2016 IL App (1st) 132820-U

SIXTH DIVISION
August 26, 2016

No. 1-13-2820

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 10 CR 8077
v.	)	
	)	
JAMES COTTON,	)	
	)	The Honorable
Defendant-Appellant.	)	Michele M. Simmons,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Hoffman concurred in the judgment.
Justice Delort specially concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction and sentence for first degree murder were affirmed where: (1) the shackling of the defendant during his jury trial was harmless error; (2) the admission of the autopsy report did not violate the defendant's constitutional right to confront the witnesses against him; and (3) the defendant's 37-year sentence for first degree murder was not excessive.

¶ 2 Following a jury trial, the defendant, James Cotton, was found guilty of first degree murder in connection with the death of Romeo Burdine (the victim) and sentenced to 37 years' imprisonment in the Department of Corrections. The defendant appeals raising the following contentions: (1) the trial court's failure to hold a hearing to determine if leg shackles were necessary denied him due process; (2) the admission of the autopsy report violated his constitutional right to confront the witnesses against him; and (3) the defendant's 37-year sentence for first degree murder was excessive. For the reasons set forth below, we affirm the defendant's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 On March 30, 2010, the body of the victim was discovered in his apartment. The victim's body bore signs of a beating, and various electronic items were missing from the apartment, including a cell phone. The police traced the cell phone to Martin Shenault and recovered the victim's electronic equipment from Mr. Shenault and Danny Loggins. According to the two men, the defendant exchanged the victim's electronic equipment for cash and crack cocaine on the morning of March 30, 2010.

¶ 5 On March 31, 2010, Dr. Cogan, a Cook County assistant medical examiner, performed an autopsy on the victim. He concluded that the manner of the victim's death was homicide caused by blunt-force injuries to the brain. The doctor noted 26 separate injuries on the victim's head and upper body. Several of the wounds to the victim's head appeared

rectangular, oval or triangular in shape; one was a rectangular-in-shape laceration with sharp edges. The victim's upper body showed signs of chemical burns which appeared to have been inflicted post-mortem.

¶ 6 The defendant was arrested on April 5, 2010, and identified by Messrs. Shenault and Loggins in a lineup. During interviews with the detectives investigating the victim's murder, the defendant gave several statements, initially denying that he knew the victim, denying that he fought with him or that he removed electronics from the victim's apartment. Eventually, the defendant admitted fighting with the victim but only after the victim attacked him. He further admitted that he had taken electronics and beer from the victim's apartment.

¶ 7 SHACKLING

¶ 8 At a pretrial status date, defense counsel pointed out that the defendant was wearing leg shackles. When the trial judge asked the reason for the leg shackles, the deputy sheriff stated "high risk movement." Defense counsel pointed out that there was nothing that indicated the need for the leg shackles. Noting that not all defendants appearing before her were shackled, the judge ordered the State to provide her with the information as to the reason for the high risk treatment. Addressing defense counsel's concerns as to the effect of the shackles on the jury, the trial judge stated as follows:

> "I would like to see what the basis is for shackling. If it's security, I assume that's what it is, then I'll make the determination, but with regards to his hands, his hands absolutely will not be shackled. He'll sit at the desk. Even if he testifies, he'll be placed up here outside the presence of [t]he jury. He'll be on the witness stand when they file in. So they certainly wouldn't see any leg shackles. But I would like to see from the jail, if you don't have

any objection, and I'll make my determination as to whether or not he's to remain shackled and their basis of bringing him here shackled."

¶ 9 The trial judge agreed with defense counsel that the defendant's courtroom decorum had never been an issue, and he never caused any problems for the judge. The judge continued as follows:

"However, I don't know what happens at the jail. I don't know what happens during his transport. So I don't run the Sheriff's Department and I expect that they need to protect everyone in this courtroom and also keep him secure. So I'll need to see the basis of the shackling.

MS. MORRISSEY (the prosecutor): That's fine. I'll make inquiry. I'll also subpoena his master file.

THE COURT: I assume you don't have any objection to that?

MR. WILSON (defense counsel): No, no problem."

After discussing possible trial and status dates with the trial court and the prosecutor, defense counsel stated as follows:

"That's fine, your Honor. We'll have it for status and then at that point we should have the master file from the county and address that matter as well on that day as well."

¶ 10 Prior to jury selection, defense counsel renewed his concern about the defendant's shackling, stating as follows:

"MR. WILSON (defense counsel): Before you recess and the Court is well aware Mr. Cotton has been alleged to have committed some sorts of

infraction within the County Jail system which has him in - - well, he is not shackled now. At least leg shackles.

* * *

MR. WILSON: Number one, we'd like to see if any distraction - - first of all we believe the leg shackles are prejudicial."

¶ 11 The trial judge pointed out that the leg shackles could not be seen when the defendant stood behind the defense table. When defense counsel informed the court that there was a strong likelihood that the defendant would testify, the trial judge stated as follows:

"Oh, I certainly will take care of it then. That he would be up there before the jurors come in. Never see his feet. Due to security apparently something that occurred in the County Jail during his incarceration he has been - - he has been brought to the court under high risk movement. And there is a special officer with him apparently. I ordered his hands not to be shackled. But due to security his legs need to be shackled due to whatever occurred in Cook County Jail. The jury will never see his feet. Never see him shackled. His arms are not shackled. He is behind a wooden desk. That is a solid desk so that his feet and his legs are not even visible. And, if and when he testifies he will be placed on the witness stand prior to the jury coming into the courtroom."

