2018 IL App (1st) 151208-U

No. 1-15-1208

Order filed March 9, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 7622 (02)
	)	
JANET RICHMOND,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not prejudiced by trial counsel's failure to move to sever defendant's bench trial from codefendant's trial because any error in allowing codefendant's statement was harmless in light of other evidence of defendant's involvement and common scheme; defendant's sentencing challenge was not reviewable under plain error; the mittimus is corrected to reflect defendant's conviction for Count 1.

¶ 2 Following a simultaneous joint bench trial,[1] defendant Janet Richmond was convicted of three counts of heinous battery, one enhanced with a finding of severe bodily harm, and three counts of aggravated battery/great bodily harm, and sentenced to an aggregate term of 15 years' imprisonment under an accountability theory. On appeal, defendant contends that 1) her trial counsel was ineffective for failing to move to sever her trial from that of her codefendant, Keyanna Richmond, thus allowing codefendant's statement which implicated defendant to be admitted as evidence against defendant; 2) alternately, even if trial counsel was not ineffective for failing to move to sever the trials, she was denied her right to confront her accuser and her due process right to a fair trial where the State elicited, and the trial court relied upon, the inculpatory statement of her non-testifying codefendant; 3) her sentence was excessive due to her young age, lesser role, and mitigating factors; and 4) the mittimus should be corrected to reflect that defendant's conviction for heinous battery is Count 1, not Count 9. For the following reasons, we affirm defendant's convictions and sentences and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Briefly stated, defendant's conviction stemmed from an incident on March 24, 2010, in which she and her siblings, codefendant Keyanna and brother Tracey, went to her aunt's home in Ford Heights, after having a heated text exchange with their cousin, Suprisa Villa-Gomez the previous evening. According to evidence presented at trial, defendant and her siblings arrived at the home of Sally Villa-Gomez (their aunt), armed with socks filled with rocks and bottles of drain declogger (acid). When they arrived, someone from the car, a white Monte Carlo, yelled

[1] Defendant's trial was held simultaneously with her codefendant and sister, Keyanna Richmond. Her brother, Tracey (also spelled Tracy in the record), was a minor and is not a party to these proceedings.

"come outside b*tches." Suprisa, who was sitting in the living room with her sister, Katina Villa-Gomez, went outside and saw her three cousins get out of the car. Tracey swung a sock filled with a hard object at her, and they began to fight. Shortly thereafter, Sally and Katina also came out of the house. Suprisa saw a white bottle in Keyanna's hand, which Keyanna threw at her as she fought with Tracey. At that point, Suprisa and Keyanna began fighting. During the fight, Suprisa felt a burning sensation on her back and face, and went back into the house. A younger sister, Alexis, called for an ambulance. Suprisa subsequently had skin-graft surgery due to second and third degree burns from the acid, and has permanent scarring on her back and under her arm.

¶ 5 Sally testified that, during Keyanna's fight with Suprisa, defendant was standing outside of the car, a white Monte Carlo which she identified as belonging to defendant, and subsequently reached down and threw a bottle towards her as she exited the house and ran towards the fight. Sally then felt a burning sensation on her face. By this time, Suprisa had stopped fighting and was screaming. Sally observed Suprisa's shirt melting onto her back. Sally subsequently suffered burns and permanent scars on her face and arm. Katina was also burned on her arm, stomach and legs, although she did not participate in the fighting. Sally then stated that Keyanna, who was burned as well, ran to the car and defendant then drove off. An ambulance subsequently came and transported Sally, Suprisa and Katina to St. James Hospital where they were treated.

¶ 6 Defendant's trial counsel questioned Sally regarding her previous grand jury testimony, at which time she stated that defendant had thrown the bottle at her son Martell. Sally responded that she "probably" testified to that, but as the incident happened five years prior, she could not remember everything.

