
A: I have testified that this was a strangulation.
Q: Okay. And you've never—
A: *I don't think* I said manual.
Q: So you don't believe you've ever testified it was manual?
A: *I don't believe* that word, "manual," came up.
Q: So you're testifying that this could have been a ligature?
A: It *might be*. A soft--but it had to be a soft ligature.

(Dr. Kalelkar June 8 AM Testimony, Pg. 96). Dr. Kalelkar's testimony was full of possibilities. Although Dr. Kalelkar denied it, the Illinois Supreme Court opinion stated that Dr. Kalelkar had

testified that this was a "manual" strangulation. *People v. King*, 2020 IL 123926, ¶ 14. Obviously, Dr. Kalelkar was hesitant to describe any instrument that would have caused injuries to the neck because she had testified that the neck was not injured.

100. Further, Dr. Kalelkar did not consider the most important evidence in formulating her opinions. She was unaware of Mrs. King's EKG strip and she was unaware that the train conductor reported that Mrs. King was breathing. (Dr. Kalelkar's June 8 AM Testimony, Pg. 124 attached as **"Exhibit 57"**). Dr. Kalelkar could not answer many of the basic questions regularly posed to a forensic pathologist such as, determining time of death (lividity, temperature, rigor mortis, EKG, etc.), place (injury pattern analysis), and cause of death.[6] Although Dr. Kalelkar knew Mrs. King's toxicology indicated that Mrs. King had caffeine and alcohol in her system, she failed to consider as important Mrs. King's BAC of 0.15 at the time of the autopsy on July 7, 2014. Dr. Kalelkar admitted that she relied on the police investigation in formulating her opinions as to Mrs. King's cause of death. (*See* Dr. Kalelkar's June 8 AM Testimony, Pg. 111, **Ex. 14**).

101. Dr. Kalelkar relied upon the police investigation in formulating her opinions. Dr. Kalelkar was given misinformation by the police. The Authority for the Autopsy provided to Dr. Kalelkar stated that "according to police, the subject (Mrs. King) was in an altercation or domestic related dispute with her husband this morning" and further, "according to police, the spouse (Mr. King) stated that *the subject* (Mrs. King) *had been out drinking till 2am. When she got home they had an argument*." (*See* **DX18a** attached as "**Exhibit 58**"). The statements police provided were false. Mrs. King did not go out drinking alone. She was with Mr. King. When Mrs. King arrived home, she did not have an argument with Mr. King. Deputy Coroner Lisa

[6] Unlike Dr. Kalelkar, Dr. Blum answered all of these questions, in his 9 hours of testimony.

Krieghbaum (Gilbert) testified that she prepared the Authority for Autopsy report and it was given to Dr. Kalelkar.

102. From the time of her preliminary findings, Dr. Kalelkar did not discover any new medical evidence that Mrs. King had been strangled. The only new evidence that Dr. Kalelkar was provided prior to the first trial that could reasonably be inferred changed her opinion from an undetermined death to strangulation was the false police information provided to her in the Authority for Autopsy report (**DX18a, Ex. 58**). Undoubtedly, Dr. Kalelkar's change of opinion was infected by this false information. Her reliance on this false information further undermines her credibility.

103. Dr. Kalelkar testified that Mrs. King's clothing was in disarray but this did not cause her to conclude that there was a death due to strangulation in her preliminary findings on July 7, 2014. Furthermore, Dr. Kalelkar admitted that Mrs. King's clothing disarray, with the exception of the bra twist, could have been the result of her intoxication. (Dr. Kalelkar's June 8 Testimony, Pgs. 82-83, **Ex. 47**). Despite Dr. Kalelkar's fixation on the twist in Mrs. King's bra, it did not cause her to conclude on July 7, 2014 that Mrs. King had died as a result of strangulation. (Dr. Kalelkar's June 8 Testimony, Pg. 105, **Ex. 49**). Officer Hann disagreed with Dr. Kalelkar and testified that the bra twist could have been caused by Mrs. King's intoxication. (Officer Hann's June 9 PM Testimony, Pg. 16, **Ex. 48**).

104. Dr. Kalelkar did not testify to a reasonable degree of medical certainty that strangulation was the cause of Mrs. King's death, which further undermined her credibility.

105. Dr. Kalelkar was only able to rule out that Mrs. King "died as a result of a fall or walking and landing in the position" in her testimony as such:

Q: In your expert medical opinion and to a reasonable degree of medical certainty

and based on all of the evidence you reviewed in the case, is there any way possible that Kathleen King died as a result of a fall or walking and landing in the position shown in People's Exhibit 106?

A. No.

(Dr. Kalelkar's June 8 AM Testimony, Pgs. 70-71).[7] Therefore, Dr. Kalelkar failed to rule out, beyond a reasonable doubt, the supervening cause of a sudden cardiac arrhythmic death due to binge drinking. The burden was on the State to rule out this supervening cause beyond a reasonable doubt and it failed to do so.

106. This Court's finding that Dr. Kalelkar was credible is manifestly erroneous and should be reversed. *See People v. Rovito*, 327 Ill. App. 3d 164, 172 (2001).

The State's expert Dr. Smock was not credible

107. Dr. Smock relied on Conductor Daniel Mongelli's observations that Mrs. King had blue or purplish lips at 6:47 a.m. and was therefore deceased. Photographs presented by the State clearly demonstrated that Mrs. King did not have blue or purplish lips and that her lips were a normal, pinkish color both at the tracks and at autopsy. This manifest error by Dr. Smock completely undermines his opinion as to time of death and should have resulted in this Court finding him to not be credible. (*See* Dr. Smock's June 7 PM Testimony, Pgs. 10-13 & **DX18K** and **DX63G** - Photos of Mrs. King's Pink Lips at Scene and Autopsy from State's Discovery attached as **"Group Exhibit 60"**).

108. Conductor Daniel Mongelli was also clearly impeached by his testimony that he was not standing over Mrs. King when he observed her breathing. This impeached testimony completely undermines the opinion of Dr. Smock who completely relied upon the testimony of Conductor Mongelli to establish Mrs. King's time of death. (Mongelli's June 6 Testimony, Pgs.

[7] Dr. Kalelkar did not rule out the possibility of Mrs. King collapsing onto the rail, only falling from a standing position.

65, 76 attached as **"Exhibit 61"**; **PX502** (back of train video); **DX1** (UP Dispatch synced with train video beginning at 6:48 a.m.)).

109. This Court's finding that Dr. Smock was credible is manifestly erroneous and should be reversed. *See People v. Rovito*, 327 Ill. App. 3d 164, 172 (2001).

The State's two experts contradict each other and create reasonable doubt as to their opinions about cause of death, time of death and injury pattern analysis

110. The two State experts, Dr. Smock and Dr. Kalekar, disagreed on the cause of death, the specific injuries, the location of the injuries and the timing of the injuries. Dr. Smock testified there was a suffocation. (Dr. Smock's June 7 PM Testimony, Pg. 25 attached as **("Exhibit 104").** Dr. Kalelkar testified there was **not** a suffocation. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 111-12, **Ex. 14**). Dr. Smock testified that there were injuries to the neck. (Dr. Smock's June 7 AM Testimony, Pgs. 132-33 attached as **"Exhibit 105"**) Dr. Kalelkar stated that there were no injuries to Mrs. King's neck. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 95, **Ex. 50**). Dr. Smock testified there was an injury to Mrs. King's lip (Dr. Smock's June 7 PM Testimony, Pg. 48, **Ex. 13**). Dr. Kalelkar testified there was no lip injury. (Dr. Kalelkar's June 8 AM Testimony, Pg. 62, **Ex. 51**) Regarding the timing of the injuries, Dr. Smock testified that Mrs. King's right ankle scrape and scrape on her shin were postmortem (Dr. Smock's June 7 PM Testimony, Pgs. 67-68, attached as **"Exhibit 106")**, and Dr. Kalelkar testified that these injuries were consistent with Mrs. King falling and striking the rail and landing in the position she was found in Mr. King's first trial, which she was impeached with when she tried to change her testimony in Mr. King's second trial. (Dr. Kalelkar's June 8 AM Testimony, Pg. 103-04, **Ex. 98**). Dr. Kalelkar testified that the inner arm bruise on Mrs. King was antemortem (Dr. Kalelkar's June 8 AM Testimony, Pg. 100). Dr. Kalelkar testified that the outer arm bruise was consistent with Mrs. King landing in the position she was in (Dr. Kalelkar's June 8 AM Testimony, Pg. 99).

Dr. Smock testified that Mrs. King's arm bruises were consistent with Mrs. King being grabbed by someone where they would leave a thumb mark on the outer aspect of the arm (Dr. Smock's June 7 PM Testimony, Pgs. 59, attached as **"Exhibit 107")**

111. Dr. Smock testified that Mrs. King had cyanosis on the basis of Conductor Mongelli's alleged observations at 6:48 a.m. (Dr. Smock's June 7 PM, Pgs. 10-11, attached as **"Exhibit 60A").** Dr. Kalelkar reported no cyanosis on Mrs. King, and cyanosis does not just appear and then disappear. (*See* **DX18d, Ex. 88**). Further, while Dr. Kalelkar could not specify any time of death in her testimony. (Dr. Kalelkar's June 8 AM Testimony, Pg. 126, attached as **"Exhibit 108"**); Dr Smock testified that by 7:14 a.m., Mrs. King had "been dead for a long period of time as evidenced by the lividity that was seen [by Conductor Mongelli] at 6:47 a.m." (Dr. Smock's June 7 PM Testimony, Pg. 81).

112. Both of the State's experts contradicted the State's new theory that Mrs. King could have been alive on the tracks after being strangled and/or smothered somewhere else. Dr. Smock testified death by asphyxiation would happen very quickly; he gave a time of "death from no airflow" occurring "4 to 6 minutes." (Dr. Smock's June 7 AM Testimony, Pg. 136 attached as **Ex. 7**). Dr. Kalelkar, in her postmortem exam, listed the "time between onset and death" as "minutes." (Dr. Kalelkar's Report of Postmortem Exam, **DX18d, Ex. 88**).

113. The Fourteenth Amendment's due process clause requires the prosecution *to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt. Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The multiple contradictions between the only two experts for the State demonstrates the failure of the prosecution "*to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt.*"

No evidence of a crime existed at the King residence

114. No evidence of a clean up existed at the King residence. Mr. King voluntarily allowed his entire home to be searched several times. There was absolutely no evidence of a clean up ever occurring in the King home. Investigator Rusty Sullivan testified the following on cross-examination:

> Q: Fair to say on that occasion you didn't find any evidence of cleanup in the home?
> A: There was none located that was easily recognizable through our efforts.

(Inv. Rusty Sullivan's June 10 Testimony, Pg. 101, **Ex. 64B**; *see also* Mr. King's June 27 Testimony, Pgs. 121-22, attached as **"Exhibit 63"**) This Court ignored this significant evidence of reasonable doubt.

115. No evidence of an altercation existed at the King residence. Lead Detective Pech testified that the house was just in general disarray but that there was no evidence of an altercation having occurred. There were no broken fingernails, no flipped furniture, no ligature found that could have been used in what Dr. Kalelkar opined "could have been" a "possible" ligature strangulation. (Dr. Kalelkar's June 8 AM Testimony, Pgs. 47, 96; Inv. Rusty Sullivan's June 10 Testimony, Pg. 101 attached as **"Group Exhibit 64"**). This Court ignored this significant evidence of reasonable doubt.

116. There was no evidence of damage occurring on July 6, 2014 to the bathroom doorframe. The evidence established that the State planted the wood shard in the King bathroom on July 8, 2014. The wood shard did not exist in the photographs taken on July 6, 2014 by law enforcement. **(DX24** attached as **Ex. 49**). This Court ignored this significant evidence of reasonable doubt.

117. No connection was established between the bleach bottle and any alleged crime cleanup. The State failed to establish that bleach was used for any reason to clean up the King residence on July 6 through July 8. The bleach bottle remained untouched by Mr. King as the

photograph on July 8 demonstrates. (Det. Pech's June 22 Testimony, Pg. 82, **Ex. 8**). Law enforcement took photos of a bleach bottle in the home (which receipts show that Mrs. King bought) and could not find any evidence the bleach had been recently used to clean up the King residence. (Det. Pech's June 22 Testimony, Pg. 86 attached as **"Exhibit 66"**). The State's witnesses could not provide a location in the home where the crime allegedly occurred. (*See* Det. Pech's June 22 Testimony, Pg. 83, **Ex. 8**) This Court ignored this significant evidence of reasonable doubt.

118. No connection was established between the leaves on Mrs. King's body and the leaves found at her residence. The GPD extracted plant DNA and sent it to the Morton Arboretum for testing with negative results. There is no burden on Mr. King, after the failure of the State to prove a forensic link between the leaves in Mrs. King's shorts and the leaves at the King residence, to establish any alternative explanation. However, the Defense did provide a reasonable alternative explanation for the presence of leaves in Mrs. King's shorts. Leaves/leaf fragments were all over the house, including in the washing machine that contained a children's comforter and pillow cases, and Mr. King testified that leaves frequently ended up on the family's clothing. (Det. Pech's June 22 Testimony, Pgs. 87, 91-92; Inv. Rusty Sullivan's June 10 Testimony, Pg. 89; Mr. King's June 27 Testimony, Pgs. 125-28 attached as **"Group Exhibit 67").** There was even a leaf fragment embedded in Mrs. King's jean shorts in the bathroom **(PX193; 205).** In light of the leaves in the washer and Mr. King's testimony about leaves in their clothing and Mrs. King's jean shorts with embedded leaves, it is a reasonable inference that Mrs. King dressed herself and that she had the leaf fragments in her jogging shorts and on her body. This Court ignored the lack of forensic evidence and the alternative explanation for the presence of the leaf fragments on Mrs. King to arbitrarily conclude that someone else dressed Mrs. King

and somehow the leaf fragments were exclusively the result of her being dressed by someone else. This Court ignored this significant evidence of reasonable doubt.

119. No connection was established between the loose hair on Mrs. King's body and any alleged altercation. The GPD did microscopy testing on the hairs found on Mrs. King's body. The couple of loose hairs on Mrs. King's body were hers and these hairs had been ruled out as being pulled out by the roots, thereby showing there was no altercation. There were loose hairs photographed all over the King residence; in the bed, on the floors, all over the house (*see* Inv. Rusty Sullivan's June 10 Testimony, Pgs. 114, 116 attached as **"Exhibit 68"**)—the reasonable inference was that she was a hair shedder, as corroborated by Mr. King's testimony that he would frequently have to go under their house to fix their drains clogged with Mrs. King's hair. (Mr. King's June 27 Testimony, Pg. 123 attached as **"Exhibit 69"**). This Court ignored this significant evidence of reasonable doubt.

INSUFFICIENT EVIDENCE OF THE *CORPUS DELICTI*: THE FACT THAT THE DEATH WAS CAUSED BY THE CRIMINAL AGENCY OF SOME PERSON

120. As for the essential element #2 of the corpus delicti of murder, that the death was caused by the criminal agency of some person, there is a complete absence of evidence that Mr. King caused Mrs. King's death. The State failed to connect Mr. King to any crime after an all-intensive investigation focused specifically on him. This absence of evidence is ignored, overlooked or mistakenly interpreted by this Court and that is a clear abuse of discretion.

121. The absence of any forensic evidence connecting Mr. King to Mrs. King's death demonstrated, beyond a reasonable doubt, that Mr. King did not commit any crime against his wife. (*See* State Witness Forensic Scientist Blake Aper's Testimony admitted under stipulation: **PX602**).

No evidence connects Mr. King to the railroad tracks

122. No evidence connected Mr. King to the railroad tracks. All of the responders who were at the scene on the morning of July 6, 2014 left with traces of mud and rust on their shoes and left tire tracks that matched their vehicles. Mr. King's vehicle was ruled out as matching the vehicle tracks and no trace evidence from the scene was detected on his shoes. (Det. Pech June 22 Testimony, Pg. 41; Officer Hann's June 21 Testimony, Pgs. 153-54; Inv. Rusty Sullivan's June 10 Testimony, Pgs. 111-12 attached as **"Group Exhibit 70"**; *see also* Michael Antenore June 7 AM Testimony, Pg. 46 attached as **"Exhibit 71"**). All of this evidence proves that the responders were at the scene but Mr. King was not. This Court ignored this significant evidence of reasonable doubt.

123. No evidence was established that anyone attempted to wipe Mrs. King's phone of fingerprints before it was discovered. It is a reasonable inference that if this were a murder and a murderer was attempting to disguise the crime by staging the murderer would have carefully wiped Mrs. King's iPhone of any incriminating forensic evidence. The GPD determined that it had *not* been wiped clean. (Officer Hann's June 21 Testimony, Pg. 12 attached as **"Exhibit 72"**). This Court ignored this significant evidence of reasonable doubt.

124. New cell phone data established a new timeline for the events of July 6, 2014. The new cell phone ping evidence[8] that the Defense presented demonstrated that Mrs. King's

[8] These were not in the GPD cell phone extraction report of Mrs. King's phone produced by the State. With new software, the Defense's forensic data expert was able to extract deleted locations from Mrs. King's phone. The cell phone pings are not to be confused with cell phone tower data. The Defense expert testified as to the margin for error of the cell phone ping locations generated by the report. Namely, Mr. Schiff testified that the margin for error for the 6:34 a.m. ping location coordinates was 165 meters (diameter surrounding the coordinates generated in the entry on the report) (Mr. Schiff's June 28 Testimony, Pg. 141), putting Mrs. King's phone east of where she was was at 6:38 a.m. He testified that the margin for error for the 6:23 a.m. ping location was 65 meters (Mr. Schiff's June 28 Testimony, Pg. 116, **Ex. 10A**). It was established that the 6:23 a.m. ping was in the vicinity of the King residence and the 6:34 a.m. ping was in the vicinity of the railroad tracks near the Johnson Control building. Additionally, the Defense forensic data expert indicated that these entries depicting the cell phone pings had been marked as "deleted." Mr. Schiff was unable to conclude what that meant besides that at some point these 6:23 a.m. and 6:34 a.m. cell phone location pings had been deleted, although they are still able to be extracted with new software.

phone was in the vicinity of her home and pinged at 6:23 a.m. The next cell phone ping was at 6:34 a.m., at least 200 feet east of where she was ultimately discovered on the railroad tracks at 6:38 a.m.

