

No. 1-13-2163

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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. 11 CR 5844
	)	
TERRANCE TUCKER,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for first degree murder and his 55-year prison sentence are affirmed, where: (1) there were no errors at trial depriving defendant of a fair trial; (2) defendant was not provided ineffective assistance of trial counsel; and (3) defendant, who was a juvenile at the time of the murder, was not improperly subjected to an unconstitutionally mandated *de facto* life sentence.

¶ 2 After a jury trial, defendant-appellant, Terrance Tucker, was convicted of first degree murder and sentenced to a term of 55 years' imprisonment. On appeal, defendant contends that: (1) he was denied a fair trial, where the State was allowed to introduce testimony that improperly implied that defendant had confessed to the murder; (2) his defense counsel provided ineffective assistance of counsel with respect to the State's introduction of that evidence; and (3) because defendant was a juvenile at the time of the murder, the sentencing scheme applied in this case

unconstitutionally mandated that a *de facto* life sentence be imposed upon defendant. For the following reasons, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 Defendant was charged by indictment with multiple counts of first degree murder, unlawful use or possession of a weapon by a felon, and aggravated unlawful use of a weapon. A jury trial was held in January of 2013, at which the State elected to proceed solely on two of the first degree murder counts. Each of those counts generally alleged that, on or about December 20, 2009, defendant personally discharged a firearm that proximately caused the death of Gregory Tuck.

¶ 5 Prior to trial, the trial court addressed the motions *in limine* filed by defendant and the State. Of particular relevance to this appeal is a motion that was filed by the State, which sought to permit the introduction of evidence regarding the "location and context" of a conversation between defendant and Edmund Kavanaugh. Mr. Kavanaugh was listed in the State's answer to discovery as being among those witnesses the State "may or may not" call at trial.

¶ 6 In its written motion, the State contended that defendant had made a confession to Mr. Kavanaugh with respect to the murder of the victim. This confession purportedly occurred while defendant and Mr. Kavanaugh were both incarcerated in prison—defendant on a prior weapons charge conviction—and that defendant spoke to Mr. Kavanaugh about the murder at issue here because Mr. Kavanaugh was acting as a "jailhouse lawyer." The State argued that it was necessary to provide the jury with the circumstances surrounding this confession because, "[w]ithout the context of the men meeting in the penitentiary, it is inexplicable why these two men, who have nothing in common, had such a confidential conversation." The State maintained that it would not be introducing this evidence to establish that defendant was "criminally

predisposed," and would not seek to introduce any evidence as to why defendant was incarcerated. Defendant responded to the State's motion with a written motion of his own, seeking to bar the introduction of any evidence that defendant's conversation with Mr. Kavanaugh occurred while defendant was incarcerated, because such evidence was not probative and was unduly prejudicial.

¶ 7 During oral arguments on these motions, defense counsel made it clear that it was objecting to the introduction of evidence regarding the circumstances of the conversation, not the content of the conversation. The trial court then granted the State's motion and denied defendant's motion, ruling that the circumstances surrounding defendant's confession were probative and not unduly prejudicial. However, the trial court also ruled that the jury should not be presented with any specific evidence regarding why and for how long defendant was incarcerated, and that the jury could be instructed as to the purposes for which it could and could not consider the evidence regarding the confession's context. When asked by the trial court, the State indicated that Mr. Kavanaugh would not be its first witness. The trial court then encouraged the parties to draft a proposed limiting instruction prior to Mr. Kavanaugh's testimony.

¶ 8 The parties then proceeded to give their opening statements. In its opening statement, the State did not discuss Mr. Kavanaugh's anticipated testimony or defendant's confession in any way. Defense counsel's opening statement, however, did specifically discuss Mr. Kavanaugh in an apparent effort to preemptively discredit his anticipated testimony. Defendant's theory of the case, as outlined in his opening statement, was that Marcellis Fields—defendant's friend and the man in whose possession the murder weapon was ultimately found—was the person who shot the victim. Defendant only spoke to Mr. Kavanaugh in an effort to help Mr. Fields, but

unfortunately Mr. Kavanaugh was "an opportunist" and a "user" whose "intention all along was to be dishonest, to cheat Terrance and to use him for his own gain." Defense counsel did not indicate that defendant had confessed to Mr. Kavanaugh, or the fact that the two men were in prison when they spoke to each other. Defense counsel did, however, assert that Mr. Kavanaugh provided the State with false information regarding the content of that conversation in an effort to use defendant for his own gain. This included the assertion that defendant believed Mr. Kavanaugh could, for a price, recover both the murder weapon from the police and the bullets fired during the murder from the medical examiner.