¶ 12 Defense counsel did not object to the trial court decision to have the defendant seated in the witness box before the jury entered. He did express concern as to where the special officer assigned to the defendant would be seated in the courtroom. Defense counsel questioned whether there had been a determination that the defendant committed the

infraction. Still, counsel did not challenge the presence of the extra security officer, stating only that it had a prejudicial affect. The trial judge ordered the high-risk security unit to dress in civilian clothes and to sit away from the defendant while the regular courtroom deputy sat next to the defendant. The defense counsel responded, "That's fine."

¶ 13 After the State rested its case, defense counsel informed the trial court that the defendant would be the first defense witness. The judge ordered the defendant be seated in the witness box before the jury returned. The special security officer stated that he needed to stand behind the defendant. Defense counsel objected asking that the officer be placed in a less intrusive place. The judge suggested that the security officer sit some place other than behind the defendant. If the officer wished, he could arrange to have the other exits guarded, explaining:

> "I would like the defendant to testify without the sheriffs right up on him.
>
> MR. WILSON: Your Honor, I understand the logistical situation of what we are dealing with right now as far as Mr. Cotton here, but my suggestion perhaps is if we brought the jury out and the State rested, basically recess the jury, then place Mr. Cotton and then have us come in ready, as opposed to the State resting with Mr. Cotton on the witness stand.
>
> THE COURT: That's denied, Counsel. There is no need to do that."

¶ 14 JURY TRIAL

¶ 15 The victim was 53 years old at the time of his death. He received disability for his heart condition and depression. The victim was homosexual.

¶ 16 Through the testimony of numerous witnesses and physical evidence, the State established the defendant's presence in the victim's apartment as well as in the surrounding area, both before and after the victim's murder.

¶ 17 The defendant acknowledged that the victim died during a struggle with him but maintained that he acted in self-defense. The pertinent parts of the defendant's testimony at trial are set forth below.

¶ 18 On March 29, 2010, the defendant resided with his aunt in Lansing, Illinois. At 8:30 p.m., as he walked to his aunt's residence, he was approached by the victim who was looking to buy some marijuana or crack cocaine. The defendant, who had seen the victim prior to that night, told him he might try Chicago Heights or Harvey, Illinois. The victim invited the defendant to his apartment to smoke some crack cocaine, and the defendant agreed.

¶ 19 Arriving at the victim's apartment complex, the defendant waited outside while the victim obtained some marijuana from some other individuals in the area. Entering the victim's apartment, the victim told the defendant that they would smoke the drugs in the bedroom. The defendant put down the brown bag he was carrying and followed the victim into the bedroom. While smoking, they also drank gin or vodka mixed with fruit punch and watched pornographic movies. The victim and the defendant exchanged telephone numbers which they dialed into their cell phones in order to arrange another time to "get high." The victim told the defendant that he was gay and HIV positive. The defendant said he was okay with that but that he was not gay and not to "come on" to him. After they smoked two dime bags of crack cocaine, the victim arranged to get more crack cocaine.

¶ 20 The two men continued to smoke and drink and watch pornographic movies. The defendant became aroused and masturbated. When the victim attempted to put his mouth on

the defendant's penis, the defendant jumped back, grabbed his brown bag and left the apartment. While walking to his aunt's residence, he tried to call out on his cell phone but misdialed twice, each time reaching the victim. The victim then called him, asking if he knew anyone he could have sex with that night. The defendant said no and reminded the victim that he was not gay. Continuing to walk, the defendant realized he had left his cell phone charger in the victim's apartment. He called the victim who agreed that he could return to the apartment and retrieve his charger.

¶ 21 After being admitted to the victim's apartment, the defendant entered the victim's bedroom where he observed a drink and a cigarette on the table. He consumed the drink and smoked the cigarette before grabbing his charger. Just as he was headed out of the bedroom, the victim pulled at the hood of his jacket and told the defendant he was not going anywhere until he paid what he owed the victim. When the defendant denied owing him anything, the victim lunged at him and scratched him. The defendant hit the victim, who grabbed him and threw him on the bed. The victim continued to punch the defendant who tried to fend off the blows. The two men continued to exchange punches with the defendant striking the victim's head and face. The fight ended when the victim bit the defendant who retaliated, striking the victim with his elbows three times. The victim then began snoring.

¶ 22 At the time of the struggle with the victim, the defendant related that he was 5 feet 11 inches tall and weighed 210 pounds while the victim was 6 feet 2 inches tall and weighed 260 pounds. The defendant denied striking the victim with anything other than his hands or his elbows. The defendant poured bleach on the snoring victim. He then grabbed a bag and put a DVD player and some DVD's in the bag in retaliation for the victim trying to rape him. When the defendant left the apartment, he believed that the victim was still alive. From there,

the defendant went to Harvey, Illinois, to sell the items he had taken from the victim's apartment for drugs.

