

No. 13-1553

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 18310(02)
)	
JEFFREY ALLEN,)	
)	Honorable Dennis J. Porter
Defendant-Appellant.)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court improperly admitted a witness's out-of-court statement as substantive evidence when the witness repudiated the statement at trial. However, the error did not entitle defendant to plain error relief or to prevail on a claim for ineffective assistance of counsel. The automatic transfer statute is not facially unconstitutional nor is it unconstitutional as applied to defendant. The trial court did not abuse its discretion when it fashioned defendant's sentence.

¶ 2 Defendant Jeffrey Allen, 16 at the time, was charged with first degree murder as the State claimed that he was the shooter in a drive-by shooting. Patrick Stribling, 22, died from the 17 gunshot wounds he suffered in that shooting. Defendant was tried as an adult under Illinois'

No. 13-1553

automatic transfer statute (705 ILCS 405/5-130) which mandates that a 16 year old that is charged with first-degree murder does not get the benefit of being judged in the juvenile court system. 705 ILCS 405/5-130(1)(a). Therefore, defendant faced trial under the criminal laws. He was convicted by a jury and the trial court sentenced him to 85 years in prison. He now appeals.

¶ 3

BACKGROUND

¶ 4 On June 7, 2009, Patrick Stribling was near 93rd Street and Dobson Avenue in Chicago. A green Jeep approached Stribling's location and four or five shots were fired at him from the vehicle. The Jeep then pulled away, circled the block, returned, and the passenger fired about a dozen more shots at Stribling. The Jeep was found abandoned in the area a short time later, and someone had apparently attempted to set it on fire. The Jeep turned out to have been stolen five days earlier.

¶ 5 The State's theory of the case was that defendant and his co-defendant, Caleb Charleston, killed Stribling because Stribling was cooperating with the authorities regarding another murder, the killing of Mark Cooper. Cooper was killed two months before Stribling and the murders took place within a couple blocks of one another. Nine days before being killed, Stribling testified before a grand jury against Donate Graham and Andrew Davis, leading to their eventual arrests for the Cooper murder.

¶ 6 At trial, Shirley Head testified that on the day of Stribling's murder, she was riding a bicycle near her home. She saw a green Jeep driving down the street and observed defendant in the passenger seat, holding a pistol. Head had never seen defendant or his co-defendant in that vehicle before. Head had known defendant for one or two years from around the neighborhood, and she had known co-defendant for many years because he was a friend of the family. Head

No. 13-1553

testified that co-defendant joked to her, "I ought to pop you," which she did not take seriously.

The Jeep continued toward Dobson and, minutes later, she heard gunshots from the direction in which the vehicle traveled. Head continued on her bike in the direction of the shooting and as she was riding through an alley a block away, she again observed the Jeep. This time, the Jeep was coming down the alley real fast and she soon heard a second barrage of gunfire. She later observed Stribling's mother crying at the scene and an ambulance driving away. She spoke to police at the scene and told them that defendant and co-defendant were the perpetrators.

¶ 7 Head admitted that she was a drug addict. On the day of the murder, she was in the area because she was looking to score drugs. She claimed that she had not done any drugs that day. After the shooting, Head returned home and the police came to her residence, interviewed her, and took her to the police station where she identified both defendant and co-defendant in a photo array. The officers also took her to the location where the Jeep was abandoned and she identified it as the vehicle she had seen occupied by defendant and co-defendant just before the shooting.

¶ 8 Darnell Payne was also called to testify. He stated that Head was his long-term girlfriend and admitted that he was also a drug addict. He was at 93rd and Dobson on the day of the shooting trying to obtain drugs for himself and Head. As he was at that location, he came into contact with Stribling. He borrowed Stribling's phone and, after standing and talking to Stribling for 15 minutes, Payne observed a Jeep approaching them. Payne recognized the occupants of the vehicle and began to approach them because he was hoping they would have drugs to sell. Payne knew defendant and co-defendant through Donate Graham, who Payne considered to be his nephew. Payne then observed defendant produce a pistol and motion for Payne to get out of the way. The gun came out of the passenger window and Payne ran and then heard four or five

No. 13-1553

gunshots. The Jeep drove off and Payne approached Stribling who had been shot and was attempting to crawl away. Payne testified that Stribling was panicking, and that someone then screamed that the Jeep was returning, so he left Stribling and took cover behind a parked truck. Payne claimed that from cover, he again identified co-defendant to be the one driving the vehicle. He saw the Jeep approach Stribling for a second time and heard about 12 more shots which he could see striking Stribling's body. Payne testified consistently with his trial testimony when he testified before a grand jury.

