

No. 1-12-1496

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 4396
)	
HECTOR PEREZ,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's second degree murder conviction affirmed over defendant's claim of self-defense; sentence was not an abuse of discretion; mittimus corrected to reflect two-year period of mandatory supervised release.

¶ 2 Following a bench trial, defendant Hector Perez was found guilty of second degree murder, and sentenced to 14 years' imprisonment followed by three years of mandatory supervised release (MSR). On appeal, defendant contends that the State failed to disprove that he acted in self-defense and that the sentence constituted an abuse of discretion. Defendant also

requests that his mittimus be corrected to reflect two, rather than three, years of MSR on his Class 1 offense.

¶ 3 Defendant's conviction stems from an incident that occurred about 1 a.m. on February 22, 2011, in defendant's apartment on the southwest side of Chicago. There, defendant stabbed and killed the victim, Rodolfo, a.k.a. "Chugo," Castro, following an argument and evening of drinking.

¶ 4 At trial, Hector, a.k.a "Martin," Ortega testified that he lived in a rear apartment at 2502 South Sacramento Avenue, and that defendant lived in the attic apartment of the same building. From 5 p.m. to 10 p.m. on February 21, 2011, he and defendant were in defendant's apartment, where Ortega drank about seven beers, and defendant consumed cognac, Bacardi rum, and three to four beers. Ortega recalled that defendant also played with a knife for a period of time, and when he was done, he threw the "blade" at Ortega. The knife was closed, and Ortega picked it up and put it to the side. At trial, Ortega identified the knife as the one later entered into evidence as the weapon used to stab the victim.

¶ 5 Ortega telephoned his friend Oscar Martinez, a.k.a. Ivan,¹ to come to defendant's apartment to drink with them. Martinez arrived about 5:30 p.m., stayed for 10 to 15 minutes, drank a beer, and then left. Ortega believed Martinez left with his friend "Chugo," and Ortega left the apartment about 10 p.m. because he had to work the next day. About 12:30 a.m.,

¹ Oscar Martinez's alias "Ivan" is spelled variously throughout the trial transcript as "Yvonne," "Iban," and "Ivan." We use the latter spelling as indicated in the common law record.

Martinez knocked on the window of his apartment, and asked to use his phone to call 911.

Ortega could not accommodate his request because his daughter had his phone.

¶ 6 Oscar Martinez testified that he was Castro's friend and had known him for 12 years.

About 5 p.m. on February 21, 2011, Castro picked him up at his residence and the two of them split two 12-packs of beer while sitting in Castro's car. About 7:30 p.m., Martinez went to defendant's apartment by himself, where he had a beer with defendant and Ortega. Castro picked him up about 20 minutes later, and they purchased and drank most of another 12-pack of beer. After that, they purchased a fourth 12-pack of beer, and went to defendant's apartment about 10:30 p.m. where they continued drinking. Martinez had known defendant for about a year, and had been to his apartment, which he described as having two beds and two television sets in the rear of the apartment, *i.e.*, the "bedroom" or "living room," a kitchen, and a bathroom. Martinez testified that he was seated on a chair in the bedroom drinking and watching television, and Castro and defendant were sitting behind him on a bed.

¶ 7 Several hours later, Castro and defendant started arguing about who was tougher, but they were not fighting. Martinez could not hear the specific words used by either of them and he had his back to them as he watched television. Martinez testified that he was not paying attention to the argument, which lasted a few minutes. He observed, however, that Castro and defendant got up from the bed, and were hugging and arguing as they went into the hallway of the apartment near the bathroom. Martinez then heard a scream, which he believed to be coming from Castro, stood up, and saw Castro lying face-up on the bathroom floor with blood near him. Martinez tried to talk to him, but he did not respond or move, and was hardly breathing. Martinez was afraid and told defendant to call the police, then went downstairs to Ortega's apartment and

also told him to call the police, but Ortega's daughter had his phone. Martinez stayed in the hallway until the police arrived and directed them to defendant's apartment.