¶ 9 Both before and after the parties' opening statements, the jury was specifically instructed that those statements were "not evidence," with the trial court also reiterating just prior to the presentation of State's first witness that "[t]he evidence starts right about now."

¶ 10 The State's evidence at trial generally established that, on December 20, 2009, defendant was with a group of friends at defendant's home, located in Chicago at 69th Street and Artesian Avenue. The group eventually left defendant's home to walk to a store a few blocks away. At 68th Street and Artesian Avenue, the group was confronted by the victim and an altercation ensued. The incident ended with defendant shooting the victim multiple times, including in the victim's back.

¶ 11 The State's evidence included testimony from a number of eyewitnesses to the shooting. Marcellis Fields testified that he was a friend of defendant, and that he was part of the group at defendant's home on the night of the shooting. While the group was at defendant's home, defendant showed them a .38-caliber revolver. When the group left defendant's house, defendant was the only one carrying a gun. After the victim and defendant engaged in a verbal altercation, Mr. Fields observed defendant shoot the victim "about six times." Mr. Fields ran from the scene,

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but sometime later defendant gave him the murder weapon with instructions to "get rid of it." Mr. Fields hid the gun in the basement of another friend's home, across the street from the location of the shooting. On January 19, 2010, Mr. Fields was arrested at that location for being in possession of the murder weapon. At the time of the trial, Mr. Fields had a previous felony burglary conviction and was in jail pending the resolution of a robbery charge.

¶ 12 Jasmine Barker was a life-long acquaintance of defendant, and was with the group that left defendant's home on the night of the shooting. The victim began swearing at the group and then a fight broke out after the victim slapped a cigarette out of another member of the group's hand or mouth. Ms. Barker identified defendant as the person that shot the victim, though she specifically testified at trial she only heard a gunshot and saw a flash of light coming from defendant's hand while it was pointed at the victim. She also testified that she had observed Mr. Fields with the gun prior to the night of the shooting.

¶ 13 Chacity Foggey testified that she was part of defendant's group at the time of the incident. The victim and another member of the group were fighting when she saw two "sparks" coming from the crowd of people present. At trial, she equivocated as to whether—and at times denied—she saw defendant shoot the victim and that he had announced his intention to do so. However, Ms. Foggey admitted that she testified before the grand jury to that effect. She specifically acknowledged her grand jury testimony that defendant shot the victim multiple times, including in the back. She also testified that after the shooting, defendant threatened her and other members of the group if they talked about the incident.

¶ 14 Samuel Calhoun testified that he was another member of the group at defendant's house, where he observed defendant with a black revolver. After the group left and got into the altercation with the victim, Mr. Calhoun saw defendant shoot the victim multiple times with that

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same gun. Mr. Calhoun testified that he had previously denied seeing defendant shoot the victim when speaking to defense counsel. At trial, however, he explained that this denial was untrue, he was in jail at the time he made the denial, and that he was nervous and uncomfortable about identifying a murderer while in that situation. Mr. Calhoun was also in jail at the time of trial, due to a pending contempt charge for his previous failure to appear in court to testify in this matter.

¶ 15 Faison Jackson testified at trial, where he denied that he saw defendant shoot the victim on the night of the murder. He further testified that he had previously informed a defense investigator that he did not see "anything" at the time of the shooting. However, Mr. Jackson also acknowledged at trial that he had previously identified defendant as the person that had shot the victim in conversations with the police and an assistant state's attorney, as well as in his prior testimony before the grand jury. Defendant disavowed these prior statements at trial.

¶ 16 Hassan Jones was not a member of defendant's group, but testified that he was at the scene of the shooting. Mr. Jones testified that he observed an altercation involving defendant and the victim, and that he then saw and heard defendant shoot the victim multiple times. Mr. Jones fled from the scene and did not tell anyone what he saw because he did not want to get involved.

¶ 17 Mr. Jones was a twice-convicted felon at the time of trial, and was also then in jail on a pending contempt charge for his previous failure to appear in court to testify in this matter. He indicated at trial that he did not want to testify. He also testified that it was not until January of 2010, while he was on mandatory supervised release for another offense, that he informed the police about what he had seen at the time of the shooting. Mr. Jones indicated that he knew he was going to fail a drug test and thus return to prison for a parole violation, and thought that the

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police might give him some "help" if he provided information about the shooting. He also acknowledged that he had previously informed a defense investigator that he had not observed defendant shoot the victim, and provided a signed statement to that effect. Mr. Jones indicated that his interaction with the defense investigator occurred while he was incarcerated, he did not want to identify defendant around other inmates, and that he did not want to become involved in this matter. Finally, Mr. Jones testified that he had previously identified defendant as the person who had shot the victim to the police and to the grand jury.