125. Many witnesses in the State's case described for this Court the difficulty in reaching the scene by vehicle; the difficulty in walking on the ballast rocks and over the track rails after reaching the scene; and the conditions making vehicle access to the scene very difficult. (Mr. Antenore's June 7 AM Testimony, Pg. 50 attached as **"Exhibit 73"**; Mr. Mongelli's June 6 Testimony, Pg. 9 attached as **"Exhibit 74"**; Mr. Cavendar's June 6 Testimony, Pgs. 134-36 attached as **"Exhibit 75"**).

126. In order to believe the State's theory that after murdering Mrs. King, Mr. King transported/carried Mrs. King's deceased body to the railroad tracks, this Court, despite visiting and walking the scene by the Johnson Control building, must have ignored the negative evidence in paragraphs 121 through 125 and believed the following scenario:

(1) Despite being in a rage when Mr. King allegedly strangled and suffocated Mrs. King, Mr. King had to carefully plan and deliberately create an injury pattern that would appear to have been caused by Mrs. King collapsing at the tracks. Mr. King, according to this Court, only had 79 minutes (5:19 a.m. to 6:38 a.m.) to formulate and execute such a plan. Specifically, Mr. King had to plan to carefully avoid inflicting any injuries on Mrs. King's neck, except for a thin, broken red line on one side. Mr. King had to avoid fracturing the hyoid bone or thyroid cartilage, causing any intramuscular bleeding or leaving any bruising on her neck. He had to inflict injuries that were non-specific to strangulation such as hemorrhages to eyes, epiglottal mucosa and the base of her tongue. Despite his rage Mr. King had to very, very softly strangle (with a broken ligature) and/or apply pressure to the tip of Mrs. King's chin, while simultaneously suffocating Mrs. King by pressing only on the right corner of her lower lip. These unconventional techniques produced none of the classic signs of strangulation or a suffocation asphyxial death and more closely resembled a sudden cardiac arrhythmic death. In their alleged struggle Mr. King had to grab Mrs. King's outer arm with his fingers reversed so that it would match the linear pattern of the rail that she was pressed against at the tracks. He had to photoshop photos of Mrs. King's inner left arm on July 4, 2014 to create the appearance of a bruise so that he could grab her inner left arm on July 6, 2014 but claim it was a pre-existing bruise. He also had to inflict an injury on her left hip and then position her just so

at the tracks so that it would appear to have been caused by her position on the ballast rocks. When he used the unconventional strangulation method of pressing his very large thumbs, into the tip of Mrs. King's chin he put debris on his thumbs that matched the debris on the rails at the tracks, causing two tiny, debris-laden dots. He simultaneously tried to smother Mrs. King by only pressing on the corner of her right lip so that this injury pattern would match the thin vertical marks on the rail that her lip was pressed against. Even though Mrs. King's airway was not blocked by these unconventional strangulation techniques; she died within minutes never using the self-defense techniques she acquired in her Army training. Mr. King somehow managed to avoid leaving a single forensic trace that connected him to any part of this alleged crime. However, despite all of his careful planning Mr. King forgot to tie Mrs. King's running shorts, twisted her bra and one sock, forgot her running accessories and her contacts that were needed only for driving. He allegedly performed like a true idiot-savant.

(2) Mr. King had to load Mrs. King's body into his Dodge Durango after changing her clothes into her jogging outfit. The Dodge Durango was sitting in plain sight on his driveway since his garage was packed with furniture. He accomplished this feat in broad daylight with no detection by his closely situated neighbors; (*See* Inv. Rusty Sullivan's Testimony; Mr. King's Testimony and the photographs taken by Pech and Jerdee on July 6, 2014)

(3) Mr. King selected as the place to carry Mrs. King's deceased body the one overgrown path that had no vehicle access by the Johnson Control building **(access point 2)** (the lack of vehicle access was demonstrated by the undisputed fact that no responders were able to get their vehicles through the path by the Johnson Control building);

(4) Mr. King carried Mrs. King's body at least 200 feet[9] *east* of where he deposited her on the tracks in broad daylight, in a full, unobstructed view of anyone on the gravel path alongside the tracks, anyone on the Route 25 overpass and anyone in an oncoming train;

(5) Mr. King opted not to use access point 3 though it was closer to the King residence and he would have passed by it on the way to access point 2, it had vehicle access and was closer in proximity than access point 2 to where Mrs. King's body was discovered;

(6) Mr. King had four minutes to stage the railroad track scene, meaning he had to walk at least 200 feet with a combined weight of 400 pounds, he had to pick the one spot to lay Mrs. King on the rail so that the train would hit her neck and destroy any evidence of manual strangulation and additionally destroy her cell phone. He had to lay Mrs. King's body with her neck over the rail and twist her torso in the opposite direction, pull up her bra and shirt, position her head so that

[9] This is derived from taking the distance between the GDP's location coordinates of where Mrs. King was found and the 6:34 a.m. ping coordinates. The distance between the two points is significantly more than 200 feet—closer to 700 feet. However, factoring in the margin for error of the ping coordinates, if Mr. King were on the outside of the perimeter of the possible location of Mrs. King's phone and closest to Mrs. King's final resting place, he would still be at least 200 feet east at 6:34 a.m. of where she was found at 6:38 a.m.

her lip would be pulled back by the rail, put a rust-like substance on her right thumb as if she had placed her phone between the spikes, push her feet into the ballast rock after dragging them across the rail to get iron oxide and metal on them, scuff her left shoe on the side as if she tripped on the rail and make sure that none of the ballast rocks were displaced (Det. Pech's June 22 Testimony, Pgs. 51-52, *See* **Ex. 21)**, he inadvertently overlooked emesis on the rail that was consistent with a nacho chip Mrs. King had eaten at the Dam Bar; most importantly he failed to detect that Mrs. King was still breathing.

(7) After accomplishing all of the above tasks, the 6'4", 270 pound Mr. King with the bad knee had to disappear like Houdini from the tracks so that he would not be detected by the oncoming Union Pacific commuter train that had a clear, unobstructed view of Mrs. King lying on the tracks from as far away as the Route 25 overpass. (*See* **DX39**-July 6, 2014 Interview Transcripts, Pg. 60, the observations of Detective Pech and Jerdee that King had bad knees)[10]

This scenario which must have been persuasive to this Court, beyond a reasonable doubt, is "arbitrary, fanciful [and] unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera,* 2013 IL 112467 ¶ 37. Mr. King's conviction must be vacated or reversed and a filing of not guilty entered or a new trial granted.

No defensive injuries on Mr. King

10

> DETECTIVE JERDEE: Knee injury? **After observing Mr. King get up**
> MR. KING: Oh, yeah. I had that when I was 15 or so.
> DETECTIVE PECH: Back in the day when they cut you open?
> MR. KING: Yeah. Now it's a little old laser.
> DETECTIVE PECH: Now you get a couple of little pokes and that's it. I just had shoulder surgery. They did the arthroscopic.
> MR. KING: Yeah. My knee has bothered me since. Like I said, the running kind of has helped a little. I mean, I can't run.

(**DX39** - Transcript of July 6, 2014 Interview, Pg. 60).

> DETECTIVE PECH: Anybody in the neighborhood that she would kind of scoop up?
> MR. KING: Not that I know of, no. I think she liked to run, and nobody I know of. Like I say, there's nobody I know in our neighborhood that could run with her.
> DETECTIVE PECH: Right, right.
> MR. KING: I mean, I couldn't keep up with her. If she was running--if she was doing her eight-minute mile I couldn't keep up with her because I can run about a ten minute and that's pushing it for me. I mean, my knees are creaky, but she could run, and she really liked sprinting, and she really kind of got addicted to running.

(**DX39**, Pg. 77).

127. Mr. King had no defensive wounds on his body whatsoever. Officer Perkins testified that when he saw Mr. King "his lips were a bit chapped but that's the extent of my recollection" concerning Mr. King's lips, and he was one of the first officers to see Mr. King (Officer Eric Perkin's June 21, Testimony, Pg. 96 attached as **"Exhibit 76"**). Kurt Kuester, the first person to see Mr. King that morning besides Mr. King's neighbor who saw him in his car before he left for Kurt's, also did not see any injuries on Mr. King. (Kurt Kuester's June 10 Testimony, Pg. 52-53 attached as **"Exhibit 77"**). Mr. King was photographed by Detectives Jerdee and Pech, and there are no injuries on him. The State's attempt to argue that Mr. King had a fat lip is entirely fictitious because that is not visible in the photographs from July 6, 2014, and Mr. King's lip during his second trial 8 years later looks entirely the same as in the photograph from July 6, 2014. The State's attempt to compare a photograph of Mr. King on July 6 with a poor quality photograph from Mr. King's booking (**PX164**) when his facial expression and angle is entirely different was another one of the State's attempts to manufacture evidence against Mr. King. This Court had the ability to see Mr. King's face this whole trial to recognize that Mr. King's lips are visibly asymmetrical.

128. Even the State's expert Dr. Smock, when given the opportunity, failed to describe any information that would have connected Mr. King to the strangulation. Dr. Smock testified the following:

> Q: So you did not -- you are not providing any information connecting the defendant to what you're alleging is a strangulation?
> A: That is correct.

(Dr. Smock's June 7 PM Testimony, Pg. 85 attached as **"Exhibit 78"**). If Mr. King had any injuries to his body consistent with inflicting a strangulation on Mrs. King, Dr. Smock would have described such injuries but did not describe any such injuries because they did not exist.

129. The GPD had the Illinois State crime lab test Mrs. King's fingernails with negative results. Significantly, Mr. King's clothing was tested with negative results. Mrs. King's clothing was tested with negative results. There was zero trace evidence that would indicate any transfer of trace evidence between Mr. and Mrs. King which would have occurred if he had strangled her, transported her to the tracks and carried her to her final resting place.

No eyewitnesses to any crime

130. The GPD interviewed all of Mrs. King's family members.[11] Further, the GPD canvassed the neighborhood numerous times and found that no one had seen Mr. or Mrs. King that morning as they surely would have if he loading Mrs. King's body into his Dodge Durango in his driveway and unloading her body at Esping Park and carrying it to its final resting place and then staging the body to create the impression of an accident.

131. There were no eyewitnesses who saw Mrs. King, Mr. King or Mr. King carrying Mrs. King through Esping Park on July 6, 2014 even though it was broad daylight by 5:30 a.m. and people were in the Esping Park area around 6-6:30 a.m. (*See* Defense Witnesses Raelene Thielk, Terri Rieser, and Randy Rieser Testimonies; Randy Rieser's Testimony admitted by Stipulation, **DX99**). Evidence was introduced that Mrs. King was likely near the Johnson Control Building, access point 2, near the tracks at 6:34 a.m. when her phone pinged east of where she was found at 6:38 a.m. (**DX61b, Ex. 10B**). No Dodge Durango, the King vehicle, was ever seen by any of the witnesses. The only vehicle in the Esping Park lot spotted by any witness during the relevant time period was a red car with tinted windows with a person dressed in a police

[11] The evidence introduced in this trial showed that the Geneva Police Department ("GPD") executed at least 4 searches of Mr. King's home. Mr. Kurt Kuester, Mr. King's father-in-law, broke into the King home in late August of 2014 and grabbed bags containing "items of evidentiary value." (Det. Pech's June 28 Testimony, Pgs. 13-15 attached as **"Exhibit 101"**). This allowed the GPD to circumvent the law because rather than getting a warrant, officers met with Mr. Kuester and seized the items he improperly removed from the home and collected them as evidence. (*Id.*) Regardless, there was nothing of evidentiary value in those items.

uniform standing next to it, whom Engineer Soto reported that he observed about 30 minutes after the METRA train stopped (METRA Train Engineer Robert Soto's June 6 Testimony, Pgs. 89-90 attached as **"Exhibit 79"**). It is undisputed that Mr. King would have had to use his vehicle to transport Mrs. King's body to the railroad tracks, unload the body and carry it to its final resting position.

132. The GPD interviewed everyone Mr. King and Mrs. King interacted with the night of July 5, 2014 into the morning hours of July 6, 2014.

133. No evidence exists of any neighbors complaining about noise or observing anything out of the ordinary in the early morning hours of July 6, 2014. The King residence sits between 2 houses very close to it on both sides.

The State fails to perform the most obvious testing

134. If the State truly believed that Mr. King had strangled Mrs. King by pressing his thumbs into the chin, Dr. Kalekar could have swabbed Mrs. King's neck and chin and obtained DNA from the alleged perpetrator but she chose not to do so rather she focused her analysis on Mrs. King's twisted bra whose clasp was never swabbed for DNA. (*See* Dr. Kalelkar's June 8 AM Testimony, Pg. 56, **Ex. 6)** Additionally the State would have tested, her shoe ties and her clothing for any trace DNA of Mr. King. If the State truly believed Mr. King had been at the railroad tracks they would have tested Mr. King's shoes for the presence of iron oxide. The failure to test these items demonstrates that the State did not act in good faith in prosecuting Mr. King.

No inculpatory statements by Mr. King

135. There is **no confession** in this case. Rather, there were **126 denials** from Mr. King in his **two voluntary interviews** with police on July 6, 2014 and July 8, 2014. The portions of

the videos of his interrogation that the State played for this Court[12] demonstrate Mr. King's innocence—Mr. King was given every opportunity to implicate an alternative suspect (*i.e.* when asked by detectives if anyone wanted to hurt Mrs. King, he flat out told detectives "no") or to provide an alternative explanation for her death such as that she was suicidal (*i.e.*, when asked whether Mrs. King had any health issues, he stated that she did not).

136. This Court erred in denying both of Mr. King's motions for directed verdict. The State failed to prove corpus delicti, failed to prove the elements of the crime of murder, as well as whether Mr. King committed any acts, and failed to prove Mr. King guilty beyond a reasonable doubt.

THE DEFENSE'S CASE CREATED MORE REASONABLE DOUBT

137. There was unrebutted evidence presented by the Defense that Mrs. King was alive at the scene of the railroad tracks even 34 minutes after she was found by the first people to respond, the train personnel. There was evidence presented that Mrs. King had independent activity at the tracks: rust/debris on her right thumb which she would have used to set her phone down; emesis of a food particle on the rail resembling the food she was eating at the Dam Bar the night before; a scuff mark on her left shoe containing iron oxide from the rails; minerals and abrasions on the bottoms of her shoes caused by pressure on uneven surface of ballast rocks; and antemortem injuries consistent with a collapse. An EKG strip reading taken at 7:13 a.m., interpreted by Electrophysiologist Dr. Kanagundram showing resuscitatable heart activity which was unrebutted by the State. Unrebutted and ignored evidence that Mrs. King's phone last pinged at or near her home at 6:23 a.m. and by the tracks next to the Jonson Control Building, east of

[12] The State conveniently did not show the beginning clip of what this Court described as Mr. King "wailing," where Mr. King is overcome with grief after learning of his wife's death. This Court did, however, allow the Defense to play this portion during its cross examination of Detective Pech.

where she was found at 6:34 a.m.—that is, four minutes before she was spotted by the train engineers as they passed the Route 25 overpass.

138. The Defense presented five expert witnesses, four of which were completely unrebutted by the State.

139. Triple-board certified electrophysiologist Dr. Kanagasundram opined that Mrs. King's EKG strip demonstrated pulseless electrical activity at 7:13 a.m. and therefore, she was not deceased. Based on his evaluation of the heart rhythm, he opined that Mrs. King had a cardiac event while at the tracks and died from a sudden cardiac arrhythmic arrest due to binge drinking. The State did not present a cardiologist, much less an electrophysiologist to interpret Mrs. King's EKG strip or her PEA. Therefore, Dr. Kanagasundram's opinions were unrebutted.

140. Dr. Blum, the defense's triple forensic pathologist also opined that Mrs. King died from sudden cardiac arrhythmias due to binge drinking. Dr. Blum's opinion corroborated Dr. Kanagasundram's opinion. Dr. Blum provided this Court with analyses of time of death, injury pattern (consisting of analyzing extensively far more injuries than the State's experts), and place of death. He spent over 200 pro bono hours on this case and has performed 60% more autopsies than Dr. Kalelkar and 100% more autopsies than Dr. Smock, who is not even a forensic pathologist or board certified in any area of medicine. Dr. Blum explained that Dr. Kalelkar's initial "triage" of findings in her autopsy report are not determinative of asphyxia. Petechiae (tiny red dots in eyes and epiglottal larynx) are non-specific and can result from many non-homicidal causes, an undisputed fact[13] in this case from both trials. Further, Dr. Blum explained the position of Mrs. King's head on the rail, blocked blood flow, and that the removal

[13] Even Dr. Smock agreed that petechial hemorrhages can be the result of non-traumatic causes such as vomiting, coughing, childbirth, infection, bleeding and that they do not suffice to make a conclusion that there is a manual strangulation. Dr. Kalelkar also agreed about several other causes of petechial hemorrhaging such as vomiting. (Dr. Smock's June 7 PM Testimony, Pg. 90; Dr. Kalelkar's June 8 AM Testimony, Pg. 61 attached as "**Group Exhibit 84**").

of the tongue, at autopsy, caused two tiny pinpoint tongue hemorrhages. (Dr. Blum's June 30 PM Testimony Pgs. 7-15 attached as **"Exhibit 80"**). Dr. Blum explained that the tongue hemorrhages are not intramuscular and are not located where strangulation injuries occur to the tongue. (Dr. Blum's June 30 PM Testimony Pgs. 8-9, attached as **"Exhibit 81"**). The erythema (thin, broken red line on the neck) that Dr. Kalelkar testified could be an indication of a ligature strangulation (or caused by anything) was caused by the folds in Mrs. King's neck from her position on the rails which matched with the thin broken red line (and two other thin red lines matching the 3 neck folds), as well as the fact that the line could not be a ligature mark because of its form and color and also because it had gaps in it and ended before the middle of Mrs. King's neck. (Dr. Blum's June 30 AM Testimony, Pgs. 40-43 attached as **"Exhibit 82"**). The bruise on Mrs. King's outer arm was consistent with her position on the rail; this was undisputed. Dr. Blum also opined that the bruise on Mrs. King's inner arm was depicted in a July 4 photograph of Mrs. King which was taken 2 days before her death. (Dr. Blum's July 1 Testimony, Pgs. 17-18, attached as **"Exhibit 83"**), There are 2 photos from July 4, 2014 showing Mrs. King's inner arm bruise pre-existed her death.