¶ 8 Martinez further testified that he did not see anything in the hands of Castro or defendant when they walked past him, that he did not see Castro with any type of weapon on February 21 and 22, 2011, and that he did not observe Castro hitting or striking defendant. On cross-examination, Martinez stated that he and Castro used cocaine "at times. . . but not regularly" and on February 21, 2011, he was not using cocaine and did not see Castro do so either, and they were just drinking beer. Martinez believed defendant was drunk because he had been drinking before he and Castro arrived at the apartment, and believed defendant drank an additional three or four beers after they arrived. On redirect examination, Martinez testified that he did not hear defendant scream, nor did he hear a punch.

¶ 9 Chicago police officer Dan Lenihan testified that at 1:10 a.m. on February 22, 2011, he responded to the scene at 2502 South Sacramento Avenue, and Martinez directed him to defendant's third floor attic apartment. When they entered, defendant was pacing back and forth near the kitchen. They also found a person, later determined to be Castro, lying face-up in the bathroom with a puddle of blood next to his feet. Defendant told Officer Lenihan that Castro was fighting with five "gangbangers" in the apartment who then fled, but Officer Lenihan did not see any gangbangers fleeing that apartment or anywhere outside. Officer Lenihan noted in his police report that defendant was 63 years old, 5 feet 6 inches tall, and weighed 200 pounds.

¶ 10 Chicago police forensic investigator Brian Smith testified that about 1:55 a.m. on February 22, 2011, he processed the crime scene at defendant's apartment. Detective Jones directed Officer Smith to a knife, which was on a stack of clothing on a chair in the bedroom,

and not initially in plain view, and, after videotaping and photographing it, Officer Smith's partner inventoried it. The blade of the knife measured $3 \frac{6}{8}$ or 3.75 inches. Other than numerous cans of beer and other containers of alcohol in the apartment, Officer Smith observed that the apartment had a neat and orderly appearance, and that there was one small area near the bed where a heater and an alarm clock had been knocked to the ground.

¶ 11 Chicago police detective Peter Maderer testified that on February 22, 2011, he spoke with several witnesses regarding Castro's death, including defendant. He testified that he first spoke with defendant alone in the interview room about 2:30 a.m. Defendant stated that he was watching television in his apartment when a group of about five unknown "gangbangers" came over and started fighting, then everyone ran out and he saw one person lying on the floor. About 3:15 a.m., Detective Maderer and another officer interviewed defendant again, and defendant stated that five unknown individuals had entered his apartment and that he was unable to describe them. Detective Maderer informed him that another witness had stated that there were only three people in the apartment at the time, namely, defendant, Martinez and Castro, and defendant then stated that he got into a fight with the victim and stabbed him. He also stated that the knife he used to stab Castro was on a chair with some clothing on it. The officers immediately exited the room, activated the ERI (electronic recording of interrogation) equipment, and informed the detectives on the scene.

¶ 12 The parties stipulated that a proper chain of custody was maintained over the evidence at all times, swabs from the knife indicated the presence of blood, and that the DNA collected from those swabs matched that of Castro. They also stipulated that the video recording of defendant's interview with the assistant State's Attorney on February 22, 2011 was accurate, that defendant

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was read his Miranda rights in English and Spanish, and that he waived them prior to speaking with the State's Attorney.

¶ 13 The video of that interview was played in open court and entered into evidence. On the video, defendant first stated that Martinez and Castro came to his apartment through his open door without an invitation, and he did not know they were coming. He then stated that Martinez had come over earlier in the evening and left to buy beers. He knew Martinez was returning with the beer, but Martinez also brought "the other dude," later identified as Castro, whom he had seen a couple of times, and had instructed Martinez not to bring over. The three of them drank beer in the bedroom and watched television. Defendant stated that he was sitting in the chair, Martinez and Castro were sitting on the bed, and at some point, he got into a fight with Castro who was drunk and "messing up [his] place" and drinking his beer. Defendant told him to go home, but Castro "jumped him" and tried to punch him. Defendant stated that Castro hit him once in the front of his head and the blow was "not too hard." Defendant retreated by walking back and stated that Castro "jumped me and then he appeared all cut up and shit" and that he must have cut himself. Defendant then stated that he cut Castro with his knife in self-defense, that he had the knife in his pocket, and retrieved it when he stepped back. Defendant also stated that Castro "crashed into the knife," ran, and then fell in the washroom.