¶ 23 On April 5, 2010, the defendant appeared at the courthouse in Bridgeview on a DUI charge, when he was arrested by Lansing police officers. At the Lansing police department, he was interviewed by Detective Anthony Curtis. The defendant was shown a photograph of the victim but denied that he knew him though he had seen the victim "around." He did not mention his fight with the victim since he did not know why he had been arrested and did not think it was important. When the defendant was asked about the stolen items, he denied taking them because he wanted to avoid a theft charge. Once the officers told him that the victim was dead, the defendant stated that he and the victim had fought but did not give the reason for the fight because he was still traumatized by the incident. The defendant acknowledged that he had told the detectives various versions of the events. He finally did tell them the reason for the fight.

¶ 24 Under cross-examination by the prosecutor, the defendant acknowledged that at the time of the encounter with the victim, he had no money or steady employment and was addicted to crack cocaine. Going into the victim's bedroom did not make the defendant uncomfortable. In his interview, the defendant told the police that the victim did place his mouth on the defendant's penis for about five to ten seconds during which the defendant ejaculated. While the defendant maintained the act made him feel "dirty," he stayed another five hours to smoke the additional crack cocaine the victim ordered. The victim did not attempt to engage the defendant again. After smoking $100 worth of crack cocaine, the defendant left but returned for his cell phone charger.

¶ 25 When the defendant returned to the apartment, the victim was dressed in shorts and a tank top. The victim did not grab the defendant by his genitals but by the hood of his jacket. The defendant had consumed the victim's liquor and $50 to $100 worth of crack cocaine. The fight ensued when the victim told him he was not leaving until he paid up. The defendant could not get away from the victim who kept punching him. He did not hit the victim with an object. After the fight ended, the defendant did not call 911 because he thought the victim was merely knocked out. The defendant poured bleach on the victim but it was not to clean off the blood on the victim, although that is what he told the police. The defendant left the apartment with a bag of electronic equipment, a bag containing bottles of beer, which he discarded, and his brown bag.

¶ 26 After his arrest on April 5, 2010, the defendant was questioned by police over a 36-hour period. He maintained that he was going through "slight withdrawal" from crack cocaine during questioning by the police. He acknowledged that he told multiple versions of his encounter with the victim. The defendant admitted he lied to the police about the events in the victim's apartment to protect himself from being involved in the victim's death even though the defendant maintained that he was the real victim.

¶ 27 CLOSING ARGUMENTS

¶ 28 The prosecutor argued to the jury that the defendant's testimony that he was attacked from behind by the victim was contradicted by the various injuries to the victim detailed in the autopsy report. He pointed out that the report described the scratch and the bite mark the defendant suffered were defensive wounds that the victim inflicted in an attempt to defend himself from the defendant. The prosecutor further noted that the report referred to evidence of strangulation and argued that the bite mark on the defendant's bicep and the injuries to the

inside of the victim's mouth indicated that the victim was trying to defend against being suffocated.

¶ 29 VERDICT and POSTRIAL MOTIONS

¶ 30 The jury returned a verdict finding the defendant guilty of the first degree murder of the victim. The trial court entered judgment on the verdict. The defendant's motion for a new trial was denied.

¶ 31 SENTENCING HEARING

¶ 32 According to the presentencing report, the defendant was 35 years old at the time of the offense. He was a high school graduate and had attended college for one year on a football scholarship. The defendant worked at various jobs but never for a long period of time. The defendant's drug and alcohol use began when he was 16 years old, and he had been in a residential drug treatment center in 2001. In 2010, the defendant regularly consumed alcohol and marijuana though not every day. He was "high" the day the victim was killed.

¶ 33 In aggravation, the State called Swayzer Burdine, the victim's brother, who read his victim impact statement. While acknowledging that the victim was not perfect, Mr. Burdine described him as a loving person, close to his family and his own personal hero. The victim's death was the first violence the Burdine family had experienced, and his murder would continue to impact them. In addition to Mr. Burdine's testimony, the State argued that the statutory factors in aggravation, which included the defendant's criminal history dating back to 1994, supported a sentence of 50 years in the Department of Corrections.

¶ 34 In mitigation, the defendant called Sharon and Theodore Flemister, the defendant's mother and stepfather, and family friends, Christina Reid and Camilla Hudson. In written statements or in testimony, the witnesses described the defendant as a caring person who

never harmed any one until this incident. They stressed the defendant's struggle to overcome his drug addiction and his rehabilitative potential. In addition, there were letters from: Nontombi Norma Tutu of Nozizwe Diversity Consulting, located in Nashville, Tennessee; Linda Hannah of New Skill Builders, where she was the executive director of a pre-apprenticeship program the defendant had successfully completed; and Reverend Dr. Jeremiah A. Wright, Jr. of Trinity United Church of Christ, which the defendant's family attended. The letters emphasized the defendant's struggles with addiction and that through their contact with him, they recognized his potential for rehabilitation. The defendant also presented a group exhibit consisting of letters from various family members, members of the clergy, co-workers and physicians who wished to address the trial court in support of the defendant.

¶ 35 In further mitigation, defense counsel pointed out that the defendant had no prior history of violence and had no felony convictions. His prior record consisted of convictions for misdemeanor battery and criminal sexual abuse for which he received sentences of supervision. The defendant's remaining convictions were for drug offenses. Defense counsel requested a sentence of 20 years in the Department of Corrections.

