2017 IL App (1st) 142895-U

THIRD DIVISION
May 10, 2017

Modified upon denial of rehearing July 19, 2017

No. 1-14-2895



IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 12410 (02) |
| | ) | |
| DEVIN BICKHAM, SR., | ) | The Honorable |
| | ) | Noreen Valeria Love, |
| Defendant-Appellant. | ) | Judge Presiding. |

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Cobbs concurred in the judgment.

**MODIFIED ORDER UPON DENIAL OF REHEARING**

*HELD*: Trial court did not err in prohibiting admission of defendant's postarrest statements to police as these fell outside the scope of his direct and cross examinations, and curative admissibility doctrine was not applicable; trial court did not err in admitting codefendants' statements pursuant to coconspirator exception to the hearsay rule, as the State made a clear *prima facie* showing, independent of these statements, that a conspiracy existed among them; and defendant failed to show any error, and thus any plain error, with respect to the trial court's consideration of aggravating factors in sentencing him. However, with the State's concession, remand is necessary with respect

to sentence imposed, as court confused available sentencing range; and one-act, one-crime doctrine requires additional murder convictions and accompanying sentences be vacated, with corrections to defendant's mittimus.

¶ 1 Following a jury trial, defendant-appellant Devin Bickham, Sr. (defendant) was convicted of two counts of first degree murder. The jury additionally found that defendant committed the murder with a firearm and in a cold, calculated and premeditated manner. He was sentenced to 2 concurrent terms of 95 years in prison. He appeals, contending that the trial court erred in refusing to allow him to introduce evidence pursuant to the doctrine of curative admissibility; that the trial court erred in admitting statements at his trial under the coconspirator exception to the hearsay rule; that the trial court abused its discretion at sentencing by relying on its personal views of him; and that his sentence and mittimus must be corrected pursuant to the one-act, one-crime doctrine. He asks that we reverse his conviction and remand for a new trial, or that we remand for a new sentencing hearing and/or correct his mittimus. For the following reasons, we affirm defendant's conviction for the most serious charge of first degree murder (committed with a firearm and in a cold, calculated and premeditated manner); vacate his second, lesser, conviction for first degree murder and its accompanying sentence; modify his mittimus accordingly; and, additionally, remand for resentencing pursuant to our directions herein.

¶ 2 BACKGROUND

¶ 3 The instant cause arose from events that occurred on the evening of July 11, 2011, in the parking lot of Dominican Priory Park in River Forest, Illinois. The victim, Chevron Alexander, who was defendant's newly pregnant girlfriend, was shot once in the face and three times in the

shoulder while sitting in the front passenger seat of defendant's car. Codefendant Devin Bickham, Jr., defendant's son, was also tried for the crime in a simultaneous but severed jury trial with defendant; he was convicted and sentenced to 50 years in prison.[1] Upon review, this Court affirmed his conviction and sentence for first degree murder with an additional contract murder factor; vacated a second, lesser, first degree murder conviction pursuant to the one-act, one-crime rule; and modified his mittimus accordingly. See *People v. Devin Bickham, Jr.*, No. 1-14-2894 (March 22, 2017) (unpublished order under Illinois Supreme Court Rule 23). Another codefendant, Cardell Taylor, was tried separately and was also convicted; he was sentenced to 70 years in prison, and his appeal remains pending with our Court. See *People v. Taylor*, No. 1-15-0978 (appeal pending).

¶ 4 The substantive issues and merits of the instant appeal pertain to defendant only.

¶ 5 Prior to trial, the State filed a motion *in limine* seeking to introduce statements against defendant, including a series of text messages, between defendant, his son and Taylor that were made during the time of the murder pursuant to the coconspirator exception to the hearsay rule. The State argued that the text messages, in which the men described to each other their whereabouts and locations right before the murder, when combined with several other facts, indicated there had been a conspiracy among them. The other facts cited by the State included,

[1]For the record, Devin Bickham, Jr., was a 20-year-old college student at the time of the murder. His theory on the case, as presented during his trial, was that, after a lifetime of mental manipulation, defendant had, once again, manipulated him into helping commit the murder because defendant knew that his son would do anything for him, if asked. Although finding that he was well aware of his actions and the consequences thereof, the trial court, based on the evidence presented, seemingly agreed with his theory, commenting as much in its colloquy during his sentencing.

in part: Taylor's postarrest confession that the murder was planned, that it was done because the victim was causing problems in defendant's marriage, and that he killed the victim after receiving a gun and money from defendant's son; defendant's son's postarrest confession detailing the conspiracy, that it had been ongoing for months, that defendant asked him to find someone to kill the victim and gave him the gun and money to pass onto Taylor to accomplish it, and that defendant's son drove Taylor to the scene after being told by defendant where the victim would be in order to commit the murder; and evidence that, once detained, police heard Taylor demand the promised money from defendant's son. Additional evidence cited by the State in support of its motion included that defendant and his son were related and living together at the time, that Taylor was their neighbor, that Taylor used a gun belonging to defendant to kill the victim, that all three men were in the same area that night (which was some 30 miles from their homes), that Taylor was listed in defendant's cell hone, that Taylor and defendant both tested positive for gun shot residue, and that all three men were in communication during the time immediately before the murder. Defendant objected to the State's motion, asserting that it could not make a *prima facie* showing that a conspiracy existed among the three men independent of the statements it sought to introduce. The trial court disagreed and granted the State's motion to allow the statements under the coconspirator exception, finding that the State had, indeed, made the required *prima facie* showing of a conspiracy.

¶ 6 The cause proceeded to trial. Essentially, defendant's theory on the case was that his son, learning that defendant was going to marry the victim and move away, sought to, of his own accord and with Taylor's help, kill her; defendant denied any involvement in or knowledge of his

son's plan or the actual murder.

¶ 7 Mary Alexander, the victim's mother, testified that at the time of the murder, she lived with the victim and the victim's daughter in Chicago. In June 2011, Mary discovered that the victim and defendant were engaged and planned to marry and move to Louisiana in August 2011. However, Mary later discovered that defendant father was already married, and noted that around this time, the victim appeared sad and argued often with defendant. On the night of July 11, 2011, defendant came to Mary's home to visit the victim, and the three played cards. Mary noticed that when the victim left the table, defendant was texting on his cell phone. At 10 p.m., the victim left with defendant in his car. At 10:23 p.m., Mary received a call from defendant informing her that the victim had been shot. Mary averred that defendant was calm during the call.

¶ 8 Lavette Alexander, the victim's sister-in-law, testified that she was with the victim when they first met defendant, and soon after, the victim and he began to date. In early March 2011, the victim called her from the hospital and told her she had just had a miscarriage. However, by June 2011, when Lavette was selling t-shirts for charity, defendant offered to buy a large one for the victim, telling her that the victim needed room "for her stomach to grow." Lavette further testified that by late June and early July 2011, the victim and defendant argued "a lot."