¶ 18 In addition to the eyewitnesses, the State also introduced evidence regarding its investigation into this matter. In particular, Detective Oscar Arteaga testified that he was assigned to investigate the victim's murder in November of 2012, after the police had received a letter from Mr. Kavanaugh, who was then an inmate at the East Moline Penitentiary. Detective Arteaga testified that Mr. Kavanaugh was not an eyewitness, but that after speaking to him in November of 2010, the police were looking for a handgun and wanted to speak with defendant and "witnesses to an incident." He also testified that Mr. Kavanaugh later testified before the grand jury, and indicated that, on March 16, 2011, defendant was arrested at a liquor store located across the street from his home and one block from the location of the shooting.

¶ 19 Finally, the State introduced forensic evidence that the victim died of multiple gunshot wounds, with an autopsy revealing five entrance wounds in the victim's back. While a single bullet retrieved from the scene of the shooting could not be identified or eliminated as having been fired from the firearm recovered from Mr. Fields, two bullets recovered from the victim's body were positively identified as having been fired from that weapon.

¶ 20 Defendant presented testimony from three witnesses at trial. Douglas Hood testified that he was in a car with Mr. Fields' brother, "Trell," on the night of the murder. Sometime that

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night, a "frantic" man got into the car and attempted to have a conversation with Trell. During that conversation, Mr. Hood observed that the man, who was not defendant, was in possession of a black revolver. Patricia Gutierrez, a defense investigator, testified that when she interviewed Mr. Jones, he stated that he was not an eyewitness to the murder and that Mr. Jones had simply told the police information he had heard "on the street." Deonta Sistrunk testified that he was friends with Mr. Fields and Mr. Fields' brother, Trell. Mr. Sistrunk testified that the murder weapon was recovered by the police in Mr. Fields' possession, and that this recovery occurred in Mr. Sistrunk's basement. Mr. Sistrunk admitted that he had previously spoken with both the police and a defense investigator about this matter, and had testified before the grand jury. Before that, however, he had spoken to Trell about the matter.

¶ 21 Neither defendant nor Mr. Kavanaugh testified at trial, nor was any direct evidence of a confession presented to the jury.

¶ 22 At the conclusion of the jury trial, defendant was found guilty of first degree murder, with the jury also finding that defendant personally discharged a firearm resulting in the death of another person. Defendant's motion for a new trial was denied, and a sentencing hearing commenced in April of 2013.

¶ 23 In preparation for that hearing, a presentence investigation report was prepared. That report reflected—*inter alia*—that defendant was 17 years old at the time of the shooting, was the father of a young daughter, had begun using marijuana and alcohol as a minor, and had previously been identified as a gang member. In aggravation, the State introduced additional evidence of defendant's prior arrests for possession of a stolen vehicle, burglary, and robbery, his prior adult conviction for aggravated unlawful use of a weapon, a juvenile finding of delinquency for defendant's participation in an armed robbery, and a victim impact statement

from the victim's aunt. In mitigation, defendant introduced a letter from his family and evidence that he had previously received special education services for a diagnosed learning disability. Defendant made a statement in allocution, in which he maintained his innocence and asked the court for "mercy" in light of his young age and the fact that he had a young daughter. The State asked the trial court to impose a "significant period" of incarceration, while defendant asked the trial court to impose the statutory minimum sentence.

¶ 24 At the conclusion of the sentencing hearing, the trial court specifically reviewed defendant's juvenile and adult criminal history, the mitigating circumstances outlined by defense counsel, the defendant's relative youth, the fact that defendant was the father of a young daughter, and the circumstances of defendant's actions in this case. The trial court then noted that that defendant was subject to a statutorily mandated sentence ranging from 45 years' imprisonment to a term of natural life, which would be comprised of a 20 to 60 year sentence for the murder conviction and a mandatory 25-year to natural life sentencing enhancement due to defendant's use of a firearm. Defendant was ultimately sentenced to a term of 55 years' imprisonment, with the trial court specifically indicating that—considering all the sentencing factors—this was not a case where a minimum sentence was appropriate. Defendant's motion to reconsider his sentence was denied, and he has now appealed.

¶ 25

## II. ANALYSIS

¶ 26 Defendant makes a number of arguments on appeal, involving claims of various trial errors, ineffective assistance of trial counsel, and unconstitutional sentencing. We address each in turn.

