FIRST DIVISION
December 26, 2017

No. 1-14-1037

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 16847 (03)
	)	
CHRISTOPHER HARRIS,	)	The Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to suppress. The court did not err in imposing a 105-year sentence. Defendant's mittimus is corrected.

¶ 2 Following a jury trial, defendant Christopher Harris was found guilty of first degree murder in the shooting death of Chicago police officer Alejandro Valadez and attempted first degree murder of Kelvin Thomas. Defendant was sentenced to 105 years' imprisonment. Defendant now appeals and argues that (1) his electronically recorded statement should have been suppressed because it was obtained after he requested the presence of counsel; (2) his 105-year sentence is excessive; and (3) his mittimus should be corrected to reflect that his conviction of attempt first degree murder is a Class X felony. For the following reasons, we affirm but

correct defendant's mittimus.

¶ 3 BACKGROUND

¶ 4 In the late evening hours of May 31, 2009, Chicago police officer Alejandro Valadez was shot and killed in a drive-by shooting while he was questioning a neighborhood citizen, Kelvin Thomas, about a report of shots fired. After an investigation, on June 1, 2009, the police arrested co-defendants Shawn Gaston and Kevin Walker.[1] Defendant Christopher Harris was also arrested that night but released. The police later brought defendant into Area 1 on August 14, 2009 for questioning and, after giving a statement, he was also charged in the case. On October 16, 2009, the State indicted defendant, along with Gatson and Walker, with the first degree murder of officer Valadez and the attempted murder of Thomas. Defendant does not challenge the sufficiency of the evidence against him. We will therefore only address the facts relevant to the disposition of this appeal.

¶ 5 Prior to trial, defense counsel filed a motion to suppress defendant's electronically recorded interrogation[2] on the sole basis that defendant requested counsel before he was questioned but the questioning continued despite his request. On August 14, 2009, at approximately 3:04 a.m. defendant was arrested in connection with the murder of Officer Valadez and the attempted murder of Thomas. He was alternately questioned by detectives and eventually placed in a holding cell at about 9:40 a.m., where Detective Foster read defendant his *Miranda* warnings "word for word verbatim from the FOP book." Later, defendant was removed from a holding cell and taken to be photographed. Defendant was escorted back to the holding

[1]Shawn Gaston and Christopher Kevin Walker are not parties to this appeal.

[2] Defendant also filed pretrial motions to suppress Jolaine Thomas' identification of defendant and a motion to quash arrest. The trial court denied both motions.

cell, at about 2 p.m. As Detective Foster was closing the cell door, defendant asked Foster, "Hey, if I want to I can still talk to my lawyer right now?" Detective Foster immediately replied, "Yeah, we'll just, we'll be back in a minute, all right?" and then left the room. This exchange was captured on an audio and video recorder.

¶ 6 About 3 minutes later, Foster and Assistant State's attorney (ASA) Fabio Valentini entered the room. ASA Valentini introduced himself to defendant as a state's attorney and told the defendant that he wanted to be sure that defendant understood his rights. Valentini asked defendant if he understood that he had "the right to remain silent." Defendant replied yes. He then asked defendant if he understood that if he chose to waive his right to remain silent anything he said could be used against him in court. Defendant stated that he understood. ASA Valentini then asked defendant if he understood that he had a right to have an attorney present during questioning. Defendant stated "yes" and also stated that he understood that if he couldn't afford a lawyer, one would be appointed to him "prior to any questioning." ASA Valentini asked defendant if he understood all of "those rights." Defendant responded, "Yes." After each admonishment, defendant did not make any comment about speaking with an attorney or questioning whether he could talk to "his lawyer." Valentini then informed the defendant that he had the results of a gunpowder residue test that had been taken the night of the officer Valadez shooting. Defendant then gave an inculpatory statement. At the hearing on the motion to suppress, defense counsel argued that defendant unequivocally requested counsel before ASA Valentini appeared, and if he did not, he at least made a request sufficient to require further clarification.

¶ 7 Following the hearing, the circuit court denied the motion to suppress concluding that defendant's statement "[w]as not a request for an attorney, not an invocation." The court found

that it could be inferred from the video that defendant did not intend to request an attorney because he did not do so when ASA Valentini entered the room. The court further rejected defense counsel's argument that Detective Foster should have clarified defendant's request before leaving the room.

