

No. 1-11-2586

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 2745
	)	
ERIC DIAZ,	)	Honorable
	)	Angela M. Petrone,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying defendant's motion to suppress his videotaped confession; the trial court's error in admitting evidence of gang graffiti was harmless; the trial court did not err in allowing the victim's photographs in life and death to be viewed by the jury during deliberations; Illinois' sentencing scheme does not violate juvenile offenders' Eighth Amendment and due process rights; and defendant's sentence was not excessive.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Eric Diaz was convicted of first-degree murder and sentenced to 65 years of imprisonment. Upon reconsideration, the trial court reduced the defendant's sentence to 60 years. On appeal, the

defendant argues that: (1) the trial court erred in denying his pretrial motion to suppress his videotaped confession; (2) the trial court erred in admitting photographs of gang graffiti made by him in the police interview room and in admitting video clips of him making the graffiti; (3) the trial court erred in allowing the victim's life and morgue photographs to be viewed by the jury during deliberations; (4) Illinois' sentencing scheme is unconstitutional because it violates juveniles' Eighth Amendment and due process rights; and (5) his sentence was excessive. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

### BACKGROUND

¶ 4 On June 25, 2007, then 17-year-old defendant shot and killed Nico Dezort (Dezort) near Marmora Avenue and Altgeld Street in Chicago, Illinois. On November 13, 2007, the defendant, who by then had turned 18, was arrested and later made a videotaped confession to the police regarding his involvement in the crime. On February 6, 2008, the defendant was charged with murder.

¶ 5 On April 23, 2009, the defendant filed a motion to suppress his videotaped confession (motion to suppress), alleging that the police failed to honor his right to counsel by failing to cease questioning after the defendant requested the presence of an attorney during interrogations.

¶ 6 On July 29, 2009, a hearing on the motion to suppress was held<sup>1</sup> at which Detective James Adams (Detective Adams) testified and excerpts of the defendant's videotaped interrogations were played for the court. Detective Adams testified that on November 13, 2007, the defendant was in custody at a Cook County jail for a matter unrelated to the instant case. Shortly after 11 a.m., the defendant was transported to the Area 5 police station, where, at

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<sup>1</sup> Judge Kazmierski presided over the hearing on the motion to suppress while Judge Petrone presided over the jury trial.

approximately 11:39 a.m., he was placed in an interview room that was equipped with an audio and video recording system. During the 11:39 a.m. conversation, Detective Adams advised the defendant of his *Miranda* rights and, subsequently, Detective Adams and his partner, Detective Czablewski, questioned the defendant about the shooting death of Dezort. At that time, the defendant denied being involved in the incident. At the end of the initial interview, the defendant asked if he could speak with a lawyer because he did not know "what's going on." In response, Detective Adams asked, "Is that what you want, you want a lawyer?" When the defendant confirmed that he wanted the presence of an attorney, the detectives left the room. A video clip of the 11:39 a.m. interview was played for the court during the hearing on the motion to suppress.

¶ 7 According to Detective Adams, the next conversation occurred at about 3:10 p.m and lasted about 10 minutes, when the defendant knocked on the door and requested to use the restroom. A video clip of the 3:10 p.m. interaction was also played for the court at the hearing. Detective Adams testified that the defendant was then taken to the restroom and returned to the interview room about two minutes later. A video clip of the defendant returning to the interview room from the restroom was played for the court during the hearing. In the video clip, Detective Adams and the defendant were seen having a conversation. At the hearing, Detective Adams explained that on the way back from the restroom, the defendant asked a "strictly [] procedural" question about "what was going on with his case." Detective Adams waited until they were back on camera in the interview room before informing the defendant that the police was preparing to conduct a physical lineup, at which point the defendant denied any involvement in the shooting. Detective Adams then reminded the defendant that he had invoked his *Miranda* rights, which meant that the detective could no longer converse with him about the investigation, and that he

would have to be readvised of his *Miranda* rights should he wish to speak with the detectives. Detective Adams then asked, "Do you want to talk to me?" to which the defendant said "Yeah, I'll talk to you, but---" and Detective Adams interjected by providing him with *Miranda* warnings. The defendant again denied being involved in the shooting.

¶ 8 At the hearing, Detective Adams testified that at no time between the 3:10 p.m. conversation on November 13, 2007 and noon on November 14, 2007, did the defendant invoke his rights to silence or counsel. At about noon on November 14, 2007, Detective Adams had a conversation with the defendant during which he showed the defendant two police video recordings of their conversations with William and Nicolas Martinez, who implicated the defendant in the crime. The defendant then invoked his right to counsel and the detectives left the interview room. A video clip of the noon conversation was played at the hearing.

¶ 9 According to Detective Adams, at about 1:24 p.m., about twenty minutes after the noon conversation ended, he was bringing the defendant back into the interview room from the physical lineup when the defendant asked him whether "he was going to be able to talk to his lawyer today" and whether "he could get his own lawyer," to which Detective Adams responded, "[N]o, you get whatever you want to get. But as of right now you're not talking to us anymore, okay, and that's pretty much it. The State makes their decision and you get your lawyer down the road." At the hearing, Detective Adams explained his remarks to mean that since the detectives were not questioning him anymore, the defendant would get an attorney in court after he was charged. At the end of the 1:24 p.m. conversation, a video clip of which was played for the court at the hearing, the defendant requested food.

¶ 10 At approximately 1:48 p.m., about 20 minutes after the 1:24 p.m. conversation ended, Detectives Adams returned to the interview room with food for the defendant. The defendant

tried to confirm that he would be released from the interview room by 11 a.m. the next day, November 15, 2007. At the hearing, Detective Adams explained that the reference to 11 a.m. pertained to the defendant's 48-hour period in custody, which marked the maximum amount of time the police were allowed to hold him without charging him. When the defendant asked whether he could make a telephone call, Detective Adams informed him that he could use the telephone once he "hit[s] the lock-up." At the suppression hearing, Detective Adams explained this comment to mean that the defendant would be able to use the telephone in the lockup area when he was being processed, photographed and fingerprinted. Detective Adams testified that a suspect could be processed in the lockup area at any point during police investigation. The defendant then asked whether he would be sent to "Division I," to which Detective Adams replied that he did not know and that "We'll talk more in a little bit. We're gonna – we're not done yet. The state's attorneys gonna come out anyways again, all right." Thereafter, Detective Adams left the interview room. A video clip of the 1:48 p.m. conversation was played for the court at the hearing.

¶ 11 Detective Adams testified that neither he nor his partner had any contact with the defendant until 4:07 p.m., when the defendant knocked on the door and informed him that he was "ready to cooperate." A video clip of the 4:07 p.m. interaction was played for the court at the hearing. Detective Adams then left to find his partner, and returned to the interview room at about 4:13 p.m. At the start of the 4:13 p.m. conversation, Detective Adams advised the defendant of his *Miranda* rights, which the defendant indicated that he understood, waived, and proceeded to admit his involvement in the shooting. A video clip of the 4:13 p.m. conversation was played for the court at the hearing.

¶ 12 On August 18, 2009, the trial court denied the defendant's motion to suppress, finding that the defendant made a knowing, valid, and voluntary waiver of his *Miranda* rights. The court noted that there were "on and off indications of counsel" during police interrogation, but that there was "a reinitiation by the defendant of his willingness to speak to the police in some fashion" at 4:07 p.m. The court found that, at that point, the police readvised the defendant of his constitutional rights, which he knowingly and voluntarily waived before making his videotaped confession to the police.