¶ 27

### A. Trial Errors

¶ 28 Defendant asserts that he was prejudiced by a number of errors at trial. Specifically, defendant contends that the State was improperly allowed to introduce hearsay evidence that defendant confessed to Mr. Kavanaugh through the testimony of Detective Arteaga. Defendant also contends that he was denied a fair trial by the combination of Detective Arteaga's purportedly improper testimony and the fact that, while Mr. Kavanaugh's testimony was ruled admissible pursuant to the State's pretrial motion *in limine* and was addressed in defense counsel's opening statement, Mr. Kavanaugh never testified at trial. We disagree.

¶ 29 As an initial matter, defendant never raised these issues at trial or in his posttrial motion. Therefore, defendant has not preserved these issues for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Defendant acknowledges his forfeiture of these alleged errors, and asks this court to review them for plain error.

¶ 30 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182. Finally, we note that where there is "no error, there can be no plain error." *People v. Bannister*, 232 Ill. 2d 52, 79 (2008)

¶ 31 We first address defendant's contention that, by introducing Detective Arteaga's testimony that he spoke to Mr. Kavanaugh and thereafter began looking for a handgun, defendant, and "witnesses to an incident," the State was improperly allowed to introduce hearsay evidence that defendant had confessed to Mr. Kavanaugh. Defendant contends that this testimony was inadmissible hearsay and violated defendant's constitutional right to confront the witnesses against him.

¶ 32 Defendant has a constitutional right to confront the witnesses against him. U.S. Const., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right \*\*\* to be confronted with the witnesses against him."). Moreover, in *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the confrontation clause prohibits the introduction of any hearsay statements against the accused if they are deemed "testimonial" in nature, unless the declarant is unavailable for trial and the defendant has had a prior opportunity to cross-examine that declarant. *Id.* at 59. "Hearsay is defined as testimony of an out-of-court statement offered to establish the truth of the matter asserted therein and resting for its value upon the credibility of the out-of-court asserter." *People v. Armstead*, 322 Ill. App. 3d 1, 11 (2001). "Hearsay statements are excluded from evidence primarily because of the lack of an opportunity to cross-examine the declarant." *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007)

¶ 33 However, the " 'explanatory exception' to the hearsay rule allows the admission of statements that explain the progress of a police investigation under the rationale that such evidence is not offered for its truth." *Id.* at 984. Thus, "a police officer can testify that he had a conversation with an individual and acted on information from that exchange." *Id.* at 985. Indeed, so long as the officer does not testify to the content of such a conversation, " [t]estimony describing the progress of an investigation is admissible even if it suggests that a nontestifying

witness implicated the defendant.' " *Id.* at 986 (quoting *People v. Simms*, 143 Ill. 2d 154, 174 (1991)).

¶ 34 This is exactly what occurred here. As even defendant acknowledges on appeal, "Kavanaugh's words were not introduced" by Detective Arteaga's testimony. As outlined above, the detective only testified that he spoke to Mr. Kavanaugh, and that thereafter he began looking for a handgun, defendant, and witnesses. This testimony did not reveal the content of the conversation with Mr. Kavanaugh, it merely indicated that the conversation took place and identified the subsequent investigatory steps taken by Detective Arteaga.

¶ 35 As defendant also acknowledges on appeal, *at best* this testimony "implied the substance of Kavanaugh's statement" to the detective, with defendant further contending that the "logical implication of the detective's testimony was that Tucker had confessed to Kavanaugh." Even if we were inclined to agree with defendant as to the necessary implication of Detective Arteaga's testimony, the fact remains that his testimony was permissible even if such an implication was suggested thereby. *Id.* Because we find no error with respect to this issue, we obviously find no plain error. *Bannister*, 232 Ill. 2d at 79.

¶ 36 Defendant next contends that he was denied a fair trial by the combination of Detective Arteaga's testimony regarding his conversation with Mr. Kavanaugh and the fact that, while Mr. Kavanaugh's testimony was ruled admissible pursuant to the State's pretrial motion *in limine* and was addressed in defense counsel's opening statement, Mr. Kavanaugh never testified at trial. For the reasons discussed above, we reject defendant's assertion that Detective Arteaga's testimony deprived him of a fair trial.