¶ 8 At trial, it was established that Chicago police officers Thomas Vargas and Alejandro Valadez began their shift around 11 p.m. on May 31. They were each wearing jeans, a bullet proof vest, a duty belt, and a police badge over the vest. Not long after starting their patrol in an unmarked police vehicle, Officers Vargas and Valadez met with Officers Larsen and Pienta at 60th Street and Ashland Avenue to discuss a report of possible gunfire. The officers drove to the vicinity of the report, and shortly thereafter, a radio dispatcher reported that there were calls of shots fired in the area of 60th Street to 61st Street and Hermitage Avenue and Paulina Street. Around the same time, another radio report informed officers of a garage on Hermitage Avenue used by gang members to store weapons. Officers Vargas, Valadez, Larsen, and Pienta, along with another officer, Officer Lopez, drove down the alley east of Hermitage Avenue to investigate the garage. While there, Officers Valadez, Vargas, Larson, Pienta, and Lopez approached a man they saw from across a vacant lot, with Officer Valadez reaching him first. The man was identified as Kelvin Thomas. Officer Valadez asked Thomas whether he had heard any gunshots. Thomas stated that he and his sister Jolaine had heard several gunshots approximately 15 minutes earlier while they were at Jolaine's house at 60th Street and Hermitage Avenue.

¶ 9 While Thomas was telling Officer Valadez where the earlier gunshots came from, witnesses heard another set of five or six gunshots. Witnesses testified that the shots came from the street and were fired in slow succession, as if they were fired from a revolver. As Officers

Vargas and Larson fell to the ground, they saw Officers Valadez and Thomas fall to the ground as well. Officers Vargas, Larson, Lopez, and Pienta saw a blue or grey four-door vehicle. Officer Lopez observed that the passenger side of the car was scratched or damaged. Officers Vargas and Larson saw the car stop and a black male in a white t-shirt emerge from the front passenger window and begin firing in quick succession, as if from a semi-automatic pistol. Thomas saw a white sleeve on the passenger side of the car, and his sister Jolaine saw an arm extended from the back passenger side of the car. When the shooting stopped, the car drove north on Hermitage Avenue and turned a corner. Officer Vargas saw a Pontiac symbol on the back of the car. Officer Larson pursued the car on foot while Officer Vargas checked on Officer Valadez.

¶ 10 Officer Valadez had been shot in the head and left thigh. He was taken to the hospital, where he died on June 1, 2009. The medical examiner recovered two fragments of a copper-jacketed bullet from the left side of Officer Valadez's head along with a deformed medium caliber copper-jacketed bullet from the right side of his brain. Another medium caliber copper-jacketed bullet was recovered from Officer Valadez's thigh. His death was ruled a homicide.

¶ 11 Meanwhile, at 1:10 a.m. on June 1, Officer Ruzak located a grey Pontiac G6 that matched the description of the car provided by Officer Lopez in the area of 6147 South Paulina Street. Officer Ruzak put his hand on the hood of the car, which was warm. He observed a .40-caliber shell casing wedged between the rear window and the trunk. Officers Larson, Pienta, and Lopez arrived, and identified it as the car in which the shooters were driving, noting that it had the same scratches or damage on the passenger side that the officers observed on the shooters' car. Thomas viewed the car and stated that it looked similar to the car he saw during the shooting on Hermitage Avenue. The car was towed to a police facility where it was determined that the car was registered to Gaston's mother, Uvonne Gaston.

¶ 12 Uvonne told police that she permitted Gaston to drive the car, and that he still had possession of the car on May 31 when she went to bed around 9:00 p.m. She consented to a search of Gaston's room, where police found a box of .357-caliber ammunition, a box of .44 Magnum ammunition, and three loose .38-caliber rounds. Gaston and Walker were arrested across the street.

¶ 13 Police searched the impounded Pontiac G6 and recovered a fired .40-caliber CBC-brand bullet casing wedged between the back window and trunk of the car. In the trunk, police recovered a .357 Colt revolver with one live round and five fired cartridge casings, a .40-caliber semiautomatic handgun with an empty clip, and a .9mm rifle with eight bullets in its magazine and two jammed cartridges—one of which was live—inside the chamber. From the scene of the shooting, eight unweathered CBC-brand .40-caliber cartridge casings, one weathered Winchester-brand .40-caliber cartridge casing, and six .38 special cartridge casings were recovered.