141. Dr. Blum testified that if a hand was placed over Mrs. King's mouth to suffocate her there would be injuries to her upper and lower lip not just the lower lip on one side as Dr. Smock described. (Dr. Blum's June 30 AM Testimony, Pgs. 49-50, **Ex. 59A**). Dr. Blum aligned the lip injury with the wear pattern on the rail and the position of Mrs. King's lip folded back on the rail. Dr. Blum testified there were small vertical lines on the inside of the lower lip starting from the right corner of the mouth and stopping at the center that were consistent with Mrs. King's lip making contact with the rail, which had similar vertical lines. (Dr. Blum's June 30 AM Testimony, Pgs. 45-50; **DX63cc;** attached as **"Group Exhibit 59"**)

142. Yaniv Schiff, the Defense's forensic data expert performed an extraction on Mrs. King's phone and discovered two new cell phone location pings The 6:23 a.m. ping placed the phone in the vicinity of the King home; the 6:34 a.m. ping placed her phone near the brush path by the Johnson Control building by the tracks at least 200 feet from her final resting place. The fact that the train personnel first spotted Mrs. King at 6:38 a.m. and saw no one else in the area indicates that Mrs. King was alone when she reached her final resting position and reached that spot of her own volition, within 4 minutes. This rules out any opportunity for Mr. King to carry her at least 200 feet and place her on the tracks in a contorted position and somehow vanish into thin air. Any activity on the railroad tracks was also visible from the Route 25 overpass and makes it even less likely that a murderer would have selected this location over a secluded one.

143. The only reasonable inference from the above stated evidence is that Mrs. King had a medical emergency while she was walking towards the Johnson Control Building. She walked through access point 2 to the path next to the train tracks. As her medical condition worsened she likely crossed over to the south side of the tracks, where there was no train coming and tried to signal the eastbound train which would have been clearly visible as it moved towards her. Her decision proved to be correct that signaling the train would generate a much quicker response than calling 911 on her cell phone since the first EMS responders did not reach her until 7:07 a.m. and the train spotted her at 6:38 a.m. and reached her on foot by 6:48 a.m.

144. Dr. Gussow extrapolated that Mrs. King had 5 drinks in her system at her autopsy because of her BAC level of 0.15 on July 7, 2014. He extrapolated that during the night into the morning hours of July 6, 2014, Mrs. King had about 14 alcoholic drinks in total. Her peak alcohol level would have been above 0.2 and she would have been severely intoxicated. Dr. Gussow testified that the reported episode of Mrs. King getting very sick after drinking 5 drinks on June 22, 2014 could indicate that Mrs. King's consumption of alcohol on July 5 to July 6

would make her similarly ill or even more impaired. (Dr. Gussow's June 29 Testimony, Pgs. 48-51, **Ex. 26-29**).

145. The defense trace expert, Mr. Skip Palenik, testified that the bottom of Mrs. King's shoes contained iron oxide and steel particles from the rails, not the ballast rocks. Mr. Palenik also discovered abrasions on the bottoms of her shoes which indicated she had walked on an uneven surface like the ballast rocks. Additionally, Mr. Palinek testified that there was a scuff mark on Mrs. King's left shoe that he tested for trace materials. He discovered the scuff mark contained iron oxide from the rail, not the ballast rocks. Therefore, the opinions of Mr. Palenik demonstrate that Mrs. King walked along the rail on the ballast rocks and that she scuffed one of her shoes against the rail as she was walking. (Mr. Palenik's June 28 Testimony Pgs. 85-93 attached as **"Exhibit 85"**). Mr. Palenik's opinions were unrebutted since the State did not have a trace expert. Contrary to the State's argument that the scuff mark on Mrs. King's shoe contained iron oxide that came from the shoes resting on the ballast rocks, Mr. Palenik's testing demonstrated that iron oxide came exclusively from the rail and not the ballast rock. Therefore, the reasonable inference is that the scuff mark came from Mrs. King walking along the rail and tripping on the edge of the rail. None of the State's photos show Mrs. King's shoes touching the rail in her final resting position.

146. Mr. Palenik testified that the steel particles, found on the bottom of Mrs. King's shoes, were formed when the steel in the rail was pressed flat by the train and flecked off when those steel particles came in contact with Mrs. King's shoes. Mr. Palinek testified:

Q: So when you say it's been reduced into the confirmation that we are seeing here, Are you saying that it's been pressed, that it's had pressure applied to it?
A: Yes, that's really the only explanation for this morphology of a steel particle.
Q: So it's a steel particle that's had pressure applied to it, correct?
A: Yes.

(Mr. Palenik's Testimony, Pg. 86, **Ex. 85**).

Q: Let's go to 62R.
A: This represents another one of the black opaque particles that I showed you that are in fact—have metallic luster. You'll see, again, this is a different morphology. You've got all these little smaller things that are pressed into it. But, again, the overriding morphology—and the part, frankly, that's most interesting—is that this also was produced by high pressure. Something took this iron particle and just pressed it tight—I mean, it pressed it down. It's really an iron particle. It's not rust like we saw before. Why? It's because there's no oxygen over here. That's where the oxygen would be in the X-ray spectrum. (Pgs. 86-87).
[. . .]
Q: And is that because we are seeing pressure on these particles—pressure points?
A: Yes, intense pressure to cause these.

(Mr. Palenik's Testimony, Pg. 89-90, **Ex. 85**).

147. Additionally, Mr. Palenik described the steel particles found on the bottom of Mrs. King's shoes in the abrasions indicating she had last walked on an uneven surface such as the ballast rocks and also her shoes had come in contact with the steel particles from the rails that he observed were embedded in abraded material of her shoes. Mr. Palinek testified as follows:

Q: And these metal—what would you call them—metal particles were found in the bottom of Mrs. King's shoes, correct?
A: Yes, they were found in the material on that outer surface that I showed you where the rubber had been abraded.

(Mr. Palenik's Testimony, Pg. 89-90, **Ex. 85**).

148. According to the Second District, in Mr. King's first trial, Mr. Safarik's inadmissible testimony "broke the tie" by presenting a second opinion to corroborate Dr. Kalelkar's. *People v. King*, 2018 IL App (2d) 151112, ¶ 79. In Mr. King's second trial, the State failed to present a second opinion to corroborate Dr. Kalelkar's opinion. The State's two experts presented two different opinions on Mrs. King's cause of death: Dr. Kalelkar opined strangulation due to compression of the neck and chest, and Dr. Smock opined suffocation and strangulation. Here, no State expert broke the tie.

149. Moreover, in Mr. King's retrial, **two** defense experts (Dr. Kanagasundram and Dr. Blum) opined that Mrs. King's cause of death was a sudden cardiac arrhythmic death due to

binge drinking. The three other defense experts' opinions and evidence all corroborated this finding based on the timing of cell phone pings (Yaniv Schiff); Mrs. King's severe intoxication level after consuming 14 drinks in a seven hour period (Dr. Gussow's June 29 Testimony, Pgs. 36, 51 attached as **"Group Exhibit 86"**); and trace evidence showing Mrs. King walked to the tracks (Skip Palenik). Dr. Blum ruled out asphyxia (which is not even a cause of death) but needs to be proved before there is a strangulation finding.

This Court's Omissions/Failure to Consider Evidence in its Opinion

150. The Defense presented five experts, not four as stated in this Court's opinion; Thus, this Court did not consider the testimony of Yaniv Schiff, who was admitted as an expert for the Defense in Digital Forensic Analysis.

151. This Court failed to acknowledge that Mrs. King was "severely intoxicated" because her BAC was significantly higher than the 0.15 BAC at autopsy. It is undisputed that Mrs. King had 14 drinks during the evening hours of July 5, 2014 into the morning hours of July 6, 2014 which more than qualifies her as binge drinking. The State had no toxicologist to rebut the opinion of Dr. Leon Gussow. Rather than hiring a toxicologist, the State in its closing, delivered by ASA Sams, chose to testify as to his own anecdotal understanding of binge drinking. Specifically, ASA Sams, "Judge, she just in her argument said that Gussow said 0.15 is severe intoxication. . . But 0.15 is not severe intoxication. It is not severe intoxication for getting dressed. It is just intoxicated. That's all it is. That's all that expert added to this case; that it was .15, which we already knew. And his opinion that .15 is severe, Judge, is just plain flat out wrong." (Closing Argument Transcript, July 11, 2022, Pgs. 144-45 attached as **"Exhibit 109"**). ASA Sams completely misconstrues the undisputed testimony of Dr. Gussow that his extrapolation resulted in a calculation of Mrs. King consuming 14 alcoholic drinks over the course of seven hours. (Dr. Gussow's Testimony, Pgs. 36, 51, **Group Ex. 86**). ASA Sams

completely misconstrued that 14 alcoholic drinks is not binge drinking. Unfortunately, this Court failed to recognize that Dr. Gussow performed an extrapolation from the 0.15 BAC level at autopsy. It is the consumption of the 14 drinks that resulted in Mrs. King's untimely death.

152. ASA Sams completely misconstrued Dr. Kanagasundram's opinion when he stated in his closing argument, "Now, Dr. K also opined that binge drinking for a female is two to three drinks. I'm not going to say anything more about that, Judge, because that in the State's opinion is a self-impeaching statement, that a woman who drinks two to three drinks is binge drinking." (Closing Argument Transcript, July 11, 2022, Pgs. 147 attached as **"Exhibit 110"**). ASA Sams flatly misstated Dr. Kanagasundram's testimony regarding binge drinking. Dr. Kanagasundram testified the following: "Binge drinking in my context is a lot more of a narrow definition. We don't--when I think about binge drinking, I'm thinking about my patient population that does not drink very often. And really, like I said, if a woman has, you know, three to four drinks in the background of not drinking regularly [. . .], we see this predisposition towards a bad outcome from arrhythmia." (Dr. Kanagasundram's June 29 AM Testimony, Pg. 33 attached as **"Exhibit 27"**).

153. This Court failed to consider Mrs. King's intoxication level as contributing to her clothing disarray. Dr. Gussow, Dr Kalelkar and Officer Hann testified that any clothing disarray could have been as a result of Mrs. King's intoxication. (*see* Dr. Gussow's June 29 Testimony, Pgs. 52-53, **Ex. 29**; Dr. Kalelkar's June 8 AM Testimony, Pgs. 82-83, **Ex. 47**)

154. This Court considered the fact that Mrs. King was not wearing contact lenses as evidence of staging. However, the State failed to prove the level of Mrs. King's visual impairment and most importantly whether she would have needed to wear corrective lenses to walk or run. Mr. King's testimony is undisputed that Mrs. King did not wear any corrective lenses to her job. (Mr. King's June 27 Testimony, Pg. 94 attached as **"Exhibit 87"**). The State's

failure to present the precise prescription for Mrs. King's contact lenses undermines their theory that staging was demonstrated by the fact that she was not wearing corrective lenses on the day of her death. This theory is wholly speculative without evidence of the precise prescription for her contact lenses, which would have provided the Defense with an opportunity to rebut the State's theory through expert testimony by an opthamologist. All the State presented was a photo of a contact lens box with no discernible prescription, Mrs. King's driver's license which shows a "B" for restriction for corrective lenses and the testimony of Mrs. King's sister, Kristine, who had not lived with Mrs. King for more than 10 years. It is just as plausible that Mrs. King was not wearing her contact lenses because she was severely intoxicated. The State's opinion is nothing more than speculation, and this Court has abused its discretion in relying on that opinion.

155. This Court ignored the fact that **Mrs. King's chin lesions were 7.5 mm and 15 mm, both smaller than a dime (about 19 mm); the grime/foreign substance on the chin lesions matched the rail; and the sawtooth pattern on the chin lesions also matched the rail, which refutes the State's theory that they were evidence of strangulation.** Dr. Kalelkar's Report of the PostMortem Exam from Autopsy states that "over the left side of the face over the mandible there is a 0.6 inch contusion" and that "at the submental region, in the midline there is a 0.3 inch contusion." (Pg. 2 of **DX18d** attached as **"Exhibit 88"**). Dr. Blum testified that the two chin lesions/contusions were 7.5 millimeters and 15 millimeters (Dr. Blum's June 30 AM Testimony, Pg. 36 attached as **"Exhibit 89"**), which is the measurement from Dr. Kalelkar's autopsy report converted into millimeters. To put the size of lesions into perspective, a dime is 19.05 millimeters in diameter. Thus, one chin injury/lesion was less than half the size of a dime and the other in the midline was 4 millimeters less than a dime. <u>These measurements do not correlate with the size of an adult male thumb.</u> This Court erroneously prevented Dr. Blum from testifying about the thumb measurements he personally took of Mr. King. However a simple

review of the photos taken of Mr. King after his interrogation show the size of his thumbs are far larger than the small chin lesions on Mrs. King. (**DX64c, DX63d** attached as **"Group Exhibit 111"**). In Dr. Blum's testimony, photos were introduced into evidence depicting foreign substance from the rail in the chin lesions, prior to being washed off during the autopsy, as well as a pattern on the lesions that resembled the sawtooth pattern from the rail. This evidence leaves little doubt that the chin lesions resulted from Mrs. King's contact with the rail. This Court abused its discretion by ignoring this evidence. (*See* **DX63f; 63g; 63w; 63x** attached as **"Group Exhibit 90"**). This Court's opinion is further undermined by this Court's obvious misunderstanding of basic anatomy in concluding, "There are two clear injuries on the Deceased's neck under the chin and are situated exactly where thumbs would be placed to put pressure on the windpipe." (*See* ¶ 57). No matter how confused or mistaken this Court is about anatomy, pressing on the tip of the chin will never obstruct the windpipe (trachea). *See People v. Williams*, 2013 IL App (1st) 111116, ¶¶ 102-104. This Court, in its opinion, stated that the two chin injuries are caused by the thumbs, however this opinion is "arbitrary, fanciful [and] unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera,* 2013 IL 112467 ¶ 37.

The State's Errors

156. The State caused the following errors at trial:

a. The State claimed that Mr. King and Mrs. King had some sort of altercation as evidenced by a wood shard found under the Kings' bathroom scale as depicted in a photo taken by police on July 8, 2014. However, there is a photo showing that the damage to the bathroom door was there on July 4, 2014 and suspiciously, when GDP officers Pech and Jerdee took photos of the bathroom floor next to the scale on July 6, 2014; **there was no wood shard there**. It was improper for the State to use the wood shard in the photograph from July 8, 2014 as evidence, knowing there is a photograph showing that the wood shard was not there on July 6, 2014 during Detectives Pech and Jerdee's walk through after Mr. King voluntarily allowed them inside his house and allowed them to photograph the inside and outside of the home. Additionally, the State had knowledge of a photograph taken of Mrs. King on July 4, 2014 that showed pre-existing damage to the

bathroom door frame and a wood shard was missing from the frame. State's witness Investigator Rusty Sullivan testified as follows:

> Q: Well, let me ask you this, if the damage [to the] bathroom door occurred prior to July 6th, 2014, would you agree with me that it has no evidentiary value whatsoever in this case?
>
> A: If that was what occurred, it would not have relationship to the case, sir. (Inv. Rusty Sullivan's June 10 Testimony, Pg. 125 attached as **"Exhibit 94"**).

b. Further, the State mislead this Court about the level of Mr. King's computer sophistication. Officer Sarah Sullivan testified that Mr. King had used an asterisk in a search of Billy Keogh's name in order to persuade this Court that Mr. King was a sophisticated computer user and was actively searching for information about Billy Keogh. In fact, Mr. King had not used an asterisk, he used a quotation mark which is useless and indicates an unsophisticated computer user. In Officer Sullivan's exhibit, **PX522G**, there are quotation marks, not asterisks. In both trials, the State has mischaracterized the quotation marks as "asterisks" and elicited from testimony from Officer Sullivan that the use of an asterisk demonstrates a sophisticated computer user. When Defense Counsel tried to impeach Officer Sullivan on the issue of quotation marks rather than an asterisk Officer Sullivan claimed that she could not remember what symbol was contained in the exhibit that she had just testified on direct had an asterisk.

c. The State presented evidence that was meant to mislead this Court into believing that Mr. King had typed "Billy Keogh" into his phone so frequently that it had created a username "Keogh" in Mr. King's user dictionary on his phone. On cross examination, Officer Sullivan admitted that in her examination of Mr. King's cell phone that the word "Keogh" never appeared and that the word "Keogh" came up in Mr. King's cell phone user dictionary without any evidence that he had repeatedly typed in the name "Keogh." there was nowhere in Mr. King's cell phone report that the word "Keogh" came up aside from in his user dictionary. (Sarah Sullivan's June 23 Testimony, Pgs. 52-53 attached as **"Exhibit 95"**).

d. ASA Sams improperly attempted to cross-examine Defense expert witnesses on confidential conversations from a meeting between Defense Counsel and State's Attorney Jamie Mosser about potentially dismissing the charges against Mr. King. (Dr. Kanagasundram's June 29 AM Testimony, Pg. 79; Dr. Blum's June 30 PM Testimony, Pg. 84 attached as **"Group Exhibit 96"**).

e. The prosecutors further erred in calling Brandon King, Mr. King's son, to testify as a witness for the State. The State was aware that Brandon would testify that he could not remember most of his prior testimony from the first trial. When Brandon testified he could not remember his prior court testimony the prosecutors tried to impeach him without confronting him with any prior inconsistent statements, nor properly trying to refresh his recollection. (*See* Defendant's Motion to Bar Brandon King's Prior Trial Testimony and Interview Statements as Substantive Evidence in the Instant Case attached as **"Exhibit 97"**). The Defense stands on the arguments raised in its motion.

f. Further, the State erred when ASA Sams, in his closing stated that the Defense should have tested Mr. King's shoes if it wanted to prove he was innocent. This was improper and misleading since the State never tested them. The prosecution is generally not permitted to comment on a defendant's failure to produce evidence. *People v. Williams*, 2022 IL 126918, ¶ 45. This is an attempt by the State to shift the burden to the Defendant to prove his innocence beyond a reasonable doubt.

g. After Defense Counsel had already objected to the "mountain of evidence" (literally, a huge pile of evidence packages) the State introduced concerning irrelevant evidence not connected to Mr. King, the State continued to present meaningless evidence such as swabs taken from Mrs. King's clothing resulting in nothing of evidentiary significance and unconnected to Mr. King. When Defense Counsel objected, the State responded, "I think this is—I don't want to sound—it's relevant and maybe it is nonrelevant, Judge." (Det. Hann's June 21 Testimony, Pg. 15 attached as **"Exhibit 100"**). This Court, despite ASA Sams' admission that the evidence was not relevant, admitted the sexual assault kit, all of the loose hairs on Mrs. King, the bleach bottle and multiple leaves, all of which were never connected to Mr. King. The State's strategy seemed to be to use these fillers to pad an otherwise wholly meritless case.
h. The State presented for the first time in its closing argument the theory that Mr. King had "staged" the homicide. However, the State objected everytime the Defense asked about staging in order to refute that theory, and the Court sustained the objections. *(See i.e.* Dr. Blum's June 30 PM Testimony, Pgs. 120-21).