¶ 36 Speaking on his own behalf, the defendant maintained that he did not enter the victim's apartment with the intent to take his life or his possessions. When the victim and he fought, the defendant was defending himself against what he felt was an attempted sexual assault. While incarcerated, the defendant had grown spiritually and had started two ministries. He also had restored his relationship with his son. The defendant requested leniency and mercy from the trial court in imposing the sentence.

¶ 37 The trial court agreed with defense counsel that in the three years he had been appearing before her, the defendant was courteous and never caused a problem. The court found that the defendant's addiction to alcohol and drugs caused him to forego the benefits of his college experience and led him to "throw away" his life. While the defendant's addiction was severe, the court found that it did not excuse his conduct in causing the victim's death. Noting that the defendant and his supporter asked for mercy, the court observed that the defendant showed no mercy in killing the victim. While the defendant maintained he acted in self-defense, the jury had rejected the defendant's testimony.

¶ 38 Having considered the large amount of mitigation evidence, the trial court found neither the defendant's nor the State's recommended sentences appropriate. The court sentenced the defendant to 37 years in the Department of Corrections.

¶ 39 Following the denial of his motion for reconsideration of his sentence, the defendant filed his notice of appeal.

¶ 40 ANALYSIS

¶ 41 On appeal, the defendant maintains that he is entitled to a new trial based on trial court errors. He further maintains that his 37-year sentence for first degree murder is excessive.

¶ 42 I. Shackling

¶ 43 The defendant contends that he was denied due process when he was shackled throughout his jury trial without a hearing to determine whether there was a "manifest need" for such restraints.

¶ 44 A. Standard of Review

¶ 45 The trial court's determination as to whether and by what means a defendant is to be restrained is reviewed for an abuse of discretion. *People v. Allen*, 222 Ill. 2d 340, 348 (2006).

¶ 46 B. Forfeiture

¶ 47 The State argues that the defendant's failure to raise the lack of a *Boose* hearing as error in his posttrial motion forfeited the error. The defendant responds that his objections to the defendant's leg shackles were sufficient to preserve the error for review under *People v. Almond*, 2015 IL 113817. In *Almond*, our supreme court reiterated its holding in *People v. Cregan*, 2014 IL 113600 that in the interests of judicial economy constitutional issues objected to at trial but not preserved in a posttrial motion were not subject to forfeiture if the issue could be raised later in a postconviction petition. *Almond*, 2015 IL 113817, ¶ 54; *Cregan*, 2014 IL 113600, ¶¶ 16, 18.

¶ 48 Failure to follow the *Boose* procedures is a violation of a defendant's constitutional right to due process. *Allen*, 222 Ill. 2d at 349. Therefore, we agree with the defendant that the error was not subject to forfeiture. Since the error was not forfeited, we do not reach the defendant's alternative arguments for plain error review and ineffective assistance of counsel.

¶ 49 C. Discussion

¶ 50 1. *Due Process Violation*

¶ 51 Shackling a defendant should be avoided where possible because it tends to prejudice the defendant in the eyes of the jury, it restricts the defendant's ability to assist his counsel during trial, and it offends the dignity of the judicial process. *People v. Boose*, 66 Ill. 2d 261, 265 (1977). Recognizing that under certain circumstances the restraint of a defendant might be necessary, the supreme court in *Boose* set forth a list of factors that the trial court should consider in determining the need to restrain the defendant. Those factors include: the seriousness of charge against the defendant; the defendant's temperament and character; the defendant's age and physical attributes; his past criminal record; past escapes or attempted

escapes and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the physical security of the courtroom; and the availability of alternative remedies. *Boose*, 66 Ill. 2d at 266-67; *Allen*, 222 Ill. 2d at 347-48 (reciting the *Boose* factors).

¶ 52 To aid reviewing courts in determining whether a trial court's ruling on a shackling issue was an abuse of discretion, the court in *Boose* set forth the following requirements: "the record should clearly disclose the reason underlying the trial court's decision for the shackling and show that the accused's attorney was given an opportunity to oppose this decision." *Boose*, 66 Ill. 2d at 267. In *Boose*, the court found an abuse of discretion where the trial court's decision to restrain the defendant was based solely on the nature of the crime, murder, since that could permit the shackling of all defendants accused of a violent crime. *Boose*, 66 Ill. 2d at 267. In *Allen*, the supreme court found an abuse of discretion where the only reason given by the trial court to support its decision to have the defendant restrained was for "security purposes," without further explanation or justification by the court, and no other *Boose* factors supported the decision. *Allen*, 222 Ill. 2d at 348.[1]

¶ 53 The record does not convince us that the trial court followed the procedure set forth in *Boose* when it overruled the defendant's objections to being shackled during his jury trial. The trial court questioned the use of the shackles observing that the defendant never caused a problem in the three years he had appeared before the court and ordered the State to provide the basis for the sheriff's determination for the need to shackle the defendant. Since the record is silent as to what the State's investigation revealed, it is unclear how defense counsel

[1] In 2010, the supreme court adopted Illinois Supreme Court Rule 430 (eff. July 1, 2010) codifying the rulings in *Allen* and *Boose*. Although it was effective at the time of the proceedings in this case, neither party brought the rule to the trial court's attention, and the defendant first mentioned the rule in this appeal.

and the trial court were made aware that the defendant's infraction of the jail rules was the basis for his leg shackles and the addition of a security unit. The trial court did not state on the record the specific infraction the defendant committed that required his legs to be shackled.