¶ 9 Another occurrence witness, Garfield Rattray also testified at trial. He is the co-defendant's stepfather. Rattray testified that he was sleeping in an apartment above the liquor store at 93rd and Dobson when he heard four or five gunshots. When he opened the window and stuck his head out, he saw a Jeep driving away and someone lying on the ground. Rattray also observed someone, who he identified as Payne, picking up what he believed to be bags of drugs from around the victim. Then, Rattray heard a lady cry out that the Jeep was coming back. He saw Payne run away across the street as the Jeep came to the same spot again, and watched the passenger shoot the "guy on the ground" again about 11 or 12 times. Rattray testified that he could see the head and the side of the face of the shooter, but that the driver's face was obscured. Just after the shooting, Rattray identified defendant as the shooter from a photo array. He also identified defendant as the shooter in a line-up two months later. However, Rattray did not identify defendant as the shooter when asked if he could make an in-court identification at trial.

¶ 10 The incident was also caught on tape by a Chicago Police POD camera and a surveillance camera from a liquor store. The police showed Payne the video and Payne identified himself. The videos corroborate the basic events described by both Payne and Rattray, but neither of the

No. 13-1553

occupants of the Jeep is identifiable. The video does have probative value, however, because it shows Payne's proximity to the shooting and gives some insight into Rattray's point of observation at the time of the second round of gunfire.

¶ 11 Ashmona Williams, an acquaintance of defendant and a friend of co-defendant who she had known her whole life, also testified at trial. While she was in jail on a possession of a controlled substance charge, she was approached and interviewed by an assistant state's attorney and a Chicago Police Department detective. In the interview, Williams stated that she spoke with co-defendant on the phone and that co-defendant indicated that he intended to retaliate against Stribling as a result of Stribling cooperating with the authorities on the Cooper murder. She also stated that defendant told her and two other individuals that he had shot Stribling from a stolen car and that he saw Stribling still moving as they initially drove away, so they came back around to finish him off. Williams also indicated that defendant told her that there was a drug user near Stribling when he shot him. In the statement, signed by Williams on each page, she indicates that she gave the statement freely and voluntarily, that she received no benefit for giving the statement, that the statement was read aloud to her, that she understood it, and that everything in the written statement was true and correct. The statement is also signed on each page by the assistant state's attorney and the detective.

¶ 12 However, at trial, Williams repudiated her entire statement. She admitted that she met with the assistant state's attorney and the detective. She admitted that her statement to them was that she had a phone conversation with co-defendant and that co-defendant intended to hurt or kill Stribling for cooperating in the Cooper murder investigation. Then, however, Williams testified that she never actually had a phone conversation with co-defendant and that defendant did not tell

No. 13-1553

her any of the things that she told the investigators. The State confronted Williams with the written statement. She admitted that the written statement was accurate as to what she told the investigators and that the detective typed it as she gave it. She admitted that she then signed it, and that the investigators both signed it in her presence. She admitted that she was given the opportunity to make any changes she wanted to the statement, that she did not make any, and that she did not ask to correct the part of her statement that indicated that everything contained therein was true and correct.

¶ 13 Williams claimed at differing times during her testimony that she gave the statement because she was threatened, harassed, was scared, was told additional charges would be brought against her if she did not make a statement, and because she just wanted to get probation on her drug case. She testified that she just made up the part about retaliating against Stribling. She then testified that another individual, Warren Mangum, informed her that Stribling was killed in retaliation for cooperating in the Cooper case. She then testified that her statement reflected just what everybody in the neighborhood was saying. Assistant State's Attorney Jason Poje and Chicago Police Department Detective Brian Forberg both testified that they never threatened Williams, that she was calm and treated well, and that she indicated to them that the statement was true.

¶ 14 The jury found defendant guilty of first degree murder and made a special finding that defendant personally discharged a firearm to accomplish the killing. At the sentencing hearing, the trial judge took note of defendant's young age. The trial judge, however, found that the significant planning that went into the murder along with the fact that the intent to kill was so clear were aggravating factors. The trial judge gleaned the clear intent to kill from the fact that they

No. 13-1553

circled the block and came back to shoot Stribling a dozen times. The trial judge also noted defendant's lack of remorse while observing him for almost four years during the pendency of the case. Finding that the killing was "carried out in a cold blooded fashion with a cold blooded result," the trial judge sentenced defendant to 85 years in prison.