The State's Misleading Strategy Regarding "Staging"

157. Defense Counsel brought forth a motion *in limine* to bar the State from eliciting "criminal profiling" and "crime scene analysis" testimony and/or presenting evidence relating to a "staging" theory during the trial on July 12, 2021. On August 25, 2021, this Court heard arguments on the motion and ruled the following:

> I think the Supreme Court spoke to this very clearly, in my mind, and I read the opinion more than once. To me, if I learned anything from that opinion, it's that you can't talk about things of which you're not qualified to render opinions on. And I think that's what the gist of this motion is because I think there was a lot of that in the trial, and obviously, I think that's probably what caused—majorly caused the reversal. I don't know. That's not for me determine. My evidentiary position on this is that you can't draw opinions unless you're qualified by some manner to draw a lay opinion and there are certain things lay people can draw opinion on that anybody can, which is all in any kind of textbook you'll find. You'll find many, many examples of that. The fact that someone can just describe a fact is fine. Anybody that's an occurrence witness can describe a fact. Drawing a conclusion from that fact may be a problem, depending on what kind of background they have in order to draw that conclusion. [. . .] The Supreme Court was very, very clear on what was in and out here. I'm going to be listening for that kind of testimony, and I will be vigilant on not letting that into the record if I feel that it's an improper conclusion or—it's loaded testimony. Laid perfect on the track; that's loaded testimony to me, which we're assuming facts that clearly are not in evidence. So in the end, I don't disagree with, really, anything that's argued here at all. I agree that those aspects are clear, and I'll be listening closely to it. **Any kind of opinion not based on experience, training, or education is not going to be allowed. Any recitation of facts observed will be allowed.**

(August 25, 2021 Hearing Transcript, Pgs. 44-47 attached as **"Exhibit 62"**).

158. Defense Counsel believed that any evidence of staging would have been clearly identified by the witnesses for the State pursuant to the Court's ruling that no unqualified witnesses would be allowed to comment on staging. ASA Sams, rather than presenting direct testimony about staging, waited until his closing argument to claim that "[the] Supreme Court did not say no one who was unqualified could say this was staged. What the Supreme Court said was that the evidence in this case was so clear that an expert was not needed by the trier of fact to come to the conclusion that the crime scene was staged." (Closing Argument Transcript, July 11, Pg. 4 attached as **"Exhibit 112"**). ASA Sams testified in his closing about staging without having presented any qualified witnesses pursuant to this Court's order on the Defense's motion *in limine*. This was totally misleading to Defense Counsel, who assumed that the State had abandoned presenting staging evidence because of this Court's ruling, which never mentioned the provision of the Supreme Court's ruling that ASA Sams relied upon in his closing argument. Additionally, ASA Sams blatantly misrepresented what the Supreme Court found. The Supreme Court did not find that all of the "staging" evidence "was so clear that an expert was not needed." The Supreme Court found that certain evidence did not require expert testimony because it was the type of evidence "that ordinary jurors easily could draw [conclusions] for themselves." *People v. King*, 2020 IL 123926, ¶ 38. Specifically, the Court identified that evidence as follows:

> that an experienced runner would not have dressed in the garments Kathleen was wearing when she died; that Kathleen would not have left her contacts, earbuds, and armband at home when she went running; that Kathleen would not have been running on the railroad tracks when her habit was to run in the park; that Kathleen would not have put on a sock with the heel twisted to the top of her foot; that Kathleen's iPhone had been placed on the railroad tracks by someone other than Kathleen; and that Kathleen likely died somewhere else and was later moved to the tracks.

Id.

159. The State violated Mr. King's due process rights by misleading Defense Counsel about its intentions to rely upon staging evidence at the second trial. Mr. King was deprived of

his constitutionally guaranteed right to present a complete defense to the charges against him. *See Holmes v. South Carolina,* 547 U.S. 319, 324 (2006); *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973). The Defense would have called witnesses to rebut any staging evidence presented by the State, but the Defense relied upon this Court's ruling that there would be no staging evidence unless it was presented by qualified witnesses. The disingenuity of the State's efforts to mislead Mr. King and deprive him of due process rights is clearly illustrated by the fact that the State's staging evidence was not presented until its closing argument.

160. The State actively tried to block any evidence of staging at the second trial. For example, during Dr. Blum's testimony, ASA Sams objected to Defense Counsel asking Dr. Blum if he had an opinion on whether Mrs. King was killed at her home at 6:15 to 6:25 a.m. ASA Sams objected, "This gets into the pretrial issues on staging and moving the body." (Dr. Blum's July 1 Testimony, Pg. 38 attached as **"Exhibit 113").** When Defense Counsel asked Dr. Blum if he had the experience in his long career with bodies being moved to a different site, the State objected and argued, "I think we may be getting close to the point in time where the defense is getting ready to go into—is asking somebody an opinion about staging as opposed to just presenting evidence about that." (Dr. Blum's June 30 PM Testimony, Pgs. 120-21 attached as **"Exhibit 114").**

161. Defense Counsel assumed when this Court barred testimony of Dr. Blum on staging, that this Court was adhering to its previous ruling on the motion *in limine*, that no staging evidence would be permitted because the State had not raised staging at any point in the second trial.

162. Unfortunately, this Court relied upon the State's closing argument regarding staging to connect Mr. King to the alleged murder of Mrs. King, and this Court barred testimony from the Defense which would have demonstrated there was no staging.

Judicial Bias

163. The right of a defendant to an unbiased, open-minded trier of fact is so fundamental to our system of jurisprudence that it should not require either citation or explanation. It is rooted in the constitutional guarantee of due process of law, and entitles a defendant to a fair and impartial trial before a court which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. These standards of impartiality apply to both judges and juries; one does not waive his right to an impartial trial by waiving his right to a jury. If this most basic and fundamental right is not afforded a defendant during trial, that defendant has been denied due process of law and is entitled to a new trial. *People v. Kennedy*, 191 Ill. App. 3d 86, 87 (1989).

164. In *People v. Kennedy*, 191 Ill. App. 3d 86 (1989), the defendant's conviction was reversed and remanded because the defendant was not judged by an impartial, open-minded trier of fact. The record did not support the judge's belief that the defense witnesses were "thieves, drug addicts, fornicators and welfare recipients." The judge either guessed these things from the witnesses' clothing or relied on information outside the record; in either case, he was unwilling to believe the defense witnesses because of their living arrangements and employment status.

165. Likewise, the record does not support this Court's findings and this Court improperly reviewed the transcripts of the first trial without obtaining the consent of both parties. *See Anderson v. Kohler,* 376 Ill. App. 3d 714 (2nd Dist. 2007). This Court inaccurately cited, misconstrued or flatly ignored the testimony of the Defense experts in order to discredit their testimony.

166. This Court demonstrated judicial bias in the following instances:

a. This Court ignored the fact that the State's "evidence" includes a **planted piece of wood shard** from pre-existing bathroom door damage[14] being portrayed disingenuously as a wood shard found under the Kings' bathroom scale from bathroom door damage allegedly caused that morning during an alleged altercation. (*See* **DX24a**-Photograph taken by Det. Jerdee and Pech on July 6 of bathroom scale with no wood shard; Det. Pech's June 22 Testimony, Pgs. 93-94 attached as **"Exhibit 92"**).
b. This Court ignored several transparent efforts by the State to mislead it as the factfinder. The State omitted the first 1 minute and 34 seconds of the interview videotape of Mr. King on July 6, 2014 which shows Mr. King sobbing and clearly distraught after being informed of his wife's death (**DX37**). The State's intent was clear. It wanted to portray Mr. King as indifferent and emotionless about the death of his wife.
c. Similarly, the State presented Officer Garza, who blatantly changed her testimony about calling an ambulance for Mr. King because Mr. King appeared in need of medical attention after learning of the death of his wife. (Officer Angela Garza's June 21 Testimony, Pgs. 78-80 attached as **"Exhibit 91"**).
d. When the deputy coroner Lisa Gilbert (Krieghbaum) changed her testimony to say that after meeting with with the State's Attorney, she suddenly realized, contrary to her report, that Mrs. King had some lividity at the scene at 8:30 am, this Court ignored this evidence of Gilbert-Krieghbaum's clear bias and the State's involvement in transforming her evidence.
e. When engineer Soto admitted discussing his testimony in the hallway with the State's next two witnesses, Mongelli and Cavender, and Defense Counsel asked that his testimony be stricken this Court conducted its own examination of Soto and confirmed that he had indeed discussed his testimony with the next two witnesses but failed to strike the witnesses' testimony or to rule on the matter at all.
f. When Defense Counsel's office manager, Scott Panek, was summoned for questioning by this Court about shaking his head during a prosecution witness' testimony, and Mr. Panek informed this Court that he was reacting to observing ASA Stajadhor signaling a prosecution witness who was on the stand testifying, by shaking his head, this Court dropped the matter with no further inquiry.
g. When the State accused the Defense of a discovery violation and the Defense filed a motion regarding the allegation and pointed out that the document at issue had been disclosed in a confidential pre-trial meeting between the Defense and

[14] There is a photograph showing the pre-existing bathroom door damage. During Mr. King's photoshoot of Mrs. King on July 4, 2014, he took a picture of her wearing the jeans she had fit into for the first time after losing weight, while she was standing in the bathroom. It is clear that above the hinge to the bathroom door is a missing piece of wood in the photo. Further, corroborating this, Mr. King testified that his children caused this bathroom door damage. Mr. King's testimony is corroborated by his son Brandon's testimony in the first trial and statements made to Child Advocate Pamela Ely that the bathroom door damage was caused by his brothers. The lengths the State went to portray the door damage and wood shard as evidence of an altercation is seriously troubling.

State's Attorney Mosser this Court dropped the matter and never ruled on the Defense motion. (See June 10 Excerpt, Pgs. 7-10).

h. This Court created its own theories of Mr. King's motive in reaching its verdict. The Court's theory was never argued or presented by the State. The Court acted as an advocate for the State in supplying a new motive to justify the conviction of Mr. King. The State never mentioned that Mr. King killed his wife because she did not want a divorce.

i. This Court denied the media's numerous requests to film Mr. King's trial; the State objected but Mr. King did not object. Mr. King was the one on trial. This Court still banned the media even though there was sufficient time to obtain the necessary consents. Additionally, this Court asked the parties if it was acceptable to them for the public to watch the trial via ZOOM. Mr. King had no objection. However, the State objected and this Court closed the trial from being accessed publicly via ZOOM. (June 6 AM Transcript, Pgs. 4-5 attached as **"Exhibit 93"**).

j. It was error for this Court to allow Kristine Kuester to testify about Mrs. King's contact-wearing habits. When Mrs. King was 15, she got glasses and contacts. She lived with Kristine at that age. When Mrs. King was 17 years old, she stopped living with Kristine. Mrs. King was 32 years old at the time of her death. The Defense objected to questioning Mrs. Kuester about Mrs. King's habits, but this Court overruled and allowed Kristine to testify that Mrs. King always put in contacts in the morning, even though she had only lived with Kristine for 2 years over a decade prior to Mrs. King's passing. This was improper because there was no foundation for this testimony and it merely served to prejudice Mr. King. Kristine did not even know Mrs. King's contact prescription, and she changed her testimony various times on how much she would have a sleep over at the King home. (Kristine Kuester's June 9 PM Testimony, Pgs. 40-51 attached as **"Exhibit 99"**).

k. This Court admitted into evidence packages of leaves, a bleach bottle, strands of Mrs. King's hair and a sexual assault kit, all of which were irrelevant, but indicates this Court was biased in the State's favor.

l. This Court prevented the Defense from refuting the staging theory by sustaining State objections to the Defense asking questions to refute staging but then made "staging" the key element in connecting Mr. King to the alleged crime. (Dr. Blum's June 30 PM Testimony, Pgs. 120-21).

THIS COURT ERRED IN ITS RULING ON THE FOLLOWING OBJECTIONS:

Sgt. Carbray:

- When Defense Counsel asked if Carbray would defer to Deputy Coroner Lisa Gilbert's judgment that there was no lividity when she arrived to the scene, this Court sustained the State's objection. (Carbray's June 6 Testimony, Pg. 5)
- When Defense Counsel asked him if he would defer to a forensic pathologist about whether what is shown in the photographs is lividity, this Court sustained the State's objection. (Pg. 6).
- When Defense Counsel asked if it would have been important for him to know if the train conductor had reported to dispatch twice he thought Mrs. King was breathing, this Court sustained the State's objection. (Pg. 6).

- When Defense Counsel asked if someone could fall walking on the rocks, this Court sustained the State's objection. (Pg. 9).
- When Defense Counsel asked him if he was aware that the paramedics detected pulseless electrical activity in Mrs. King, this Court sustained the State's objection. (Pg. 12).

Train Engineer Soto:

- When Defense Counsel tried to ask Soto if he had never noticed the road leading directly to the tracks prior to the train passing under the Route 25 overpass, this Court sustained the State's objection.
- When Defense Counsel tried to impeach Soto on his testimony that Mrs. King's eyes were open when he saw her from his train moving by her and showed a picture of Mrs. King with her eyes closed at the scene from the same direction he would have observed her and asked if he would no longer be able to say her eyes looked blanked, this Court sustained the State's objection. (Soto's June 6 Testimony, Pg. 24).
- When Defense Counsel asked Soto if Mongelli dispatched to him that Mrs. King was still breathing, this Court sustained the State's hearsay objection. (Pg. 32-33).
- When Defense Counsel asked if after Mongelli relayed his observations to him, he relayed to dispatch that conductor let me know she is still breathing, this Court sustained the State's hearsay objection. (Pg. 33).
- When Defense Counsel asked Soto if Mongelli communicated his belief that Mrs. King was still still breathing more than one time to him, this Court sustained the State's objection. (Pg. 33).

Brakeman Cavendar:

- When Defense Counsel asked him if it looked like the woman possibly stumbled and hit her head, this Court sustained the State's objection. (Cavendar's June 6 Testimony, Pg. 58).
- When Defense Counsel asked him if he heard Mongelli communicate that she was breathing twice, this Court sustained the State's hearsay objection. (Pg. 59).
- When Defense Counsel asked him if he did not know that Mrs. King was dead, this Court sustained the State's objection. (Pg. 60).

Paramedic Grandgeorge:

- When Defense Counsel asked him if he had any opinion as to how long Mrs. King's alleged rigor (from his report re: "obvious death" reason) had taken to develop, this Court sustained the State's objection on the basis of his qualification to give that opinion. (Grandgeorge's June 6 Testimony, Pg. 104).
- When the State asked him if his training involved "a phenomenon called or a process called lividity" and asked about his training on lividity, this Court overruled Defense Counsel's hearsay objections. (Pg. 60).
- When the State asked, "And as far as this Fox Valley EMS Policy book, policy manual, let's say hypothetically a paramedic did not follow that policy in a particular way, in a small way, would that mean in anyway that Kathleen King wasn't dead when you were there at 7:14 a.m.?, Defense Counsel objected and this Court overruled it. (June 7AM Testimony, Pg. 60).