¶ 54 The record does not support the conclusion that the trial court considered the *Boose* factors, such as the defendant was a flight risk, had self-destructive tendencies, threatened harm to others or might be the object of a rescue attempt, to find that shackling was a manifest necessity. Certain of the *Boose* factors did not favor the shacking of the defendant; the defendant had no history of violent crimes and the trial court's own acknowledgement that the defendant had never created a disturbance or caused a problem when he appeared in court. Rather than exercise its discretion, the trial court deferred to the sheriff's decision to shackle the defendant. See *Allen*, 222 Ill. 2d at 348.

¶ 55 We conclude that the trial court failed to comply with the procedures set forth in *Boose* in determining that there was a manifest necessity for the defendant to be shackled during his jury trial. The record does not reflect that the trial court's decision was based on a consideration of the *Boose* factors and, by failing to identify the specific violation of the jail rule the defendant committed and explain why the defendant's violation required leg shackles and a security detail, the trial court did not "clearly disclose the reason underlying" the decision. *Boose*, 66 Ill. 2d at 267.

¶ 56 Since the trial court failed to follow the *Boose* procedures, the defendant's constitutional right to due process was violated. *Allen*, 222 Ill. 2d at 349.

¶ 57 2. *Harmless Error*

¶ 58 A constitutional due process error is subject to a harmless error analysis. *People v. Davis*, 233 Ill. 2d 244, 273 (2009). In determining whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict in the case. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). The State bears the burden of proof. *Patterson*, 217 Ill. 2d at 428.

¶ 59 The supreme court identified three different approaches to determine if the constitutional error was harmless: "(1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *Patterson*, 217 Ill. 2d at 428.

¶ 60 The first approach is pertinent to this case. The record reflects that the trial court ordered that the defendant's hands were not to be shackled and took precautionary measures to ensure that the jurors did not view the defendant's leg shackles. With respect to the additional security personnel, the trial court ordered the officers to dress in civilian attire and to position themselves so as not to draw the attention of the jurors to their presence in the courtroom. In preparation for his testimony, the trial court also ordered the defendant seated in the witness box prior to the jurors entering the courtroom. See *Allen*, 222 Ill. 2d at 358 (rejecting the argument that preseating the defendant would cause the jury to attach undue significance to that fact, since most jurors were unfamiliar with courtroom procedure and would not discern a difference much less impute a negative connotation to it).

¶ 61 The trial court's actions addressed the concerns associated with shackling: prejudice to the defendant, inability to assist in his defense, and the dignity of the proceedings. There is

no evidence that the defendant was not able to cooperate with defense counsel or that the jury saw or knew the defendant was wearing leg shackles and was guarded by extra security. The trial court's precautionary measures assured that the shackling of the defendant's legs did not diminish the dignity of the proceedings. We conclude that the error in shackling the defendant during his jury trial did not contribute to his conviction.

¶ 62 The defendant's argument that the trial evidence was closely balanced is not supported by the record. The defendant's presence in the victim's apartment, smoking crack cocaine and drinking alcohol with the victim were confirmed by the defendant's own testimony as well as the physical evidence. The defendant acknowledged that the victim and he fought, that he poured bleach on the victim, and he left the apartment with certain electronic devices belonging to the victim.

¶ 63 The autopsy report detailing the injuries suffered by the victim and the defendant did not support the defendant's description of the fight between the victim and him. While the victim was slightly taller and weighed more than the defendant, the victim was 18 years older than the defendant and suffered from a heart condition. There were 26 separate injuries to the victim's body while the defendant suffered two scratches to his face and a bite mark on his left bicep. While the cause of the victim's death was blunt-force trauma to his head, there was also evidence of strangulation, which explained the injuries to the inside of the victim's mouth. The scratches to the defendant's face were inflicted by the victim in trying to defend himself from the defendant. The bite mark on the defendant's left bicep was a defensive wound and indicated that the victim was struggling to avoid being strangled by the defendant.

¶ 64 Moreover, "[a] false exculpatory statement is 'probative of a defendant's consciousness of guilt.' " *People v. Milka*, 211 Ill. 2d 150, 181 (2004) (quoting *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996)). In the course of his multiple statements to police, the defendant lied repeatedly. He denied knowing the victim and denied taking electronic equipment from the victim's apartment. It was only after the police began confronting the defendant with the evidence, that the defendant finally admitted the fight with the victim and only later stated that the victim tried to rape him. The defendant's testimony at trial was contradicted by his statements to police in which he admitted that the victim had placed his mouth on the defendant's penis as the defendant ejaculated and that he had poured bleach on the victim to erase the evidence. While the defendant maintained that he was never behind the victim, in describing to police how he got the bite mark, the defendant conceded that he could have been behind the victim.