¶ 7 Katina Villa-Gomez testified that she was living at her mother's home at the time of the incident and was foster parent to three of defendant's mother's children. She and her children were about to leave the house when a white Monte Carlo arrived and she saw codefendant Keyanna hanging out of the sunroof. She indicated that both defendant and codefendant were yelling "come outside b*tches," and she identified them in court. Katina also stated that their brother Tracy was there as well. Katina unsuccessfully attempted to keep Suprisa inside of the house, but Suprisa eventually went outside. Katina followed her and saw both defendant and codefendant standing outside of the car. Katina unsuccessfully attempted to hold Suprisa back while telling defendant and codefendant to leave, but an argument ensued. Eventually, Suprisa began fighting with Tracy, before fighting with codefendant Keyanna. She was standing nearby, but not fighting with anyone and then she heard her mother screaming that her face was burning. Katina didn't realize that she was "burning" either until they had gone back into the house, where she saw that she was burned on her arm, stomach and her legs, and her clothes began ripping.

¶ 8 Cook County Sheriff Investigator Lester Rogers testified that he was given the names of defendant Janet, codefendant Keyanna, and a juvenile Tracy, as suspects in his investigation of the battery. He identified both defendant and codefendant in open court. He went to the emergency room of St. James Hospital to speak with both victims and suspects.

¶ 9 At approximately 8:30 p.m. on March 24, 2010, Investigator Rogers spoke with codefendant Keyanna. After being advised of her *Miranda* rights, codefendant agreed to speak with him. Specifically, according to Investigator Rogers, codefendant stated: "the reason they went there was to fight because of comments made about her mom who was incarcerated, and Suprisa had been spreading rumors about her mom being incarcerated; so the three of them went

there to fight." Codefendant identified the "three" as herself, defendant and brother Tracy. Investigator Rogers further testified that codefendant also said that "they took socks - - took two socks with them with rocks in them and that they had taken a bottle of acid plumbing. It was used to unstop the toilet. They got it from an Ace Hardware in Sauk Village." Codefendant also said that defendant purchased the acid, they took the rocks and chemical for protection and if Suprisa got in her face, she was to throw it in Suprisa's face. There was no objection by defendant's trial counsel during Investigator Rogers' testimony concerning codefendant's statement. Investigator Rogers then testified about his interview with defendant, who spoke with him after being *Mirandized*. His interview with defendant occurred at the Sixth District police facility in Markham. Defendant told him that "[she] and Suprisa exchanged messages the night before and that the three of them, her, her brother Tracy, and Keyanna went to their residence on [1]300 Kennedy Lane, at which time her brother Tracy jumped out of the car and started to fight with Montrel." Defendant told him that the messages were about her mom being incarcerated, and that her mom is probably going to go away for awhile for killing her kid.

¶ 10 Cook County Police Investigator Ronald Sachtleben investigated the scene outside of the Villa-Gomez home and collected various items, including two pairs of socks containing rocks, swabs from a “splash pattern” and a “pour pattern,” and a broken glass bottle containing an unknown liquid, which was subsequently identified as sulfuric acid.

¶ 11 Prior to defendant's bench trial, the State tendered defendant a plea offer of six years, which she rejected.

¶ 12 At the close of the State’s case, defendant moved for a directed finding on Counts 1 and 10 (heinous battery to Suprisa by attacking her with Drano and by striking her with a sock full of

rocks) which the trial court denied as to Count 1 but granted as to Count 10. In denying defendant's motion for directed finding, the trial court stated: "Count 1 denied because obviously your [sic] - - everybody is saying nobody proved this stuff. Well, stuff got there somehow, and it was thrown somehow, and both of the defendants were there, and they, according to the evidence, they went specifically to fight with them and brought this item along with them. So the evidence is - - I believe that the State has met their burden." Defendant also moved for a directed finding on Count 4 (heinous battery as to Katina) and Count 16 (aggravated battery with great bodily harm against Katina), which the trial court denied.

¶ 13 In closing argument, defendant's trial counsel argued, with regard to the State's legal accountability theory, that the evidence the State relies on the most was codefendant Keyanna's statement, which was the only solid evidence presented by the State. Defendant's trial counsel contended that there was very little testimony as to what defendant's role was and what fighting she was doing, if any, at the scene. Counsel urged the court not to rely on codefendant's statement as proof beyond a reasonable doubt because it "is a statement not written by her, attributed to the young person who, in the hands of law enforcement, they know is the key to incorporating everybody else into a scheme specifically to injure people with a dangerous chemical."