¶ 13 On January 11, 2011, a jury trial commenced that lasted for several days. The State's theory at trial was that the defendant ventured into rival gang territory and shot the unarmed victim. The defense's theory at trial was that the defendant shot and killed the victim in self-defense or under an unreasonable belief that the victim was reaching for a weapon at the time the defendant shot him. At trial, the State presented the testimony of multiple witnesses, who established that at about 5 p.m. on June 25, 2007, victim Dezort, a member of the Milwaukee Kings (MK) street gang, was in the company of fellow gang members Enrique Ruiz (Enrique), Bobby Willis (Bobby), and Anthony Martinez (Anthony) in the area of Marmora and Fullerton Avenues in Chicago. The MK gang territory encompassed Marmora Avenue and Riis Park. As the four MK members walked in the area, a blue car drove past them, at which point Enrique and the victim displayed their gang signs. In response, the occupants of the car also flashed gang signs and left the area. Several minutes later, the blue car returned to the area while the foursome continued walking northbound on Marmora Avenue toward Altgeld Street. When the blue car reached Altgeld Street, a male individual with a shirt covering his face exited the vehicle and started shooting a gun at the foursome. Enrique, Bobby and Anthony testified to hearing

several gunshots as they fled. However, Enrique, Bobby and Anthony did not see the victim in possession of a gun or reach for anything prior to getting shot.

¶ 14 Jessica Gwinn (Jessica) testified for the State that on June 25, 2007, she was 13 years old and had gone swimming with a girl named Annette at Riis Park. After swimming, Jessica and Annette joined the defendant and Nicolas (Nick), William (Will) and Gabriel Martinez<sup>2</sup> (collectively, the Martinez brothers) in the area. The group then entered a blue vehicle driven by Nick. Will sat in the front passenger seat, the defendant sat in the back passenger seat, Annette sat in the middle backseat, while Jessica sat on Gabriel's lap behind the driver's seat. Jessica thought they were going to the beach. As the six individuals drove to the area of Fullerton and Marmora Avenues, Jessica saw the victim "[h]anging out with a bunch of guys in front of a liquor store." The victim and his companions flashed MK gang signs at the blue car, and the defendant responded by flashing a Maniac Latin Disciple (MLD) gang sign in return. The defendant then made a telephone call inside the car, during which Jessica could hear him say that he wanted a "thumper," which Jessica understood to mean a gun. The defendant then directed Nick to drive to a certain location, where the defendant exited the blue car and went to a "green pearl Honda." The defendant then returned to the blue car with a gun wrapped in an orange t-shirt. After the group left the location, the defendant unwrapped the gun, played with it in his lap, and remarked, "let's go get the Milwaukee Kings." Nick then drove to the area near Marmora Avenue and Altgeld Street, where she observed the victim walking toward Altgeld Street with the same group of males she had seen earlier. The defendant then jumped out of the blue car with a gun and with a shirt covering his face, while she, Annette and the Martinez

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<sup>2</sup> The Martinez brothers are not related to Anthony Martinez.

brothers remained in the vehicle. The defendant ran behind the blue car and Jessica hid underneath her seat in the car. Jessica then heard the defendant yell "M.K. blank, M.K. blank, M.K. blank," and heard five or six gunshots. Jessica did not see anyone else on the street with a gun, nor did she hear anyone yell anything at the blue car before the shooting. After the shooting, the defendant ran back to the blue car and the group drove away. Jessica then told the defendant that he made a "very big mistake," to which he responded that if she and Annette got him into trouble he would find someone to kill them. As Nick continued to drive, the defendant threw the orange t-shirt out into an alley. Nick then dropped Jessica and Annette off at Annette's home, while the Martinez brothers and the defendant left in the blue car. Later, they returned to Annette's home in a purple Chevy. Jessica testified that she did not initially tell the police what had happened because she was scared. On November 8, 2007, Jessica reported the crime at the police station, where she identified the defendant in a photographic array as the shooter. On November 13, 2007, she returned to the police station and identified the defendant in a physical lineup as the shooter.

¶ 15 The three Martinez brothers testified at trial that they were members of Latin Stylers (LS) street gang. Nick and Gabriel, who were also initially charged with first-degree murder of the victim, testified that they entered into written plea agreements with the State for a reduced charge of "conspiracy to commit first-degree murder" in exchange for testifying against the defendant in the instant case. Pursuant to the plea agreements, Nick was sentenced to a 24-year prison term while Gabriel was sentenced to 17 years of imprisonment. The Martinez brothers denied hearing most of the comments that Jessica testified she had heard the defendant make in the car prior to and after the shooting. However, Nick testified that after the shooting, the defendant told the occupants of the blue car to keep the shooting "between us" and that he would kill them or their



families if they "said anything." Gabriel further testified that, after encountering the MK gang members for the first time on the date in question, he and others in the blue car drove to the home of "JD," where the defendant exited the blue car and shortly returned to the car. Gabriel testified that they were supposed to visit a liquor store after they left JD's house, but instead, they encountered the MK gang members a second time near Marmora Avenue and Altgeld Street. While the Martinez brothers testified that they did not see a gun in the defendant's possession prior to the shooting, Gabriel testified that he saw a handgun in the defendant's possession after the shooting. Gabriel also testified that, at the time of the shooting, members of the defendant's gang, MLD, was in rivalry with the victim's MK gang. At trial, portions of the Martinez brothers' videotaped statements to the police that contradicted their trial testimony were shown to the jury.

¶ 16 Evidence was presented at trial that the police never recovered the handgun used to kill the victim. The parties stipulated at trial that the police recovered one fired bullet in a tree trunk at the crime scene. The parties further stipulated that, if called to testify, medical examiner Dr. Crowns would testify that he performed an autopsy on the victim. Dr. Crowns would testify that he observed a bullet entrance wound on the victim's back and recovered a deformed lead bullet from the exit wound in the left chest. Dr. Crowns would testify that the bullet's course was from right to left, back to front and upwards, and that there was no evidence of close-range firing. He would testify to a reasonable degree of medical certainty that the victim's death was caused by the gunshot wound to his back and the manner of death was homicide. The parties further stipulated that ballistics evidence revealed that the bullets recovered from the tree trunk and the victim's body were fired from the same handgun.

¶ 17 Detective Adams testified at trial as to the police investigations into the shooting death of Dezort—including police interrogations of Will and Nick Martinez. Detective Adams testified that in November 2007, he also interviewed Jessica in the presence of her mother. Jessica identified the defendant from a photographic array and a physical lineup as the shooter. Detective Adams also testified to the November 2007 police interrogations of the defendant. During his testimony, the video clips of the defendant's police interrogations, including his videotaped confession, were played for the jury. In his videotaped confession, the defendant detailed the events leading up to the shooting: he stated that he had the gun in his possession the entire time prior to the shooting; that he did not let his companions in the blue car know about the gun; that he checked to make sure that all of the bullets were in the gun prior to the shooting; that he began running and shooting at the MK gang members after he exited the blue car near Marmora Avenue and Altgeld Street; that the victim then started running, and the defendant saw his back and began shooting; that the defendant was aiming for the victim, but that he "didn't mean to shoot him" and that it was an "accident." During Detective Adams' testimony, the trial court allowed the State to introduce, over defense objections, several photographs of gang graffiti that the defendant made on the wall of the police interview room, as well as video clips of the defendant making the graffiti in question. The gang graffiti contained gang symbols, including those of the defendant's MLD gang and the defendant's nickname, as well as references to Riis Park and to Nick and Will as snitches.

¶ 18 The defense presented the testimony of Loisa Velez (Velez) and the defendant. Velez testified that she was friends with the defendant when they were young, but that they did not have a close relationship at the time of trial. Velez testified that about 5:20 p.m. on June 25, 2007, she was walking towards Altegard Street in the area of Fullerton and Marmora Avenues

when she noticed a group of males yelling "MK" and gang-related things at a passing car. The car then turned onto Altegeld Street, at which point an individual exited the passenger side of the car and the group of males ran toward the car. Velez then heard more yelling. From a distance of about 15 to 20 feet, she observed one of the males in the walking group reach into his torso area and pull out an object which she believed to be a gun. The individual who exited the car then began shooting. At that point, Velez fled the area, hid in a nearby gangway, and later went home. Velez estimated that about 3 to 5 seconds passed between the time the individual exited the car to the time he fired his weapon. Because gang violence was the norm in her neighborhood, she never reported the incident to the police. It was not until over three years after the shooting, in November 2010, that she learned from her cousin about the defendant's involvement in the shooting, at which point she began to talk about her observations. Thereafter, she was contacted by an attorney who asked her questions about the incident.