¶ 65 The defendant maintains that the length of the jury deliberations and the question from the jury regarding second degree murder indicated the evidence was close on the mitigating factors that could have resulted in his conviction for the lesser offense of second degree murder. The record reflects that the jury retired to deliberate at 2:46 p.m. At 5:46 p.m., the jury sent a note to the trial court asking if it could have "a descriptive explanation of second degree murder?" With the parties' agreement, the trial court responded that the jury had been provided with all the law pertaining to second degree murder and to continue deliberating. The jury returned a verdict at 7:24 p.m.

¶ 66 The length of time a jury spends deliberating is not always an accurate indicator that the evidence was closely balanced. *People v. Walker*, 211 Ill. 2d 317, 342 (2004). Careful consideration of the evidence adduced and the exhibits admitted is what is expected of jurors

in any trial. *People v. Wilmington*, 2013 IL 112938, ¶ 35. In reaching a verdict in this case, the jury reviewed the testimony of numerous witnesses, both lay and expert, and a great deal of physical evidence. The fact that the jury deliberated almost seven hours does not indicate that the jurors considered this to be a close case. While the jury's question involved second degree murder, nothing in the note suggested the jurors had reached an impasse as to that issue or that they could not reach a consensus on second degree murder.

¶ 67 The cases relied on by the defendant are distinguishable. In *Walker*, the supreme court found reversible error in the admission of the defendant's prior conviction. The court found the evidence against the defendant less than overwhelming, where the jury sent notes and questions to the trial court suggesting that it did not find the State's main witnesses entirely credible. *Walker*, 211 Ill. 2d at 342. In *People v. Gray*, 406 Ill. App. 3d 466 (2010), the court found that lengthy deliberations coupled with notes from the jury requesting transcripts and the locations of vehicles and witnesses at the time of the shooting and finally informing the court that it could not reach a consensus, showed that the jury found the evidence closely balanced. *Gray*, 406 Ill. App. 3d at 473-74.

¶ 68 Unlike the error in *Walker*, we have determined that the error in shackling the defendant did not contribute to his first degree murder conviction, and the jury's note about second degree murder did not reflect a credibility concern. Unlike *Gray*, the jury did not send multiple notes questioning the evidence and never informed the court that it could not reach a consensus. In light of the seriousness of the charge of first degree murder and the extensive amount of evidence it had to consider, nothing about the length of the deliberations or the note from jury leads us to conclude that the jury found the evidence favoring second degree murder closely balanced.

¶ 69 In sum, we find that the trial court's failure to follow the *Boose* procedure denied the defendant his right to due process of law. However, the error did not contribute to the defendant's first degree murder conviction, and the evidence of the defendant's guilt was overwhelming. We conclude the error was harmless.

¶ 70 II. Admission of the Autopsy Report

¶ 71 The defendant contends that the admission of the autopsy report violated his constitutional right to confront the witnesses against him. U.S. Const. VI; Ill. Const. 1970, art. I, § 8.

¶ 72 A. Standard of Review

¶ 73 A defendant's claim that his sixth amendment right of confrontation was violated constitutes a question of law, and therefore, our review is *de novo*. *People v. Barner*, 2015 IL 116949, ¶ 39.

¶ 74 B. Discussion

¶ 75 The defendant maintains that the trial court erred when it admitted the medical examiner's report into evidence without the testimony of Dr. Cogan, the medical examiner who performed the autopsy on the victim. The defendant argues that since he was unable to cross-examine Dr. Cogan, his right to confront witnesses was violated. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the confrontation clause bars the admission of testimonial statements of a witness who does not testify unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68.

¶ 76 In *People v. Leach*, 2012 IL 111534, our supreme court determined that the admission of an autopsy report did not violate the defendant's confrontation rights because it was

nontestimonial in nature. *Leach*, 2012 IL 111534, ¶ 137. Whether a document was testimonial depended upon the primary purpose a reasonable person would ascribe to the statement taking into consideration all the relevant circumstances. To determine whether an autopsy report was testimonial, the court applied an objective test: if the primary purpose was not to accuse a targeted individual or for providing evidence in a criminal case, then it was not testimonial. *Leach*, 2012 IL 111534, ¶¶ 120-122.

¶ 77 The defendant asserts that applying the objective test described in *Leach* to the circumstances of the present case, it is clear that his confrontation rights were violated. He points out that Dr. Cogan performed the autopsy in the presence of two police officers, and the autopsy report was not signed and issued by Dr. Cogan until December 9, 2010, well after the defendant had been arrested and charged with the victim's murder. The defendant maintains that the presence of the police officers and the issuance of the autopsy report months after the defendant was charged with the victim's murder established that the primary purpose of the autopsy report was to target him as the individual who killed the victim and to obtain evidence to be used against him at trial.

¶ 78 The defendant's arguments were rejected in *Leach*. An autopsy report is not generated for the production of evidence at trial. The court in *Leach* pointed out that state law requires that as soon as a coroner " 'knows or is informed that the dead body of any person is found, or lying within his county, *** [h]e shall *** take charge of the same and shall make a preliminary investigation into the circumstances of the death' if any one of five enumerated conditions exists. [Citation.] One such condition is that the death was 'sudden or violent death, whether apparently suicidal, homicidal or accidental.' " *Leach*, 2012 IL 111534, ¶ 126 (quoting 55 ILCS 5/3-3013(a) (West 2010)). Nothing in the autopsy report linked the

defendant to the victim's murder. See *Leach*, 2012 IL 111534, ¶ 132 (only when the autopsy results were linked to the defendant's statement was he linked to the crime); see *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 151(autopsy report was properly admitted where it was prepared in the normal course of business and not for the sole purpose of litigation).