¶ 14 The State called Justin Barr, a forensic scientist, to testify as an expert in the field of firearms identification. Defendant expressly accepted Barr as an expert in that field. Barr testified that he examined and test-fired the revolver recovered from the trunk of Gaston's car using both .38 Special ammunition and .357 Magnum ammunition. He concluded that there was substantial agreement of class and individual characteristics between the test-fired bullets and the recovered bullets. Over defendant's objection, Barr opined that the bullets recovered from Officer Valadez's body were fired from the .357 Colt revolver recovered from the trunk of Gaston's car. Furthermore, following all proper procedures and protocols that are commonly accepted in his field, Barr compared the five cartridge casings recovered from the .357 Colt revolver to the cartridge casings from the test-fired shots using the comparison microscope to

compare. Over defendant's objection, Barr opined that based on his training and individual examination of the class and individual characteristics, the five fired cartridge casings recovered from the .357 Colt revolver had been fired by that weapon.

¶ 15 Barr also examined and tested the .40-caliber semiautomatic pistol and the empty clip recovered from the trunk of Gaston's car. He opined that the eight cartridge casings recovered from the scene of the shooting and the single .40-caliber cartridge casing recovered from Gaston's car were fired from the .40-caliber semiautomatic pistol recovered from the trunk of Gaston's car. After Barr's direct examination, defendant moved to strike Barr's opinion for lack of an adequate foundation, which the circuit court denied.

¶ 16 The State's evidence was that on May 31, 2009, at around 3:30 p.m., Gaston was stopped by Illinois State Police while driving a grey 2009 Pontiac G6 registered to Gaston's mother, Uvonne Gaston. Defendant was a passenger in the car when it was stopped. Gaston was issued a ticket for a seat-belt violation, and defendant was issued a verbal warning.

¶ 17 Jolaine Thomas, Kelvin Thomas's sister, told Detective Foster that she saw the person who shot at her brother and Officer Valadez out of the rear seat of the grey Pontiac and that his name was "Chris." Jolaine later identified defendant in a photograph as the person she saw firing from the back seat. She subsequently identified defendant in a lineup and in a photograph before the grand jury.

¶ 18 Defendant's hands were tested for gunshot residue on June 1, 2009. Defendant's right hand tested positive which showed that he discharged, contacted or was in the environment of a discharged firearm.

¶ 19 ASA Fabio Valentini testified that defendant gave an electronically recorded statement to him and Detective Foster. A video of that statement, as well as a transcript, were admitted into

evidence. After initially denying his involvement, defendant stated that on the night of the shooting, Gaston and Walker wanted to get tattoos and asked defendant to come with them. Defendant declined because he was spending time with his girlfriend. Gaston and Walker came back a few hours later to get him because they had been shot at by rival gang members while they were driving down Hermitage and wanted to go retaliate. Defendant agreed to go. They all had guns. Defendant admitted that he was sitting in the back seat of the vehicle, behind Gaston who was in the passenger seat. Walker was driving. Defendant was the one who "shot the three fifty seven but I didn't aim it at nobody. You know, I just shot it out the window * * * my arm was out the window, yeah." Defendant thought he had fired his gun four times. Defendant stated that they drove by the area where Officer Valadez and Thomas were standing at about 30 miles per hour and saw someone who was wearing white so they "get to shooting" because 'they thinking it's one of them it could be who just shot at them not knowing that it's an officer or it could be an innocent bystander or anything nothing thinking about none of that." Defendant further stated that "we were blinded by anger and how bad we wanted to retaliate we didn't think about it." Defendant stated that after they were done driving around in Gaston's car he put his .357 in the trunk. Gaston and Walker put their guns in the trunk too.

¶ 20 Defendant did not testify. Defendant was convicted of first degree murder and attempt first degree murder. The jury determined that it was not proven that defendant knew or should have known that the murdered person was a police officer and failed to reach a verdict regarding whether defendant personally discharged a firearm that proximately caused the victim's death. Defendant was sentenced to 60 years' imprisonment for first degree murder along with a consecutive 30-year sentence for the attempted first degree murder of Thomas plus a 15-year firearm enhancement, for a total of 105 years in prison. This timely appeal follows.

¶ 21 ANALYSIS

¶ 22 Defendant first argues that the trial court erred in denying his motion to suppress his electronically recorded statement because defendant requested his lawyer before he was interviewed by ASA Valentini, but his interrogation continued. Defendant claims that after he was arrested and taken to the police station, defendant asked Detective Foster, "Hey, if I want to I can still talk to my lawyer right now?" Detective Foster responded, "Yeah, we'll just, we'll just be back in a minute, all right?" Three minutes later, ASA Valentini entered the room, introduced himself as an assistant state's attorney and told defendant "I'm gonna show you something but before I can show you I want to tell you what your rights are and make sure you understand them. Okay?" Defendant answered "Okay." After giving defendant his *Miranda* rights and after defendant acknowledged understanding each of those rights, defendant subsequently made a statement. Defendant claims that neither Detective Foster nor ASA Valentini addressed his request to speak with his lawyer.