Lt. Michael Antenore:

- When Defense Counsel asked him if he had later assisted officers in opening the gate by Sandholm Court, this Court sustained the State's objection. (Antenore's June 7 AM Testimony, Pg. 39).
- When Defense Counsel asked if Mrs. King was considered a patient, the State's objection was sustained. (Antenore's June 7 AM Testimony, Pg. 50-51).
- When Defense Counsel asked if Mrs. King's neck was twisted possibly blocking her airway, this Court sustained the State's objection. (Pg. 53).
- When Defense Counsel asked if he would defer to a well-trained forensic pathologist about cyanosis, this Court sustained the State's objection. (Pg. 56).
- When Defense Counsel tried to ask questions about his obligations as an EMT/Lt. and whether his determination of "obviously dead" was in line with the protocol he followed, this Court sustained the State's objections. (Pg. 63).
- When Defense Counsel asked him if it would surprise him that none of the life saving equipment he claimed to have carried to the scene was actually there at the scene, this Court sustained the State's objection. (Pg. 64).
- When Defense Counsel asked him if a heart rate monitor is used to directly save someone's life, this Court sustained the State's objection. (Pg. 65).

Dr. Smock

- When Defense Counsel asked Smock what his understanding was of what an electrophysiologist does/is trained to do, this Court sustained the State's objection. (Dr. Smock June 7 AM Testimony, Pg. 103).
- When Defense Counsel objected to Smock being admitted as an expert in the various nuanced areas the State proposed, this Court overruled its objections. (Pgs. 117-18).

Officer Clint Montgomery

- When Defense Counsel objected to him testifying that grayish color was a sign of lividity on basis of speculation/outside his expertise, this Court overruled. (Montgomery's Testimony, June 7 PM Testimony, Pg. 121).

Dr. Mitra Kalelkar

- When the State asked Dr. Kalelkar if lividity starts to be visible in an hour and there was a photo taken at 7:32 a.m., if it was possible Mrs. King was still alive at 7:13 a.m., Defense Counsel objected on the basis of pure speculation and this Court overruled the objection.

Deputy Coroner Lisa Krieghbaum

- When Defense Counsel asked if there was no cause of death of asphyxia reported until August 13th, this Court sustained the State's outside of scope objection. (Krieghbaum's June 8 AM Testimony, Pgs. 169-70).
- When Defense Counsel asked if Det. Sarah Sullivan faxed a press release to Krieghbaum on July 11th, 2014 with an article saying "Shadwick King asphyxiated Kathleen King at their home killing her," this Court sustained the State's objection. (Pgs. 170-171).

Brandon King

- When the State asked Brandon if he remembered if his mom took anything with her to run and Defense Counsel counsel objected to relevance, this Court overruled it. (Brandon's June 9 Testimony, Pgs. 133-34).
- When Defense Counsel objected to the manner the State tried to admit evidence in Brandon's testimony where Brandon stated that he did not remember in response to most of the questions he was asked, this Court allowed the State to admit Brandon's prior testimony as to certain questions over Defense Counsel's objection. (June 21st Transcript, Pg. 170).

Officer Matthew Hann

- When Defense Counsel asked him if the tread marks were "just another piece of evidence that didn't match Shad," this Court sustained the State's objection. (Hann's June 9 Testimony, Pg. 10).
- When Defense Counsel asked if Hann took 91 photographs of Shad and Kate's shoes, this Court sustained the State's objection. (Pg. 18).
- When Defense Counsel asked Hann if he had gone to the King home at some point after collecting leaf fragments, this Court sustained the State's scope objection. (Pg. 22).
- When Defense Counsel asked him if the pieces of hair that he collected ended up being inconclusive to anything and were just Mrs. King's hair, this Court sustained the State's objection. (Pg. 25).
- When Defense Counsel asked him if in the way he characterizes things, shorts can be loose and tight at the same time, this Court sustained the objection. (Pg. 27).
- When Defense Counsel objected to all the shirts, shorts, clothes, leaves, etc. introduced through Hann on grounds of relevancy and prejudice, this Court overruled and allowed the State to introduce the items. (Hann's June 21 Testimony, Pgs. 14-15, 25-27).
- When Defense Counsel asked if he thought that doing touch DNA testing on the clothing Mrs. King was found in would have been beneficial in this case, this Court sustained the State's objection. (Pgs. 38-39).
- When Defense Counsel asked Hann why he was not testifying about all the shoe "evidence" he collected and testified about in the first trial, this Court sustained the State's "outside scope" objection. (Pgs. 41-42).
- When Defense Counsel asked whether Hann was aware of an instance where Kurt Kuester came into the home and took bags of clothes, this Court sustained the State's objection. (Pg. 63).

Kristine Kuester

- When the State asked "so based on the time you spent with [Mrs. King] over those 17 years, did she either have her glasses on or contacts in--do you know--throughout most of the day?" and Defense Counsel objected on the basis of the improper habit evidence, this Court overruled and allowed the State to ask Kristine questions about Mrs. King's contact-wearing "habits." (Kristine Kuester's June 9 Testimony, Pgs. 41-50).

Kurt Kuester

- When Defense Counsel asked Mr. Kuester if he was not ruling out that the sequence of the conversation he had with Shadwick was that Mr. King said he "did not do anything" after Mr. Kuester told him that he "better not have hurt her," this Court sustained the State's objection. (Kurt Kuester's June 10 Testimony, Pg. 48).

Investigator Rusty Sullivan

- When Defense Counsel asked him if poor evidence collection techniques could lead to misinterpretation of the true facts later, this Court sustained the State's objection of "argumentative." (Inv. Rusty Sullivan's June 10 Testimony, Pg. 80).
- When Defense Counsel asked him, "where do you think he killed her?," this Court sustained the State's objection. (Pg. 81).
- When Defense Counsel asked him, where do you think she became dead, this Court barred the answer. (Pg. 80).
- When Defense Counsel asked him if he could say why the wood shard in the bathroom was not there in Detective Pech's photograph from July 6th (but was there on July 8th), this Court sustained the State's objection. (Pg. 97).

Angela Garza

- When the State asked "did the defendant ever ask to be taken to his wife's body," Defense Counsel objected that this was leading, and this Court overruled. (Garza's June 21 Testimony, Pg. 73).
- When Defense Counsel asked if Mr. King was more than just upset, this Court sustained the State's objection. (Pg. 77).
- When Defense Counsel asked, "so there was really no reason for [Mr. King] to keep asking you questions," this Court sustained the State's objection. (Pg. 83).

Officer Eric Perkins

- When Defense Counsel asked if other officers had expressed concern that there should be an ambulance called, this Court sustained the State's objection. (Perkin's June 21 Testimony, Pg. 92).
- When the State asked if he had reported the swelling that he had seen on Mr. King's cheek to any one else, this Court overruled Defense Counsel's hearsay objection. (Pg. 96).

Lead Detective Robert Pech

- When Defense Counsel asked him, "Mrs. King's shoes were never tested, were they?" this Court sustained the State's objection. (Det. Pech's June 22 Testimony, Pg. 57).
- When Defense Counsel asked if he would agree that on July 10th there had been no determination as to the manner of death being a homicide, this Court sustained the State's "argumentative" and "irrelevant" objection. (Pg. 58).
- When Defense Counsel asked if he knew when the determination was made that the manner of death in this case was a homicide, this Court sustained the State's objection. (Pgs. 58-59).
- When Defense Counsel asked him if Mr. King took any of "that bait" (regarding statements he made to Mr. King in his interview) from him, this Court sustained the State's objection. (Pg. 68).
- When Defense Counsel asked, "[Mr. King's] shoes didn't have iron oxide on them, did they?" this Court sustained the State's objection. (Pg. 75).
- When Defense Counsel asked if there was any DNA that connected Mr. King to the alleged murder of Mrs. King, this Court sustained the State's objection. (Pg. 76).
- When Defense Counsel asked him if most asphyxiation deaths are non homicidal, this Court court sustained the State's objection. (Pg. 79)
- When Defense Counsel asked him if most married men who find out their wives are cheating on them, get a divorce, this Court sustained the State's objection. (Pg. 81).
- When Defense Counsel asked him if there was a law against having a bleach bottle on the counter, this Court sustained the State's objection. (Pg. 85).

- When Defense Counsel asked him if he found anything of evidentiary significance in the home, this Court sustained the State's objection. (Pg. 86-87).
- When Defense Counsel asked him if at some point in time he had become aware that a pair of blue jean shorts were in the bathroom on the floor, this Court sustained the State's objection. (Pg. 90).
- When Defense Counsel asked him if he said there were leaves in the washing machine, this Court sustained the State's objection. (Pg. 91).
- When Defense Counsel asked if leaves collected from the house were attempted to be tested, this Court sustained the State's objection. (Pg. 93).
- When Defense Counsel asked if he would agree that his interview of Mr. King failed to elicit any confession on his part, this Court sustained the State's objection. (Pg. 94-95).
- When Defense Counsel asked if he would agree that Mr. King maintained his innocence throughout the interview, this Court sustained the State's objection. (Pg. 95).
- When Defense Counsel asked him if his interview of Mr. King was not a success, this Court concluded the cross examination. (Pg. 95).
- When Defense Counsel asked him if he told "Dr. Kalelkar that Shad stated . . ." , the State objected and this Court sustained the objection. (June 27 Testimony, Pgs. 148-49).
- When Defense Counsel asked him the following: "[Mr. King] didn't say anything like: You know what, why don't you chill here for a while, and I'll meet you there in an hour?" in regards to going to his home on July 6, this Court sustained the State's objection. (June 27 Testimony, Pg. 157).
- When Defense Counsel asked him if he had learned about Billy Keogh's appearance, this Court sustained the State's objection. (June 27 Testimony, Pg. 151).
- When Defense Counsel asked him "So did you learn—let me put it this way—anything in your investigation that Billy Keogh was someone to be jealous of?" this Court sustained the State's objection. (June 27 Testimony, Pg. 156).
- When Defense Counsel asked him "are you aware as to whether your department, because there was no pink shirt seized, accused prior Defense Counsel of obstructing evidence?" this Court sustained the State's objection. (Pg. 170).
- When Defense Counsel asked him, "for lack of a better term, it turned out there had been no funny business with [the pink shirt]?" this Court sustained the State's objection. (Pg. 171).
- When Defense Counsel asked him (concerning why he would not believe that Kurt Kuester broke into the King home just to get children's clothing) "Would one reason be that you knew at that time that he believed Shadwick King had murdered his daughter?" this Court sustained the State's objection. (June 28 Testimony, Pg. 12)
- When Defense Counsel asked if Mr. Kuester's conduct allowed him to circumvent the warrant requirement, this Court sustained the State's objection. (June 28 Testimony, Pg. 16).
- When Defense Counsel asked if the items Mr. Kuester took belonged to Mr. King and Mrs. King, this Court sustained the State's objection. (Pg. 18).
- When Defense Counsel asked if he would agree that as of the moment Mr. Kuester entered the home, it became a contaminated crime scene, this Court sustained the State's objection. (Pg. 18).
- When Defense Counsel asked him if he learned that the leaf fragment that was found near Mrs. King's pubic region appeared to be from an oak tree, this Court sustained the State's objection. (Pgs. 20-21).
- When Defense Counsel asked him if he was aware that Mrs. King had tied the shoes she was found in in a single knot, this Court sustained the State's objection. (Pg. 23).

<u>Sarah Sullivan</u>

- When Defense Counsel objected to the admission of PX520 for lack of foundation, this Court overruled this objection. (Sullivan's June 23 Testimony, Pg. 47-49).

- When Defense Counsel tried to impeach Det. Sullivan on her testimony about an exhibit containing asterisk marks when it really was quotation marks in PX522G, this Court sustained the State's objection. (Pgs. 46-50).

Shadwick King

- When Defense Counsel asked if Mrs. King ever indicated to Mr. King that she had any injuries while she was in basic training, this Court sustained the State's hearsay objection. (Mr. King's June 27 Testimony, Pgs. 29-30).
- When Defense Counsel asked if basic training was difficult physically for Mrs. King, this Court sustained the State's objection. (Pg. 30).
- When Defense Counsel asked if it was his understanding that Mrs. King did not have access to any alcohol in her military training, this Court sustained the State's objection. (Pgs. 62-63).
- When Defense Counsel asked if Mrs. King ever made jokes or comments to Mr. King about how much she shed her hair, this Court sustained the State's objection. (Pgs. 123-24).
- When Defense Counsel asked if Mr. King ever tried to hide or remove the bleach bottle in his home, this Court sustained the State's objection. (Pg. 124).
- When Defense Counsel asked Mr. King if Mrs. King's shorts were untied in a photograph of her from June 19, this Court sustained the State's objection. (Pgs. 145-46).
- When Defense Counsel asked Mr. King if any of the officers in his interview on July 6th or July 8th or at his home on July 8th ever told him they were sorry about his loss, this Court sustained the State's objection. (Pg. 148).
- When Defense Counsel asked Mr. King if he felt any guilt about his wife's death, this Court sustained the State's objection. (Pgs. 149).
- When Defense Counsel asked Mr. King if he had ever had an opportunity to grieve over his wife, this Court sustained the State's objection. (Pg. 150).
- When the State asked, "Well, if that's a bruise, that bruise wouldn't go away in about 15 or 20 minutes, would it?" and Defense Counsel objected, this Court overruled this objection. (Mr. King's June 27 Testimony Cross, Pg. 9)
- When the State asked, "What's your explanation as to what happened to the bruise that you believe you saw?" Defense Counsel objected to "no foundation" for this question and this Court overruled this objection. (Mr. King's June 27 Testimony Cross, Pg. 12).
- When Defense Counsel objected to the State asking Mr. King about photographs he did not have personal knowledge of (and also did not even show Mrs. King's inner arm where her pre-existing bruise was in 2 other photos from July 4, 2014), this Court overruled this objection. (Mr. King's June 27 Testimony Cross, Pg. 13).
- When the State asked, "Your testimony this morning was that on June 6th of 2014 was a day that you were going to Facebook to try and, for lack of a better term, research Billy Keogh; is that right?" and Defense Counsel objected "misstates the evidence from this morning," this Court overruled this objection. (Pg. 25).
- When the State asked, "So you're seeing texts that Kate and Billy Keogh have exchanged. And how many do you think you saw, hundreds, thousands, what?" and Defense Counsel objected this was mistatting the evidence, this Court overruled this objection. (Pg. 35-36).
- When the State asked, "So 3 hours and 15 minutes from the time from when the first interview started to when that interview ended on July 6th, it seemed to you, you would have been able to figure out that if anybody, detectives, knew what had happened to Kate, it would have been Pech and Jerdee; is that right?" and Defense Counsel objected to calling for speculation, this Court overruled this objection. (Pg. 42).
- When the State asked, "How many text messages had you read by that time?" and Defense Counsel objected "asked and answered" this Court overruled this objection. (Pgs. 49-50).

- When the State asked, "Well, this was fresh in your mind on July 6th; is that correct?" (about going to the bank), Defense Counsel objected to the question being vague and this Court overruled. (Pg. 52).
- When the State asked, "Mr. King, you never told the detectives in that first interview on July 6th that you had gone to the bank at about 5:00 a.m.; you never told them that, did you?" Defense Counsel objected "asked and answered" and this Court overruled. (Pg. 57).
- When the State asked Mr. King if he told Jerdee and Pech that it was about 20 minutes from when he went to Shell to Jewel and told him the time stamp said an hour, Defense Counsel objected, "misstates the evidence" and this Court overruled the objection. (Pg. 59).

Raelene Thielk

- During the State's cross of Ms. Thielk, Defense Counsel objected to a narrative question and this Court overruled this objection. (Ms. Thielk's June 27 Testimony, Pg. 121-22).

Lisa Gilbert - Krieghbaum

- When Defense Counsel asked if it was possible that Det. Pech provided her with the information for her report, this Court sustained the State's objection. (Krieghbaum's June 28 AM Testimony, Pg. 65).
- When Defense Counsel asked, "Did [the police officers] ever provide you with information that Mr. King specifically told them that there was no argument, there was no altercation?" this Court sustained the State's objection. (Pg. 67).
- When Defense Counsel asked if it would have been important to her to have information that the train conductor dispatched twice about his observations that Mrs. King was still breathing, this Court sustained the State's objection. (Pg. 68).
- When Defense Counsel asked, "This report was from September 14th, 2014. Was it the first time that homicide was ever mentioned in a report?" this Court sustained the State's objection. (Pg. 77).
- When Defense Counsel asked "why didn't you notice your mistake (about lividity) in Mr. King's first trial when you would have also reviewed the photos you took in that trial?" this Court sustained the State's objection. (Pg. 83).

Nurse Diane Kissinger

- When Defense Counsel asked if she was told by Paramedic Grandgeorge in the call that the patient was obviously dead, this Court sustained the State's objection. (Diane Kistinger's June 28 PM Testimony, Pgs. 13-14).

Dr. Carlos Duarte

- When Defense Counsel asked him if a patient has a flatline EKG strip, can resuscitation still be attempted, this Court sustained the State's objection. (Dr. Duarte's June 28 PM Testimony 22-23).
- When the State asked, "Hypothetically if she had been seen at 6:35 that morning on the tracks, and at 7:22 when Paramedic Grandgeorge spoke with the nurse, that would have been 25 -- it would have been 47 minutes. That would have been a substantial amount of time for you to -- for her to have been down, is that correct?" this Court overruled Defense Counsel's objection. (Pgs. 29-30).

Skip Palenik

- When the State objected to Mr. Palenik opining that Mrs. King walked to the tracks, this Court sustained the State's objection. (Mr. Palenik's June 28 PM Testimony, Pgs. 49-53).
- When the State again objected to Mr. Palenik's conclusion that the shoes had been worn by someone walking on high points, this Court sustained the State's objection. (Pg. 69).