¶ 15

ANALYSIS

¶ 16 On appeal, defendant argues that: (1) the statement of Ashmona Williams was improperly admitted at trial as motive evidence; (2) the trial court improperly allowed certain "other crimes" evidence to be admitted; (3) his trial and the resulting sentence violate his state and federal constitutional rights; and (4) his sentence is excessive.

¶ 17

Admission Of Evidence

¶ 18 Defendant argues that his conviction should be reversed because the trial court improperly allowed the State to introduce the statement Ashmona Williams gave when she was interviewed by an assistant state's attorney and a detective. First, defendant contends that the putative motive evidence was inadmissible against him because it improperly ascribed a motive to him while there was no evidence tying him to the statement co-defendant allegedly made to Williams. Second, defendant contends that Williams should not have been able to testify as to the meaning of the statement at trial and that doing so constituted improper lay witness testimony. Third, defendant argues that Williams' statement should not have been admitted because it was inadmissible hearsay.

¶ 19 The State concedes that the trial court improperly allowed the introduction of Williams' statement as substantive evidence because it was not based on her personal knowledge. See 725 ILCS 5/115-10.1; *People v. Simpson*, 2015 IL 116512, ¶¶ 32-34. It should be acknowledged,

No. 13-1553

however, that Williams admits making the statement and admits that the statement she was presented with on the witness stand was true and accurate as to what she told the State. She authenticated the genuineness of the statement and only repudiated its content for the first time at trial. Nonetheless, under the Code of Criminal Procedure and controlling precedent, the statement should not have been admitted as substantive evidence.

¶ 20 Although defendant challenged the admissibility of Williams' statement both in a motion *in limine* and in a posttrial motion, he did not object to the admission of the statement on any of the grounds he presents here. When a party objects to the admissibility of evidence at trial, but raises a different ground for inadmissibility on appeal, the trial objection is insufficient to preserve the error for review. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 30. A specific objection made at trial forfeits all grounds not specified, and a ground of objection not presented at trial will not be considered on appeal. *People v. Gales*, 248 Ill. App. 3d 204, 229 (1993).

¶ 21 Defendant also argues that the trial court improperly allowed the State to elicit evidence that the vehicle in which defendant and co-defendant were alleged to be operating was stolen. As to this issue, defendant did not object to the now-challenged evidence at trial or in a posttrial motion. A defendant must do both to preserve the issue for review. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 22 Defendant asks us to review the forfeited errors under the plain error doctrine. Defendant also asks us to review the forfeited errors on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to preserve the errors for review. Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or

No. 13-1553

(2) if the 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. Herron*, 215 Ill. 2d 167, 178-79 (2005). To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27.

¶ 23 Defendant claims that, despite forfeiting these errors, he is entitled to a reversal of his conviction under plain error review or for ineffective assistance of counsel on the basis that the evidence of his guilt was closely balanced and he was prejudiced by the admission of the evidence. Under the closely-balanced prong of plain error review, the defendant must show prejudicial error. *Id.* The defendant bears the burden of persuasion with respect to prejudice. *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 31. To satisfy the prejudice prong of an ineffective assistance of counsel claim, the defendant must show that, but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 45.

¶ 24 In this case, identification was the only issue in dispute. There was incontrovertible evidence that a drive-by shooting took place from a Jeep that resulted in the death of Patrick Stribling. The only real question at trial was whether defendant was in the vehicle and whether he was the shooter. The identification evidence presented against defendant was compelling.

¶ 25 Garfield Rattray, co-defendant's stepfather, testified that he was in the apartment above the liquor store when he heard the initial shots. He saw the Jeep driving away from the scene and then saw the Jeep come back around, heard a scream, and witnessed the second round of gunfire.

No. 13-1553

Ratray could see the head and the side of the face of the shooter as the shooting occurred. Ratray identified defendant in a photo array shortly after the shooting and in a line-up two months later, after defendant was arrested. Ratray also saw Payne at the scene and described Payne's actions in a manner consistent with Payne's testimony and the corroborating surveillance video. Defendant had the opportunity to challenge Ratray's observations on cross-examination and Ratray never wavered in his testimony that defendant was the shooter. The testimony was unequivocal and unimpeached.

¶ 26 In evaluating the reliability of an identification, we look to the following five factors: (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's degree of certainty; and (5) the length of time between the crime and the confrontation. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Of course, identification evidence is stronger when multiple eyewitnesses identify the defendant as the perpetrator. *People v. Standley*, 364 Ill. App. 3d 1008, 1014-15 (2006).