¶ 19 The defendant testified on his own behalf that he belonged to the MLD street gang and that he regularly carried a gun on his person for protection. On June 25, 2007, he visited the Martinez brothers' home to drink, smoke and talk. Jessica was also present. The Martinez brothers talked about how their gang, the LS, had issues with the MK gang. The defendant stated that he had friends from different street gangs. The group eventually got into a car and drove around, and the defendant overheard the Martinez brothers say that they wanted to "go do something." En route to a liquor store, they drove to the area of Fullerton and Marmora Avenues, where a group of MK gang members flashed gang signs and made hand gestures at them. The defendant and his companions responded by displaying their gang signs, after which they drove away. The Martinez brothers became angry about the MK gang members' disrespectful behavior toward them. They then stopped at the home of "JD," who was the

defendant's friend. At trial, the defendant denied that he got a gun from JD, but stated that he already had a gun in his possession during the car ride. After leaving JD's house, Nick wanted to see "what was going on with the MKs," and the group returned to the area of Fullerton and Marmora Avenues, where they observed the same group of MK members walking on Marmora Avenue. As they drove past the MK members, the MK members again flashed gang signs at them and approached the vehicle. Nick then turned onto Altgeld Street, where the defendant exited the vehicle to "see what the problem was with these MKs." The defendant claimed that he was "tired of them just gangbanging at the car," that he did not want the situation to escalate, that he was acting as the "middle man" between the groups, that he told the Martinez brothers to stay in the vehicle and that he would "take care of this," and that he only covered his face with a shirt to appease the Martinez brothers in the hopes that they would remain in the car. As the defendant walked toward Marmora Avenue, he asked the MK members, "what's up now," to which the victim replied, "what's up MK Love, [expletive]" and reached inside his pants pocket. At that time, the victim was about 15 to 20 feet from the defendant. The defendant then backed up and reached for his gun. The victim then saw the defendant's gun and began to turn, but that the defendant began firing his weapon because he thought the victim was about to shoot him. The defendant then ran back to the car. He stated that the entire incident happened quickly, estimating that it lasted about 10 seconds. No gun was ever recovered from the victim's person. On cross-examination, the defendant admitted that he never told the detectives that the MK members made hand gestures at him because "they never asked me"; and that he never told the police that the victim had said "what's up MK Love, [expletive]," that he felt threatened by the victim, or that he believed the victim was going to shoot him, because he was scared of the police and wanted to leave the interview room.

¶ 20 Following closing arguments, defense counsel objected to sending into the jury deliberation room certain morgue photographs of the victim and the gang graffiti evidence, which the trial court overruled. Subsequently, the jury found the defendant guilty of first-degree murder, finding that he personally discharged the firearm that caused the victim's death.

¶ 21 On February 17, 2011, the trial court denied the defendant's motion for a new trial, and sentenced the defendant to 65 years of imprisonment. On March 8, 2011, upon reconsideration, the trial court reduced the defendant's sentence to 60 years of imprisonment.

¶ 22 On September 26, 2011, the defendant's late notice of appeal was allowed.

¶ 23 ANALYSIS

¶ 24 We determine the following issues: (1) whether the trial court erred in denying his pretrial motion to suppress his videotaped confession; (2) whether the trial court erred in admitting photographs of gang graffiti made by the defendant in the police interview room and in admitting video clips of him making the graffiti; (3) whether the trial court erred in allowing photographs of the victim in life and death to be viewed by the jury during deliberations; (4) whether Illinois' sentencing scheme is unconstitutional; and (5) whether the defendant's sentence was excessive.

¶ 25 We first determine whether the trial court erred in denying his pretrial motion to suppress his videotaped confession.

¶ 26 The defendant argues that the trial court erred in failing to suppress his videotaped statement to the police, where, after he had requested counsel, the police reinitiated interrogation by making statements that were reasonably likely to elicit an incriminating response from him. Specifically, he contends that questions he posed to the detectives after invoking his right to counsel did not evince a willingness and desire for a generalized discussion concerning the

investigation, and that the police's answers to his questions were reasonably likely to elicit an incriminating response. Thus, he argues, his subsequent incriminating statement to the police should have been suppressed. The defendant further maintains that such error was not harmless, and urges this court to remand the case for a new trial.

¶ 27 The State counters that the trial court properly denied the motion to suppress, arguing that the trial court had properly found that it was the defendant who reinitiated communication with the police and that the police had then properly readvised him of his *Miranda* rights, which he knowingly and voluntarily waived before making his videotaped statement to the police. The State posits that it was clear from the record that whenever the defendant invoked his right to counsel, the detectives "wholly respected his wishes and concluded all conversations beyond meeting the defendant's physical needs and answering his questions regarding procedures." The State contends that the detectives' responses to the defendant's questions were not reasonably likely to elicit an incriminating statement from him, where he made no incriminating statements until several hours later. The State argues that, even if the police erred in answering the defendant's questions, that fact alone did not render any subsequent incriminating statements by the defendant to be involuntary because there was nothing in the record to suggest that the police employed deliberate or coercive tactics in obtaining the confession. The State further points out that the defendant's argument on appeal that his incriminating statement was somehow elicited by the police officers' responses to his questions regarding police and court procedures, was completely contrary to his testimony at trial. Even assuming the trial court's ruling was erroneous, the State contends that the error was harmless.

¶ 28 On review of a trial court's ruling on a motion to suppress, great deference is afforded to the trial court's factual findings, and the reviewing court will reverse those findings only if they

are against the manifest weight of the evidence. *People v. Lopez*, 2013 IL App (1st) 111819, ¶ 17. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. (Internal quotation marks omitted.) *Id.* However, this court reviews *de novo* the ultimate question of whether or not the motion to suppress evidence should have been granted. *Id.* Further, in reviewing the court's ruling on a motion to suppress, "it is proper for us to consider the testimony adduced at trial, as well as at the suppression hearing." *People v. Slater*, 228 Ill. 2d 137, 149 (2008).

¶ 29 Under the United States and Illinois Constitutions, a criminal defendant has a constitutional right to counsel at all custodial interrogations. U.S. Const., amends V, XIV; Ill. Const. 1970, art. I, § 10; *People v. Crotty*, 394 Ill. App. 3d 651, 655 (2009). "Once a defendant invokes that right, the police cannot interrogate him further unless the defendant initiates further communication, exchanges, or conversations with the police." *Crotty*, 394 Ill. App. 3d at 655; *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). "Even where the defendant has reinitiated contact, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the right to have counsel present." *Crotty*, 394 Ill. App. 3d at 655-56. If, however, after an accused has invoked his right to counsel, the *police* initiates a conversation with him in the absence of counsel, his statements are presumed involuntary and are inadmissible as substantive evidence at trial. *Id.* at 656. The United States Supreme Court has set forth a two-prong analysis for determining whether a defendant's statement made in response to police interrogation may be admissible as substantive evidence at trial. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983); *People v. Woolley*, 178 Ill. 2d 175, 198 (1997). The first prong is whether the accused, rather than the police, initiated further discussion after

invoking the right to counsel. *Woolley*, 178 Ill. 2d at 198. In order for the accused to "initiate" the discussion, he must make a statement that evinces a willingness and a desire for generalized discussion about the investigation. *Id.* Communications that relate to routine matters of the custodial relationship, such as restroom requests, do not constitute "initiation." *Id.* at 198-99. If the defendant did not initiate a conversation with the police after asserting his right to counsel, statements made in response to the interrogation are inadmissible. *Id.* at 199. If, however, the defendant did initiate the conversation with the police, the court moves to the second prong of *Bradshaw*. *Id.* That is the determination of whether the defendant's subsequent waiver of the right to counsel was knowing and intelligent. *Id.* "The question at this juncture is whether the totality of the circumstances, including the fact that the accused reopened dialogue with the police, shows that the accused knowingly and intelligently waived his right to the presence of counsel during questioning." *Id.*

¶ 30 In the case at bar, although the evidence presented at the hearing on the motion to suppress shows, and the trial court found, that the defendant made "on and off indications of counsel" during police interrogations, the defendant challenges only the admissibility of his videotaped statement to the police which was made after his final invocation of his right to counsel. Thus, we focus our examination of the record on the relevant portions of the police interrogation and the circumstances leading up to his confession.