¶ 37 We also reject defendant's contentions regarding the fact that the State never presented Mr. Kavanaugh's testimony. Defendant essentially contends that defense counsel was "mislead"

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by the State's motion *in limine* and its answer to discovery into believing that Mr. Kavanaugh would be called to testify at trial. In anticipation thereof, defense counsel therefore addressed Mr. Kavanaugh during opening statements in an effort to preemptively discredit his anticipated testimony. Defendant contends that he was therefore prejudiced in that, "because Kavanaugh did not testify, the opening statement was the only time that the jury heard that [defendant] had tried to hire Kavanaugh to steal the physical evidence in the case."

¶ 38 Defendant cites to no evidence in the record to support his contention that defense counsel was improperly misled by the State, relying solely on the State's answer to discovery and its motion *in limine*. However, the State's answer to discovery merely listed Mr. Kavanaugh as being among literally dozens of persons the State "may or may not" call as witnesses, most of whom did not end up testifying at trial. Defendant makes no assertion his defense counsel was improperly misled into believing that *each* of these witnesses would *necessarily* testify.

¶ 39 With respect to the State's motion *in limine*, we make a number of initial observations. First, while the motion implied that the content of Mr. Kavanaugh's conversation would be presented at trial, on its face that motion only sought a ruling finding that evidence of the "location and context" of a conversation between defendant and Mr. Kavanaugh would be admissible. Second, the State also told the trial court that Mr. Kavanaugh would not be its first witness. Nowhere in the record is any explicit statement from the State that Mr. Kavanaugh would absolutely testify.

¶ 40 Defendant also cites to no legal authority standing for the proposition that, having listed Mr. Kavanaugh in its answer to discovery and having received a favorable pretrial ruling on its motion *in limine*, the State was *obligated* to call Mr. Kavanaugh as a witness. Indeed, such a proposition would be antithetical to the purpose of a motion *in limine*, which is "used to bring the

trial court's attention to potentially irrelevant, inadmissible, or prejudicial evidence and obtain a pretrial order from the court excluding or permitting the evidence." *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 26. Here, the trial court's pretrial ruling only *permitted* the evidence regarding the circumstances surrounding Mr. Kavanaugh's conversation with defendant, it did not *require* it to be admitted or require that Mr. Kavanaugh be the witness to testify as to those circumstances. And even that order was not final, as it is well recognized that a "trial court's ruling on a motion *in limine* is an interlocutory order that is subject to review by the trial court any time prior to or during trial." *People v. Denson*, 2013 IL App (2d) 110652, ¶ 9.

¶ 41 We also note the general rules applicable to opening statements in criminal trials. Our supreme court has summarized these rules as follows:

"The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove. [Citation.] An opening statement may include a discussion of the expected evidence and reasonable inferences from the evidence. [Citations.] No statement may be made in opening which counsel does not intend to prove or cannot prove. [Citation.] As such, it is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence. [Citation.] Nevertheless, it is not always grounds for reversal when an opening statement refers to evidence which later turns out to be inadmissible. Reversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct of the prosecutor and result in substantial prejudice to the defendant. [Citation.]" *People v. Kliner*, 185 Ill. 2d 81, 127 (1998)

¶ 42 While remotely similar, the facts of this matter are simply not analogous to the potentially prejudicial situation described in *Kliner*. Again, there is no evidence of deliberate

misconduct on the part of the State here. Moreover, it was not the State that made opening statements about testimony to be introduced at trial that was never actually produced as evidence, it was defense counsel.

¶ 43 Even if we perceived that any possible prejudice might have resulted from defense counsel's opening statement, we note that "improper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. [Citations.] Moreover, any possible prejudicial impact is greatly diminished by the court's instructions that \*\*\* arguments are not evidence." *People v Willis*, 409 Ill. App. 3d 804, 814 (2011). Here, the trial court properly instructed the jury both before and after closing arguments that arguments were not evidence and should not be considered as such. Therefore, we find that any possible error was cured by the admonishments provided to the jury.

¶ 44 Finally, we note again that because defendant forfeited all these alleged errors, we review them for plain error. On appeal, defendant only contends that these purported errors amounted to plain error because the evidence was so closely balanced that these errors alone threatened to tip the scales of justice against him. *Piatkowski*, 225 Ill. 2d at 565. Even if we agreed with defendant that the issues discussed amounted to error, the evidence in this case was not closely balanced. It is generally understood that "a positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction." *Id.* at 566. This general rule is applicable to determining whether evidence was closely balanced. See *In re M.W.*, 232 Ill. 2d 408, 435 (2009). Furthermore, substantively admitted previous inconsistent statements are *alone* sufficient to prove a defendant's guilt beyond a reasonable doubt. *People v. Armstrong*, 2013 IL App (3d) 110388, ¶¶ 23-25; *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999).