¶ 27 Along with Ratray, two other eyewitnesses with more than ample opportunity to observe defendant contemporaneous with the relevant events testified unequivocally that defendant was indeed the shooter. The identification evidence offered by Head and Payne was strong, with the only not insignificant caveat being that they were drug addicts. Head testified that she had known defendant for one or two years from around the neighborhood. She testified that she had known co-defendant for many years because he was friends with her nephew. In her words, co-defendant was "good friends with [her] family." She testified that she saw and recognized

No. 13-1553

defendant in the passenger seat of the Jeep and co-defendant driving. She testified that the Jeep even stopped and they had a conversation, so she had very ample opportunity to identify the occupants. She saw defendant with the gun and, within minutes, the shooting occurred. Then, between the first and second bursts of gunfire, she encountered the same Jeep with the same occupants in an alley. Head identified defendant as the shooter at the scene, in a photo array shortly after the incident, and at trial.

¶ 28 As for Payne, he had known defendant for a few months through his almost-nephew, and had known the co-defendant for approximately ten years. Payne too unequivocally testified that he saw defendant occupying the passenger side of the Jeep when he approached the vehicle hoping to get drugs. Then, defendant motioned for him to get out of the way, he fled, and the shooting occurred. Moments later, Payne observed the vehicle, with co-defendant still driving, come around for the second round of shooting. Payne identified defendant as the shooter both in a photo array shortly after the shooting and then at trial.

¶ 29 Defendant, however, maintains that the identification evidence offered by Head and Payne should not be credited because the witnesses were drug addicts and they presumably still had drugs in their systems at the time of the shooting. The fact that a witness is addicted to drugs may be used at trial in an attempt to diminish the witness's credibility. *People v. Kliner*, 185 Ill. 2d 81, 130 (1998). The testimony of someone addicted to drugs should be carefully scrutinized, but it is not necessarily unworthy of belief. *People v. Morrow*, 303 Ill. App. 3d 671, 677-78 (1999). Instead, the totality of circumstances surrounding the addicted person's testimony must be considered to determine if it is believable. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). Ultimately, it is up to the trier of fact to decide how much weight identification evidence

No. 13-1553

deserves. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 59. The jury's assessment of the witnesses' identification testimony, like its resolution of all factual questions, will be upheld so long as, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have come to the same conclusion the jury did beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 30 The jury had to consider whether the identification evidence was reliable on account of Head and Payne being admitted drug addicts. Both Head and Payne unequivocally testified at trial, and at numerous other times, that they were not under the influence of narcotics at the time of the shooting and that they had not used drugs that entire day. Payne's testimony was entirely consistent with Rattray's testimony in all important respects, down to the number of shots that were fired during each round of gunfire. Rattray's testimony corroborated the complete narrative offered by Head and Payne. Both Head and Payne had at least two opportunities to observe defendant and their testimony was corroborated by Rattray and by video. The evidence was not closely balanced on the issue of whether defendant was the shooter, and defendant cannot make a showing of the necessary prejudice to be entitled to relief under plain error review or for a claim of ineffective assistance of counsel. The State put forth unequivocal, uncontradicted testimony proving the identification.

¶ 31 The other argument defendant interposes concerning the identification evidence is that Head and Payne's testimony should not be believed because they had a motive to lie. Defendant theorizes that Head's nephew (who was essentially Payne's nephew too) would have been a suspect in this case and Head and Payne wanted to shift potential blame away from their nephew. But that is simply an unsupported theory—a hollow argument with no indicia of being supported by fact.

No. 13-1553

It also fails to account for Rattray's corroborative testimony. Defendant had the opportunity to, and did, ask the occurrence witnesses about their motive to lie and to implicate someone other than their nephew. The witnesses made clear that their trial testimony, subject to cross-examination, was true. Again, whether to believe a witness's testimony and whether to believe a person's motivation to falsely testify are questions to be resolved by the jury.

¶ 32 In the end, the weaknesses in the identification evidence that defendant brings up on appeal were all presented to, and rejected by, the jury. There is a lot of corroboration here, especially in light of Rattray's testimony and the surveillance video, and there is no real reason to doubt the veracity of any of the testimony. We hold that the evidence presented to the jury to prove the proposition that defendant was the shooter was not closely balanced and, therefore, defendant suffered no prejudice from his counsel's failure to preserve the error for review nor did the admission of the evidence prevent defendant from receiving a fair trial.