¶ 9 Kimmie Martin testified that she was married to defendant from 1999 to 2012, when she divorced him following what occurred in the instant cause. Martin discovered that defendant had been having affairs with other women throughout their marriage, and he had several children from other relationships. His and Martin's marriage consisted of separations and reunifications,

with Martin living with defendant and defendant's son in July 2011. However, defendant was never home and Martin knew he was seeing another woman, but did not know her identity. On the night of July 11, 2011, Martin returned home from work; defendant was not home and defendant's son left the house in his silver Chevy Impala later that evening–a car which defendant's son drove but which was registered in defendant's name.

¶ 10 Stephanie Fumo testified that she, Bryan Johnson and their friends were in Dominican Priory Park on the evening of July 11, 2011 when she heard voices coming from the parking lot. She saw a man and a woman by a car. Later, at about 10:15 p.m., she and Johnson began to walk to Johnson's car in the lot when she now saw another man, wearing a short-sleeve baggy shirt and shorts, standing in the grass between the sidewalk and the lot, and the first man standing outside the car on its passenger side. Fumo averred that it looked like the two men knew each other from the way they were standing. Fumo next heard three popping noises which she thought were fireworks, and saw the second man run away. The first man began crying and yelling that his girlfriend had been shot and Fumo called 911. She could not positively identify anyone involved for police.

¶ 11 Johnson corroborated Fumo, testifying that he was in the park with her that night when he, too, heard three popping noises. He stated that as they walked toward the sounds, he saw a man in a white shirt and khaki cargo shorts standing alone at the front entrance of the parking lot and then running across the street. He next heard another man yell that his girlfriend had been shot. Johnson was also unable to positively identify anyone.

¶ 12 Dennis Barnes, defendant's longtime friend, testified that in April 1999, he purchased a

.380 Lorcin firearm and gave it to defendant as a wedding present when he married Martin. Barnes identified the gun used to kill the victim as the gun he had given defendant.

¶ 13 Officer Anthony Pluto of the River Forest Police Department testified that he received a call of a shooting in the parking lot of the park at 10:21 p.m. He arrived seconds later, whereupon defendant emerged from the bushes and ran toward his squad car, yelling that his girlfriend had been shot. Officer Pluto stated that while he sounded like he was crying, there were no tears on his face nor was there any blood on his clothes. Officer Pluto approached defendant's car and saw the passenger side window shattered and the victim slumped over in the front passenger seat, bleeding. Defendant described the shooter as a black male wearing a white shirt who fled the scene and got into a gray vehicle traveling east on Division Street. Officer Pluto broadcasted his description and was soon informed that another officer had just made a traffic stop of a matching car near the area.

¶ 14 Officer Pluto further testified that he drove defendant to the traffic stop for a showup. Once there, defendant's son and codefendant Taylor were standing behind squad cars and near a silver Impala. Officer Pluto averred that during the showup, he asked defendant if these men were the ones who shot the victim, and defendant responded that they did not look at all like the assailants; he also stated that he did not recognize the Impala. As officer Pluto was about to go speak with his fellow officers, defendant stopped him and told him that codefendant was his son. Officer Pluto further testified that police recovered an empty Lorcin .380 semi-automatic pistol, capable of holding 8 rounds, from underneath the driver's seat of the Impala, and further discovered that the Impala was registered to defendant.

¶ 15 Officer Dan Miller testified that he heard the dispatch call of shots fired at the park and the descriptions of the assailant and the car. Officer Miller spotted a silver Impala in the immediate vicinity of Harlem Avenue and, noting that the driver's shirt matched the description, curbed it. He and another officer ordered the driver and passenger to exit. The other officer looked inside the Impala and saw a gun. Officer Miller averred that, at this point, defendant's son began to explain that he had been driving the car when a black male threw the gun onto his lap. Officer Miller further testified that, as he moved defendant's son and Taylor in preparation for the showup, he saw Taylor look at defendant's son and tell him that he wanted his money now.

¶ 16 Physical evidence presented at trial showed that gunshot residue tests were positive for defendant's hand and Taylor's white shirt, and negative for defendant's son's hands and clothes. It was also discovered that the gun contained DNA from at least three people; defendant and Taylor could not be excluded, but defendant's son was excluded. Four live rounds were recovered from outside defendant's car on the passenger side in the parking lot of the park, as well as four fired shell casings, three bullets from inside the victim and one bullet in the seat of defendant's car, for a total of eight. These were all .380 caliber and all fired from the gun belonging to defendant recovered from the Impala registered to him and which his son was driving.

¶ 17 In accordance with the trial court's ruling on the State's pretrial motion *in limine*, additional evidence was presented with respect to the cell phones of defendant, his son, Taylor and the victim. First, with respect to defendant's phone, it was revealed to contain contacts for

his son as well as for Taylor. Moreover, defendant had manually deleted his entire outbox of sent text messages before his phone was confiscated by police, but police were able to recover these. And, his deleted messages were recovered on his son's phone, as his son had not deleted any messages. All the recovered evidence from these phones together showed that, right before 8:00 p.m. on the night in question, defendant and the victim exchanged texts about playing cards and later discussed going somewhere afterwards on Harlem Avenue. Taylor then called defendant's son, defendant's son called defendant, and defendant called his son back within minutes of each other. Defendant's son and Taylor exchanged several more texts and calls, with defendant's son texting Taylor at 8:49 p.m., "Dey N the crib," and then Taylor calling defendant's son twice at 8:50 p.m. and 8:55 p.m. At 9:32 p.m., defendant texted his son, "We goin 2 da park." Defendant's son texted back, "I'm out here. Wat park," and defendant answered, "Idk." At 9:44 p.m., defendant texted his son, "How close;" defendant's son texted back, "Passing Central;" and he later texted defendant, "on Lake." Police were able to decipher that defendant's deletion of his messages occurred at some point right after his last text message, at 9:46 p.m. At 10:05 p.m., defendant called his son for 17 seconds, and at 10:08 p.m., defendant's son called him back for 33 seconds. At 10:19 p.m., defendant called 911 and then the victim's house.

¶ 18 Defendant testified on his own behalf. He stated that he began dating the victim while still married to Martin, whom he cheated on "constantly." He broke up with the victim briefly in April 2011, but they reunited and he proposed to her in May 2011; they planned to marry in August 2011 and move to Louisiana. He described that at a July 4, 2011 family picnic, he spoke

to his son about his plans and his son became angry. Defendant averred that, on the night in question, he went to the victim's house to play cards. During the game, they were texting each other and flirting, making plans to leave and go somewhere later to have sex. He admitted he was texting his son at the same time, explaining that it was their normal practice to inform each other where they were and also because defendant wanted to meet up with him to talk more about his plans to marry the victim and move away.

¶ 19 Defendant further testified that he and the victim left her house around 10 p.m. and drove to the park to have sex. Defendant recounted that he was about to lean over and kiss the victim when someone approached the car and began shooting. Defendant was able to get out and hide behind the driver's side of the car and then tried to chase the shooter, but did not see his face. He called 911 and, when police arrived, he described the shooter as a black male with a white shirt and colored shorts who jumped into a light-colored car and sped off. He denied directing his son to the park to shoot the victim and denied any knowledge of the shooting.