¶ 14 According to defendant, the fight occurred in the middle of the living room. He then called the police and did not remember what he told them, including the story about the five gangbangers. When Castro tried to punch defendant, he ducked the punches, and he did not remember if they crashed into things in the apartment. Defendant stated that he was "a little bit drunk" and confused. Once Castro fell, defendant did not try to speak with him, or assist him,

and Martinez had fled. Defendant did not ask Martinez for help and stated that everything happened very quickly and that he did not see a gun, knife, club, or any other weapon in Castro's hands.

¶ 15 Dr. Hillary McElligott, the Assistant Medical Examiner for Cook County testified that she performed the post mortem examination of Castro, which revealed a single 3.8 inches-deep stab wound on the left side of his chest, involving his heart and left lung. Castro was approximately 5 feet 2 inches tall, and weighed 145 pounds, and a toxicology test revealed the presence of drinking alcohol, cocaine and benzoylecgonine, the major metabolite of cocaine, in his system. Based on the autopsy, Dr. McElligott testified that the cause of Castro's death was a stab wound to the chest, and the manner of death was homicide. On cross-examination, she explained that the presence of cocaine in the blood indicated that it was ingested approximately within an hour of death and that Castro's blood alcohol level of .224 and eye fluid alcohol level of .280 indicated that he was inebriated at the time of his death.

¶ 16 The trial court denied defendant's motion for a directed finding, and the parties then stipulated that Chicago police detective Roberto Garcia interviewed Ortega on February 22, 2011, and Ortega incorrectly stated at that time that his birth date was December 11, 1969, and did not inform Detective Garcia that defendant threw a knife at him. The parties also stipulated that defendant placed two 911 emergency calls, one on February 22, 2011 at 1:03:45 a.m., and another at 1:09:21 a.m.

¶ 17 Following the arguments of counsel, the court found defendant guilty of first degree murder, but reduced it to second degree murder, finding that defendant acted under an unreasonable belief of self-defense. The court stated that there was "some struggling" prior to the

stabbing, the struggle was nonviolent, and that there was no evidence that the victim had any weapon in the incident, and thus, defendant was guilty of second degree murder.

¶ 18 Defendant's motion for a new trial was denied, and at sentencing, the State pointed out in aggravation that defendant had a prior misdemeanor battery conviction from 1990, and a 1999 felony conviction for possession of a firearm, for which he spent time in prison because he was unable to successfully complete his probation. The State also published victim impact statements from Castro's mother, two sisters, and the mother of Castro's daughter, and noted that defendant abused drugs and alcohol for over 30 years. The State informed the court that defendant was collecting disability benefits, while Castro was young and gainfully employed, and requested that defendant be sentenced closer to the maximum end of the sentencing range.

¶ 19 In mitigation, defense counsel informed the court that defendant was 65 years of age, and that alcohol had played a negative role in his life, including this incident. Counsel also commented on the amount of alcohol Castro had consumed that evening, and apologized to his family for their loss. Counsel then indicated that defendant had a father who was in his 90's in Puerto Rico, and he wished to leave a better legacy for his family name. Counsel stated that defendant had "learned a great deal" and believed his days of alcohol abuse were over, and requested that the court not "compound this tragedy with a very significant sentence." Defendant then waived his right to allocution.

¶ 20 Prior to announcing its sentencing decision, the court stated that it considered the evidence presented at trial, the presentence investigation report, the evidence offered in aggravation and mitigation, the statutory factors in aggravation and mitigation, as well as the financial impact of defendant's incarceration. The court noted that defendant was convicted of

second degree murder predicated on an incident where both sides were "profoundly intoxicated," a fight broke out, and defendant stabbed the victim in the chest a single time. The court also stated that it considered defendant's right of allocution or his indication that he did not wish to exercise that right. The court then addressed the seriousness of the offense and stated that it did not consider defendant to be near the minimum of four years, and instead found that a more serious sentence was warranted. The court then sentenced defendant to 14 years' imprisonment, followed by three years of mandatory supervised release.

¶ 21 On appeal, defendant first challenges the sufficiency of the evidence to prove him guilty of second degree murder beyond a reasonable doubt. He maintains that his belief in self-defense was reasonable, and therefore his conviction should be reversed.

¶ 22 When presented with a challenge to the sufficiency of the evidence to sustain a conviction, the relevant question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). This court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 23 In this case, defendant was charged with first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)), and found guilty of second degree murder (720 ILCS 5/9-2 (West 2010)).