¶ 45 Here, the State introduced evidence that, at one time or another, no less than six eyewitnesses identified defendant as the shooter. This evidence was corroborated by the forensic evidence. See *People v. Caffey*, 205 Ill. 2d 52, 104 (2001) (finding no plain error where eyewitness testimony corroborated by forensic evidence). Thus, the outcome of this trial did not hinge on whatever Detective Arteaga's testimony may have silently implied about Mr. Kavanaugh's statement or on the purportedly prejudicial statements of defense counsel during opening arguments. To the extent that there were any credibility issues or inconsistencies with respect to the testimony of the State's eyewitnesses, we note that the jury was in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony, to draw reasonable inferences from all of the evidence, and reiterate that the record as a whole here does not reflect evidence that was closely balanced. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 76 (coming to similar conclusion under similar circumstances).

¶ 46 B. Ineffective Assistance of Counsel

¶ 47 Next, we consider the allegations of ineffective assistance of counsel raised by defendant on appeal.

¶ 48 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010).

¶ 49 While the defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if the defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Our supreme court has held that "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). A defendant has the burden of establishing any such prejudice. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006).

¶ 50 Defendant first contends that his trial counsel was ineffective for failing to object to the introduction of Detective Arteaga's testimony about his conversation with Mr. Kavanaugh. However, we have already determined that Detective Arteaga's testimony was properly admitted, and as such defendant's trial counsel cannot be deemed ineffective for failing to object to such admissible testimony. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) (counsel is not required to make futile motions to avoid charges of ineffective assistance of counsel).

¶ 51 Defendant also faults his trial counsel for failing to request a mistrial after defense counsel was misled to believe that Mr. Kavanaugh would testify, defense counsel discussed Mr. Kavanaugh during opening statements, and Mr. Kavanaugh was not called as a witness at trial. However, we have already determined that the State did not improperly mislead defense counsel with respect to Mr. Kavanaugh being called to testify, and that any possible harm resulting from defense counsel's opening statements was cured by the trial courts' instructions to the jury. "In general, a mistrial should only be granted in a case where an error is so grave that it infects the fundamental fairness of the trial so that continuing the proceeding would defeat the ends of justice." *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 140. Under these circumstances, defense counsel was not ineffective for failing to bring such a futile motion for a mistrial. *Ivy*, 313 Ill. App. 3d at 1018.

¶ 52 Lastly, defendant faults his defense counsel for failing to seek a limiting instruction with respect to the evidence regarding Detective Arteaga's conversation with Mr. Kavanaugh, even if it was properly admitted to explain the progress of the police investigation. Defendant contends that there was a "risk" that the jury would use that testimony to conclude that either defendant confessed to Mr. Kavanaugh or that Mr. Kavanaugh had "some other basis" to identify defendant as the person that shot the victim. We find these assertions to be the type of "speculation as to prejudice" that will not support a claim of ineffective assistance of counsel. *Bew*, 228 Ill. 2d at 135. Indeed, as we have already concluded, the evidence in this case was not closely balanced. Even if we were to assume that defense counsel was wrong in failing to seek a limiting instruction, we do not believe that defendant has met his burden to establish any prejudice resulting from that failure in light of the other evidence. *Glenn*, 363 Ill. App. 3d at 173.

¶ 53 C. Sentencing

¶ 54 Finally, defendant raises constitutional challenges with respect to his sentencing, contending that both the statutorily mandated 45-year minimum sentence he faced and the 55-year sentence that he actually received violate the provisions of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and article I, section 11, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11). We disagree.

¶ 55 Defendant was convicted of first degree murder. The sentencing range for defendant's first degree murder conviction was from 20 to 60 years' imprisonment. 730 ILCS 5/5-4.5-20(a) (West 2010). Because the jury also found that defendant personally discharged a firearm resulting in the death of another person, defendant's sentence for murder was also subject to a mandatory sentencing enhancement ranging from an additional 25 years' imprisonment to a term of natural life. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). Further, pursuant to section 3-

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6-3(a)(2)(i) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(i) (West 2010)), defendant's sentence is not eligible to be reduced through good-conduct credit. Thus, defendant faced a sentence ranging from a statutorily mandated 45 years' imprisonment to a term of natural life, without the possibility of mandatory supervised release. The trial court, ultimately, sentenced defendant to a term of 55 years' imprisonment.

¶ 56 A statute carries a strong presumption of constitutionality. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). The party challenging the statute bears the burden of clearly establishing that it violates the constitution (*id.*), and 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). The constitutionality of a statute is a matter of law subject to *de novo* review. *Sharpe*, 216 Ill. 2d at 486-87.