¶ 20 On cross-examination, defendant admitted that he did not tell Martin about dating the victim and did not ask her for a divorce, even though he planned to marry the victim. He also admitted having between 10 and 20 girlfriends while married to Martin, that his son knew about all of them and that his son never hurt or grew angry with any of them. Defendant averred that, in January 2011, he lost his house and contacted bankruptcy attorneys. With respect to the murder, defendant stated that, even though he was an ex-police officer and he was close enough to chase the perpetrator that night to his car, he was unable to provide a more detailed description of him or the getaway car. He admitted that, at the showup, he initially told officers

he did not recognize anyone and did not identify the car or his son, but did so later by telling officer Pluto at the showup. He also admitted that the gun used in the murder was his, but explained that he used to keep it on the top shelf of his bedroom closet and when he moved in January 2011, he no longer saw it there.

¶ 21 On redirect examination, defendant testified that he did not tell police immediately that it was his son and his car at the showup because he "could not imagine that" his son would have been involved and, thus, he did not identify him. At this point, defense counsel asked defendant whether he later told police, after the showup and while at the police station during his interrogation, that he believed his son killed the victim and he (defendant) had nothing to do with the crime. The State objected. During sidebar, defense counsel argued such evidence was admissible because the State had "opened the door" by asking defendant questions about what he told police. The State responded by noting that its questions about what defendant said to police were limited in scope to the time of the showup. The trial court agreed with the State and prohibited defense counsel from asking questions about what defendant told police after the showup.

¶ 22 At the close of trial, the jury found defendant guilty of first degree murder with a firearm and that the State had proved the added factor that he committed the murder in a cold, calculated and premeditated manner.

¶ 23 The cause then proceeded to sentencing. In addition to victim impact statements, the State presented testimony that defendant had been a North Chicago police officer but, in 2000, was terminated after he admitted having sex with an underage girl to whom he issued two

driving tickets. In mitigation, defendant presented his education, employment and lack of criminal history; he did not address the court or the victim's family. Finding this to be a "horrible, horrible crime" in which defendant involved his son and then threw "him under the bus when [defendant took] the stand," and for which defendant expressed "absolutely no remorse," the trial court sentenced him to 95 years in prison, explaining the maximum allowable by law for this murder was 80 years due to the cold, calculated and premeditated factor plus 15 years for the firearm enhancement.

¶ 24 ANALYSIS

¶ 25 Defendant presents four issues on appeal. We address each separately.

¶ 26 I. Admissibility of Postarrest Statements

¶ 27 Defendant's first contention on appeal is that the trial court should have allowed him to testify that he denied involvement in the victim's murder during his interrogation with police following the showup. He points to the State's cross examination of him about his failure to immediately identify his son at the showup and, particularly, its subsequent questioning which revealed he did not proclaim his lack of involvement in the crime upon seeing his son and Taylor at the showup. Defendant argues that the State's questioning in this regard "opened the door" to the introduction of evidence that he did deny his involvement to police afterwards during his police interrogation at the station and, because the trial court prohibited the introduction of this evidence, it abused its discretion and prejudiced him, requiring the reversal of his conviction and remand for a new trial. We disagree.

¶ 28 We begin by noting that the admissibility of evidence at trial is a matter solely for the

trial court. See *People v. Illgen*, 145 Ill. 2d 353, 364 (1991); *People v. Taylor*, 409 Ill. App. 3d 881, 914 (2011). This is particularly true when an issue arises as to the scope of questioning allowed on cross and redirect examination. See *People v. Sanchez*, 73 Ill. App. 3d 607, 610 (1979); accord *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000) (scope and extent of cross and redirect examination are within discretion of trial court). Generally, the scope of a witness' cross examination is limited by the scope of his preceding, direct, examination. See *Sanchez*, 73 Ill. App. 3d at 610. Redirect examination, likewise, is also limited by the scope of the witness' preceding examination, namely, his direct and cross examinations. See *Sanchez*, 73 Ill. App. 3d at 610. It may focus on questions aimed at displacing unfavorable inferences or impressions brought out on cross examination. See *Sanchez*, 73 Ill. App. 3d at 610; accord *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 43. However, allowing redirect examination beyond the scope of what was asked during direct or cross examination is within the sound discretion of the trial court which, accordingly, may chose to, or not to, permit it. See *Sanchez*, 73 Ill. App. 3d at 610. We will not overturn the court's decision with respect to admissibility of evidence or the applicable scope of questioning absent a clear abuse of discretion, which occurs only when its decision is arbitrary, fanciful or where no reasonable man would take the view adopted by that court. See *Illgen*, 145 Ill. 2d at 364; *Sanchez*, 73 Ill. App. 3d at 610.

¶ 29 In the instant cause, when it came to details regarding defendant's response to the victim's murder, his direct and cross examinations were both limited in scope to what he said, or more precisely, what he did not say, at the showup before his arrest. Neither his counsel on direct nor the State on cross asked him any questions with respect to statements he made to

police during his postarrest interrogation once he was taken to the station. That is, and as the record demonstrates, defendant testified on direct examination that he did not order his son to murder the victim and he denied any knowledge of the murder–that he planned it, manipulated his son, conspired with Taylor, or even knew it was going to happen. With respect to the showup, he testified that police (officer Pluto) took him to the showup and he saw two black males, both wearing white shirts, and one wearing dark shorts, as well as a light-colored car, all matching the description he had given at the scene. He discussed that police asked him if he recognized either man or the car, and defendant stated that he told police he did not recognize any of them and that they did not look like who and what he saw at the scene. Defendant described that, when he did not make any identifications at the showup, officer Pluto got out of the car, whereupon he (defendant) knocked on the window and revealed to him that one of the men was his son. Once again denying any involvement, defendant finally testified that he was then transferred to the police station. At this point, defendant's direct examination ended, and he was not asked any questions about statements he made to police at the station.

¶ 30 Limiting its scope of questioning on cross examination in light of this direct examination, as it was required to do, the State, too, focused solely on what occurred at the showup. The State questioned defendant extensively on his reaction to seeing his son at the showup, and the length of time between the start of the showup when he saw him and the moment he knocked on the window and told officer Pluto that one of the men was his son. It clarified whether, and at what point exactly, defendant knew it was his son and what he said to police. The State also asked defendant why he did not say to police "my son and his friend killed my girlfriend, and I had

nothing to do with it," to which defendant replied he did not because he "had no idea that was the case at the time," but then said it "about 40 seconds later" when he identified his son to officer Pluto. Again, no questions were asked of defendant regarding what he said to police at the station following his own arrest.