Pursuant to section 9-1(a)(1) of the Criminal Code of 1961, first degree murder occurs when a

person kills another person without lawful justification and, in performing the acts which cause the death, he either intended to kill or do great bodily harm to that individual or another, or knew that such acts will cause death to that individual or another. 720 ILCS 5/9-1(a)(1) (West 2010). The elements of first and second degree murder are identical (*People v. Jeffries*, 164 Ill. 2d 104, 122 (1995)), however, second degree murder differs from first degree murder by the presence of a mitigating factor, such as an alleged provocation or an unreasonable belief in justification (*People v. Porter*, 168 Ill. 2d 201, 213 (1995)).

¶ 24 Here, the court found that defendant stabbed and killed Castro with a knife with the knowledge that his actions would cause his death or great bodily harm, and thus had met the requirements of first degree murder. The court then found that defendant acted under an unreasonable belief in self-defense, which served as a mitigating circumstance to warrant a finding of guilty of second-degree murder rather than first-degree murder. *People v. Flemming*, 2014 IL App (1st) 111925, ¶53. Defendant disputes that conclusion on appeal, asserting that he successfully raised a claim of self-defense, which the State failed to disprove.

¶ 25 The difference between a justified killing under self-defense, and one not justified, amounting to what is now second degree murder, is that in the former instance, the belief that the use of deadly force is necessary is reasonable, while in the latter, it is not. Once defendant raises the affirmative defense of self-defense, the State must not only prove the elements of first degree murder beyond a reasonable doubt, but also that it was not carried out in self-defense. *Jeffries*, 164 Ill. 2d at 127. If the State meets its burden in this regard, the trier of fact may then proceed to a determination of second degree murder. *Id.* at 128-29. In order to raise self-defense, defendant must establish some evidence of each of the following elements: (1) force was threatened against

a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable.” *Id.* at 127–28. If the State negates any one of these elements, a defendant's claim of self-defense fails. *Id.* at 128.

¶ 26 According to defendant, the only element of self-defense that can reasonably be disputed was whether his belief in the need to defend himself was objectively reasonable. His contention that it was reasonable requires that the trial court believe the version of events he gave in his statement to the assistant State's Attorney. That statement, however, was inconsistent in several respects, and contrary to defendant's contention, it was not the only evidence about the struggle adduced at trial.

¶ 27 Although Castro was young, intoxicated and had consumed cocaine as defendant alleges, Martinez and Ortega testified that defendant had also been drinking heavily. Martinez testified that the two men were arguing over who was tougher before defendant stabbed Castro, whereas defendant claimed that Castro was "messing up" his things and drinking his beer, and so he asked him to leave. Other key aspects of the fight are also in dispute. Martinez testified that he was sitting on the chair when he observed defendant and Castro get up from the bed and hug as they continued to argue and walk into the hallway of the apartment near the bathroom, whereas defendant stated that he was in the middle of the bedroom during the fight. Martinez did not hear defendant call out for help or being punched, while defendant claimed he was ducking the punches that Castro was throwing at him, and Castro only hit him once, and "not very hard" in the head.

¶ 28 Defendant also made inconsistent statements regarding the sequence of events that led to the stabbing. He initially told detectives that five unknown "gangbangers" had entered his apartment, fought, and then fled after one of them was wounded, but he later admitted that he stabbed defendant following an argument. His statement was also inconsistent regarding the presence of Martinez and Ortega in his apartment. He initially claimed that he did not know Martinez and Castro were coming to his apartment, and that they came in uninvited through his open door, but he then stated that Martinez had come over earlier in the evening, left to buy beer, and although he knew Martinez was returning, he brought Castro, who was not welcome. Nonetheless, further evidence showed that defendant continued to drink with his unwelcome guest for several hours before the argument occurred. Defendant's story was also inconsistent as to how Castro "jumped [him] and then he appeared all cut up and shit" and that he "crashed into the knife," yet he also stated that he had the knife in his pocket, and retrieved it when he stepped back from Castro's punches, and cut Castro with that knife in self-defense.