¶ 14 In rendering judgment, the trial court stated:

¶ 15 "All right.

First of all I believe there was premeditation in this case. I believe that Keyanna Richmond and Janet Richmond and the brother decided that they were going to go to the

address in Ford Heights where their cousins were and call them out and basically throw acid at them. That is what the evidence shows.

We have evidence that, in fact, they have the acid. We have evidence that, in fact, it was bought at Ace by Janet. We have evidence that it was brought there. We have evidence that they had it during the fight.

You don't go to a fist fight and bring a gun. Just like here. You don't go to an argument and fight and bring acid. It doesn't make any sense. Okay. It doesn't make any sense for them to bring acid to the scene, and this stuff that they were going to use was going to be used for self-defense? Really? Come on.

The evidence is overwhelming. There is a finding of guilty as to all counts for both defendants."

¶ 16 At the sentencing hearing, the trial court considered defendant's Presentence Investigation Report (PSI), factors in aggravation and mitigation, and defendant's statement in allocution. The court made a specific finding of severe bodily harm as to Count I, related to Suprisa, and sentenced defendant to nine years' imprisonment. Defendant was then sentenced to concurrent terms of six years' imprisonment on the other two counts of heinous battery, which would run consecutive to Count I, for a total of 15 years' imprisonment, plus 3 years supervised release. No motion to reconsider sentence was filed, and this timely appeal followed.

¶ 17 ANALYSIS

¶ 18 As previously noted, defendant makes several arguments on appeal and we will examine each of her arguments below.

¶ 19 A. Ineffective Assistance of Counsel/Severance of Trials

¶ 20 Defendant first contends that her trial counsel was ineffective for failing to move to sever her trial from her codefendant's trial because not severing the trial allowed codefendant's hearsay statement, which implicated defendant, to be admitted as evidence against her. She contends that the evidence against her was "slim," and that such decision by counsel was objectively unreasonable and prejudicial as she was denied the right to confront her accuser and thus denied her due process right to a fair trial where the State elicited the inculpatory statement of her non-testifying codefendant. Specifically, defendant contends that codefendant's statement implicated her in a significant way, namely that codefendant told police that they both went to Ace Hardware and bought the bottle of liquid drain cleaner.

¶ 21 In contrast, the State contends that defendant incorrectly asserts that codefendant's statement was used as a basis for her conviction while ignoring the evidence at trial, namely that all three offenders planned to jointly attack their relatives and that defendant herself threw acid at her relatives. The State further contends that at no time during trial were any of the out-of-court statements by codefendant used against defendant, nor did they serve as any basis for defendant's conviction. Additionally, the State contends that defendant's argument on appeal is that the mere fact that the statement was elicited during their joint trial results in the presumption that her confrontation rights were violated. Further, the State denies that its case relied solely on the theory of accountability and codefendant's statement that they bought the acid together as evidence of defendant's guilt; instead, the case relied on defendant's own act of throwing acid on her relatives, her own statements to Investigator Rogers, in addition to the theory of accountability.

¶ 22 We first examine defendant's contention that trial counsel was ineffective for failing to file a motion to sever her trial because of the admission of codefendant's statement which implicated defendant.

¶ 23 In determining whether a defendant was denied the effective assistance of counsel, this court applies the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), as adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687; *People v. Gabriel*, 398 Ill. App. 3d 332, 346 (2010). More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Strickland*, 466 U.S. at 694; *Gabriel*, 398 Ill. App. 3d at 346. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *Gabriel*, 398 Ill. App. 3d at 346.

¶ 24 The right to effective assistance of counsel refers to competent, not perfect representation, and mistakes in trial strategy or tactics or in judgment do not, in themselves, equate to incompetent representation. *People v. Fuller*, 205 Ill.2 2d 308, 331 (2002). Rather, a defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Griffin*, 178 Ill. 2d 64, 74 (1997).

¶ 25 1. Deficient Performance

¶ 26 We first address counsel's performance. Here, as defendant argues, trial counsel failed to file a motion to sever her trial with codefendant.