¶ 57 Furthermore, it is "well settled that the legislature has wide discretion to set penalties for the offenses it defines and such penalties will not be invalidated unless they clearly exceed the very broad constitutional limitations that apply." *People v. Kasp*, 352 Ill. App. 3d 180, 185 (2004). Among the "broad constitutional limitations" of the legislature's discretion to provide specific penalties for specific criminal offenses, are the provisions of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and article I, section 11, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11). The eighth amendment, applicable to the states by virtue of the fourteenth amendment (see *Robinson v. California*, 370 U.S. 660, 666 (1962)), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., amend. VIII). In turn, article I, section 11, of the Illinois Constitution of 1970—the proportionate penalties clause—provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of

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restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Our supreme court has recognized that our state constitution's "proportionate penalties clause is coextensive with the [federal] cruel and unusual punishment clause." *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) (citing *Sharpe*, 216 Ill. 2d at 517).

¶ 58 On appeal, defendant first contends that "the mandatory minimum 45-year sentence for first degree murder when imposed on a juvenile is a *de facto* life sentence that violates the Eighth Amendment's prohibition of cruel and unusual punishment and the Illinois Constitution's proportionate-penalties provision." This argument relies upon a number of recent United States Supreme Court opinions addressing the constitutionality of various criminal sentences imposed upon minors.

¶ 59 In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court found that the death penalty was unconstitutional as applied to minors. *Id.* at 574-75. In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. Finally, in *Miller v. Alabama*, — U.S. —, 132 S. Ct. 2455 (2012), the Supreme Court concluded that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" convicted of homicide. *Id.* at 2469. In each case, the Supreme Court relied in part on the lesser moral culpability and greater rehabilitative potential of minors in support of its decisions, and "it is clear the United States Supreme Court in *Roper*, *Graham*, and *Miller* has provided juveniles with more constitutional protection than adults." *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 68.

¶ 60 Defendant essentially argues that, given the fact that he was a juvenile at the time of the murder and considering his life expectancy, based on his age, gender, and race at the time of

sentencing, the mandatory minimum 45-year sentence that he faced was a *de facto* life sentence and was therefore unconstitutional because "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, — U.S. —, 132 S. Ct. at 2469. However, in contending that the sentencing scheme under which he was sentenced was "unconstitutional as applied to juveniles" such as himself, and in relying on his own personal life expectancy given his age, gender, and race, defendant is clearly mounting an "as applied" constitutional challenge. See *In re Commitment of Walker*, 2014 IL App (2d) 130372, ¶ 21 ("Constitutional challenges come in two varieties: facial and as applied."). "An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party." *People v. Thompson*, 2015 IL 118151, ¶ 36; see also, *People v. Garvin*, 219 Ill. 2d 104, 117 (2006) ("an 'as applied' challenge requires defendant to show the statute violates the constitution as it applies to him"). Nevertheless, defendant (at least initially) is attempting to challenge the constitutionality of a statutorily mandated minimum 45-year sentence that *he did not actually receive*.

¶ 61 Such a challenge was explicitly rejected in *People v. Edwards*, 2015 IL App (3d) 130190, wherein a defendant who was 17 at the time of his crimes faced a mandatory *minimum* term of 76 years' imprisonment but was ultimately sentenced to a total of 90 years' imprisonment. *Id.* ¶ 78. After noting both that the "thrust of defendant's argument on appeal is that this 76-year minimum is unconstitutional" under *Miller* and that the defendant cited to "no case law, nor has our research uncovered any, that allows a defendant to argue that a sentence he did not actually receive is unconstitutional," the court rejected "defendant's attempts to attack the constitutionality of sentences he did not receive." *Id.* ¶¶ 78, 79, 81. We agree, and conclude that

defendant here may not mount an as-applied constitutional challenge to a statutorily mandated minimum 45-year sentence that he never received.