¶ 29 When the trial court is presented with conflicting versions of events, it need not accept defendant's version of events as true and is entitled to choose among those competing versions. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). Where, as in the instant case, there are many facts in controversy, the trial court must determine the credibility of the witnesses, weigh their testimony, draw reasonable inferences, and resolve conflicts in the evidence. *Ortiz*, 196 Ill. 2d at 259. Here, the court addressed the condition of the participants and the inconsistencies in the testimony, and determined that defendant's use of deadly force was unreasonable. Other than defendant's testimony that Castro attacked him, there is no evidence to show that defendant needed to stab Castro to protect himself or his property, and thus, viewing the evidence in a light

most favorable to the State, we conclude that a rational trier of fact could find that the State disproved beyond a reasonable doubt that any belief on defendant's part that he was justified in using deadly force was unreasonable. *Flemming*, 2014 IL App (1st) 111925 at ¶ 56.

¶ 30 Defendant also asserts that he was justified in stabbing Castro with deadly force in order to prevent him from committing residential burglary, a forcible felony. A person commits residential burglary when he knowingly and without authority enters or remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft. 720 ILCS 5/19-3(a) (West 2010). Defendant cites no evidence other than his statement that defendant remained within his apartment without authority, and there is no evidence in the record to show that Castro intended to commit a felony or theft in defendant's apartment. This argument, like those previously addressed, requires that the trial court accept defendant's claim that Castro refused to leave his apartment and attacked him, and to ignore conflicting testimony that indicated that the two men were sitting and drinking together for a period of time before the quarrel began. The court was not required to believe defendant's version of events (*Villarreal*, 198 Ill. 2d at 231), and his argument fails for a lack of evidence to support a finding of a forcible felony (*Blackburn v. Johnson*, 187 Ill. App. 3d 557, 564 (1989)).

¶ 31 Defendant also contends that he was found guilty of second degree murder only because there was no evidence that Castro had any weapon whatsoever, and a person need not be armed in order to reasonably act in self-defense, citing *People v. Brown*, 218 Ill. App. 3d 890, 899 (1991) ("the law does not require the aggressor be armed before the use of a deadly weapon in self-defense is justified[;] it must appear that the aggressor is capable of inflicting serious bodily harm without the use of a deadly weapon, and is intending to do so."). This argument

misperceives the court's finding and the necessary elements of proof required for a conviction of second-degree murder. In reaching its final conclusion, the court stated:

"[Defendant] does indicate that there was some struggling that went on prior to the stabbing. And a stabbing, unlike a shooting, sometimes can matriculate into a fatality, as it did in this case, from a struggle, a nonviolent struggle. There is no evidence that the victim had any weapon whatsoever in this incident. For that reason, the defendant will be found guilty of second degree murder."

This statement, taken in its entirety, and combined with the undisputed evidence in the record, indicates that the court believed that defendant and Castro, who were both "profoundly intoxicated," were involved in a non-violent struggle, and that Castro, who was younger and smaller than defendant, did not have a knife or any other weapon and thus, defendant's belief that lethal force was necessary was unreasonable. That conclusion was supported by the record, and we do not find that determination called into question by the court's mention of the fact that Castro was unarmed.

¶ 32 In sum, we find that the evidence, viewed in the light most favorable to the State, was sufficient to allow the trial court to find that defendant was proved guilty of second degree murder beyond a reasonable doubt, and we affirm that conviction. *Flemming*, 2014 IL App (1st) 111925 at ¶ 64.

¶ 33 Defendant next contends that the trial court abused its discretion in sentencing him to 14 years' imprisonment. Although this sentence falls within the 4-to-20 year statutory range provided for second degree murder (730 ILCS 5/5-4.5-30(a) (West 2010)), defendant asserts that the trial court failed to consider the mitigating factors in his case.

¶ 34 Under well-settled principles, a trial court's sentencing decision is afforded great deference, and a reviewing court will disturb a sentence within statutory limits only if the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000). A sentence within the statutory limits will be deemed excessive only if it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999). We do not find this to be such a case.

¶ 35 Defendant acknowledges that the trial court explicitly stated that it considered the statutory factors in mitigation and aggravation, however, he claims that the court did not articulate or acknowledge many of them, including his lack of criminal record and that this incident was the result of circumstances unlikely to recur. A trial court need not detail precisely for the record the exact thought process it used to arrive at the ultimate sentencing decision or articulate its consideration of mitigating factors (*People v. Quintana*, 332 Ill. App. 3d 96, 109), and when the trial court is presented with mitigating evidence, we presume that the court considered that evidence, absent some indication, other than the sentence itself, to the contrary (*People v. Hill*, 408 Ill. App. 3d 23, 30 (2011)).