¶ 33 Facial Challenges To The Automatic Transfer And Sentencing Scheme

¶ 34 Defendant argues that the Automatic Transfer statute (705 ILCS 405/5-130), especially when combined with mandatory minimum sentences, enhancements, and the truth in sentencing statute, violates his constitutional rights. Defendant argues that the statutes are facially unconstitutional. Like many defendants over the past couple of years, defendant challenges the constitutionality of these statutes based on a line of United States Supreme Court cases: *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455 (2012). The cases essentially provide that minors cannot be sentenced to the death penalty and cannot be mandatorily sentenced to life imprisonment without the possibility of parole. Defendant points to one statement in *Miller* in particular to support his argument: "

No. 13-1553

'[a]n offender's age * * * is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take a defendant's youthfulness into account at all would be flawed.' " *Miller*, 132 S. Ct. at 2466. Distilling from that line of cases, defendant argues that the sentencing scheme applied to him violates: (1) the Eighth Amendment; (2) the Proportionate Penalties Clause; (3) his right to procedural due process; and (4) his right to substantive due process.

¶ 35 All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate a clear constitutional violation. *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005). A court must construe a statute so as to affirm its constitutionality if reasonably possible. *Id.* To deem a statute facially unconstitutional, we must find that there are no circumstances in which the statute could be validly applied. *People v. Davis*, 2014 IL 115595, ¶ 25.

¶ 36 In *People v. Reyes*, 2016 IL 119271, ¶ 10, the Illinois Supreme Court held that a legislatively mandated 97-year sentence for a 16-year-old offender was unconstitutional under *Miller*. *Miller* stands for the proposition that life-without-parole sentences for juveniles cannot be based on statutory mandates. *Miller*, 132 S. Ct. at 2475. The Illinois Supreme Court in *Reyes* interprets *Miller* to say that even if a juvenile defendant has a mandatory term-of-years sentence, the sentence may be so long that it is a *de facto* life sentence and violates the eighth amendment. *Reyes*, 2016 IL 119271, ¶ 10. *Reyes* is inapplicable here.

¶ 37 In this case, the mandatory minimum sentence was 45 years. Defendant was sentenced to 85 years, but that was based on judicial discretion which is exactly what the *Miller* Court held was required for justifying lengthy juvenile sentences. See *id.* at ¶¶ 9-10. As discussed in ¶ 40 *infra*, the trial judge had the opportunity to, and did, consider mitigating circumstances including

No. 13-1553

defendant's age before imposing the sentence. The length of the sentence here was not legislatively mandated, it was crafted by the trial judge after careful consideration of the circumstances (see *infra* ¶ 41). So *Reyes* does not apply and does not render defendant's sentence unconstitutional.

¶ 38 As-Applied Challenges And Length Of Sentence

¶ 39 Defendant also argues that the automatic transfer and the sentencing scheme are unconstitutional as applied to him. In addition, defendant argues that his 85-year sentence is excessive because it is a *de facto* life sentence as he will most likely spend the rest of his natural life in prison. The sentencing range for defendant's conviction was anywhere from 45 years to life imprisonment.

¶ 40 In regard to defendant's as-applied constitutional challenge to the sentencing scheme, a defendant's age is still a factor that the trial judge can, and should, consider when sentencing a minor tried as an adult. In this case, the trial judge indicated that "probably the single most significant mitigating factor" was defendant's "age at the time of the crime." The trial judge clearly was not constrained by the mandatory minimums as he sentenced defendant to 40 years more than the minimum allowable sentence. Thus, the mandatory minimums were not the cause of defendant's lengthy sentence. In fact, the trial judge was inclined to impose a life sentence, but felt that defendant's age limited him.

¶ 41 As for defendant's argument that the sentence is excessive, a trial court's sentencing decision is afforded great deference, and a reviewing court will not disturb a sentence within statutory limits unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000). A sentence that falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of

No. 13-1553

the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 42 The record in this case reflects the fact that the crime was heinous. Defendant shot Stribling 17 times. After firing four or five shots at him and realizing that he was still alive, defendant and his co-defendant circled the block to fire another dozen or so shots at the victim as he lay defenseless on the ground, crawling for his life. The trial judge's sentence was thoughtful and deliberate. The trial judge took into consideration defendant's lack of remorse while observing him for almost four years during the pendency of the case. The trial judge also took note of the amount of planning and premeditation that went into the killing and explained that the killing was "carried out in a cold blooded fashion with a cold blooded result." Of course, Stribling is dead. At the sentencing hearing, Stribling's family members proclaimed sincere despair, especially for Stribling's young, now-fatherless sons. Considering the totality of the circumstances presented, we cannot say that trial judge abused his discretion in fashioning defendant's sentence.

¶ 43

CONCLUSION

¶ 44 Accordingly, we affirm.

¶ 45 Affirmed.