Dr. Arvindh Kanagasundram

- When Defense Counsel asked him "So because Kathleen King had not been drinking for several months" (referring to when she was in the military), the State objected "assumes facts not in evidence" and this Court sustained this objection. (Dr. K's June 29 AM Testimony, Pgs. 38-40).
- When he was asked about the significance of the placement of the heart rate monitor leads on Mrs. King, this Court sustained the State's objection. (Pgs. 74-78).
- When ASA Sams asked Dr. Kanagasundram about what he allegedly said in a confidential meeting with the State's Attorneys Office, Defense Counsel objected and this Court overruled this objection. (Pg. 79).
- When ASA Sams asked, "Would you agree that somebody saying, I mean, she hadn't drank in four months and then testifying under oath that she was drinking more heavily in referring to the same time frame makes it difficult for you, as an analyzer of Kate's drinking habits, to come to a proper determination as to how often she drank?" Defense Counsel objected stating, "There's no foundation for this. He's reciting what he thinks is conflicting testimony and then asking the doctor. It's an improper question. There's no foundation. The doctor hasn't indicated that he read any of that." This Court overruled Defense Counsel's objection. (Pg. 92).
- When ASA Sams asked again, "My question was, yes or no, does it make it more difficult for you as an analyzer to make that determination?" Defense Counsel objected, "He's asking him to comment on the credibility. It's improper question." This Court again overruled this objection. (Pgs. 92-93).
- When ASA Sams asked, "You are aware though now that he says his study should not ever be cited for the proposition that PEA goes from 12 to 21 minutes?" referring to Dr. Parish's study, Defense Counsel objected "states facts not in evidence . . . Dr. Parish was not presented in this case, and he's now quoting some statement Dr. Parish made. That's improper. So I would object. He's quoting that Dr. Parish said my study should never be cited for this proposition and Dr. Parish hasn't been here and hasn't testified. . . it's inadmissible hearsay." and this Court overruled this objection. (Pgs. 101-03).
- When Defense Counsel asked on redirect "when CPR is rendered, what is the body position?" and the State objected on the basis of scope, Defense Counsel argued that on cross the issue about resuscitation percentages came up and this Court sustained the State's objection. (Pg. 120).

Dr. Larry Gussow

- The State objected when Mr. Gussow testified that he reviewed Mrs. King's military records because it did not say "military records" on his materials reviewed. However, Defense Counsel stated that this was the "report on alcohol intake" which is what the military record in the State's discovery was called. This Court did not allow Dr. Gussow to be asked about any of his opinion based upon Mrs. King's alcohol intake report from her military records. (Dr. Gussow's June 29 PM Testimony, Pg. 21-29, 38).
- When Defense Counsel asked if alcohol impairment can lead individuals to end up in dangerous places such as the railroad tracks, this Court sustained the State's objection. (Pgs. 55-56).
- When the Assistant State's Attorney asked, "The defendant said she had two to three glasses of wine at the barbeque" as his question, this Court overruled Defense Counsel's objection. (Pg. 57).
- When ASA Stajadar marked as an exhibit (**PX906**) a timeline of Mrs. King drinking on July 5-6 that he took from Dr. Gussow in the hallway immediately before his testimony, Defense Counsel

objected to this. This document was from a private meeting with the State's Attorneys Office that Dr. Gussow had brought to the trial unbeknownst to Defense Counsel and he testified that he did not rely upon it in formulating his opinion. (Pgs. 63-67). This Court allowed the State to admit the document as an exhibit and question Dr. Gussow about it. The document was prepared for and given to the State in a confidential meeting at Defense Counsel's law offices. The document contained an accurate summation of all of the alcoholic drinks consumed by Mrs. King on July 5, 2014 and July 6, 2014 derived from the State's discovery documents.

- On redirect, Defense Counsel asked Dr. Gussow if while reviewing the Dam Bar Video, he noticed, at any point in time, that Mr. King was counting or tallying up the drinks that Mrs. King was drinking, this Court sustained the State's objection. (Pg. 80).

Dr. Larry Blum

- When Dr. Blum testified that he took Mr. King's thumb measurements last year, this Court sustained the State's objection. (Dr. Blum's June 30 Testimony, Pgs. 36-37).
- When asked whether the wounds were relatively small in comparison to thumb sizes for the average male, this Court sustained the State's objection. (Pgs. 37-38).
- When asked whether the size of the chin injuries were consistent with an adult male thumb, this Court sustained the State's objection. (Pg. 39).
- When Dr. Blum was asked why he believed it was significant that there was rust on Mrs. King's right thumb, he responded and ASA Sams objected and this Court sustained the objection. (Pg. 69).
- When Dr. Blum described the foreign debris on Mrs. King's thumb as being reddish brown and globular, similar to iron oxide, this Court sustained the State's objection. (Pg. 70).
- When Dr. Blum testified about his experiment of using nacho chips from the Dam Bar, this Court sustained the State's objection. (Pgs. 86-87).
- When Defense Counsel asked Dr. Blum in the world of homicides, how common are manual strangulations, this Court sustained the State's objection. (Pg. 99).
- When Defense Counsel asked Dr. Blum, in the 12,000 autopsies he performed what percentage of the homicides have been manual strangulations, this Court sustained the State's objection. (Pgs. 99-100).
- When Dr. Blum stated that Mrs. King's BAC level was 150 milligrams per deciliter, 2 times the legal limit for alcohol, this Court sustained the State's objection. (June 30 PM Testimony, Pg. 5).
- When Dr. Blum was asked if dieners are allowed to opine on cause of death, this Court sustained the State's objection. (Pgs. 10-11).
- When the State handed Dr. Blum PX906 and he stated he did not recognize it, the State asked "was that something that you were given to review" and Defense Counsel objected "asked and answered" and this Court overruled this objection.
- When Defense Counsel objected to the State's attempt to improperly impeach Dr. Blum with his prior testimony about mottling, this Court overruled this objection. (Pgs. 43-45).
- When the State asked, "So that's a long way of saying that of those 12,000 autopsies that you've done, you really haven't gone to that many crime scenes?" and Defense Counsel objected that this was "argumentative" this Court overruled this objection. (Pgs. 51-52).
- When the State asked Dr. Blum to give an opinion on a photograph from PX514, from the set of photographs of Mrs. King on July 4th, Defense Counsel objected that it was not earlier permitted to do the same, and this Court overruled this objection. (Pgs. 70-73).
- When Defense Counsel asked Dr. Blum if he had the experience in his long career with bodies being moved to a different site, this Court sustained the State's objection. (Pgs. 120-21).

167. Because of all the above stated cumulative errors, Mr. King's due process rights were violated and he was denied a fair trial.

168. An abuse of discretion occurs only when the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera,* 2013 IL 112467 ¶ 37. Additionally, this Court's credibility findings "tax[] the gullibility of the credulous." *People v. Dawson*, 22 Ill. 2d 260, 264 (1961). This Court's findings are "contrary to the laws of nature or universal human experience." *People v. Shaw,* Ill. App. 125157, ¶ 30 (1st Dist. 2015).

169. Additionally, there was insufficient evidence to convict Mr. King. The Fourteenth Amendment's due process clause requires the prosecution *to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added).

170. Mr. King was deprived of his constitutionally guaranteed right to present a complete defense to the charges against him. *See Holmes v. South Carolina,* 547 U.S. 319, 324 (2006); *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973).

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Court enter an Order vacating its judgment and enter a verdict of not guilty, or, in the alternative, grant Defendant a new trial for all of the above stated reasons.

Respectfully submitted,

Kathleen T. Zellner

PEOPLE -v- SHADWICK KING
2014 CF 1229

OPINION FROM 2ND DISTRICT
APPELLATE COURT
2-15-1112

People v. King

Appellate Court of Illinois, Second District

August 21, 2018, Opinion Filed

No. 2-15-1112

Reporter
2018 IL App (2d) 151112 *; 127 N.E.3d 112 **; 2018 Ill. App. LEXIS 620 ***; 430 Ill. Dec. 876 ****

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SHADWICK R. KING, Defendant-Appellant.

Subsequent History: Appeal granted by People v. King, 2019 Ill. LEXIS 186, 426 Ill. Dec. 619, 116 N.E.3d 919 (Ill., Jan. 31, 2019)

Affirmed by, in part, Reversed by, in part, Remanded by ***People v. King, 2020 IL 123926, 2020 Ill. LEXIS 4 (Jan. 24, 2020)***

Prior History: **[***1]** Appeal from the Circuit Court of Kane County. No. 14-CF-1229. Honorable James C. Hallock, Judge, Presiding.

Disposition: Reversed and remanded.

Counsel: Gabriel A. Fuentes and Clifford W. Berlow, of Jenner & Block LLP, of Chicago, for appellant.

Joseph H. McMahon, State's Attorney, of St. Charles (Patrick Delfino, David J. Robinson, and Victoria E. Jozef, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Judges: JUSTICE ZENOFF delivered the judgment of the court, with opinion. Justices Jorgensen and Schostok concurred in the judgment and opinion.

Opinion by: ZENOFF

Opinion

[116]** **[****880]** JUSTICE ZENOFF delivered the judgment of the court, with opinion.

Justices Jorgensen and Schostok concurred in the judgment and opinion.

OPINION

[*P1] Defendant, Shadwick R. King, appeals his conviction of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) and sentence of 30 years' incarceration, following a jury trial in the circuit court of Kane County. Because defendant was prejudiced by the improper introduction of a former FBI profiler's "crime-scene-analysis" testimony, we reverse and remand for a new trial.

[*P2] I. BACKGROUND

[*P3] The common-law record, trial transcripts, photographs, and videos in evidence show the following. We will supplement the facts as necessary in the analysis section of the opinion.

[*P4] A. The Body on the Railroad Tracks

[*P5] On July 6, 2014, between 6:02 and 6:05 a.m., an eastbound Union Pacific freight train passed through Geneva Station. Locomotive engineer Devin Satchell saw no one on or near the railroad tracks. The tracks **[***2]** were surrounded by heavy brush, although there were access points at breaks in the brush.

[*P6] An eastbound Metra passenger train traveling on track 1 approached Geneva Station at 6:36 and left it at 6:37 a.m. The train was under the Route 25 overpass when student engineer Alex Perez informed engineer Robert Soto Jr. of a "body, or something" on track 2. Perez began blowing the train's horn. Soto saw a woman lying awkwardly on the track. She had a blank stare and was not moving.

[*P7] At approximately 6:39 a.m., the train came to an emergency stop, and crew members Dan Mongelli and Joel Cavender stepped out to investigate. Cavender observed that the woman's shirt was halfway up her back and that she did not move or breathe. Mongelli saw the woman's shirt lift, and he informed his dispatcher, "I believe this broad's still breathing." However, when he got within a foot of the woman and squatted down to look at her, he saw that she was not

breathing. He determined that her shirt had lifted in the breeze. Mongelli noticed that her neck was "laid" across the track "in a perfect manner" so that an oncoming train would **[**117]** **[****881]** strike it. He also noticed a purple color around her mouth, brush (described by another **[***3]** witness as dried leaves and a blade of grass) in her hair, a cell phone nearby, and "spotting" on her leg. This "spotting" was later determined by paramedic Gary Grandgeorge and deputy coroner Lisa Gilbert, who also responded to the scene, to be "lividity." Mongelli realized at the scene that the woman was deceased. Mongelli and Cavender waited for the police to arrive.

[*P8] Geneva police sergeant George Carbray arrived on the scene at approximately 6:55 a.m. According to Carbray, the body was lying on its left side, facing west. The head and neck were positioned over the northern rail. A pink iPhone was placed against a couple of railroad spikes on the opposite side of the rail from the body. It would later be determined that there were no fingerprints on the phone.

[*P9] The body was clad in a gray top, black running shorts with no spandex liner, and black and pink running shoes. The shorts were loose, and there were no underpants beneath them. A dried leaf was on the lower abdomen, just above the pubic area. A Maidenform underwire bra was pulled up, half exposing the breasts.

[*P10] Carbray found no pulse. He believed that the woman had been dead for some time, but he wanted a medical opinion, so **[***4]** he called for paramedics. They attached a heart monitor to the body but found no heartbeat. Grandgeorge testified that the monitor detected "pulseless electrical activity," which can carry on "for some time" after a person dies. The paramedics did not make resuscitation efforts, because it appeared that the woman had been deceased for "quite some time." EMT Michael Antenore noted that the woman's skin was a "cyanotic purple" color and that the pupils were "fixed and dilated." Antenore also noted that the paramedics had mud on their shoes, due to an overnight rain, but that the woman's running shoes were clean.

[*P11] The woman was later identified as 32-year-old Army reservist Kathleen King, defendant's wife. Their home was located 1200 to 1300 feet from where she was found. People who were in the general area of the railroad tracks between 6 and 6:30 a.m. on July 6 did not see anyone running or see any cars in nearby Esping Park. Esping Park was just north of the tracks and had walking paths providing access to the tracks. Defendant's neighbors did not see him or his SUV out between 6 and 6:30 a.m.

[*P12] Defendant's and Kathleen's 10-year-old son, Brandon, testified that Kathleen ran in Esping **[***5]** Park. According to Brandon, when running Kathleen customarily wore an armband into which she tucked her iPhone. She also wore either glasses or contact lenses and earbuds. When her body was found, she was not wearing contacts or glasses. Her contacts, armband, and earbuds were found in her home during a later search.

[*P13] B. The Fourth of July Party

[*P14] At approximately 6 p.m. on July 5, 2014, Kathleen, defendant, and their three boys, then ages 9, 7, and 5, arrived at the home of her father, Kurt Kuester, in Elk Grove Village for a Fourth-of-July celebration. During the evening, defendant drank three or four beers, and Kathleen drank a bottle and a half of wine. According to Kathleen's younger sister Kristine, Kathleen demonstrated a maneuver to render someone unconscious, which she had learned in the Army. At about 10:30 or 10:45 p.m., Kathleen and defendant left the party. The boys stayed overnight with Kurt. According to Kristine, Kathleen did not have any injuries or bruises that night.

[*P15] **[**118]** **[****882]** The next morning, Kristine learned from the Geneva police that Kathleen had died. At approximately 10:40 a.m. on July 6, Kristine telephoned Kurt and told him that Kathleen was dead. In a second phone call **[***6]** that morning, Kristine told Kurt not to allow defendant to have the boys.

[*P16] Kurt testified that he frantically started screaming, "What are you talking about?" when Kristine broke the news to him of Kathleen's death. At about that time, defendant was approaching the front door, which Kurt thought was unusual because defendant "never" picked up the children. Kurt asked defendant, "Where is Kathleen?" Defendant replied, "We were fighting and she went running at 6:30 to clear her head." Kurt told defendant: "Kathleen is dead, Shad." Defendant bent over and said: "I didn't do anything. I didn't do anything." According to Kurt, defendant did not ask what had happened to Kathleen or where she was.

[*P17] C. Police Interviews of Defendant

[*P18] Elk Grove Village police officers Angela Garza and Eric Perkins responded to a call at Kurt's residence on July 6 at 11:44 a.m. Defendant told Garza that Kurt would not allow him to take his children, because Kathleen was deceased. Defendant stated that he and Kathleen had an argument over her seeing a man whom she met in the military and that defendant told her to choose between the other man and him. Then, according to defendant, Kathleen went running by the river **[***7]** at 6:30 a.m. Defendant stated that he came to Kurt's home to pick up the children but that no one was home, so he drove to Kathleen's grandmother's house in Chicago. He arrived between 9 and 9:30 a.m. but no one was there, so he drove back to Kurt's house. Defendant asked if Kathleen was okay. Garza and Perkins transported defendant to the Geneva police station. Garza testified that defendant was so upset and anxious that it was not safe for him to drive himself. According to Garza, 20 minutes into the ride, defendant asked how Kathleen had died, but the officers did not have those details.

[*P19] At 1 p.m., Geneva police detectives Robert Pech and Brad Jerdee interviewed defendant. The video of the interview is in evidence. Defendant explained to the detectives that Kathleen was away in basic training from February 7 to June 14, 2014. Defendant took a leave of absence from his insurance job to take care of the children while Kathleen pursued her Army career. According to defendant, when Kathleen returned home, he learned of her relationship with a man he called "Keno," whom she met in the military. Defendant stated that he mentioned divorce but, he said, Kathleen refused to consider it. **[***8]** Defendant also stated that he agreed that Kathleen could move out of state with the children to be with Keno as long as she agreed that defendant could have the boys during the summer. Defendant further stated that he told Tim Casey, Kristine's fiancée, that he might miss their wedding because of marital problems.

[*P20] Casey (Kristine's husband at the time of trial) confirmed what defendant said that he had told him. Casey also testified that he had helped cover up Kathleen's affair by lying to defendant about Kathleen's whereabouts on one occasion.

[*P21] Defendant told Detectives Pech and Jerdee that he and Kathleen went to a bar in Geneva after they left Kurt's party the night of July 5. According to the bartender, she served defendant five bottles of Miller Lite and Kathleen four glasses of wine. A man named Chad joined the Kings and bought them each a shot. Chad testified that he did not see any bruises on Kathleen's face.

[*P22] Defendant told the detectives that he and Kathleen left the bar at approximately **[**119]** **[****883]** 1:45 a.m. and got home at about 2 a.m. Defendant was brushing his teeth while Kathleen was texting someone on her iPhone. When Kathleen put the phone down where defendant would be sure to see **[***9]** the message she had written, he saw that she was sending a romantic text to Keno.

[*P23] The record shows that the man's name was Billy Keogh. The record also shows that he and Kathleen had exchanged over 3000 text messages. In one message, Kathleen asked Keogh to marry her. Kristine was aware of her sister's relationship with Keogh and had helped Kathleen keep it from defendant.

[*P24] Defendant told the detectives that, when he saw Kathleen's text to Keogh, he picked up her phone and texted Keogh to leave her alone. Defendant stated that he also texted Keogh that he was going to bed with Kathleen.

[*P25] The record shows that 11 texts about defendant and Kathleen having sex were sent to Keogh from Kathleen's phone between 4:18 and 4:57 a.m. The record also shows that, after defendant took Kathleen's phone from her that morning, she used another device to communicate with Keogh.