¶ 31 Defendant's citation of error arose here during his trial, when defense counsel questioned him on redirect examination. Counsel first asked defendant what he thought when he saw his son and Taylor at the showup, to which defendant replied he "couldn't imagine that they would have something to do with" the murder "so that's why" he "didn't say [he] knew them at the time." Counsel then reminded him what the State had asked him about not immediately denying his involvement to police at the showup; when defendant confirmed he did not, his counsel asked him whether he did so "later." The State objected. At a sidebar, defense counsel argued to the court that the State had "opened the door" when it asked defendant whether he had "nothing to do with it" and, thus, he should be able to ask defendant about his postarrest statements to police, to provide a context, wherein he denied involvement in the murder. The State, meanwhile, argued that it had limited its questioning, just as defense counsel had on direct examination, to the showup and, thus, what defendant said to police afterwards could not be introduced. The trial court agreed with the State and prohibited defense counsel from asking defendant about his postarrest statements to police. When redirect examination resumed, the following exchange took place:

> "[Defense Counsel]: Sir, at the showup – Counsel asked you if you had said at the showup – did you tell them that you had nothing to do with it, yes, at

the showup?

[Defendant]: Yes."

¶ 32 We find no error here. Rather, the trial court properly disallowed the testimony of defendant's postarrest statements to police at the station that his counsel sought to introduce on redirect examination. Most clearly, the record solidifies that in neither his direct nor his cross examination was defendant ever asked anything about what he told police after he was transferred from the showup to the station or during any postarrest interrogation. His direct examination was limited to what occurred at the showup before he was arrested, and his cross examination was likewise, and accordingly, limited to the same topic. The questions posed by his counsel on redirect would have permitted defendant to testify as to events that were never discussed during his prior questioning at trial. Therefore, these questions were outside the scope of that questioning and, thus, improper.

¶ 33 Moreover, and contrary to defendant's assertion, the trial court had no valid or impending reason to, in its discretion, allow the questions at issue. Not only were any postarrest statements made by defendant irrelevant to the events that occurred and statements he made at the showup, but such postarrest statements would not have, under the circumstances, served to refute what he said at the showup or rehabilitate any unfavorable impression or inference allegedly created by the testimony regarding the showup. See, *e.g.*, *Sanchez*, 73 Ill. App. 3d at 610 (without unfavorable impression or inference that needs to be correct, there is no reason to extend examination of witness outside scope previously employed). The fact is, defendant initially remained silent at the showup, failing to immediately identify his son and accordingly state he

(defendant) was not involved in the murder. However, he testified repeatedly before the jury, on direct, cross and redirect examination, explaining why he did so. And, his explanations were somewhat consistent: he could not have imagined that his son and Taylor would have had anything to do with his girlfriend's murder, so that is why he did not identify them or the car at first. Apparently, it occurred to him some 40 seconds later, when he identified them to officer Pluto who had left the squad car to go talk to police following defendant's initial denials, that this could be the case. Whatever the reason, defendant made clear to the jury that he told police at the showup that he, himself, was not involved in the murder. Having so stated on direct, cross and redirect examination, we fail to see the "unfavorable impression" or "inference of guilt" defendant so fervently insists occurred here. Without this, there was no reason for the trial court to allow the completely extraneous questioning, clearly outside the scope of all prior examinations of defendant, he sought with respect to what he told police during his postarrest interrogation, particularly since its crux was the same as what he had already, and consistently, testified (*i.e.*, his denial of any involvement).

¶ 34 In refuting this, defendant cites the doctrine of curative admissibility, stating that the trial court should have employed this to allow him to present his postarrest statements to police at his interrogation denying involvement in the murder because, following the State's cross examination of him wherein it impeached him with his silence, the jury was left with the false impression that he never proclaimed his innocence to police. He likens his cause to cases involving "tacit admissions" and points out that the State noted his refusal to identify his son at the showup to the jury during closing argument. However, defendant mischaracterizes the

situation here.

¶ 35 First, we have already discussed at length that there was no "false impression" created during his direct and cross examinations. As noted, defendant testified at the outset on direct that he had nothing to do with the victim's murder, stated he had no knowledge of it and denied any discussion of it with his son or Taylor. And, even on cross examination, he again stated he "had no idea" that his son and Taylor killed the victim. His denials were repeated and clear. Thus, we fail to see how the curative admissibility doctrine plays any role in this cause.

¶ 36 Moreover, even assuming that it does, it is otherwise inapplicable when we examine what occurred here. The doctrine of curative admissibility states that "[i]f *A* opens up an issue and *B* will be prejudiced unless *B* can introduce contradictory or explanatory evidence, then *B* will be permitted to introduce such evidence, even though it might otherwise be improper." *People v. Manning*, 182 Ill. 2d 193, 216 (1998). However, this doctrine is not unlimited; it does not allow a party to introduce inadmissible evidence simply because the opposing party brought out some evidence on the same subject. See *Manning*, 182 Ill. 2d at 216. Instead, "[t]he rule is merely protective and goes only as far as is necessary to shield a party from adverse inferences." *Manning*, 182 Ill. 2d at 216. That is, the prejudice from the original evidence must be undue and invocation of the evidence sought to be admitted must be necessary to eradicate that undue prejudice. See *Manning*, 182 Ill. 2d at 217, citing *People v. Chambers*, 179 Ill. App. 3d 565, 581 (1989), and *People v. Higgins*, 71 Ill. App. 3d 912, 931 (1979). Ultimately, and as has been the underlying theme of our entire discussion thus far, the decision whether to employ the curative admissibility doctrine to allow the evidence is within the sound discretion of the trial court. See

*Manning*, 182 Ill. 2d at 217.

¶ 37 Undoubtedly, defendant's statements to police during his interrogation constituted inadmissible hearsay. See *People v. Patterson*, 154 Ill. 2d 414, 452 (1992) (a defendant's self-serving statement depends on the truth of the matter asserted or his belief therein); *People v. Grayson*, 321 Ill. App. 3d 397, 403 (2001), citing *People v. Barnwell*, 285 Ill. App. 3d 981, 989 (1996) (a defendant's exculpatory statement made to police is an out-of-court, self-serving declaration by a party with no recognized hearsay exceptions). For the curative admissibility doctrine to have applied then, defendant would have had to have been unduly prejudiced by the State's questioning of his silence at the showup and this undue prejudice must have created an adverse inference, *i.e.*, that he was guilty of murder. Based on the circumstances presented, we do not believe this occurred here. Again, the record shows that defendant told police at the showup, as well as the jury at trial, repeatedly, that he did not have anything to do with the victim's murder. He was able to respond to any prejudice that may have arisen with his consistent denials made at the scene and before the trier of fact. Moreover, simply because the State brought out some evidence with respect to the showup does not allow defendant to fling wide open the door to the remainder of what occurred in this cause, namely, what he said after his arrest at the police station, long removed, both in time and place, from the showup. This is not what the curative admissibility doctrine was meant to address. Without any undue prejudice necessary to be eradicated, there was no reason for the trial court to employ this doctrine, as defendant argues, and we find no error, and particularly, no abuse of discretion, in its choice not to do so.