¶ 62 Even if we did conclude that defendant could challenge the 45-year minimum sentence at issue here, we would not find such a challenge availing. Courts in this state have previously been asked to extend *Miller's* prohibition on mandatory life sentences for juvenile offenders to mandatory term-of-years sentences imposed upon juvenile offenders, even sentences of such length that they could arguably be described as *de facto* life sentences. Those efforts have been repeatedly rejected. See *People v. Patterson*, 2014 IL 115102, ¶¶ 107-11; *People v. Pace*, 2015 IL App (1st) 110415, ¶¶ 131-34; *People v. Reyes*, 2015 IL App (2d) 120471, ¶¶ 22-25, appeal allowed, 396 Ill. Dec. 183; *People v. Cavazos*, 2015 IL App (2d) 120444, ¶¶ 97-98; *People v. Banks*, 2015 IL App (1st) 130985, ¶¶ 20-24. The only contrary decision appears to be *People v. Gipson*, 2015 IL App (1st) 122451, where this court specifically rejected the decisions in *Reyes* and *Cavazos* in disagreeing with "other decisions of this court to the extent they suggest that sentences for a term of years and sentences for natural life without parole are mutually exclusive in the context of juveniles and the eighth amendment," while continuing on to conclude that the sentence at issue there nevertheless did not constitute "a natural life sentence without the possibility of parole." *Id.* ¶¶ 61, 67. We need not restate here the analysis set forth at length in these decisions. It is sufficient for us to note that we align ourselves with the clear majority of decisions that have rejected such an extension of the *Miller* decision.

¶ 63 Defendant has also raised a similar as-applied challenge to the constitutionality of the 55-year sentence he actually did receive. To the extent that this challenge also relies on an extension of *Miller's* prohibition on mandatory life sentences for juvenile offenders to the term-

of-years sentence imposed upon defendant, however, we reject this argument for the same reasons discussed immediately above.

¶ 64 Moreover, *Miller* itself did not impose an outright ban on the imposition of a life sentence upon a juvenile convicted of homicide, let alone a ban on lengthy term-of-years sentences imposed upon juveniles. See, *Miller*, — U.S. —, 132 S. Ct. at 2469 (refusing to completely foreclose the possibility that a life sentence could be constitutionally imposed upon a juvenile convicted of homicide). Rather, the court held only that such a sentence could not be *mandated*, and that before a life sentence could be properly imposed, "mitigating circumstances" such as "an offender's youth and attendant characteristics" must be considered. *Id.* at 2471, 2475.

¶ 65 As discussed above, the trial court here had discretion to impose a sentence ranging from 45 years' imprisonment to a term of natural life. In its discretion, it chose to impose a 55-year sentence and did so only after considering all of the evidence in aggravation and mitigation. That consideration specifically included the evidence of defendant's youth. Thus, even if we concluded that *Miller* did apply here, we would not find that defendant's 55-year sentence violated its principles. See *Cavazos*, 2015 IL App (2d) 120444, ¶ 100 (coming to similar conclusion under similar circumstances); *People v. Harmon*, 2013 IL App (2d) 120439, ¶¶ 53-54 (same); *Banks*, 2015 IL App (1st) 130985, ¶ 23 (same).

¶ 66 As a final note—and as has been previously recognized by many of the cases cited above—there are strong reasons to question whether the sentencing scheme at issue here represents good *policy* when it is applied to defendants who were juveniles at the time they committed their crimes. See *Patterson*, 2014 IL 115102, ¶ 111; *Cavazos*, 2015 IL App (2d) 120444, ¶¶ 101-102; *Pacheco*, 2013 IL App (4th) 110409, ¶¶ 67-68. Courts, including our

supreme court, have previously invited our legislature to revisit the issue and the soundness of that policy. *Id.*

¶ 67 And our legislature has responded to that invitation, by adding section 5-4.5-105 to the Unified Code of Corrections. Pub. Act 99-258 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105). This new statutory provision requires sentencing courts to consider "additional factors in mitigation" when sentencing persons that were under the age of 18 at the time they committed their offenses, including specific aspects of the offender's youth. *Id.* It also permits a sentencing court to, "in its discretion," decline to impose otherwise mandatory firearm-related sentencing enhancements. *Id.* However, by its own language, this new sentencing provision applies only "[o]n or after the effective date of this amendatory Act," which was January 1, 2016. *Id.* Therefore, the provisions of section 5-4.5-105 are inapplicable here. See *People v. J.S.*, 103 Ill. 2d 395, 410 (1984) (finding that where the legislature indicates that new statutory provision is applicable only "on or after the effective date of this amendatory Act," it is clear that the legislature did not intend the new law to apply retroactively).

¶ 68 Thus, while we share the policy concerns outlined above with respect to the sentencing scheme at issue here, we again conclude that "[u]ntil the Illinois or United States Supreme Court rules otherwise, we believe the best course is to follow this line of cases as outlined above" and conclude that the scheme is constitutional. *Pace*, 2015 IL App (1st) 110415, ¶ 134.

¶ 69

### III. CONCLUSION

¶ 70 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 71 Affirmed.