[*P26] According to defendant's statement to the detectives, he and Kathleen stayed up until 5 a.m. on July 6 talking about her desire to attend officers' school. Defendant denied that he and Kathleen argued about Keogh. Throughout the interview, defendant expressed that he accepted that his wife was having an affair. Defendant stated **[***10]** that he went to bed and slept for about an hour and that Kathleen was also in the bed. According to defendant, Kathleen went running at about 6:30 a.m. Defendant said that she usually ran by the river. Defendant stated that Kathleen was wearing black and pink running shoes but that he could not remember what else she was wearing.

[*P27] At times during the interview, defendant was tearful. He ventured that Kathleen must have been hit by a car. One of the detectives told him that Kathleen's death was not accidental. Defendant repeatedly stated, sometimes indignantly, that he did not, and could not, have harmed her.

[*P28] According to defendant, after Kathleen went

running, he left the house to get donuts, as was his Sunday habit. At 9:30 a.m., he called and texted Kathleen to find out Kurt's phone number so that he could pick up the boys. Defendant stated that he left the house at about 9:30 a.m., waved to the neighbors, and went to Kurt's house. No one was home, so he drove to Kathleen's grandmother's home in Chicago. No one was there, so he drove back to Kurt's home.

[*P29] One of the detectives asked defendant how he got a "fat" lip. Defendant rubbed the right side of his bottom lip but denied that **[***11]** his lip was "fat." At trial, Pech testified that defendant's right bottom lip was slightly swollen.

[*P30] The detectives took defendant home, where he gave them permission to search and photograph his house. Pech described a messy house, with leaf fragments on the kitchen floor. Police again searched defendant's home on July 8, 2014, pursuant to a search warrant. Among the items collected was dried vegetation matter throughout the house and on a still-wet comforter that was in the washing machine. At trial, the State did not produce evidence forensically linking the vegetation found in the house and the vegetation that was found on Kathleen's body. During the search, police also found earbuds and an armband into which a phone could be inserted. Police also noted the presence of assorted sports bras.

[*P31] [120] [****884]** On July 8, 2014, Pech and Jerdee conducted a second videotaped interview with defendant, this time after *Miranda* warnings. Pech informed defendant that Kathleen died of asphyxiation. Throughout the interview, the detectives presented defendant with various scenarios in which he accidentally killed Kathleen. Defendant repeatedly denied doing anything, or even being capable of harming Kathleen. **[***12]** Defendant denied knowing what happened to her. When Pech falsely informed defendant that his fingerprints were found on Kathleen's neck, defendant denied knowing how they got there. He suggested that he might have touched her.

[*P32] D. The Charge and Pretrial Motions

[*P33] On July 11, 2014, the Kane County state's attorney charged defendant by information with two counts of first-degree murder related to Kathleen's death. Following a preliminary hearing and a finding of probable cause, the case was assigned to Judge James C. Hallock. On September 15, 2014, the information was superseded by a two-count indictment for first-degree murder.

[*P34] On July 14, 2014, the State moved pursuant to a federal statute (18 U.S.C. § 2703(d)) for an order for the disclosure of registration records pertaining to defendant's and Kathleen's cell phones for July 5 and 6, 2014. Defendant made an oral motion, which the court denied, to declare the statute unconstitutional on the ground that the fourth amendment requires a warrant rather than a court order. On July 17, 2014, the court granted the State's motion to obtain the cell phone records.

[*P35] On July 18, 2014, defendant moved for substitution of judge as of right (725 ILCS 5/114-5(a) (West 2014)). In a written order dated **[***13]** September 3, 2014, the court, identified only as "Judge 42," denied the motion on the ground that Judge Hallock made a substantive ruling in denying defendant's motion to declare the federal statute unconstitutional, making the motion for substitution of judge untimely. The matter then remained in Judge Hallock's courtroom.

[*P36] On January 15, 2015, the State filed its motion *in limine* No. 1, seeking leave to call Mark Safarik as an expert witness in crime-scene analysis. The motion stated that Safarik was a "crime scene and behavioral analyst" for a private company known as Forensic Behavioral Services. The motion further stated that Safarik had 23 years' experience with the FBI, including as a supervisor with the Behavioral Analysis Unit (BAU). Safarik had been, in the vernacular, an FBI profiler. The substance of Safarik's proposed testimony was contained in a written report that he authored, which apparently was submitted separately to the trial court but is not in the record.

[*P37] The record shows that Safarik worked as a police officer handling violent crimes for seven years before joining the FBI. While in the FBI, Safarik attended training courses in various disciplines, including forensic **[***14]** pathology, death investigation, and criminal behavior.

[*P38] The court granted the motion *in limine* over defendant's objection. In ruling that Safarik's testimony would be admissible if Safarik were qualified as an expert at trial, the court noted that Safarik's opinions would have to be rendered "pursuant to his qualifications" and that he would not be permitted to identify "the defendant as the killer by direct testimony." Nor, the court ruled, would Safarik be allowed to give profiling testimony. The court found that Safarik's "specialized knowledge" was "reliable" and "relevant"

and that the general subject matter of his testimony would assist the jury to understand the evidence and to determine the **[**121]** **[****885]** facts. Specifically, the court found that the positioning of Kathleen's body on the railroad tracks was "a matter beyond the common experience of most jurors and is [a] subject of difficult comprehension."

[*P39] E. The Trial

[*P40] The jury trial commenced on March 2, 2015. In addition to the evidence detailed above, the following testimony was presented.

[*P41] 1. Dr. Mitra Kalelkar

[*P42] The State called forensic pathologist Dr. Mitra Kalelkar. Dr. Kalelkar performed an autopsy on Kathleen on July 7, 2014. Dr. Kalelkar **[***15]** noted the clothing on the body, as described above. Dr. Kalelkar also noted that the heel of one sock was twisted around the ankle and that one of the bra straps was twisted. Dr. Kalelkar testified to the presence of antemortem (before death), postmortem (after death), and perimortem (at the time of death) abrasions and bruises, some of which were inconsistent with Kathleen having fallen or collapsed on the train tracks. Specifically, she testified that an antemortem bruise under the chin was consistent with someone's hands having been around Kathleen's neck or Kathleen having tried to pry someone's hands off her neck. Dr. Kalelkar opined that an antemortem bruise on the upper left arm was consistent with someone grabbing her. Dr. Kalelkar noted a red mark on the neck that did not contribute to Kathleen's death and a trail of saliva mixed with stomach contents on the cheek. According to Dr. Kalelkar, the stomach contained a minimal amount of brown fluid, and a toxicology report showed the presence of caffeine. At the time of the autopsy, Kathleen's blood alcohol concentration was 0.15.

[*P43] Dr. Kalelkar filled in her autopsy protocol with "asphyxiation" as the cause of death. In her trial **[***16]** testimony, she expanded on that to include manual strangulation. She testified that she found petechial hemorrhages in the eyes and epiglottis mucosa[1] and that she also found focal hemorrhages at the base of the tongue. Those findings, she testified, indicate strangulation.

[*P44] 2. Mark Safarik

[*P45] Safarik, a former police officer and FBI profiler with no medical training, testified, over objection, that the lividity on Kathleen's body was inconsistent with her having died on the train tracks. Over objection, Safarik testified to his opinion that the cause of death was manual strangulation. He enumerated possible causes of asphyxiation, reiterated the cause of death as listed by Dr. Kalelkar, and then eliminated all but manual strangulation as fitting the facts. Safarik opined, over objection, that the death scene on the tracks was staged, that Kathleen was killed in her residence, and that someone close to her, not a stranger, staged the scene. Safarik's testimony will be examined in more detail in the analysis section of the opinion.

[*P46] 3. Dr. Larry William Blum

[*P47] Following the denial of his motion for a directed verdict, defendant presented his case. He called Dr. Blum, a forensic pathologist, **[***17]** who testified that Kathleen died of a cardiac event brought on by stress, alcohol intoxication,[2] lack of sleep, and caffeine consumption. Dr. Blum opined that Kathleen was running on the railroad tracks, became unwell, sat down on the rail, and expired. According to Dr. Blum, her bruises and lividity were consistent with that scenario. Dr. Blum acknowledged **[**122]** **[****886]** Dr. Kalelkar's findings of petechial hemorrhages in the eyes and focal hemorrhages at the base of the tongue, but he opined that those findings, standing alone, did not support a conclusion that Kathleen was manually strangled. Dr. Blum also testified that Dr. Kalelkar's autopsy report was incomplete because "asphyxiation" as a cause of death was nonspecific.

[*P48] Defendant's testimony essentially mirrored the statements that he gave to the police.

[*P49] In rebuttal, Dr. Kalelkar testified that her autopsy findings led her to conclude that Kathleen died of asphyxiation due to pressure applied to her neck. She testified that Dr. Blum's diagnosis of a cardiac event ignored evidence of strangulation. Kristine testified in

[1] The epiglottis is cartilage that projects upward behind the tongue. Webster's Third New International Dictionary 763 (1993).

[2] Dr. Blum testified that Kathleen's blood alcohol concentration was 0.26 at its peak.

rebuttal that her family's medical history could not account for Kathleen's premature demise.

[*P50] During the prosecution's rebuttal **[***18]** closing argument, the prosecutor argued that it was "okay" for the jurors to have questions about the evidence and "still convict the defendant."

[*P51] The jury found defendant guilty of first-degree murder, and, after denying his posttrial motion, the court sentenced defendant to 30 years' incarceration. This timely appeal followed.

[*P52] II. ANALYSIS

[*P53] Defendant raises six arguments: (1) the court erred in denying his motion for substitution of judge, (2) the court erred in admitting Safarik's testimony, (3) the court erred in permitting Kathleen's family to dwell on their suffering at her loss, (4) the prosecution improperly defined reasonable doubt in its closing argument, (5) defendant was not proved guilty beyond a reasonable doubt, and (6) the cumulative effect of the trial errors requires reversal.

[*P54] A. The Motion for Substitution of Judge

[*P55] The day after the court granted the State's motion for disclosure of defendant's and Kathleen's cellular telephone records, defendant filed a motion for substitution of judge as of right, pursuant to section 114-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5 (2014)). A defendant is entitled to an automatic substitution of his or her trial judge if he or she meets **[***19]** the following requirements: (1) the motion is made within 10 days after the case is assigned to the judge, (2) the motion names only one judge, unless the defendant is charged with a Class X felony, in which case he or she may name two judges, (3) the motion is in writing, and (4) the motion alleges that the judge is so prejudiced against the defendant that he or she cannot receive a fair trial. *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13. Section 114-5 also provides for naming two judges where the offense charged may be punished by death or life imprisonment. 725 ILCS 5/114-5(a) (West 2014). Additionally, the motion must be made before the judge makes a substantive ruling. *Tate*, 2016 IL App (1st) 140598, ¶ 13. Where a motion for substitution of judge is improperly denied, all of the court's actions subsequent thereto are void. *People v. Klein*, 2015 IL App (3d) 130052, ¶ 79, 396 Ill. Dec. 835, 40 N.E.3d 720. We review *de novo* a ruling on a motion for substitution of judge as of right. *In re D.M.*, 395 Ill. App. 3d 972, 977, 918 N.E.2d 1091, 335 Ill. Dec. 278 (2009).

[*P56] Here, the question is whether Judge Hallock made a substantive ruling when he (1) denied defendant's motion to declare the federal statute granting access to cellular records unconstitutional and (2) granted the State's motion for access to those records. Defendant argues that **[**123]** **[****887]** Judge Hallock ruled merely on a discovery matter that was not substantive, because it was collateral to the merits **[***20]** of the case. A ruling that does not go to the merits or relate to any issue of the crimes charged is not a substantive ruling. See *People v. Ehrler*, 114 Ill. App. 2d 171, 178-79, 252 N.E.2d 227 (1969).

[*P57] The federal statute on required disclosure of customer communications or records provides that a court order for disclosure of electronic communications shall issue "only if" the governmental entity seeking such disclosure offers "specific and articulable facts" showing that there are "reasonable grounds" to believe that the contents of the records sought are "relevant and material" to an ongoing criminal investigation. 18 U.S.C. § 2703(d) (2012). In its motion, the State alleged the following facts to show "reasonable grounds": (1) Kathleen's cell phone was found near her body, (2) Kathleen was not murdered where her body was found, (3) defendant had been in possession of Kathleen's cell phone, (4) cadaver dogs alerted on the backseat of defendant's car, and (5) defendant at all times had his own cell phone with him. The State argued that those facts supported its contention that the cell phone records were necessary to pinpoint the locations of defendant and Kathleen during the relevant time periods.

[*P58] In considering whether the State presented "specific and articulable" **[***21]** facts supporting its request for the records, Judge Hallock necessarily considered aspects of the merits of the case. The State's motion was not a routine motion for "court-ordered discovery," pursuant to Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001), as defendant maintains, but was brought pursuant to a federal statute limiting the disclosure of electronic communications to situations in which reasonable cause is shown. That showing depends upon the underlying facts of the case.

[*P59] Defendant also argues that Judge Hallock's constitutional ruling was not substantive, because he ruled only on the procedural matter of whether a

warrant, rather than a court order, was required. Defendant distinguishes *People v. Wilfong*, 17 Ill. 2d 373, 375, 162 N.E.2d 256 (1959), where a motion for substitution of judge was properly denied after the defendant unsuccessfully challenged the constitutionality of the statute under which he was indicted. Defendant in our case points out that he did not challenge the constitutionality of the statute under which he was charged but brought a procedural challenge to the federal statute's method of disclosure of electronic communications.

[*P60] At oral argument, we granted the State's motion for leave to cite *Carpenter v. United States*, 585 U.S. __, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), in which the United States Supreme Court held **[***22]** that a warrant is required before a governmental entity can seize electronic communications pursuant to 18 U.S.C. § 2703(d). We are not persuaded of *Carpenter*'s relevance. Nevertheless, we believe that the ruling in our case was substantive. It went to the State's ability to acquire evidence to use in prosecuting defendant. Consequently, we hold that the court did not err in denying the motion for substitution of judge.

[*P61] B. Reasonable Doubt

[*P62] We next consider defendant's argument that he was not proved guilty beyond a reasonable doubt. Because we determine that defendant is entitled to a new trial based upon an evidentiary error, to prevent the risk of double jeopardy, we must also consider this argument. See *People v. Macon*, 396 Ill. App. 3d 451, 458, 920 N.E.2d 1224, 336 Ill. Dec. 634 (2009). When a defendant challenges the sufficiency **[**124]** **[****888]** of the evidence, the reviewing court must determine whether, viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 291 Ill. Dec. 686 (2005).

[*P63] Defendant asserts that Dr. Kalelkar's testimony, contradicted as it was by Dr. Blum, was insufficient to prove that Kathleen's death was a homicide. The *corpus delicti* in a murder case consists of two essential elements: **[***23]** (1) the fact of death and (2) the fact that the death was caused by the criminal agency of some person. *People v. Jones*, 22 Ill. 2d 592, 595, 177 N.E.2d 112 (1961). Here, Dr. Kalelkar testified that Kathleen died as a result of asphyxiation due to manual strangulation. Dr. Blum disagreed, testifying that Kathleen's death resulted from a cardiac event, that is, natural causes. When confronted with a "battle of the experts" (see *People v. Smith*, 253 Ill. App. 3d 443, 446-47, 624 N.E.2d 836, 191 Ill. Dec. 648 (1993) (classic battle of the experts is different experts examining roughly the same information and arriving at opposite conclusions)), it is for the trier of fact to evaluate each expert's testimony and weigh its relative worth in context. *People v. Sims*, 374 Ill. App. 3d 231, 251, 869 N.E.2d 1115, 312 Ill. Dec. 124 (2007).

[*P64] Here, aside from contrasting the testimony of the two experts, defendant also maintains that Dr. Kalelkar did not complete her autopsy protocol with "any indication" of the cause of death, calling it only "asphyxiation." That determination, defendant argues, is too equivocal to support a conclusion that the manner of death was homicide. Defendant relies on *People v. Ehlert*, 211 Ill. 2d 192, 811 N.E.2d 620, 285 Ill. Dec. 133 (2004), which also involved an opinion rendered by Dr. Kalelkar.

[*P65] In *Ehlert*, the defendant was convicted of the first-degree murder of her newborn child. *Ehlert*, 211 Ill. 2d at 194. The issue was whether the child was born alive. *Ehlert*, 211 Ill. 2d at 194. Dr. Kalelkar performed the autopsy, **[***24]** found no unusual cause of death, and later told a police officer that she could not tell for sure whether the baby was born alive. *Ehlert*, 211 Ill. 2d at 199. She left blank the space on the death certificate where she would normally fill in the manner of death and instructed the police to investigate further. *Ehlert*, 211 Ill. 2d at 199. After the police advised her of their investigation, which included witnesses' statements, she concluded that the baby had been born alive. *Ehlert*, 211 Ill. 2d at 199. Dr. Kalelkar then filled in the manner of death on the certificate as "homicide." *Ehlert*, 211 Ill. 2d at 208. At trial, however, Dr. Kalelkar testified that the manner of death could have been natural causes. *Ehlert*, 211 Ill. 2d at 209. The appellate court reversed the defendant's conviction, and our supreme court affirmed, holding that there was reasonable doubt as to the defendant's criminal agency. *Ehlert*, 211 Ill. 2d at 209-10.

[*P66] *Ehlert* is inapposite. Here, contrary to defendant's contention, Dr. Kalelkar did not equivocate on the cause or manner of death. "Asphyxiation" certainly encompasses a killing (see Webster's Third New International Dictionary 130 (1993)), and at trial, relying on her autopsy findings, the doctor was clear and specific that Kathleen's neck had been compressed. Accordingly, we conclude that any rational trier of

fact **[***25]** could have found that Kathleen's **[**125]** **[****889]** death was caused by some person's criminal agency. Consequently, we also hold that retrial is not barred by double jeopardy.