¶ 36 Here, the State discussed defendant's limited criminal history, including a misdemeanor conviction from 1990 for battery, and a felony conviction from 1999 for possession of a firearm, and defense counsel noted the negative role alcohol had played in his life. Counsel also commented on defendant's consumption of alcohol that evening, but argued that defendant's days of alcohol abuse were over. Given defendant's long history of alcohol abuse, however, the trial court could reasonably conclude that such an incident could recur and thus a longer sentence was

indicated. We find no abuse of discretion in that determination, and thus his argument regarding mitigating evidence fails. *Hill*, 408 Ill. App. 3d at 30.

¶ 37 We reach the same conclusion regarding defendant's assertion that the court failed to consider that he acted under a strong provocation, that there were substantial grounds tending to excuse or justify his criminal conduct, and that his criminal conduct was induced or facilitated by someone other than himself. The record shows that the court was well aware of the circumstances in which the incident occurred and was not persuaded that defendant was not the culpable party. The record further shows that the court considered the circumstances of the incident leading to the fatal stabbing in fashioning a sentence, and specifically noted the seriousness of the offense, requiring a longer term.

¶ 38 Defendant also contends that the court's statement that it "considered the defendant's right of allocution or his indication that he didn't wish to allocute in this case" was an abuse of discretion because it is not probative of any relevant factor in sentencing and defendant has the constitutional right to remain silent. The State responds that the court did not say what it was considering this factor for, nor did it penalize defendant for waiving his statutory right of allocution. We agree.

¶ 39 In determining the propriety of a sentence, the reviewing court should not focus on a few words or statements of the trial court, but consider that entire record as a whole. *People v. Estrella*, 170 Ill. App. 3d 292, 297-98 (1988). Here, the record shows that before announcing its decision, the court merely reviewed the sentencing hearing to that point, and included defendant's decision regarding allocution. We find this single reference to an objective fact

insufficient to show that the trial court considered an improper factor or that defendant incurred a penalty for choosing to remain silent during sentencing.

¶ 40 In reaching this conclusion, we note that defendant's reliance on the lower federal court cases of *Poteet v. Fauver*, 517 F. 2d 393, 396 (3d Cir. 1975) and *Thomas v. United States*, 368 F. 2d 941, 944 (5th Cir. 1966), and the Illinois cases of *People v. Sherman*, 52 Ill. App. 3d 857, 859 (1977) and *People v. Ward*, 113 Ill. 2d 516, 528, 532 (1986) is unpersuasive. In these cases, defendants were penalized with a longer sentence for refusing to admit guilt or for persisting in claiming innocence following a conviction. *Poteet*, 517 F. 2d at 395; *Thomas*, 368 F. 2d at 944; *Sherman*, 52 Ill. App. 3d at 858; *Ward*, 113 Ill. 2d at 525. Here, defendant decided against speaking in allocution after defense counsel apologized for him to the victim's family, and the court merely recognized that defendant had chosen not to exercise his right to speak. When considered in the context of the whole, the court's reference to defendant's choice does not support his claim.

¶ 41 We also find unpersuasive defendant's argument that the court's question to the assistant State's Attorney about the relevant sentencing range in this case or sentencing defendant to three years of MSR instead of two, indicates that the court misunderstood the class of the offense and the proper sentencing range and thus abused its sentencing discretion. Defendant has not pointed to any affirmative evidence that the court misunderstood the law, and its conversational inquiry regarding the sentencing range does not show the contrary. We thus find no abuse of discretion in the 14-year term entered by the court, and have no basis to modify it. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 42 Defendant argues, the State concedes, and we agree, however, that his mittimus should be corrected to reflect that the second degree murder charge of which he was convicted is a Class 1 offense, and carries an MSR period of two years, rather than the three years, as currently reflected on it. 730 ILCS 5/5-4.5-30(1) (West 2010); 730 ILCS 5/5-8-1(d)(2) (West 2010).

Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the court to modify his mittimus accordingly.

¶ 43 For the reasons stated above, we therefore affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed; mittimus modified.