¶ 27 We must view counsel's performance "from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). And, with respect to counsel's strategic choices, we must "be highly deferential to trial counsel." *Perry*, 224 Ill. 2d at 344. However, "an attorney is ' "expected to use established rules of evidence to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts." ' " *People v. Lucious*, 2016 IL App (1st) 141127, ¶32 (quoting *People v. King*, 316 Ill. App.3 d 901, 916 (2000) (quoting *People v. Moore*, 279 Ill. App. 3d 152, 159 (1996))).

¶ 28 With regard to joint trials, the general rule is that defendants jointly indicted are to be jointly tried unless fairness to one requires separate trials to avoid prejudice. *People v. Bean*, 109 Ill. 2d 80 (1985); *People v. Bock*, 242 Ill. App. 3d 1056, 1079 (1993). Here, defendant does not deny that the charges against both she and her codefendant arose from a common occurrence. Thus she had no automatic right to severance of her trial. In that situation, a defendant who desires a separate trial must demonstrate how he will be prejudiced by a joint trial. *People v.* Daugherty, 102 Ill. 2d 533 (1984); *Bock*, 242 Ill. App. 3d at 1079.

¶ 29 With severance, the primary questions are whether the defenses of the respective defendants are so antagonistic to each other that they could not receive a fair trial without a severance (*Henderson*, 2017 IL App (1st) 142259, ¶ 202), or whether hearsay admissions of a codefendant implicate the defendant seeking severance, since the latter may be denied his constitutional right to confrontation if the codefendant does not testify (*Bock*, 242 Ill. App. 3d at 1079). A decision to grant separate trials is within the discretion of the trial court, and its

determination will not be disturbed absent an abuse of that discretion. *Bock*, 242 Ill. App. 3d at 1079.

¶ 30 Here, defendant cites to *People v. Bean*, 109 Ill. 2d 80 (1985), and *People v. Rodriguez*, 289 Ill. App. 3d 223 (1997) to support her contention that her trial should have been severed and consequently that her trial counsel was ineffective for failing to move to sever her trial. We find both cases to be distinguishable, as they discussed a trial court's failure to sever defendant's trial based on antagonistic defenses. In this case, defendant's argument regarding the failure to sever is based on trial counsel's failure to move for severance because of the admission of codefendant's statement which implicated defendant, which is more like the circumstances presented in *People v. Silas*, 185 Ill. App. 3d 920 (1989).

¶ 31 In *Silas*, the defendant argued that he was denied the effective assistance of counsel since his attorney failed to request severance of his trial from codefendant and failed to move to have defendant's name redacted from the statement given by codefendant. *Silas*, 185 Ill. App. 3d at 926-27. The court noted that it was a bench trial and found that *Bruton v. United States*, 391 U.S. 123 (1968) did not mandate severance. The court also noted that failure to sever when there is a violation of the right to confront witnesses is ground for reversal unless the trial court's failure to sever was harmless beyond a reasonable doubt. *Silas*, 185 Ill. App. 3d at 928, citing *People v. Nunn*, 184 Ill. App. 3d 253, 267 (1989).

¶ 32 Similarly, in *People v. McNeal*, 56 Ill. App. 3d 132, 138 (1977), this court noted that such situation, a joint trial where a codefendant's statement is introduced, is "closely analogous to that presented in *Bruton*, but with the significant distinction that, unlike *Bruton*, the defendant here was convicted in a bench trial." The court noted that a principal factor in the Supreme Court's

decision in *Bruton* was the "limitations upon the ability of a jury to restrict their consideration of that evidence [codefendant's out-of-court statement which inculpates another defendant]." *McNeal*, 56 Ill. App. 3d at 138.

¶ 33 Moreover, in *People v. Bedell*, 253 Ill. App. 3d 322 (1993), this court noted " 'a trial judge, sitting as the trier of fact, due to his particular training and experience, is generally believed to have a greater ability to restrict his use of improper evidence and to consider only competent evidence. ' " *Bedell*, 253 Ill. App. 3d at 330 (quoting *People v. Moore*, 128 Ill. App. 3d 505, 514 (1984)). Further, in *People v. Schmitt*, 131 Ill. 2d 128 (1989), our supreme court expressed confidence in the trial court's ability to compartmentalize its consideration of evidence and declared that, "in the absence of proof to the contrary, the reviewing court must presume that the trial court considered only competent evidence in reaching its verdict." *Schmitt*, 131 Ill. 2d at 138-39.