¶ 31 During the noon conversation on November 14, 2007, Detective Adams showed the defendant two video recordings of police conversations with Will and Nick, in which they implicated the defendant in the crime. The defendant then invoked his right to counsel and the detectives left the interview room. At about 1:24 p.m., while Detective Adams was bringing the defendant back from the physical lineup, the defendant asked, "what time is everything—this all



happening?" to which Detective Adams replied that a decision would be made by 11 a.m. the next day as to what charges, if any, would be brought against the defendant. The defendant then asked whether "he was going to be able to talk to his lawyer today" and whether "he could get his own lawyer," to which Detective Adams responded, "[N]o, you get whatever you want to get. But as of right now you're not talking to us anymore, okay, and that's pretty much it. The State makes their decision and you get your lawyer down the road." At 1:48 p.m., Detective Adams returned to the interview room with food for the defendant. At that time, the defendant tried to confirm whether he would be released from the interview room by 11 a.m. the next day. At the hearing on the motion to suppress, Detective Adams explained that the reference to 11 a.m. pertained to the maximum 48-hour period in which the police was allowed to hold the defendant without charging him. When the defendant asked whether he could make a telephone call, Detective Adams informed him that he could use the telephone once he "hit[s] the lock-up" area where fingerprinting, photographing and processing would take place. The defendant then asked whether he would be sent to "Division I," to which Detective Adams replied that he did not know and that "We'll talk more in a little bit. We're gonna – we're not done yet. The state's attorneys gonna come out anyways again, all right." Thereafter, Detective Adams left the interview room.

¶ 32 The defendant argues that the detective's foregoing answers to his questions at 1:24 p.m. and 1:48 p.m., were reasonably likely to elicit an incriminating response from him and thus, his subsequent incriminating statement to the police at 4:13 p.m. should be suppressed. Specifically, he contends that none of his questions to the police during those times evinced a willingness or desire by him for a generalized discussion concerning the investigation, and that, from his perspective, he was essentially informed by the detective's answers to his questions that he was likely going to be charged with a crime, that he would not get an attorney until after he was

charged, and that he would be sent to lockup where his fingerprints and other information would be extracted from him. Further, he contends that the detective's comments that they would "talk in a little bit" and that they were "not done yet" suggested to the defendant that he would be subject to further questioning without the presence of an attorney. The defendant cites *People v. Olivera*, 164 Ill. 2d 382 (1995) and *People v. Flores*, 315 Ill. App. 3d 387 (2000), for support.

¶ 33 We find *Olivera* and *Flores* to be factually distinguishable from the instant case. In *Olivera*, the defendant, who had previously invoked his right to counsel, participated in a physical lineup in which he was identified by two witnesses. *Olivera*, 164 Ill. 2d at 386-87. Detective Kato removed the lineup members except for the defendant, who then asked what had happened, and the detective responded by telling him that he had been positively identified. *Id.* at 387. When the defendant then asked what would happen next, Detective Kato responded by advising him of his rights. *Id.* On appeal, our supreme court held that the defendant's limited question of "what happened" did not evince his willingness or desire for a generalized discussion concerning the investigation. *Id.* Our supreme court held that the detective's response that he had been "positively identified" in the police lineup was one that the detective should have known would be reasonably likely to elicit an incriminating statement from the defendant. *Id.* at 392. Thus, the *Olivera* court reversed the circuit court's denial of the defendant's motion to suppress his inculpatory statements. *Id.*

¶ 34 Likewise, in *Flores*, the defendant and a codefendant were arrested and placed in separate interview rooms. *Flores*, 315 Ill. App. 3d at 390. The defendant invoked his right to counsel, while codefendant made a statement to the police and to two attorneys for the State. *Id.* A few hours later, as a detective escorted the defendant back to the interview room following a restroom break, the defendant stopped, looked around, and asked the detective "what's going on."

*Id.* In response, the detective told the defendant that "there were a number of State's Attorneys in the office who were reviewing the case, they were deciding *who* was going to be charged, and what charges were going to be placed." (Emphasis added.) *Id.* In reply, the defendant told the detective to "get those State's Attorneys in. I want to talk to them," and subsequently made an incriminating statement. *Id.* at 390-91. On appeal, this court held that the trial court erred in denying the defendant's motion to suppress the statement, finding that the detective's response was reasonably likely to elicit an incriminating statement after the defendant had requested counsel and that it thus violated his *Miranda* rights. *Id.* at 393-94.

¶ 35 Unlike *Olivera* and *Flores*, in this case, Detective Adams' responses to the defendant's questions in no way explained the strength of the police evidence against the defendant, nor did they provide information to the defendant that would have pitted him against a codefendant. Indeed, the record shows that the detectives made the defendant aware of Will's and Nick's video recordings, in which they implicated the defendant in the shooting, *prior* to his request for counsel during the noon conversation on November 14, 2007. Our review of the video clips pertaining to the detective's responses to the defendant's questions at hand does not convince us that they were anything but communications relating to matters routine to the custodial relationship. See *Woolley*, 178 Ill. 2d at 198-99; *Crotty*, 394 Ill. App. 3d at 661 (inquires or statements that relate to bathroom use, a drink of water, telephone use, or other matters routine to the custodial relationship generally do not constitute an "initiation" of conversation). Thus, we do not conclude that Detective Adams' responses to the defendant's questions were statements reasonably likely to elicit an incriminating statement from the defendant. Rather, based on our review of the record, we find that the evidence supports the trial court's finding that, at 4:07 p.m., the defendant unambiguously reinitiated communications with the police by stating that he was

"ready to cooperate"—a statement which clearly evinced a willingness and a desire for generalized discussion about the investigation and the crime. See *Crotty*, 394 Ill. App. 3d at 655 (once a defendant invokes his right to counsel, the police cannot interrogate him further unless the defendant initiates further communication, exchanges, or conversations with the police). The evidence also supports the trial court's finding that the police readvised the defendant of his constitutional rights, which he knowingly and voluntarily waived before making his videotaped confession to the police. Accordingly, under the totality of the circumstances, we hold that the trial court properly denied the defendant's motion to suppress his videotaped confession.

¶ 36 We next determine under an abuse of discretion standard whether the trial court erred in admitting photographs of gang graffiti made by the defendant in the police interview room and in admitting video clips of him making the graffiti. See *People v. Johnson*, 208 Ill. 2d 53, 103 (2003).

¶ 37 The defendant argues that he was denied a fair trial when the trial court allowed the State to present photographs and video clips of gang graffiti that he drew in the police interview room. He contends that the gang graffiti bore no relevance to the issues in the case. He maintains that even if the gang graffiti was relevant evidence, any probative value was minimal and was vastly outweighed by its potential prejudice. He further argues that the trial court's error in admitting this evidence was not harmless.