¶ 38 II. Coconspirator Statements

¶ 39 Defendant's next contention on appeal is that the trial court erred in admitting statements made by his son and Taylor, namely, the text messages between them and including defendant, under the coconspirator exception to the hearsay rule. He asserts that the State failed to prove through independent evidence other than the texts themselves that he, his son and Taylor were engaged in a conspiracy or had any agreement to engage in criminal activity. He further asserts that, because these texts, which indicated that his son and Taylor were in the area of the shooting and heading in the direction of the park, were the "centerpiece" of the State's case against him, their admission was reversible error meriting remand for a new trial. We disagree.

¶ 40 The parties agree that the foundation of this issue involves the admissibility of evidence. This, as we noted earlier, is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion, which occurs only when the court's determination on admissibility is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view of that court. See *Illgen*, 145 Ill. 2d at 364; *People v. Taylor*, 409 Ill. App. 3d 881, 914 (2011); accord *People v. Baez*, 241 Ill. 2d 44, 110 (2011).

¶ 41 Generally, a conspiracy arises when two or more people, who intend to commit a crime, engage in a common agreement to accomplish their goal and at least one of them performs an act or acts in furtherance of the conspiratorial agreement. See *People v. Kliner*, 185 Ill. 2d 81, 138 (1998). Any declaration made by one coconspirator is admissible against all the conspirators if that declaration was made during the course and in furtherance of the conspiracy; for example, if it advised, encouraged, aided or abetted its perpetration. See *People v. Leak*, 398 Ill. App. 3d

798, 824-25 (2010), citing *Kliner*, 185 Ill. 2d at 140-41.

¶ 42 Additionally, we note that, in order for the coconspirator's statements to be admissible against the defendant, the State must first make a *prima facie* showing that two or more people intended to commit a crime, they engaged in a common plan to accomplish this goal, and an act or acts were done by one or more of them in furtherance of the conspiracy. See *People v. Batrez*, 334 Ill. App. 3d 772, 783 (2002); see also *People v. Coleman*, 399 Ill. App. 3d 1198, 1202-03 (2010), citing *People v. Childrous*, 196 Ill. App. 3d 38, 51 (1990). Key to the instant cause, the State is required to make this *prima facie* showing via independent proof of the conspiracy and cannot rely on the statements it seeks to admit. See *Coleman*, 399 Ill. App. 3d at 1203, quoting *People v. Ervin*, 226 Ill. App. 3d 833, 842 (1992) (" '[t]his court has held that the State must make an independent, *prima facie* evidentiary showing of the existence of a conspiracy between the declarant and the defendant' "); accord *Batrez*, 334 Ill. App. 3d at 783 (declarations of coconspirator made in furtherance of conspiracy are admissible against the defendant "upon an independent, *prima facie* showing of a conspiracy" between the declarant and the defendant); *People v. Melgoza*, 231 Ill. App. 3d 510, 521 (1992) (independent, nonhearsay, evidence "aside from the coconspirator statement" evidencing a conspiracy and the defendant's participation in it is required for the hearsay evidence to be admitted); *Childrous*, 196 Ill. App. 3d at 51 (foundation of independent proof of conspiracy must be laid for coconspirator statements to be admissible). However, the State is not required to make this showing beyond a reasonable doubt; rather, it is only required to demonstrate the conspiracy by a preponderance of the evidence. See *Batrez*, 334 Ill. App. 3d at 783. Moreover, and critically, the State need not prove

the existence of the conspiracy by direct evidence. See *Leak*, 398 Ill. App. 3d at 826. Instead, the conspiracy may be inferred from all the surrounding facts and circumstances present including the acts and declarations of the accused, and the proof of this may be circumstantial as long as it is sufficient, substantial, and independent of the declarations sought to be admitted. See *Coleman*, 399 Ill. App. 3d at 1203; *Leak*, 398 Ill. App. 3d at 826; see also *People v. Cook*, 352 Ill. App. 3d 108, 125 (2004) (evidence of existence of conspiracy need not be direct and, due to its "clandestine nature," courts may allow broad inferences to be drawn from the evidence); *Melgoza*, 231 Ill. App. 3d at 521. Interestingly, coconspirators' " 'suspicious activities together while the illegal transaction was in progress are sufficient to show' " a conspiracy. *Batrez*, 334 Ill. App. 3d at 784, quoting *Melgoza*, 231 Ill. App. 3d at 523. And, it is not required that evidence supporting a *prima facie* showing of conspiracy be introduced prior to the admission of the coconspirator's hearsay statement at trial. See *Batrez*, 334 Ill. App. 3d at 784, citing *People v. Goodman*, 81 Ill. 2d 278, 284 (1980).

¶ 43 In the instant cause, the State presented a pretrial motion *in limine* seeking to introduce the contents of the text messages exchanged between defendant and his son, and defendant's son and Taylor. The State pointed to several facts, other than the texts themselves, that it believed substantively and sufficiently provided the independent foundation required to prove a *prima facie* showing of a conspiracy among the three men. These included, in part, that defendant and his son were related and lived together at the time; Taylor had been their neighbor; defendant's gun was used in the murder; all three men were in the same area on the night in question; Taylor was listed in defendant's phone; Taylor and defendant tested positive for gun shot residue; and

all three men were in communication leading up to the murder. The trial court agreed with the State, finding that it had provided sufficient independent proof of a conspiracy and allowed the introduction of the texts at defendant's trial.

¶ 44 On appeal, defendant, as he did below, argues that the State failed to make a *prima facie* showing of independent proof of a conspiracy and that it relied on the texts themselves in attempting to demonstrate that one existed. He addresses the bases cited above and insists that each of them, standing alone, did not create a sufficient, substantial or independent foundation. For example, he points out that the mere fact that the men knew each other is not enough; nor that they were in the same area since they were there for different reasons (he to have sex with the victim and his son and Taylor to kill her); nor the gun shot residue results, as they were consistent with his story that he and Taylor were both in the parking lot; nor that his son lived in the same house where he (defendant) kept, and "lost," his gun. According to defendant, then, all that was left as the foundation here were the texts themselves.

¶ 45 This is wholly incorrect. Defendant isolates each fact cited by the State. The trial court, however, did not, and was not required to, take the same viewpoint in conducting its evaluation. In contradistinction, when considered together, and in corroboration with other evidence presented by the State, we find that these facts did, indeed, provide a sufficient, substantive and independent showing of a conspiracy apart from the texts themselves such that the trial court did not abuse its discretion in admitting them under the coconspirator exception to the hearsay rule.

¶ 46 First, the motive for the murder was clear from the facts presented. Defendant simultaneously, and as was his undisputable history, had both a wife and a girlfriend at the time

of the murder. That girlfriend–the victim–had gotten pregnant and miscarried, and was now pregnant again. Defendant proposed to her and promised to care for her financially with a move to Louisiana, but he never sought a divorce from his wife, from whom he kept the victim secret. Defendant had also recently lost his house and was contacting bankruptcy attorneys. And, testimony indicated that in the two weeks before the murder, defendant and the victim, who presumably knew he was married (as her own mother had just found out), were fighting more than usual.