¶ 34 A review of the record in the case at bar reveals that the trial court did not specifically state that it was "compartmentalizing" the evidence. However, throughout the trial, the trial court consistently addressed motions received as to each defendant separately. Nonetheless, when the trial court rendered its judgment, it did not distinguish the factual basis for finding each defendant guilty; instead, it made a general commentary on the evidence and specifically referenced a portion of codefendant's statement. We do agree with defendant that use of codefendant's statement regarding defendant's purchase of the acid as evidence against her would be a violation of her rights. See *Lee v. Illinois*, 476 U.S. 530, 543 (1986), where the United States Supreme Court held that the confrontation clause is violated when the trial court presiding over a joint bench trial "expressly * * * relie[s]" on a codefendant's confession as evidence of the

defendant's guilt; *People v. Blount*, 220 Ill. App. 3d 732, 737 (1991) (The United States Supreme Court held in *Cruz v. New York*, 481 U.S. 186 (1987) that under the Confrontation Clause, a defendant's rights are violated when the confession of his nontestifying codefendant implicating the defendant is admitted at their joint trial).

¶ 35 However, based on the record before us, we cannot conclude that the trial court's passing reference to codefendant's statement proves that the court expressly relied upon the statement as evidence of defendant's guilt. This court presumes that the trial court in a bench trial considered only competent evidence in reaching its verdict, but an affirmative showing that the trial court considered improper evidence will overcome the presumption. *People v. George*, 263 Ill. App. 3d 958, 976 (1993). Where the court has considered such inadmissible evidence, even if the evidence violates a constitutional prohibition, this court should affirm the conviction if the error was harmless beyond a reasonable doubt. *George*, 263 Ill. App. 3d at 976.

¶ 36 Assuming *arguendo* that the trial court improperly relied upon such evidence, trial counsel's failure to move for severance of the trials once codefendant's statement was admitted would be deficient. However, that would not end our inquiry, as we would then have to determine whether defendant would have been prejudiced by trial counsel's failure to file such motion.

¶ 37 2. Prejudice

¶ 38 To establish prejudice, a defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Evans*, 186 Ill. 2d at 93. The second prong of the

Strickland standard entails more than an "outcome-determinative test;" instead it requires a defendant to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 455 U.S. at 687.

¶ 39 Here, defendant argues that trial counsel's failure to file a motion to sever waived her confrontation rights and further that counsel's failure to contest admission of codefendant's statement was inherently prejudicial, thus this court need not consider the closeness of the evidence. Alternately, defendant argues that even if this court weighs the evidence, we should conclude that the statement was prejudicial because the other evidence concerning defendant's actual involvement was minimal and that the evidence was otherwise close.

¶ 40 Despite the general rule that defendants jointly indicted should be jointly tried, courts have recognized that a codefendant's admission introduced through an officer's testimony may be so prejudicial that cautionary instructions regarding the admission are insufficient to ensure that the other defendant receives a fair trial. *People v. Edwards*, 128 Ill. App. 3d 993, 1003 (1984). However, in a bench trial, severance is not mandatory as the trial court is presumed to consider only competent evidence. See *Silas*, 185 Ill. App. 3d at 928.

¶ 41 In the instant case, as previously stated, we are faced with a situation where the trial court may have improperly considered codefendant's statement as evidence against defendant, which we have determined was error. We must now determine whether such presumed error was harmless beyond a reasonable doubt when assessed in the context of the entire case against defendant. *Lee*, 476 U.S. at 547. It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. See

Schmitt, 131 Ill. 2d at 140. Should we find that the trial court's error was harmless, it would follow then defendant was not prejudiced by trial counsel's failure to move for severance.

¶ 42 In viewing the record as a whole, we find the trial court's error, if any, was harmless beyond a reasonable doubt in light of the other admissible evidence presented at trial.