¶ 38 The State counters that the trial court did not abuse its discretion in admitting photographs of gang graffiti and video clips of the defendant making the graffiti in the police interview room. The State argues that the evidence was properly admitted where it was relevant to show the defendant's "state of mind" and motive, to impeach his trial testimony that he approached the victim to make peace, and to contradict his testimony that his fear of the police

was the reason behind why he failed to tell them about the exculpatory information that the victim was going to shoot him at the time he fired his weapon. The State further argues that the gang graffiti showed the defendant's demeanor when he was alone in the interview room, and that the State never used the gang graffiti as impermissible evidence to show his propensity to commit crimes. The State maintains that any error by the trial court in admitting the evidence was harmless.

¶ 39 Evidence may be excluded if it is irrelevant. *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). "Relevance is a threshold requirement that must be met by every item of evidence." *Id.* "Evidence is relevant if it tends to prove a fact in controversy or render a matter in issue more or less probable." *People v. Nelson*, 235 Ill. 2d 386, 432 (2009). Even where evidence is relevant, it may be excluded if its prejudicial effect substantially outweighs its probative value. *People v. Wilcox*, 407 Ill. App. 3d 151, 169 (2010); *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007) (evidence inadmissible "if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature"). With regard to gang-related evidence, such evidence may be admitted "so long as it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect." *People v. Johnson*, 208 Ill. 2d 53, 102 (2003).

¶ 40 At trial, the trial court, over defense counsel's objections, allowed the State to introduce six photographs of gang graffiti that the defendant made on a wall in the police interview room, as well as several video clips of him making the graffiti. The gang graffiti contained gang symbols such as pitchforks, horns, and small swastikas, and included references to the defendant's nickname and his MLD gang affiliation, phrases indicating that Nick and Will were "snitches," as well as a reference to Riis Park. The trial court found that the photograph depicting the phrase "L-S-K Gambino trick" would corroborate trial testimony that "Gambino"

was the defendant's nickname; that the photograph depicting the phrase "Riis Park" would corroborate evidence that the defendant "was in a gang and hung around Riis Park"; and that the photographs of graffiti referencing Will and Nick as "snitches" were admissible as evidence of the defendant's "guilty mind" and "consciousness of guilt" and as evidence that he was not afraid of the police during interrogations. While the trial court excluded two photographs depicting larger swastikas that were drawn by the defendant, a photograph depicting the phrase "Riis Park," along with a small swastika drawn underneath the phrase, was admitted at trial. The gang graffiti evidence was presented during the testimony of Officer Adams, who explained that MLD gang symbols included pitchforks, hearts with horns, and swastikas.

¶ 41 The defendant does not argue that gang evidence in general should not have been admitted at trial, but only challenges the admissibility of the gang graffiti in question. At trial, it was undisputed that the defendant was affiliated with the MLD street gang, that his nickname was "Gambino," and that he shot and killed the victim near Marmora Avenue and Altgeld Street near Riis Park. The only issue of contention between the parties was whether the defendant shot the victim under a belief of self-defense. The pitchfork, horns and swastikas gang symbols, as well as the graffiti depicting the defendant's nickname and gang affiliation, did nothing to shed light on whether the defendant shot the victim under an unreasonable belief that the victim was about to shoot first. Nor can we conclude that the gang graffiti referencing Will and Nick as "snitches" was relevant to determining whether the defendant shot the victim in self-defense; rather, it only showed that the defendant was upset with the Martinez brothers for implicating him in the shooting. The fact that the defendant was the shooter was not in dispute at trial. While the gang graffiti evidence was also admitted to show that the defendant was not afraid of the police during interrogations, such evidence was unnecessary and cumulative in light of the

fact that the jury viewed the videotaped interrogations of the defendant and thus had ample opportunity to judge his demeanor during police questioning. They could therefore determine for themselves as to whether the defendant feared the police. Thus, it cannot be concluded that the gang graffiti evidence was relevant to any issue in dispute or that it rendered any disputed issue more or less probable. Even if the gang graffiti was somehow relevant to show motive or relevant to the ultimate issue of whether the defendant shot in self-defense, any probative value was minimal and substantially outweighed by its potential prejudice, particularly where the evidence was published to the jury and reiterated by the State during cross-examination of the defendant and in closing arguments. We see no probative value to informing the jury that the defendant defaced the interview room with gang graffiti, while there is potential prejudice that the gang graffiti could improperly suggest to the jury that he was a bad person, that he had a propensity to commit illegal or immoral acts, or that the gang graffiti could reasonably inflame the passions of the jury so as to suggest decision on an improper basis. See *People v. Hendricks*, 137 Ill. 2d 31, 52 (1990) ("a defendant's prior [unrelated] misconduct is not admissible for the purpose of establishing his bad character or propensity to commit illegal or immoral acts, because the prejudicial impact of such evidence outweighs its negligible probative value"); *People v. Barnes*, 2013 IL App (1st) 112873, ¶ 44 (Internal quotation marks omitted.) (prejudice means "an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror"); see also *People v. Strain*, 194 Ill. 2d 467, 477 (2000) (Illinois courts have acknowledged that there may be strong prejudice against street gangs in metropolitan areas). We question the necessity of introducing this evidence at trial in the first place. Notably, it does not appear in the record that any limiting instructions regarding the gang graffiti evidence was provided to the jury by the trial court. Accordingly, we find that the trial

court abused its discretion in admitting the photographs and video clips of the gang graffiti made by the defendant in the police interview room.

¶ 42 Although we hold that the trial court erred in admitting photographs of gang graffiti and the video clips of the defendant defacing the police interview room with gang graffiti, we find such error to be harmless beyond a reasonable doubt since the defendant's conviction would stand even absent the improper admission of the gang graffiti evidence. The defendant's videotaped confession revealed that he deliberately aimed at the victim and shot him in the back while the victim was running away. Notably, the confession made no mention of whether the defendant saw the victim reaching toward his torso prior to the defendant shooting him. Other corroborating evidence at trial include the testimony of Jessica, who detailed the defendant's behavior and circumstances leading up to and after the shooting, as well as stipulated evidence that the victim suffered from a bullet entrance wound in his back and evidence that no weapon was ever recovered from the victim's person. See *People v. Maldonado*, 240 Ill. App. 3d 470, 477 (1992) (although admission of gang-related testimony and argument was improper, reversal not warranted where there was little dispute that the facts and other competent evidence established defendant's guilt beyond a reasonable doubt); *People v. Negron*, 297 Ill. App. 3d 519, 536 (1998) (error in the admission of evidence is harmless when the competent evidence in the record establishes a defendant's guilt beyond a reasonable doubt and it can be concluded that a retrial without the erroneous evidence would produce the same result). Although we hold that the trial court's error in admitting the gang graffiti evidence was harmless, we question the practice of admitting clearly prejudicial and irrelevant evidence given the substantial amount of competent evidence available to the State.



¶ 43 We next determine whether the trial court erred in allowing photographs of the victim in life and death to be viewed by the jury during deliberations, which we review under an abuse of discretion standard. See *People v. Chapman*, 194 Ill. 2d 186, 219-20 (2000) (decision of whether a jury should be allowed to see photographs of a decedent at trial and whether the photographs may be sent to the jury during deliberations are within the sound discretion of the trial court).

¶ 44 The defendant argues that he was denied a fair trial when the trial court allowed a photograph of the smiling victim in life, a close-up morgue photograph of the victim's face in death, and two photographs of the bullet wounds in the victim's body to be sent back to the jury deliberation room, where the photographs carried a high potential for prejudice and little probative value. Specifically, he contends that because the victim's identity, the defendant's role as the shooter, and the manner of the victim's death were not in dispute at trial, allowing the jury prolonged exposure to the photographs by sending the evidence back to the jury room was "needlessly prejudicial." The defendant acknowledges that this issue was forfeited because he failed to raise it in his posttrial motion, but argues that it may be considered under plain error.