¶ 47 Add to this the contact between defendant and his son (codefendant) leading up to the murder. Without getting into the content of the texts, the evidence demonstrates that defendant was communicating with his 20-year-old son repeatedly about their locations shortly before the crime. Defendant explained reporting their whereabouts to each other was something they did often. However, there were some 15 communications (texts and phone calls) between them between 8:09 p.m., when defendant testified he was with the victim driving to a secluded area so they could have sex, and 10:19 p.m., when defendant called 911 to report the shooting. It is also of significance that this communication was happening as all three men–defendant, his son and Taylor–were driving around in the same area, with all of the ending up at the same place at the same time, approximately 30 miles and some 45 minutes from where any of them lived.

¶ 48 Next is the fact that defendant deleted his entire outbox of text messages from his phone. Police were able to decipher that defendant did so on the night of the murder at 9:46 p.m., right after a last text message he sent to his son. And, this was, again, at a time when he was supposedly trying to have sex with his girlfriend in the privacy of the park and just half an hour

before he called police to come to the scene of the murder.

¶ 49 Moreover, there was testimony from a witness at the scene that also helped provide a *prima facie* showing of a conspiracy independent of the texts. That is, Fumo, who was in the park with friends that night, stated she heard voices and saw a man and a woman by a car in the parking lot. Later, she saw another man standing in the lot near the first man she had seen, who was now standing outside the same car on the passenger side–the same side of the car from which shots were fired into the car, and the same side of the car where the victim's body was recovered. Fumo specifically testified that, from the way the two men were standing and their interaction, it looked like they knew each other. This was less than four minutes before Fumo heard the gunshots and defendant yelling that his girlfriend had been shot, and in direct contradiction to defendant's insistence that he did not see who shot her.

¶ 50 Furthermore, evidence was brought out that defendant had been a police officer. Thus, he had been trained as one. He described to the jury that the shooting occurred while he was in the driver's seat of his car and the victim was in the passenger seat; a man came to the passenger side and began shooting. Defendant was able to make it out of the car unharmed and unbloodied, he hid on the side of the car until the shooting stopped, and then he gave chase to the man as he fled to a car and then drove away. Yet, defendant, a trained police officer who was considerably close to the assailant and followed him from the scene all the way to his car, could only provide police with the description of a black male in a white shirt fleeing in a light-colored car–despite the fact that defendant himself owned both the murder weapon and the getaway car.

¶ 51 Finally, and briefly, is the added evidence of the showup, which we have already referred

to at length. When officers curbed defendant's car and found his son and Taylor inside matching Fumo, Johnson, and defendant's descriptions, they began preparing them for the showup, whereupon Taylor turned to defendant's son and said he wanted his money now. Additionally, of course, was defendant's failure/refusal to identify his son or his car when he first arrived for the showup and was asked if he recognized them, waiting instead some 40 seconds before admitting this to officer Pluto, who was on his way to speak with his colleagues after defendant's denials.

¶ 52 When all of this evidence is taken into consideration together, and not isolated into fragmented facts as defendant insists, it is clear that the State made the required *prima facie* showing of a conspiracy by a preponderance of the evidence. Although circumstantial, this proof was sufficient, substantial and, most critically, independent of the content of the texts it sought to introduce between defendant, his son and Taylor. Therefore, the trial court did not abuse its discretion in granting the State's pretrial motion and admitting the texts at defendant's trial under the coconspirator exception to the hearsay rule.

¶ 53 III. Sentencing

¶ 54 Defendant's third contention on appeal is that the trial court abused its discretion in sentencing him by relying on its own personal views and making personal attacks. He cites to phrases in the court's colloquy and insists that the court rested on its disapproval of his extramarital affairs and his out-of-wedlock children, factors he asserts were significant in its determination of his sentence, but improperly aggravating, and meriting remand for resentencing.

¶ 55 As a threshold matter, the parties agree that defendant failed to object at all during the

court's sentencing colloquy to any of the comments he now finds objectionable and that he failed to include any reference to these as erroneous in his posttrial motion. While the State argues that this effectively amounts to waiver of this issue on appeal, defendant insists that the waiver rule should be relaxed here because the conduct of the trial judge was at issue. He then goes on to argue that, alternatively, his claim should still be reviewed pursuant to the plain error doctrine because the trial court's egregious error denied him a fair sentencing hearing.

¶ 56 Undeniably, defendant has technically forfeited this issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (contemporaneous objection and mention in posttrial motion are required to preserve issue for review). But, the failure to contemporaneously object during a trial court's colloquy during sentencing to point out an error on its part in its sentencing considerations may not necessarily be required to preserve a sentencing issue, since this puts counsel in a dubious position. See *People v. James*, 255 Ill. App. 3d 516, 531 (1993); see also *People v. Dameron*, 196 Ill. 2d 156, 171 (2001), and *People v. Woolley*, 205 Ill. 2d 296, 301-02 (2002) (it is not always necessary to interrupt sentencing judge with objection to preserve error). Ultimately, this discussion of forfeiture and plain error leads us to the conclusion that, in this particular cause, we should, as courts before us have, exercise our prerogative to review the instant issue, regardless of any technical missteps that may have occurred. See *People v. Hobson*, 2014 IL App (1st) 110585, ¶ 36.[2]

[2]We do note, however, that while we may consider the waiver rule "relaxed" here, we by no means absolve defendant from his admitted failure to file a posttrial motion citing the alleged sentencing error he now asserts. It is one thing to find it futile to contemporaneously challenge a sentencing judge who may be relying on factors perceived to be improper at the time of sentencing, but it is another to then further choose not to list these alleged errors–the crux of

¶ 57 With that said, however, the review we must employ is pursuant to plain error. See *James*, 255 Ill. App. 3d at 531, citing *People v. Martin*, 119 Ill. 2d 453, 459 (1988), and *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986) ("if a defendant asserts on appeal that a trial judge considered erroneous aggravating factors in determining the appropriate sentence of imprisonment, the issue will be reviewed under the 'plain error' doctrine"). Accordingly, the burden is squarely upon defendant to show a clear and obvious error occurred and it was so serious as to affect the fairness of his trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010) (the defendant has the burden under plain error review to demonstrate the applicability of the two prongs to his sentencing hearing). Ultimately, absent error, there can be no plain error. See *Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("the first step is to determine whether error occurred"); accord *People v. Simon*, 2011 IL App (1st) 091197, ¶ 89.

¶ 58 Because, based on our thorough review of the record before us, we do not find any error in the trial court's consideration of aggravating factors against defendant, we, in turn, cannot find any plain error and his claim fails. See, *e.g.*, *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur); *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010) (absent error, there can be no plain error); *People v. Brooks*, 187 Ill. 2d 91, 137 (1999).

¶ 59 Turning to the merits of issue presented, we begin by noting several general and well established principles with respect to the law on sentencing. Axiomatically, the trial court has

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one's appeal–in writing in a postsentencing motion, as the law requires.

broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 46, citing *People v. Price*, 2011 IL App (4th) 100311, ¶ 36. A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. A sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 60 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented,

it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). In addition to rehabilitative potential and lack of criminal history, such factors also include the particular circumstances of each case and the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits (see *Price*, 2011 IL App (4th) 100311, ¶ 36), as well as the seriousness of the crime, protection of the public, punishment and deterrence (see *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998)). The seriousness of the offense is the most important of all the factors a court should consider in imposing a sentence. See *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 52, citing *Coleman*, 166 Ill. 2d at 261.