¶ 79 The presence of police officers at the autopsy did not establish that the police played a direct role. *Leach*, 2012 IL 111534, ¶ 133 (the reports should be considered testimonial only in the unusual case in which the police played a direct role, such as where the police arrange for the exhumation of a body to reopen a cold case). In *Leach*, the court rejected the argument that the autopsy report was testimonial because the assistant medical examiner performing the autopsy was aware that the police suspected homicide and that a specific individual might be responsible. *Leach*, 2012 IL 111534, ¶ 136; see *Crawford*, 2013 IL App (1st) 100310 ¶ 152 (this court rejected the argument that *Leach* was distinguishable because the medical examiner's determination as to the cause of death was suspended for two months during which time the medical examiner had discussions with police detectives investigating a series of similar deaths).

¶ 80 In addition to *Crawford*, this court has followed *Leach* in *People v. Hensley*, 2014 IL App (1st) 120802 and *People v. Brewer*, 2013 IL App (1st) 072821. In *Hensley*, this court found *Leach* controlling and held that an autopsy report was nontestimonial and therefore, its admission was not error for the purposes of plain error analysis. *Hensley*, 2014 IL App (1st) 120802, ¶¶ 78-79; *Brewer*, 2013 IL App (1st) 072821, ¶ 43 (the autopsy report was not testimonial, and it was not error to allow a medical examiner other than the one who authored the report to testify about the autopsy results).

¶ 81 Like the supreme court, we cannot state that an autopsy report could never be testimonial. *Leach*, 2012 IL 111534, ¶ 136. In this case, applying the objective test set forth in *Leach*, the autopsy report was nontestimonial and was properly admitted into evidence without the testimony of the authoring medical examiner.

¶ 82 We conclude that the defendant's constitutional right to confront the witnesses against him was not violated.

¶ 83 III. Sentencing

¶ 84 The defendant contends that his 37-year sentence, while within the statutory limit for first degree murder, was excessive.

¶ 85 A. Standard of Review

¶ 86 A sentence within the statutory limit is reviewed for an abuse of discretion. *People v. Calhoun*, 404 Ill. App. 3d 362, 385 (2010). A sentence within the statutory limit will not be disturbed unless it is greatly disproportionate to the nature of the offense. *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009).

¶ 87 B. Discussion

¶ 88 Defense counsel sought the minimum sentence of 20 years while the State requested 50 years, 10 years less than the 60-year maximum sentence. The defendant maintains that at 38, his age at sentencing, a 37-year sentence, of which he must serve 100%, amounts to life imprisonment. The defendant argues that a reduction in his sentence would not denigrate the seriousness of his offense but would fulfill the constitutional mandate to restore him to useful citizenship. *Calhoun*, 404 Ill. App. 3d at 385 (citing Ill. Const. 1970, art I, § 11).

¶ 89 In devising a sentence within the statutory limit and proportionate to the nature of an offense, a trial court must balance the retributive and rehabilitative purposes of punishment.

To that end, the trial court considers all of the factors in mitigation and aggravation, including, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education, as well as the nature and circumstances of the crime and of the defendant's conduct in its commission. *Calhoun*, 404 Ill. App. 3d at 385.

¶ 90 The defendant maintains that the trial court did not give adequate consideration to the mitigation evidence which showed his strong rehabilitative potential. There is a presumption that when a court hears evidence in mitigation the court considered that evidence. *Cotton*, 393 Ill. App. 3d at 267. That the trial court did consider the mitigation evidence was reflected in its remarks at the sentencing hearing. The court specifically referred to the great amount of mitigation evidence that was submitted on his behalf and the defendant's struggles with his addiction to alcohol and drugs. While recognizing that the defendant's addiction was severe, the court found that it did not excuse his conduct in causing the victim's death. While the defendant maintained he acted in self-defense, the court pointed out that the jury rejected the defendant's testimony.

¶ 91 This court has held that the seriousness of the offense is the most important factor, and the defendant's rehabilitative potential need not be given greater weight. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). The evidence established that the defendant beat the victim to death, poured bleach over the body to destroy evidence and stole the victim's possessions which he then sold for drugs and cash. When questioned by police, the defendant refused to acknowledge that he had been involved in the victim's murder or the theft of his property. When he finally acknowledged that he fought with the victim, he claimed self-defense.

However, his claim of self-defense was contradicted by the evidence of the victim's injuries and his own conduct in trying to destroy evidence and taking the victim's property.

¶ 92 Moreover, unlike the defendants in the cases he relies on, the defendant graduated from high school and received a football scholarship to attend college. While his severe addiction to drugs and alcohol led him to forego a college education, the evidence indicated that the defendant had many chances to turn his life around but continued to abuse drugs and alcohol. See *People v. Steffens*, 131 Ill. App. 3d 141, 152 (1985) (30-year sentence for murder was an abuse of discretion where the defendant had just turned 17, came from a poor social background and had never been arrested for a violent crime). The defendant was a 35-year old adult, not a juvenile or young adult, when he committed the acts which caused the victim's death.