¶ 23 The review of a trial court's ruling on a defendant's motion to suppress involves both questions of law and fact. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). A trial court's credibility determinations and findings of historical fact will be upheld on review unless they are against the manifest weight of the evidence. *People v. Watson*, 214 Ill. 2d 271, 279 (2005). However, the ultimate legal question of whether the evidence should be suppressed is reviewed *de novo. Id*.

¶ 24 Under *Miranda v. Arizona*, 384 U.S. 436 (1966), an individual subjected to custodial interrogation or under the imminent threat of interrogation is entitled to have retained or appointed counsel present during the questioning and as a means to protect the fifth amendment right against self-incrimination. *People v. Harris*, 2012 IL App 100678, ¶ 69 (citing *Miranda*, 384 U.S. at 444-45). If at any time during the interview the accused requests counsel, he cannot

be subject to further questioning "until a lawyer has been made available or the individual reinitiates conversation. *Davis v. United States*, 512 U.S. 452, 458 (1994); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005)). This rule exists to prevent police from either deliberately or unintentionally persuading the accused to incriminate himself notwithstanding his earlier request for counsel's assistance. *Smith v. Illinois*, 469 U.S. 91, 98 (1984); see also *Davis*, 512 U.S. at 458 (the right to counsel is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights).

¶ 25 When a defendant invokes his right to counsel all further interrogation must cease. *Miranda*, 384 U.S. at 474. A defendant may waive his right to counsel however, provided that the waiver is voluntary, knowing and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). In order to determine whether a defendant invoked his right to counsel, we must use an objective inquiry, "which at minimum requires some statement that reasonably can be construed as an expression of a desire for counsel." *Harris*, 2012 IL App (1st) 100678, ¶ 69 (citing *Davis*, 512 U.S. at 459). A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning. *Davis*, 512 U.S. at 459, 114 S. Ct. 2350; *In re Christopher K.*, 217 Ill. 2d at 378, 381. If the defendant's reference to his attorney is "ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," the interrogation does not need to stop. *Davis*, 512 U .S. at 459. In making his request for counsel, however, "[t]he defendant need not articulate his desire in the manner of a Harvard linguist, but he must articulate his desire in a clear enough manner that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." *People v. Schuning*, 399 Ill. App. 3d 1073, 1082 (2010) (citing *Davis*, 512 U.S. at 459). The invocation

must be sufficiently free from indecision or double meaning so as to reasonably inform authorities that the accused wishes to speak to counsel. *In re Christopher K.*, 217 Ill.2d at 382; *People v. Tackett*, 150 Ill.App.3d 406, 418 (1986).

¶ 26 Here, defendant never invoked his right to counsel - equivocally, ambiguously or otherwise. Defendant merely made an inquiry which referred to an attorney and not "every reference, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." *People v. Evans*, 125 Ill. 2d 50, 75-76 (citing *People v. Krueger*, 82 Ill.2d 305, 311 (1980)).

¶ 27 Our review of the video supports our conclusion. Defendant's inquiry did not happen during an interrogation. The video shows that defendant asked the question upon returning to the holding cell after being taken out for a short period. Detective Foster was exiting the room and closing the door as defendant was walking to a bench when defendant asked the question. Detective Foster paused briefly as he was closing the door and immediately answered the question stating "Yeah, we'll just, we'll just be back in a minute, all right?" as he closed the door. Roughly three minutes later, Foster returned with ASA Valentini. Valentini introduced himself and told defendant "I'm gonna show you something but before I can show you I want to tell you what your rights are and make sure you understand them. Okay?" Defendant answered "Okay." Defendant did not mention wanting a lawyer when ASA Valentini entered the room, or while ASA Valentini was giving him his *Miranda* warnings, or after ASA Valentini completed giving him his *Miranda* rights. The exchange between Valentini and the defendant was low-keyed, slow paced and entirely professional. The video does not remotely indicate any attempt to limit defendant's ability to request a lawyer, ask questions about speaking with a lawyer or obtain clarification of his right to speak with a lawyer from either the ASA or the detective. We

are confident that, given defendant's earlier question "Hey, if I want to I can still talk to my lawyer right now?" and the circumstances surrounding it, the trial court correctly concluded that defendant had not made an unequivocal or unambiguous invocation of his right to counsel.