¶ 45 The State argues that the plain error doctrine does not apply to circumvent forfeiture of this issue, where the trial court committed no error in allowing the victim's photographs to be sent back to the jury room during deliberations. The State contends that there was nothing unusually prejudicial about the victim's life photograph, that the photographs depicting the bullet hole in the victim's back were relevant to the issue of whether the defendant shot him in self-defense and relevant to show the exact location of the wounds, that the medical examiner's identification number on the two bullet wounds photographs matched the identification number on the photograph depicting the victim's face postmortem (thus, establishing the victim's identity

as the person whose back was depicted in the morgue photographs), and that there was nothing about the morgue photographs that were gruesome.

¶ 46 We find that the defendant has forfeited review of this issue on appeal, where he failed to raise it in his posttrial motion. See *People v. Herron*, 215 Ill. 2d 167 (2005) (a defendant who fails to make a timely trial objection and include the issue in a posttrial motion forfeits review of the issue). Under the plain error doctrine, a reviewing court may consider unpreserved issues when either: (1) the evidence is so closely balanced, regardless of the seriousness of the error, that the jury's verdict may have resulted from the error and not the evidence; or (2) the error is so serious, regardless of the closeness of the evidence, as to affect the fairness of the defendant's trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). The first step in a plain error analysis is to determine whether an error occurred at all. *Id.*

¶ 47 At trial, prior to resting its case-in-chief, the State requested, and trial court allowed, multiple exhibits to be admitted into evidence, including a photograph of the victim in life (Exhibit 1), a postmortem photograph of the victim's face in the morgue (Exhibit 2), and two photographs of the bullet entrance wound in the victim's back (Exhibits 22 and 23). Following defense testimony and closing arguments, the jury retired to the jury room. Defense counsel then objected to allowing both Exhibits 22 and 23 to go back to the jury room, arguing that only one would suffice. The State countered that Exhibits 22 and 23 corroborated the portion of Dr. Crowns' stipulated testimony that there was no evidence of close-range firing. The trial court agreed with the State, finding that Exhibits 22 and 23 were not duplicative of each other because one shows an overall view of the victim's back including the location of the bullet hole, while the other shows a close-up view of the bullet hole itself. The court found that both Exhibits 22 and 23 corroborated the stipulated medical testimony. Defense counsel then objected to Exhibit 2,

arguing that there was no question as to the identity of the victim and how he looked in death, which was stipulated to at trial. The State argued that Exhibit 2 "corroborat[ed] the fact that the person depicted in Exhibits 1 and 2 are in fact the same person." The trial court found that the medical examiner identification number on Exhibit 2 corroborated Dr. Crowns' stipulated testimony, that there was "nothing graphic or bloody or gruesome about it at all," and allowed all 4 exhibits to be sent to the jury room.

¶ 48 On appeal, the defendant does not challenge the admissibility of the photographs at trial, but only challenges the court's decision to allow them to be sent to the jury room during deliberations. We also note that the defendant does not object to the admission into evidence of the photographs which he now raises as an issue. Based on our review of the record, we find that the trial court did not err in allowing the victim's life photograph and the three postmortem photographs to be sent to the jury room. The record reveals that the trial court examined these photographs in making its ruling. Further, the defendant's argument, when carefully analyzed, makes little sense. The defendant seems to argue that it is acceptable to admit the photographs into evidence, but the jury should not be allowed to see them. This is nonsensical since evidence by its very definition is something which is submitted to the trier of fact during a legal proceeding. In addition, the photographs were arguably relevant to corroborate the stipulated medical testimony, which referenced the exhibits in question. Specifically, although Dr. Crowns' testimony regarding the victim's bullet entrance wound and cause of death was stipulated to at trial, the photographs (Exhibits 22 and 23) served to assist the jury in determining the exact location of the entrance wound, which was relevant to the issue of whether the defendant shot him in self-defense. See generally *People v. Peterson*, 202 Ill. App. 3d 33, 38-40 (1990) (affirming the trial court's finding of guilt in part because bullet wounds to victim's back and

neck was inconsistent with self-defense theory). Although, as the defendant points out, the victim's identity in general was not in dispute, Exhibit 2 depicting the victim's postmortem face was also relevant evidence because it corroborated Dr. Crowns' stipulated testimony and the matching medical examiner identification number displayed on Exhibits 22 and 23, thus, establishing the identity of the person whose back was depicted as that of the victim. We further find the defendant's cited case, *People v. Garlick*, 46 Ill. App. 3d 216, 224 (1977), to be factually distinguishable to the case at bar, where, there, the reviewing court found that the gruesome photograph of the deceased victim's massive head wound "could serve no purpose other than to inflame and prejudice the jury in the grossest manner" and was not probative of any material issue in view of the defendant's admission of the offense and his defense of insanity. By contrast, although the identity of the shooter and the victim was not in dispute by the parties, our examination of the four photographs in question supports the court's finding that they were not graphic, bloody, or gruesome. Thus, the trial court did not err in allowing the jury to view the photographs during deliberations, where the photographs had been properly admitted into evidence. See *People v. Maldonado*, 402 Ill. App. 3d 411, 420 (2010) (interpreting *Garlick* court's comments regarding photograph as mere *dicta*, where the reviewing court had already decided that a new trial was warranted on other grounds). Accordingly, because we find no error, the plain error doctrine is inapplicable to reach this forfeited issue.

¶ 49 We next determine whether Illinois' sentencing provisions unconstitutionally violate juveniles' Eighth Amendment and due process rights, which we review *de novo*. See *People v. Woodrum*, 223 Ill. 2d 286, 307 (2006).

¶ 50 The defendant argues that Illinois' sentencing scheme was unconstitutional, because it automatically subjects 17-year-old minors charged with felonies to adult prosecution and

sentencing, without individualized judicial consideration of their youthfulness and the circumstances of the offense. Specifically, he asserts that section 5-120 of the Juvenile Court Act (Juvenile Act) (705 ILCS 405/5-120 (West 2008)) (the exclusive jurisdiction provision), and sections 5-8-1(a)(1)(d)(iii) (the firearm enhancement provision) and 3-6-3(a)(2)(i) (the truth-in-sentencing provision) of the Unified Code of Corrections (the Code), violate 17-year-old juveniles' Eighth Amendment and due process rights. He challenges the constitutionality of these statutes by citing several United States Supreme Court cases in which the Court held that "fundamental differences between juvenile and adult minds" make children under 18 less culpable than adults for the same offenses and, thus, juveniles should be treated differently. See *Miller v. Alabama*, 567 U.S. \_\_ (2012); *J.D.B. v. North Carolina*, 564 U.S. \_\_ (2011); *Graham v. Florida*, 560 U.S. 48 (2011); *Roper v. Simmons*, 543 U.S. 551 (2005).

¶ 51 The State counters that the exclusive jurisdiction provision of the Juvenile Act, and the firearm enhancement and truth-in-sentencing provisions of the Code are constitutional under Illinois law. Specifically, the State argues that our supreme court has held constitutional a strikingly similar "automatic transfer provision" under section 5-130 of the Juvenile Act (705 ILCS 405/5-130 (West 2008)), which allows 15 to 16 year olds who are charged with first-degree murder and other violent crimes to be automatically tried in adult criminal court. The State asserts that our supreme court's reasoning upholding the constitutionality of the automatic transfer provision should apply equally to the exclusive jurisdiction provision at issue in this case. The State also argues that the protections afforded by the Eighth Amendment against cruel and unusual punishments were not implicated in this case, where the exclusive jurisdiction provision does not deal with "punishments" imposed upon the juvenile defendant, but rather only provides a mechanism for determining the forum in which his guilt may be adjudicated. While

the State acknowledges that the firearm enhancement provision and the truth-in-sentencing provision, which prohibits the possibility of parole, address "punishments" imposed upon the defendant, the State points out that the defendant's arguments are "clearly directed towards the jurisdictional aspect of applying the criminal justice system as opposed to the juvenile justice system to 17-year-olds" and that the defendant makes no argument that the firearm enhancement and truth-in-sentencing provisions violated the Eighth Amendment as applied to adult offenders and concedes they apply to "some" 17-year-olds. The State further contends that none of the challenged statutory provisions violate the proportionality clause of the Illinois Constitution, nor do they violate the defendant's procedural or substantive due process rights.