¶ 43 The evidence presented at trial established that defendant, codefendant and a minor sibling arrived at the home of their relatives, exited the car together, and Tracy began fighting with Suprisa. Defendant had exchanged heated text messages with their cousin, Suprisa, the night before. The evidence also showed that Tracy carried a sock filled with a hard object and both codefendant Keyanna and defendant had bottles of acid with them. Furthermore, Sally's testimony implicated defendant in the events that led to her and Katina's injuries. Specifically defendant, while she did not participate in the fighting, had a bottle of acid which she threw towards Sally, and Sally and Katina were injured as a result. Additionally, defendant's own statement confirmed a motive for the fight with Suprisa as well as the fact that defendant, along with her siblings, went to their relatives' house and that Tracy initiated the fighting. Moreover, Katina's testimony confirmed that defendant and her siblings arrived together and that she and her mother were injured at the same time. The evidence also showed that defendant drove her brother and sister from the scene. Thus any error in considering codefendant's statement with regards to defendant purchasing the acid to be used for protection if a fight ensued was harmless.

¶ 44 Additionally, with regard to the State's accountability theory for Suprisa's injuries, we find the evidence sufficient to show defendant's guilt without the use of codefendant's statement. The law is clear that a person may be held accountable for the conduct of another in certain limited circumstances. *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23. A person is legally

accountable for the conduct of another if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate [such] commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-5-2(c) (West 2010). "Where one attaches himself to a group bent on illegal acts which are dangerous or homicidal in character, or which will probably or necessarily require the use of force and violence that could result in the taking of life unlawfully, he becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a natural or probable consequence thereof even though he did not actively participate in the overt act itself." *People v. Morgan*, 39 Ill. App. 3d 588, 597 (1976).

¶ 45 Here, as stated previously, defendant's own statement confirmed that her text messages with Suprisa the night before were the catalyst for the fight. Also as previously mentioned, the victims' testimony confirmed that defendant drove the car that brought she, codefendant and their minor sibling to their relatives' home. They were armed with socks full of rocks and acid. While defendant is correct in asserting that the evidence showed she did not fight Suprisa or pour any acid on her, the evidence does nonetheless establish that she aided and abetted the commission of the acts that led to Suprisa's injuries and that she was no innocent bystander. In fact, the evidence instead shows that when her aunt Sally came out of the house to try and break up the fight, defendant threw a bottle of acid in her direction to stop her from intervening. Defendant then drove her sister and brother from the scene. We find the evidence sufficient to find defendant accountable for Suprisa's injuries without the use of codefendant's statement.

¶ 46 We conclude therefore that defendant was not prejudiced by any claimed error in trial counsel's failure to file a motion to sever the trials based on the admission of codefendant's

inculpatory statement at trial. Accordingly, defendant's request that her convictions be reversed and remanded is denied.

¶ 47 B. Denial of Confrontation Right

¶ 48 Alternately, defendant makes the related argument that even if counsel was not ineffective for failing to move to sever the trials, she was denied her right to confront her accuser and due process right to a fair trial where the State elicited, and the trial court relied upon, her non-testifying codefendant's inculpatory statement to convict her.

¶ 49 The confrontation clause of the sixth and fourteenth amendments guarantees the right of a criminal defendant to be confronted with the witnesses against him, including the right to cross-examine those witnesses. *Cruz,* 481 U.S. at 189. These rights are essential and fundamental requirements for a constitutionally fair trial. *Lee*, 476 U.S. at 540. In a joint trial, the codefendant's pretrial confession implicating the defendant is not admissible against the defendant unless the codefendant testifies and is subject to full and effective cross-examination. *People v. MacFarland,* 228 Ill. App. 3d 107, 119 (1992) (citing *Cruz,* 481 U.S. at 190). When a trial error affects a Federal constitutional right, it is reversible error unless it is harmless beyond a reasonable doubt. *MacFarland,* 228 Ill. App. 3d at 121. In determining whether the error was harmless, the sufficiency of the evidence proving guilt beyond a reasonable doubt must be considered. *MacFarland*, 228 Ill. App. 3d at 121. If the evidence of defendant's guilt is uncontroverted and/or so overwhelming that the constitutional violation resulting from its admission at trial did not have an effect on the verdict, then the error is harmless beyond a reasonable doubt. *MacFarland,* 228 Ill. App. 3d at 121.