¶ 93 The defendant failed to establish that there was strong provocation for killing the victim. See *Calhoun*, 404 Ill. App. 3d at 387-88 (maximum sentence for murder was an abuse of discretion where the trial court failed to give sufficient consideration of the defendant's strong provocation in that she believed the victim had sexually molested her infant daughter). In finding the defendant guilty of first degree murder, the jury rejected the defendant's argument that the victim attempted to rape him.

¶ 94 Finally, the defendant relies on *People v. Maggette*, 195 Ill. 2d 336 (2001). *Maggette* was primarily a sexual assault case in which the defendant was also found guilty of residential burglary. While finding that the defendant's behavior was "appalling and harmful," the supreme court found a 10-year sentence for residential burglary "manifestly disproportionate to the nature of the offense" and reduced his 10-year sentence to five years. *Maggette*, 195 Ill. 2d at 355. Unlike the defendant in the present case, in *Maggette*, the defendant's criminal

acts in committing the residential burglary were intrusive but not violent. The same cannot be said for the defendant's brutal acts, which resulted in the victim's death in this case.

¶ 95 We conclude that the trial court properly balanced the seriousness of the offense with the defendant's potential for rehabilitation in fashioning the sentence in this case. The defendant's 37-year sentence for first degree murder was not excessive. Therefore, the trial court did not abuse its discretion in imposing the sentence in this case.

¶ 96 CONCLUSION

¶ 97 For all the foregoing reasons, the defendant's conviction and sentence are affirmed.

¶ 98 Affirmed.

¶ 99 JUSTICE DELORT, specially concurring:

¶ 100 Twenty years ago, this court reached a different conclusion regarding the shackling issue presented here. In *People v. Bennett*, 281 Ill. App. 3d 814, 825-26 (1996), this court held that failure to follow the *Boose* procedures was plain error and required reversal for a new trial.

¶ 101 In *People v. Allen*, 222 Ill. 2d 340 (2006), our supreme court addressed the same issue and divided sharply on it. A majority of four justices held that the trial court did indeed violate the defendant's due process rights by allowing him to be restrained without following the *Boose* procedures. However, the majority affirmed the defendant's conviction, stating that "under the circumstances presented, we are not persuaded that such error resulted in fundamental unfairness or caused a 'severe threat' to the fairness of defendant's trial" so as to rise to the level of plain error requiring reversal. *Id*. at 360. This holding impliedly abrogated this court's holding in *Bennett*. Justice Freeman, joined by Justices McMorrow and Kilbride, dissented from the *Allen* majority's holding. They agreed that the defendant's due process rights were violated, but believed that the error satisfied the second prong of the

plain error rule and required reversal, because it was "so serious that it affected the fairness of defendant's trial and that it challenged the integrity of the judicial process." *Id.* at 361-62 (Freeman, J., dissenting, joined by McMorrow and Kilbride, JJ.).

¶ 102 A few years after it issued *Allen*, our supreme court considered the issue again in the context of juveniles in *In re Jonathon C.B.*, 2011 IL 107750. Again, a bare majority of the court denied the defendant's request for a retrial, finding no error, but only because the record did not affirmatively indicate that the trial judge actually knew that the defendant was shackled until he rose to testify at the witness stand. *Id.* ¶ 72. Three justices dissented. Chief Justice Kilbride and Justice Freeman issued separate dissents, each believing that failure to conduct a *Boose* hearing required reversal of the respondent's adjudication of delinquency. *Id.* ¶¶ 125 (Kilbride, C.J., dissenting), 127 (Freeman, J., dissenting). Justice Burke agreed that the trial court's failure to observe whether the juvenile was shackled was "error," but her dissent did not specifically call for a retrial on that basis. *Id.* ¶¶ 163-221 (Burke, J., dissenting). However, in dissenting on denial of rehearing, Justice Burke clarified her position, explicitly stating that the error required a retrial. *Id*. ¶ 265.

¶ 103 Illinois Supreme Court Rule 430 (eff. July 1, 2010) now establishes the manner in which a criminal defendant may be physically restrained at trial. The rule states in part: "Persons charged with a criminal offense are presumed innocent until otherwise proven guilty and are entitled to participate in their defense as free persons before the jury or bench." The committee comment to the rule states, in its entirety: "This rule codifies the holdings in *People v. Boose*, 66 Ill. 2d 261 (1977), and *People v. Allen*, 222 Ill. 2d 340 (2006)." The rule itself is silent with respect to the remedy to be applied when a trial court fails to follow the *Boose* procedures. The rule is written in mandatory terms – the word "shall" appears in it seven times – which perhaps

illustrates that the law regarding remedies for *Boose* violations is not as firmly settled as the State contends here. I believe that the viewpoints expressed by the dissenting justices in *Allen* and *Jonathon C.B.* are quite sound. Therefore, I would be inclined to reverse the court below on that basis. However, because *Allen* is binding on us under the principle of vertical *stare decisis*, and I agree with my colleagues that the evidence of the defendant's guilt was overwhelming, I must reluctantly join in the majority's judgment on this issue. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) (holding that lower courts must follow decisions of higher courts).

¶ 104 I join the remainder of the majority's opinion in full.