¶ 52 Statutes carry a strong presumption of constitutionality, and the party challenging the statute has the burden of demonstrating a constitutional violation. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). A reviewing court has "a duty to construe a statute in a manner that upholds its validity and constitutionality if it reasonably can be done." *People v. Graves*, 207 Ill. 2d 478, 482 (2003).

¶ 53 At the time of offense in the case at bar, the exclusive jurisdiction provision of the Juvenile Act excluded 17-year-old defendants from the jurisdiction of juvenile courts and required that they be tried in adult criminal courts. See 705 ILCS 405/5-120 (West 2008).<sup>3</sup> Because the defendant was prosecuted in adult criminal court, he was automatically subjected to adult sentencing provisions—such as the minimal sentencing range of 20 to 60 years for first-degree murder offenders (730 ILCS 5/5-4.5-20(a) (West 2010); the mandatory firearm

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<sup>3</sup> The statute was later amended, effective 2014, to include in the juvenile court system minors who are 17 years old. This change only applied to violations committed on or after the effective date of the amendment and, thus, does not affect our analysis here. See 705 ILCS 405/5-120 (West 2014). As discussed, the defendant was 17 years old at the time of the shooting in 2007, but was 18 years old at the time of police interrogations.

enhancement provision, which allows a minimum of 25 years to be added to the term of imprisonment for personally discharging a firearm that caused death (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)); and the mandatory truth-in-sentencing provision, which precludes the possibility of parole (730 ILCS 5/3-6-3(a)(2)(i) (West 2008). The defendant argues that Illinois' sentencing scheme is unconstitutional, citing recent Supreme Court decisions in *Miller*, 567 U.S. \_\_; *J.D.B.*, 564 U.S. \_\_; *Graham*, 560 U.S. 48; and *Roper*, 543 U.S. 551, for support.

¶ 54 In *Roper*, a 17-year-old defendant was tried and convicted as an adult for murder, and sentenced to death under Missouri law. *Roper*, 543 U.S. at 578. The Supreme Court held that the Eighth Amendment prohibits the death penalty for juvenile offenders, by reasoning that the "death penalty is reserved for a narrow category of crimes and offenders," and that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. In *Graham*, the Supreme Court held that the Eighth Amendment forbids a life sentence without the possibility of parole for juveniles who did not commit homicide, finding that although the state is not required to release a juvenile during his natural life, the state is forbidden "from making judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 74-75. In *J.D.B.*, the Supreme Court held that a child's age, when known or objectively apparent to a reasonable police officer, is a relevant consideration in the *Miranda* custody analysis. *J.D.B.*, 564 U.S. at \_\_. In *Miller*, the Supreme Court held that the Eighth Amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for offenders who are under 18 years old, including those convicted of homicide, by finding that the sentencing scheme prevented the court from considering the juvenile's "lessened culpability" and "greater capacity for change." (Internal quotation marks omitted.) *Miller*, 567 U.S. at \_\_ (quoting *Graham*, 560 U.S. at 68, 74). The Supreme Court in *Miller* again recognized that

children: (1) have a lack of maturity and an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and heedless risk-taking; (2) are more vulnerable to outside pressures and negative influences and do not have the ability to extricate themselves from horrific, crime-producing settings; and (3) have characters that are not as well-formed as adults, with traits less fixed and actions less likely to be evidence of irretrievable depravity. *Id.* at \_\_\_\_.

¶ 55 The defendant argues that the exclusive jurisdiction statute violates juvenile offenders' rights under the Eighth Amendment, which prohibits "cruel and unusual" punishment. U.S. Const., amend. VIII. We find that this court's recent decision in *People v. Harmon*, 2013 IL App (2d) 120439, has already addressed and rejected the same Eighth Amendment arguments that the defendant raises here. In *Harmon*, this court, in discussing *Roper*, *Graham*, and *Miller*, found that the Supreme Court in those cases was only concerned with the death penalty and life sentences without the possibility of parole, which were the harshest possible penalties allowed under the United States Constitution. *Harmon*, 2013 IL App (2d) 120439, ¶ 54; see also *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 51. Because no life sentence or death penalty was imposed on the *Harmon* defendant, and the trial court was able to consider the defendant's age and other circumstances in determining the range of sentence to impose, the *Harmon* court rejected the defendant's arguments that *Roper*, *Graham*, and *Miller* justified his constitutional challenge. Likewise, in the instant case, the defendant was neither given a life sentence nor the death penalty, and the record shows that the trial court considered mitigating circumstances prior to sentencing the defendant within the statutory sentencing range. Thus, the defendant's constitutional challenge cannot be justified under the cited Supreme Court cases. In upholding the constitutionality of the exclusive jurisdiction provision, the *Harmon* court further noted that multiple Illinois courts have previously considered and rejected similar constitutional challenges,



*albeit* in the context of the "automatic transfer provision" of the Juvenile Act (705 ILCS 405/5-130 (West 2008)). See, e.g., *People v. Willis*, 2013 IL App (1st) 110233, ¶ 53 (upholding the constitutionality of the automatic transfer provision); *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66 (same); *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 24 (same); see generally *People v. M.A.*, 124 Ill. 2d 135, 144-47 (1988). The automatic transfer provision allows 15 to 16 year olds who are charged with first-degree murder and other violent crimes to be automatically tried in adult criminal court. *Id.* The *Harmon* court, citing *Salas*, 2011 IL App (1st) 091880 and *Pacheco*, 2013 IL App (4th) 110409, found that the reasoning applied by the *Salas* and *Pacheco* courts in holding that the automatic transfer provision did not violate the Eighth Amendment, applied with equal force to the exclusive jurisdiction provision—namely, that the provision is not subject to the Eighth Amendment because it does not impose a "punishment" but rather specifies the forum in which the defendant's guilt may be adjudicated. *Harmon*, 2013 IL App (2d) 120439, ¶ 55. We find no reason to depart from the sound holding in *Harmon* or the precedents on which it relied, and thus, we hold that the exclusive jurisdiction provision did not violate the defendant's Eighth Amendment rights.

¶ 56 The defendant also argues that, as a result of the application of the exclusive jurisdiction provision, the automatic *imposition* of adult sentencing statutes—such as the firearm enhancement and the truth-in-sentencing provisions of the Code—violated his Eighth Amendment rights. This court in *Harmon* has already considered and rejected the same arguments, by finding that *Roper*, *Graham*, and *Miller* did not hold that "the [E]ighth [A]mendment prohibits a juvenile from being subject to the same mandatory minimum sentence as an adult, but rather that the prohibition was limited to the mandatory minimum sentences of the death penalty or life without the possibility of parole." *Harmon*, 2013 IL App (2d) 120439, ¶

56 (quoting *Pacheco*, 2013 IL App (4th) 110409, ¶ 57) (holding that the imposition of an adult sentence on a juvenile did not violate the Eighth Amendment or the proportionate penalties clause)). Indeed, the defendant makes no argument that the firearm enhancement and the truth-in-sentencing provisions are unconstitutional when applied to adult offenders, and concedes that they even apply to "some" 17-year-olds. We see no reason to deviate from the holding in *Harmon*.

¶ 57 The defendant further argues that the Illinois sentencing scheme also violates juvenile offenders' substantive and procedural due process rights under the United States and Illinois Constitutions, because the trial court is precluded from making individualized inquiries regarding juvenile offenders' culpability, maturity, or capacity for rehabilitation prior to subjecting them to adult prosecution, and the juveniles are automatically subjected to adult prosecution and sentencing without a hearing. See U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2. He maintains that the aforementioned Supreme Court cases suggest that juveniles have a fundamental liberty interest in *not* being automatically treated as adults, without any court consideration of their youthfulness and the attendant circumstances of the case for sentencing purposes. He further asserts that, even if juveniles do not have a fundamental liberty interest in not being automatically treated as adults for certain offenses, the exclusive jurisdiction provision still violates due process under the rational basis test because automatically treating all 17-year-olds juveniles as adults, without a hearing, "does not bear a rational relationship to the State's interest in protecting the public from the most dangerous juveniles."