¶ 61 The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record, and "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131; see *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). It is strongly presumed that the court based its sentencing determination on proper legal reasoning. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. This presumption is only overcome by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law or manifestly violates constitutional considerations. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 62 In support of his contention, defendant isolates a few particular statements made by the court during its colloquy in an otherwise lengthy sentencing hearing which was comprised of the

testimony of multiple witnesses and detailed argument by counsel about both defendant and the instant crime. The court's comments he now cites are:

> "This is a person who truly in the legal arena when we talk about a malignant heart, he is the epitome of that. This is a monster. This is not a human being. We have laws that put people in jail. We had laws that executed people for these kind of offenses because the public must be protected from people like him. That is why we have the laws we do. This man unfortunately should never have had a chance to walk the earth";
>
> "You [defendant] are lower than the vermin is up under rocks. I think you're a horrible person, if you can be called a person at all"; and
>
> "[W]hat really bothers me is that he took pride in the fact that he had these children outside of the marriage. He took pride in the fact that he cheated on his wife."

However, even considering these comments as defendant would have us, we find no merit in his claim that the trial court improperly relied on its own personal views and attacks of him in rendering his sentence. Rather, based on our review of the sentencing hearing as a whole, it is ultimately clear that the court based its considerations on the proper, statutory factors before it.

¶ 63 First, the record demonstrates that the court reviewed defendant's presentence investigation report at length. This contained information on his criminal background, social history, marital status, education, employment, community involvement and several other pertinent factors about his credibility, demeanor, moral character, mentality, habits and

personality. Defendant made no objection to any of the information contained therein. As we have already discussed, these personal factors are vital to the fashioning of a sentence and, thus, this information was properly before the court for consideration as it saw fit. See *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 64 More significantly, and again as we have already discussed, in addition to these personal factors, as well as social factors like the protection of the public, punishment and deterrence (see *Harris*, 294 Ill. App. 3d at 569), the most important consideration a court should examine in imposing a sentence is the seriousness of the offense (see *Gordon*, 2016 IL App (1st) 134004, ¶ 52, and *Coleman*, 166 Ill. 2d at 261). In the instant cause, in considering this factor, the court here found defendant's crime to be "horrible." The comments defendant isolates here clearly describe the seriousness of the crime, as well as the fact that the court believed "the public must be protected from people like" defendant who commit such crimes. There is much in the record to support this. The victim was a 29-year-old woman who had fallen in love with defendant, markedly older than she. A few months earlier, she had miscarried but was now newly pregnant again. Defendant proposed to her and they were to be married in just one month's time; he also promised her financial stability if she would leave her family, with whom she lived, and move with him to Louisiana to start a new life. On the night in question, defendant came over to her home and they played cards for a time with her mother. The victim and defendant texted each other during the games with flirtatious messages and plans to leave together for a rendezvous in the park. This is what the victim believed before she met her demise, which saw her become the object of a cold, calculated and premeditated plot organized for months by defendant that left her

shot in the face, bleeding to death in the passenger seat of his car.

¶ 65 As defendant's trial unfolded, and the theory of a murder conspiracy among him, his son and Taylor developed, what became the primary focus, with respect to defendant, was his role as the mastermind. Accordingly, his personality traits, including his ability to manipulate those closest to him into doing what he wanted, no matter how heinous, became critical considerations for the jury. And, as they were for his trial, these also became critical considerations for the court charged with sentencing him. Evidence was repeatedly brought out at trial, from witnesses and from defendant himself, that he cheated on his wife throughout their marriage–including with the victim. Incidentally, while Martin testified that he had three children outside their marriage, defendant clarified that he actually had eight children total from other relationships. Evidence was also brought out at his sentencing hearing that, as a police officer, he had sex with an underage girl to whom he had given traffic tickets. Again, this showed defendant using a position of power to prey upon someone weaker to get what he wanted. This pattern of manipulation, deceit, unfaithfulness, broken relationships–resulting in children outside of his marriage–was consistent with the facts presented in the instant cause and went directly to motive for the murder of the pregnant victim. It was only reasonable, therefore, that the court would make mention of all this in its colloquy at sentencing.

¶ 66 Moreover, it cannot be denied that the jury issued the specific, additional finding that defendant committed the first degree murder of the victim in a cold, calculated and premeditated manner. The foundation for this finding was, undeniably, and at least partly, based on defendant's demeanor and personal traits, as testified to by witnesses and as based on the

evidence presented at trial–again, factors a sentencing court would naturally discuss during its colloquy. Also, following his conviction, the court gave defendant the opportunity to speak. Defendant chose not to address the victim's family or the court, refusing to show any remorse or to accept any responsibility for his actions.

¶ 67 In examining the comments cited by defendant herein, it is clear to us that the court was making direct reference to the facts of the case, the motive behind the murder and the jury's finding that defendant committed the crime in a cold, calculated and premeditated manner–making it, in light of all the evidence presented, extra heinous. The seriousness of the instant crime, which saw a young pregnant woman gunned down in the face and three men brought to trial for it, must never be understated. That the court's colloquy focused on this, as well as on its belief that "the public must be protected from people like" defendant, does not amount to error in any respect. Rather, because we find, when we read its colloquy as a whole, that the court's sentencing determination was based upon proper statutory factors and the evidence presented, we hold that it did not abuse its discretion in its considerations here.

¶ 68 However, with this said, we must remand the instant matter for resentencing, albeit for a completely different, and technical, reason. At the end of its colloquy, when the trial court imposed sentence, it explained that it was doing so "pursuant to the extended term that's available by law, which is 80 years" due to the cold, calculated and premeditated factor, plus 15 years for the firearm enhancement, "for a total of 95 years" in prison. Yet, as the State points out, and as defendant does not dispute in his reply brief on appeal, this sentence was erroneous. Defendant was not entitled to an "extended term" sentence as the court used in that context.

¶ 69 Rather, first degree murder is generally punishable by a term of 20 to 60 years in prison. See 730 ILCS 5/5-4.5-20 (West 2010). Defendant's crime was also accompanied by a 15-year mandatory firearm enhancement, increasing the applicable sentencing range to 35 to 75 years. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010). On top of this is the jury's additional finding that he committed the murder "in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of [defendant] created a reasonable expectation that the death of a human being would result therefrom." 720 ILCS 5/9-1(b)(11) (West 2010). This factor brings with it a potential, discretionary sentence of natural life in prison. See 730 ILCS 5/5-8-1(a)(1)(b) (West 2010).

¶ 70 Defendant's eligible range for sentencing, then, was 35 to 75 (20 to 60 plus the 15-year firearm enhancement) years in prison or, alternatively, a natural life sentence, not a range between the two. Thus, he could not have received a 95-year sentence.