¶ 28 We reject defendant's allegation that "his interrogators expedited Harris' previously-leisurely interview, and that Valentini employed some sleight-of-hand to refresh Harris' *Miranda* rights before doing so." There is nothing in the record to support defendant's allegation that detectives or ASA Valentini acted improperly or unethically in any way. If anything, by immediately informing the defendant that he wanted to be sure that the defendant understood his rights, including the right to a lawyer, Valentini gave the defendant another explicit and clear opportunity to request "his lawyer" and the defendant readily, without hesitation or apparent confusion, engaged in his interview with Valentini. We find that the defendant did not invoke his right to an attorney in violation of *Miranda*.

¶ 29 Defendant next argues that the trial court abused its discretion in imposing a 105-year sentence because the trial court did not adequately consider his rehabilitative potential and chose to impose a *de facto* life sentence[3] without consideration of the significant mitigating evidence presented at sentencing.

¶ 30 Defendant was sentenced to a term of 60 years' imprisonment for first degree murder, and a consecutive sentence of 45 years' imprisonment for attempt first degree murder, 30 years for

[3] Defendant does not set forth a constitutional challenge to his claimed *de facto* life sentence in his opening brief. He does however, challenge the constitutionality of his sentence in his reply brief. We will not consider defendant's constitutional challenge to his sentence. It is well-established that points not argued in an appellant's opening brief are waived and cannot be raised for the first time in the appellant's reply brief. *People v. Polk*, 2014 Il App (1st) 122017, ¶¶ 49 (citing Ill. S.Ct. R. 341(h)(7) (eff.Feb.6, 2013)). Nevertheless, defendant's claim has no merit. See *People v. Thomas*, 2017 IL App (1st) 142557.

attempt murder plus the mandatory 15-year add on for being armed with a firearm while committing the offense (720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008)), for an aggregate of 105 years' imprisonment.

¶ 31 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). The potential for rehabilitation need not be given any greater weight than the seriousness of the offense. *People v. Sharpe*, 216 Ill. 2d 481, 525 (2005). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 32 We cannot say that the trial court abused its discretion here. Before imposing sentence, the trial court thoroughly went over the factors in aggravation and mitigation, and considered the presentence investigation report. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010). In mitigation, the court heard that defendant was 20 years old at the time of the offense, had completed three years of high school and had experience working in carpentry. Defendant had no violent

criminal background; he had two misdemeanor convictions for possessing cannabis. The record shows that the court specifically commented on defendant's age and his lack of criminal history, stating that the court was "taking into account Mr. Harris is a young man. *** I'm also taking into account the fact that he has what I would consider a lack of criminal history." Nevertheless, the court chose to impose "the maximum sentence" of 105 years because defendant and his co-defendants "were trying to send a message about how dangerous they were" by ambushing the block and not caring about "who was there" or "who they shot at." The court further found that defendant was a "danger to the public, as displayed by [his] random motions of revenge."

¶ 33 Furthermore, defendant's 105-year sentence fell within the statutory range of imprisonment and is therefore presumptively proper. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2000); 720 ILCS 5/5-5-3(c) (West 2010). The sentencing range for first degree murder is 20 to 60 years (730 ILCS 5/5-4.5-20(a)(1) (West 2008); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008). The sentencing range for attempt first degree murder while armed with a firearm is 21 to 45 years in prison, 6 to 30 years for the attempt murder plus 15 years for being armed with a firearm. 720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008). The sentences for first degree murder and attempt murder are required to be served consecutively. 730 ILCS 5/5-8-4(d)(1) (West 2008). In light of the facts of this case and in light of the mitigating and aggravating circumstances, we find that the trial court properly exercised its discretion in sentencing defendant to the maximum terms of imprisonment.

¶ 34 Finally, defendant argues that his mittimus should be corrected to reflect that the attempt first degree murder conviction is a Class X offense. The State agrees.

¶ 35 Attempt first degree murder while armed with a firearm is a Class X felony. See 720 ILCS 5/8-4(c)(1)(B) (West 2008). The mittimus inaccurately states that defendant's conviction

for attempt first degree murder is a Class M offense. Pursuant to our authority under Illinois Supreme Court Rule 615(b), we instruct the Clerk of the Circuit Court to correct defendant's mittimus to reflect the correct class of offense, Class X, for attempt first degree murder.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the trial court and order the Clerk of the Circuit Court to correct defendant's mittimus to reflect the correct class for his attempt murder conviction.

¶ 38 Affirmed; mittimus corrected.