¶ 58 The due process clauses contained in both the United States and Illinois Constitutions prohibit the government from depriving any individuals of "life, liberty or property, without due process of law." U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2.

¶ 59 We find that this court in *Harmon* has considered and rejected the same due process challenge to the exclusive jurisdiction provision as the defendant in this case is attempting to advance. In so holding, the *Harmon* court noted that "Illinois precedent holds that the automatic transfer provision does not violate a juvenile's due process rights, and the same reasoning applies with equal force to the closely related exclusive jurisdiction provision." *Harmon*, 2013 IL App (2d) 120439, ¶ 59. The *Harmon* court reasoned that our supreme court, in *People v. J.S.*, 103 Ill. 2d 395 (1984), applied the rational basis test to analyze the automatic transfer provision, and it stated that the statute was rationally based on the juvenile's age and the threat posed by the offenses because of the violence and frequency of their commission. *Id.*; see also *M.A.*, 124 Ill. 2d at 147 (holding that the automatic transfer provision does not violate due process).

¶ 60 The *Harmon* court also cited several appellate court cases which supported the holding in *J.S.* See *Salas*, 2011 IL App (1st) 091880, ¶¶ 76-77 (holding that *J.S.* remains good law in light of *Roper* and *Graham* because those cases related to Eighth Amendment challenges and did not address any due process arguments); *Jackson*, 2012 IL App (1st) 100398, ¶ 16 (agreeing with *Salas* and holding that the automatic transfer provision does not violate either substantive or procedural due process); *People v. Croom*, 2012 IL App (4th) 100932, ¶ 16 (relying on *Salas* and *Jackson* to conclude that the automatic transfer provision does not violate due process); *People v. Patterson*, 2012 IL App (1st) 101573, ¶ 27 (following *Croom*); see also *Willis*, 2013 IL App (1st) 110233, ¶ 53 (holding that the automatic transfer provision was constitutional). The defendant in the case at bar argues that *J.S.*'s holding, relied upon by the *Harmon* court, rests on the "propriety of discretionless transfers," but that the Supreme Court's decision in *Miller* "necessarily eviscerated" the foundation of *J.S.*'s procedural due process ruling. In *Harmon*, the defendant

raised the exact argument, which the court rejected and found unpersuasive. We decline to deviate from the sound reasoning and holding in *Harmon*.

¶ 61 Nor do we find persuasive the defendant's arguments that as a result of applying the exclusive jurisdiction provision, the automatic imposition of adult sentencing statutes, such as the firearm enhancement and the truth-in-sentencing provisions of the Code, violates a juvenile's due process rights. The defendant's arguments are premised upon the misplaced notion that the reasoning in *Roper*, *Graham*, and *Miller* extended to the entire range of adult penalties. As discussed, those cases did not prohibit juveniles from being subjected to the same mandatory minimum sentence as those applied to adults, but rather, they concerned only the "harshest possible penalties" of capital punishment and mandatory life imprisonment without the possibility of parole. *Harmon*, 2013 IL App (2d) 120439, ¶ 62; see *People v. Davis*, 2014 IL 115595, ¶ 43 (finding that defendant's mandatory life sentence without parole violated the Eighth Amendment); *People v. Miller*, 202 Ill. 2d 328 (2002) (affirming trial court's imposition of a 50-year sentence, rather than the statutorily required mandatory life sentence without parole, on the juvenile offender). Accordingly, we hold that the exclusive jurisdiction provision, the firearm enhancement provision, and the truth-in-sentencing provision do not violate juveniles' Eighth Amendment or due process rights.

¶ 62 We next determine under an abuse of discretion standard whether the defendant's sentence was excessive. See *People v. Patterson*, 217 Ill. 2d 407, 448 (2005).

¶ 63 The defendant argues that even if Illinois' sentencing scheme is constitutional, the trial court's imposition of 60 years of imprisonment was excessive because it, in essence, amounted to a *de facto* life sentence. He contends that the sentence imposed "virtually guarantees that he will never have the opportunity to be restored to productive citizenship," and that such an extreme

sentence was inappropriate because he was only a teenager at the time of the offense. He argues that although the trial court considered facts that were attributable to his youth during sentencing, the court "failed to recognize them as mitigating his culpability for the offense." The defendant further argues that since his 60-year sentence is a *de facto* life sentence and does not reflect his lessened culpability or his rehabilitative potential, it implies that he is incapable of rehabilitation. Thus, he requests that this court reduce his sentence to the minimum 45 years, or, in the alternative, remand the case for a new sentencing hearing.

¶ 64 The State counters that the trial court did not abuse its discretion in sentencing the defendant to 60 years of imprisonment, which is comprised of 35 years for first-degree murder and a 25-year firearm enhancement add-on for personally discharging the gun that killed the victim. Specifically, the State contends that the trial court took into consideration all mitigating factors applicable to him, that the 35-year sentence imposed was below the middle of the statutory range for the offense of first-degree murder, and that the 25-year firearm enhancement was required to be added. The State further argues that the record shows that the trial court balanced the defendant's age, rehabilitative potential, family support and background with proper consideration of factors in aggravation.

¶ 65 " 'A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record.' " *People v. Foster*, 322 Ill. App. 3d 780, 786 (2000) (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). Accordingly, a trial court has wide latitude in determining and weighing factors in mitigation or aggravation in imposing a sentence. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). The seriousness of the crime is the most important factor in determining an

appropriate sentence, not the presence of mitigating factors, and the absence of aggravating factors does not require the minimum sentence be imposed. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). When a trial court sentences a defendant to a term within the statutory range, we will not disturb that sentence absent an abuse of discretion. *Foster*, 322 Ill. App. 3d at 786. A reviewing court will not engage in the reweighing of sentencing factors, and will presume that the trial court considered all mitigating evidence before it, absent some contrary indication other than the sentence imposed. *Gutierrez*, 402 Ill. App. 3d at 900.

¶ 66 We find that the trial court did not abuse its discretion in sentencing the defendant to 60 years of imprisonment. Our review of the record shows that, at the sentencing hearing, the trial court considered factors in aggravation and mitigation, the presentence report containing the defendant's age and other background information, as well as multiple letters written by family members in support of the defendant. The trial court originally sentenced the defendant to 40 years of imprisonment plus a 25-year firearm enhancement add-on, for a total of 65 years of imprisonment. However, upon the defendant's filing of a motion to reconsider sentence and an amended motion to reconsider sentence, the trial court gave "further weight" to the defendant's allocution statement, and reduced his sentence to 35 years of imprisonment plus a 25-year firearm enhancement add-on—for a total of 60 years of imprisonment. Based on our review of the record, we cannot conclude that the trial court's sentencing decision was an abuse of discretion, where the sentence was below the midpoint of the statutory sentencing range for first-degree murder (730 ILCS 5/5-4.5-20(a) (West 2008) (sentencing range for first-degree murder is 20 to 60 years)), the court balanced the appropriate aggravating and mitigating factors in imposing the sentence, and the court was required to impose the 25-year firearm enhancement add-on because the defendant personally discharged the gun that killed the victim (730 ILCS 5/5-

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8-1(a)(1)(d)(iii) (West 2008)). We decline to reweigh the factors involved in the trial court's sentencing decision. See *Gutierrez*, 402 Ill. App. 3d at 900. Therefore, we hold that the defendant's 60-year sentence was not excessive.

¶ 67 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 68 Affirmed.