¶ 71 Therefore, while we otherwise affirm the trial court's substantive basis for it sentencing determination and find no error in the factors it considered in rendering that determination, we remand so that defendant can be sentenced within the proper range of 35 to 75 years, or natural life, in prison.

¶ 72 On May 17, 2017, defendant filed a petition for rehearing in our court, asking us to modify this portion of our judgment to make clear to the trial court upon our remand of the limitation of imposing upon him a sentence of natural life. We have examined his petition and, while we deny it, we are mindful of his request. Again, the trial court's original sentence of 95 years in prison cannot stand here since only two options were available under the instant

circumstances: a term sentence within a range of 35 to 75 years in prison as we have discussed, or a natural life sentence. The trial court chose to impose a term sentence, albeit one that was not within the correct range, having erred in determining that range. Having done so, it is clear that the court chose not to impose a natural life sentence at that time. Upon remand, now, this latter alternative of a natural life sentence is, potentially, no longer available. This is because, as defendant rightly points out, a defendant who challenges his sentence on appeal cannot be resentenced to a harsher sentence unless the increased sentence "is based on additional bad conduct performed by the defendant after the original sentencing." See *People v. Moore*, 177 Ill. 2d 421, 432 (1997); see also *People v. McBride*, 395 Ill. App. 3d 204, 209 (2009) (a defendant should not have to run risk that challenging sentence may result in longer sentence and should not be penalized for efforts to seek relief from sentence received). A natural life sentence is longer than defendant's original 95-year term. See *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 99. Accordingly, based on this, we clarify that, upon our remand, the trial court may not impose a natural life sentence on defendant here unless it is based on additional bad conduct performed by him subsequent to his original sentencing.

¶ 73 IV. One-Act, One-Crime Doctrine

¶ 74 Defendant’s final contention on appeal is that one of his convictions for first degree murder (and its accompanying sentence) must be vacated because it violates the one-act, one-crime doctrine. He notes that, because he was convicted of two counts of first degree murder but there was only one decedent, his convictions were based on the same, and sole, physical act and these multiple convictions cannot stand.

¶ 75 Briefly, we note that our state supreme court set forth the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551, 566 (1977), which held that multiple convictions are improper if they are based on precisely the same physical act and, since then, our courts have made clear that a defendant may not be convicted of multiple offenses based on the same act. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); *People v. Crespo*, 203 Ill. 2d 335, 342-43 (2010); accord *People v. Burney*, 2011 IL App (4th) 100343, ¶ 86 (where a single act is involved, multiple convictions are improper); see also *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Most significantly with respect to the instant cause, when a murder is involved, we have declared that "[w]here but one person has been murdered, then there can be but one conviction of murder." *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). And, critically, when multiple convictions have been entered in such circumstances, only one conviction–for the most serious of the murder charges–may stand, and the convictions based on less serious charges of murder must be vacated. See *Cardona*, 158 Ill. 2d at 411-12; accord *People v. Bishop*, 2014 IL App (1st) 113335, ¶ 11.

¶ 76 In the instant cause, the State concedes that, under the circumstances, and as there was only one victim, defendant cannot be twice convicted for murder here. However, the parties disagree as to which count should be vacated and which should stand as a conviction on defendant's mittimus. We clarify that now. Defendant argues that his mittimus reflects a conviction on count 1 for intentional murder and on count 4 for strong probability murder and, as count 1 is more serious, that should remain and count 4 should be vacated. The State, meanwhile, notes that it proceeded against defendant on count 1 for intentional murder with a

firearm; count 3 for intentional murder with a firearm committed in a cold, calculated and premeditated manner; count 10 for murder while armed with a firearm and knowing the act created a strong probability of death or great bodily harm; and count 12 for murder while armed with a firearm and knowing that the act created a strong probability of death or great bodily harm and the murder was committed in a cold, calculated and premeditated manner. The State further explains that, once the jury returned a general verdict form convicting defendant and then found the added factor that he did so in a cold, calculated and premeditated manner, count 3 was the most serious charge against him. However, when the mittimus was issued, the trial court incorrectly listed a conviction for intentional murder with a firearm under count 1 and merged count 3 therein, and a conviction for strong probability murder under what it labeled count 4 and merged therein a second strong probability murder charged labeled count 6, even though the State had not proceed under either of these at trial.

¶ 77 The State is correct, and defendant does not dispute its explanation in his reply brief on appeal. First, the record is clear that the State did not proceed at trial on a count 4 charge of strong probability murder, nor on a count 6 charge of the same against defendant. These counts were directed against Taylor only and had nothing to do with defendant, nor were they presented at his trial. Rather, the strong probability murder charges that were asserted against defendant were in counts 10 and 12. Therefore, any conviction under a "count 4," and any merging into that of a "count 6," should be erased from the mittimus.

¶ 78 According to defendant's initial argument, this would leave count 1 for intentional murder with a firearm. However, as the State points out, and pursuant to the legal principles we

announced above concerning the one-act, one-crime rule, when a defendant, as here, is charged with first degree murder under multiple theories, and when a jury, as here, returns a general verdict of guilty of first degree murder, the defendant is considered guilty as charged in each count pursued against him, with an inherent presumption, then, that he is guilty of the most serious form of murder charged at trial. See *People v. Davis*, 233 Ill. 2d 244, 263 (2000), citing *People v. Morgan*, 197 Ill. 2d 404, 448 (2001) (a general verdict charging different theories of murder raises the presumption that the defendant committed the most serious form of murder alleged); accord *People v. Perry*, 2011 IL App (1st) 081228, ¶ 54. Here, the most serious charge of murder the State pursued against defendant at trial was count 3--intentional murder with a firearm committed in a cold, calculated and premeditated manner. In particular, while the jury returned a general verdict form of guilty, it made the specific, additional finding that defendant committed the murder with a firearm and in a cold, calculated and premeditated manner.

¶ 79 Therefore, while we correct defendant's mittimus to reflect only one conviction, and only one accompanying sentence, of first degree murder in line with the dictates of the one-act, one crime rule, we, at the same time, correct his mittimus to reflect that this conviction was pursuant to the most serious charge against him, count 3 of intentional murder with a firearm committed in a cold, calculated and premeditated manner, and vacate any other convictions based on less serious charges of murder. See *Davis*, 233 Ill. 2d at 263-64, 265; *Morgan*, 197 Ill. 2d at 448; see also *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008) (this Court has the authority to amend the mittimus at any time).

¶ 80 CONCLUSION

¶ 81 For all the foregoing reasons, we affirm defendant's conviction for first degree murder with a firearm and with the added aggravating factor, as found by the jury, that he did so in a cold, calculated and premeditated manner (count 3); we vacate all other murder convictions and accompanying sentences in light of the one-act, one-crime doctrine; we modify his mittimus accordingly; and we remand for resentencing within the proper range of 35 to 75 years in prison or, alternatively, a natural life sentence, pursuant to our directions herein.

¶ 82 Affirmed in part; vacated in part; mittimus corrected; remanded for resentencing with directions.