[*P67] C. Safarik's Testimony

[*P68] As noted, the trial court granted the State's motion *in limine* No. 1, allowing Safarik's testimony over defendant's objection. We will not reverse a trial court's ruling on a motion *in limine* absent an abuse of discretion. *People v. Holman*, 257 Ill. App. 3d 1031, 1033, 630 N.E.2d 154, 196 Ill. Dec. 457 (1994). Also, the court made evidentiary rulings during Safarik's testimony. The admission of evidence is within the trial court's sound discretion and will not be reversed unless that discretion was clearly abused. *Snelson v. Kamm*, 204 Ill. 2d 1, 33, 787 N.E.2d 796, 272 Ill. Dec. 610 (2003).

[*P69] Safarik testified that, as director of Behavioral Services International, he conducts "analyses and interpretations" of complex violent crime scenes and violent crimes to "understand essentially what happened in the crime, how it happened[,] and why the events unfolded the way that they did." Safarik testified that he also conducts "equivocal death evaluations" in cases where the "manner of death is not well established." According to Safarik, the Kane County State's Attorney's Office asked him to examine the evidence from the scene where Kathleen's body was found, to determine **[***26]** (1) whether the scene was staged, (2) the offender's risk level, (3) a general offender motive, and (4) the "behavioral manifestations at the scene," meaning the offender's *modus operandi*, ritual behavior, and staging behavior.

[*P70] Safarik testified that he typically reviews crime reports, criminal investigation reports, crime scene photographs, autopsy protocols, autopsy photographs, diagrams and sketches of the crime scene, and witness statements. He also reviews any toxicology reports. If he needs the information, Safarik will ask to see the statements of witnesses who talked to the police about the victim's habits. Safarik testified that he will also consider, as he did in the present case, an accused's statements, if they contribute to an understanding of the timeline of events leading up to a murder. In the present case, Safarik considered Brandon's statements as to where Kathleen usually ran and the app on her iPhone that recorded that she usually ran in Esping Park, but not near the railroad tracks.

[*P71] From his review of the case, Safarik concluded the following: (1) Kathleen did not usually run on the railroad tracks; (2) defendant's statement to police that Kathleen left the house **[***27]** to go running at 6:30 a.m. was inconsistent with the lividity present on her body less than half an hour later, when the death-scene photographs were taken, which indicated that she died prior to 6:30 a.m.; (3) the lividity on Kathleen's right leg was inconsistent with her position on the railroad tracks; (4) if she had been running, her shorts would have been tied and not loose; (5) the absence of an undergarment or a liner in Kathleen's running shorts was inconsistent with her being out for a run; (6) because Kathleen had "fairly large" breasts, running in an underwire bra would have been painful; (7) Kathleen had a large selection of sports bras, so she would not have been running in an underwire bra; (8) the presence of the underwire bra was inconsistent with defendant's statement that Kathleen possessed running gear; (9) Kathleen's twisted bra strap would have been "very uncomfortable" and was inconsistent with the way she would have put on the bra; (10) there was no sexual motive to the crime, because Kathleen's bra was covering half her breasts; (11) it was unlikely that Kathleen would have put on her left sock with **[**126]** **[****890]** the heel twisted toward the top of her foot; (12) a clump of **[***28]** hair in her right sock was inconsistent with the way a person would dress herself; (13) Kathleen was not wearing an armband, which was inconsistent with witnesses' statements that she wore one when running; (14) the absence of earbuds was inconsistent with witnesses' statements that Kathleen listened to music while running; (15) the leaf material on Kathleen's body was inconsistent with that in the area where the body was found; (16) Kathleen's iPhone was placed on the tracks by someone; (17) a trail of dried saliva mixed with blood running down Kathleen's cheek was inconsistent with the way her head was positioned on the tracks, indicating that she was on the tracks after the saliva had dried; (18) Kathleen was moved onto the tracks after she died in a different location; (19) Kathleen died as a result of manual strangulation; (20) a red mark on Kathleen's neck was consistent with hands having been around her neck; (21) a bruise under Kathleen's chin was consistent with someone having strangled her; (22) every form of asphyxiation except manual strangulation was ruled out; (23) Kathleen's injuries were inconsistent with a fall on the tracks; (24) scrapes on Kathleen's shins were postmortem **[***29]** because there was no blood; (25) Kathleen was incapacitated by alcohol and did not see the attack coming; (26) the attack came on very quickly; (27) strangers do not stage crime scenes; (28) a staged crime scene indicates that the killer was

someone close to the victim; (29) the offender attempted to make Kathleen's death look like an accident; (30) the leaf material found on Kathleen's body was from her residence; and (31) based on the timeline defendant gave to the police, Kathleen was killed in her residence.

[*P72] Defendant argues that Safarik was improperly allowed to give an opinion as to the cause of death in a close case where the cause and manner of death were contested by two well-qualified, board-certified, forensic pathologists. Defendant additionally contends that Safarik improperly opined on matters that were within the ken of the jurors when he testified that the death scene was staged. Defendant asserts that Safarik essentially gave the State's closing argument.

[*P73] Expert testimony such as Safarik's falls under the general rubric of "crime scene analysis," which involves the "gathering and analysis of physical evidence." See *Simmons v. State*, 797 So. 2d 1134, 1151 (Ala. Crim. App. 2000). Here, the State also proffered Safarik as an expert **[***30]** in the cause and manner of death as well as the habits or characteristics of people who stage crime scenes. Profiling evidence usually involves a witness describing common practices, habits, or characteristics of a group of people. *People v. Vasser*, 331 Ill. App. 3d 675, 687, 770 N.E.2d 1194, 264 Ill. Dec. 498 (2002). Thus, Safarik also proffered profiling evidence.

[*P74] At oral argument, we asked the State what was Safarik's area of expertise. That question was perspicacious, because the State could not readily answer it. Indeed, Safarik's opinions ranged from forensic pathology, to botany, to the sartorial. Under the guise of expert "crime scene analysis," Safarik basically offered his subjective opinion that the State's evidence was sufficient to convict defendant. As the State admitted at oral argument, the purpose of Safarik's testimony was to "plug the holes" in the State's case.

[*P75] Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) provides that, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, **[**127]** **[****891]** or education, may testify thereto in the form of an opinion or otherwise." "Crime-scene analysis" testimony **[***31]** does not rest on scientific principles. *Simmons*, 797 So. 2d at 1151; *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002). Rather, it is based on "specialized knowledge" and offers "subjective observations and comparisons based on the expert's training, skill, or experience." *Simmons*, 797 So. 2d at 1151. Therefore, such testimony is not subject to the test outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923). *Simmons*, 797 So. 2d at 1151.

[*P76] We first consider defendant's argument that Safarik was not competent to testify to Kathleen's cause of death. Defendant asserts that an expert's opinion cannot exceed the area of his or her expertise, relying on *People v. Perry*, 229 Ill. App. 3d 29, 593 N.E.2d 712, 170 Ill. Dec. 823 (1992). In *Perry*, the defendant was convicted of killing her infant son by lying on top of him and smothering him with a pillow. *Perry*, 229 Ill. App. 3d at 30-31. The appellate court reversed that conviction and remanded for a new trial where the State's pathologist opined that the child's death was not an accident, because a sleeping mother would not roll on top of an active child without the child making its distress known. *Perry*, 229 Ill. App. 3d at 32. The court held that the pathologist's expertise did not extend to determining the ability of a sleeping mother to "feel" her child. *Perry*, 229 Ill. App. 3d at 33. While we agree that an expert cannot express an opinion on a subject beyond his or her qualifications (see *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 784, 776 N.E.2d 262, 267 Ill. Dec. 125 (2002) (mechanical engineer with 35 years' experience could not testify to the cause of a **[***32]** collision)), the question here is whether the cause of a person's death is the subject of only expert medical testimony or whether a lay person can so opine.

[*P77] The rule in Illinois is that medical testimony is not necessary to prove the cause of death where the facts proved are such that every person of average intelligence would know from his or her own knowledge or experience that a wound was mortal. *Waller v. People*, 209 Ill. 284, 288, 70 N.E. 681 (1904); *People v. Davidson*, 82 Ill. App. 2d 245, 250, 225 N.E.2d 727 (1967). Thus, in *Davidson*, the coroner's testimony that the victim was dead, coupled with other testimony establishing a criminal agency causing her death, was sufficient to sustain the murder verdict, notwithstanding the lack of medical testimony as to the cause of death. *Davidson*, 82 Ill. App. 2d at 250. In *Jones*, a *corpus delicti* case (*supra* ¶ 63), the evidence of the cause of death was sufficient without medical testimony where the evidence showed that the defendant shot the victim, the victim fell and was found lying in a pool of blood, and the victim was immediately removed to a mortuary. *Jones*, 22 Ill. 2d at 597.

[*P78] Here, medical evidence of the cause of Kathleen's death was necessary, because a lay person of average intelligence would not know what killed her. She was found lying on the railroad tracks, not breathing or moving. There were **[***33]** no gunshot wounds or stab wounds. The body was warm, and there was no immediate evidence of foul play. Consequently, Safarik—no matter how many crime scenes he had attended as a police officer, how much study he had done on violent crime scenes as an FBI profiler, or how many courses he had attended—was not qualified by knowledge, skill, experience, training, or education to opine on the cause and manner **[**128]** **[****892]** of Kathleen's death. See *Snelson*, 204 Ill. 2d at 24 (expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education to render an opinion).

[*P79] For the court to allow Safarik to opine that Kathleen died of manual strangulation was especially egregious where defendant disputed Dr. Kalelkar's conclusion as to Kathleen's cause of death and presented his own equally well-qualified forensic pathologist to testify that she died of natural causes. Through Safarik's inadmissible testimony, the State essentially "broke the tie" by presenting a second opinion to corroborate Dr. Kalelkar's. We hold that Safarik's opinion as to the cause of death was so highly prejudicial that we must reverse defendant's conviction.

[*P80] We also note that it was beyond Safarik's expertise **[***34]** to opine on the effects of lividity. As a veteran of violent-crime-scene investigations, Safarik could doubtless identify the presence of lividity. However, whether it was consistent or inconsistent with the position of Kathleen's body on the railroad tracks was appropriate testimony for a forensic pathologist, as lividity correlates to the cause and manner of death. See *People v. Legore*, 2013 IL App (2d) 111038, ¶ 6, 996 N.E.2d 148, 374 Ill. Dec. 701 (forensic pathologist pinpointed time of death in part by analyzing lividity on victim's body).

[*P81] In the same vein, Safarik should not have been permitted to testify that the vegetation on Kathleen's body came from her home, because such an opinion was beyond his expertise and the State presented no evidence of such a correlation. To be admissible, an expert's opinion must have an evidentiary basis, or else it is nothing more than conjecture and guess. *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864, ¶ 72, 410 Ill. Dec. 30, 69 N.E.3d 255.

[*P82] Next, we consider defendant's contention that the remainder of Safarik's testimony was prejudicial because it consisted of conclusions that the jurors could draw for themselves. A requirement of expert testimony is that it will assist the trier of fact in understanding the evidence. *Snelson*, 204 Ill. 2d at 24. Expert testimony addressing matters of common knowledge is not admissible unless the **[***35]** subject matter is difficult to understand and explain. *People v. Lerma*, 2016 IL 118496, ¶ 23, 400 Ill. Dec. 20, 47 N.E.3d 985. Evidence is beyond the ken of the average juror when it involves knowledge or experience that the juror lacks. *People v. Mertz*, 218 Ill. 2d 1, 72, 842 N.E.2d 618, 299 Ill. Dec. 581 (2005). Here, Safarik testified to conclusions that the ordinary juror could draw: an experienced runner would not have dressed in the garments in which the body was found; Kathleen would not have left her contacts, earbuds, and armband at home when she went running; she would not have been running on the railroad tracks when her habit was to run in the park; and she would not have put on a sock with the heel twisted to the top of her foot. We agree with the Superior Court of New Jersey's conclusion in *State v. Lenin*, 406 N.J. Super. 361, 967 A.2d 915, 925 (N.J. Super. Ct. App. Div. 2009), that none of this type of testimony should have been admitted.

[*P83] In *Lenin*, the court held that Safarik's testimony about the "characteristics of the victim and the crime scene" was inadmissible because he was "simply testifying about logical conclusions the ordinary juror could draw from human behavior." *Lenin*, 967 A.2d at 927. The court also held that behavioral-science testimony, such as Safarik's, must be evaluated under the test **[**129]** **[****893]** for admission of scientific evidence. *Lenin*, 967 A.2d at 926. We disagree with the latter holding, because, as discussed, we believe that **[***36]** the better view is that crime-scene-analysis testimony is not scientific. See *Simmons*, 797 So. 2d at 1151.

[*P84] Further, in our case, Safarik ventured beyond "crime scene analysis" into profiling when he testified to the characteristics of persons who stage crime scenes. Profiler testimony has been excluded by other states' supreme courts as unreliable. *Mertz*, 218 Ill. 2d at 72-73. In *Mertz*, our supreme court declined to opine on the admissibility of such evidence, holding that any error in admitting a profiler's testimony comparing three distinct crime scenes, with a view as to whether they could be connected, was harmless because police officers had testified to the similarities that they had observed. *Mertz*, 218 Ill. 2d at 73-74. The court emphasized that the

profiler did not explicitly opine that the defendant committed the uncharged offenses that the profiler had studied. *Mertz*, 218 Ill. 2d at 72.

[*P85] Here, in testifying that a staged scene indicates that the killer is someone close to the victim, Safarik indirectly, but pointedly, identified defendant as Kathleen's killer, because, under the circumstances, no one else fit that profile. Our case is more like *People v. Brown*, 232 Ill. App. 3d 885, 598 N.E.2d 948, 174 Ill. Dec. 316 (1992), than *Mertz*. In *Brown*, the First District held that the defendant, who was charged with possession of a controlled substance with intent **[***37]** to deliver, was prejudiced by profiling testimony regarding the violent habits of drug sellers. *Brown*, 232 Ill. App. 3d at 898. The court noted that the testimony "consisted of a complete profile of a drug dealer which corresponded to the circumstances surrounding [the] defendant's arrest." *Brown*, 232 Ill. App. 3d at 899-900.

[*P86] Trial courts are obliged to balance the probative value of expert testimony against its prejudicial effect. *Lerma*, 2016 IL 118496, ¶ 23. Here, the court performed this analysis in ruling on the State's motion *in limine* No. 1, as it precluded Safarik from directly identifying defendant as the killer or giving profiling testimony. Yet, at trial, Safarik was permitted to say indirectly what he could not say directly. We follow *Brown* and hold that such profiling evidence is inadmissible.

[*P87] The State argues that the admission of Safarik's testimony was harmless error, because (1) he drew conclusions that the jurors could have drawn on their own and (2) his testimony was cumulative. In *Mertz*, the court held that the admission of profiling testimony was harmless because "any inferences drawn by [the profiler] were commonsense ones that the jurors no doubt had already drawn for themselves." *Mertz*, 218 Ill. 2d at 74. That reasoning does not apply in our case, where one of the claimed **[***38]** errors is that Safarik's testimony was inadmissible precisely because it was within the knowledge of the average juror. Ironically, the court's discussion in *Mertz* supports defendant's argument.

[*P88] We also reject the argument that Safarik's testimony was cumulative. While Dr. Kalelkar opined that Kathleen died of manual strangulation and also opined on the staging of the death scene, her testimony was undermined by the fact that she did not complete her autopsy protocol. As the State forthrightly conceded at oral argument, **[**130]** **[****894]** Safarik's testimony was designed to "plug the holes."

[*P89] Also, unlike in *Brown*, where the error was found to be harmless, the evidence of guilt in the present case was not overwhelming. Dr. Blum questioned Dr. Kalelkar's methodology and conclusions. There was no eyewitness, no confession, and no forensic evidence connecting defendant to the crime. Consequently, we hold that it was prejudicial error to grant the State's motion *in limine* No. 1 and to permit the testimony at defendant's trial.

[*P90] On retrial, the arguments that defendant raises concerning evidence of Kathleen's family's suffering and the State's rebuttal closing argument are likely to arise, so we briefly address **[***39]** them.

[*P91] Kristine testified that she was close to Kathleen (that Kathleen was like her mother) and that Kathleen had shopped for Kristine's wedding gown. Kristine described how upset she was when she was told of Kathleen's death and that she was pacing and crying. Kurt testified that he was frantic and screaming when he heard the news of Kathleen's death. The court overruled defendant's objections to this testimony. While some reference to the victim's family is proper and inevitable (*People v. Campos*, 227 Ill. App. 3d 434, 449, 592 N.E.2d 85, 169 Ill. Dec. 598 (1992)), evidence that dwells on the victim's family is unduly prejudicial. *People v. Bernette*, 30 Ill. 2d 359, 371, 197 N.E.2d 436 (1964). Here, the evidence of the family's emotional attachments and reactions went beyond anything that was relevant and was introduced solely for its emotional impact. On retrial, such testimony is inadmissible.

[*P92] In his rebuttal closing argument, the prosecutor told the jurors that it was "okay" for them to have "questions" about the evidence and still convict defendant. The prosecutor gave an example of a permissible question dealing with what point of access defendant took to get the body onto the railroad tracks. He then reiterated that the jurors could have questions, "as long as those questions don't amount to a reasonable doubt." This **[***40]** argument was an improper attempt to define and dilute the State's burden of proof (see *People v. Evans*, 2016 IL App (3d) 140120, P59, 406 Ill. Dec. 175, 60 N.E.3d 77 (prosecutor's rebuttal remarks improperly conflated the beyond-a-reasonable-doubt standard with a question of whether the defendant's actions were reasonable, lessening the State's burden of proof)), and nothing close to it is permitted on retrial. It is well established in Illinois that "reasonable doubt" needs no definition. *People v. Amos*, 46 Ill. App. 3d 899, 902, 361 N.E.2d 861, 5 Ill. Dec. 538 (1977).

[*P93] III. CONCLUSION

[*P94] For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and the cause is remanded for a new trial.

[*P95] Reversed and remanded.

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