¶ 50 Here, we have already concluded that any consideration of codefendant's statement as evidence against defendant would have been error. However, we have also examined the remaining evidence presented at trial and have concluded that the evidence was sufficient to support defendant's convictions. We conclude that this alleged constitutional error was harmless beyond a reasonable doubt.

¶ 51 C. Sentencing

¶ 52 Next, defendant contends that her sentence was excessive. She contends that her aggregate 15-year sentence, the same that codefendant received, was excessive given the mitigation factors of her age, lesser role and non-involvement in inflicting serious harm. Defendant requests that this court reduce her sentence to the minimum aggregate available of 12-years. While acknowledging that she did not preserve her sentencing challenge for review, defendant contends that review is available under the second prong of the plain error doctrine, namely that her excessive sentence implicates her substantial rights. Alternately, defendant contends that trial counsel was ineffective for failing to object and preserve the issue of whether her sentence was excessive.

¶ 53 The failure to object to alleged error at trial and raise the issue in a posttrial motion ordinarily results in the forfeiture of the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). However, Supreme Court Rule 615(a) provides: "any error, defect irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 54 To establish plain error, a defendant must first show that a clear or obvious error occurred (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) or that the error was sufficiently grave that it deprived defendant of a fair sentencing hearing (*People v. Hanson*, 2014 IL App (4th) 130330, ¶ 26)).

¶ 55 Here, defendant argues that because sentencing affects her substantial rights, it is reviewable under the second prong of plain error. Defendant does not contend that her sentence was outside of the statutory guidelines. Indeed, the sentencing range available for her Class X heinous battery conviction with a finding of severe bodily injury was between 6 and 45 years imprisonment and defendant was sentenced to a nine-year term. Defendant was also convicted of two additional counts of heinous battery, for which she received two six-year sentences that run concurrent to one another, but consecutive to the sentence for Count 1, for an aggregate sentence of 15 years, as noted by defendant. Defendant contends only that the trial court failed to properly consider the mitigating factors presented during sentencing, which impacted her substantial rights.

¶ 56 The first step in a plain error review is to determine whether the trial court committed error and the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 57 We review a trial court's sentencing decision for an abuse of discretion, as the trial court, having observed the defendant and the proceedings, is better suited to consider sentencing factors than the reviewing court, which relies on the " 'cold' " record. *People v. Decatur*, 2015 IL App

(1st) 130231, ¶ 12 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). A sentence within statutory limits will not be deemed an abuse of discretion unless it is at variance with the spirit and purposes of the law or manifestly disproportionate to the nature of the offense. *Decatur*, 2015 IL App (1st) 130231, ¶ 12. We have previously stated that defendant's sentence was within the statutory range. The only question remaining is whether defendant's claim that the trial court did not properly consider mitigating factors when it imposed sentence was error.

¶ 58 A review of the record indicates that the trial court specifically noted each of the factors presented in defendant's presentencing investigation (PSI) report, specifically that: there was no prior criminal history; defendant helped raise younger siblings from age 11 forward; her mother was physically and mentally abusive and convicted of neglect and child abuse; she dropped out of high school after her freshman year; although currently unemployed, defendant worked for one year in 2011 at K-Mart; she was never married or had children; her home neighborhood was not good and had drug dealing and gang activity there; in 2012 defendant became a minister; had no gang affiliation; there was no history of psychological hospitalization or treatment; and defendant briefly used alcohol and marijuana. The trial court specifically noted as to mitigating factors that "she has no prior criminal record to speak of like [codefendant]. Hopefully this is a one[-]time type of situation."

¶ 59 It is the seriousness of the crime, and not the presence of mitigating factors that is the most important factor in determining an appropriate sentence. *Decatur*, 2015 IL App (1st) 130231, ¶12. Indeed, we will not find that a minimum sentence is necessarily warranted merely due to the presence of mitigating factors. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 112. Nor will we substitute our judgment for that of the trial court because we may have balanced the

factors differently. *Peoples*, 2015 IL App (1st) 121717, ¶ 112. When mitigating factors are presented to the court, there is a presumption that the trial court considered them in determining the sentence. *Peoples*, 2015 IL App (1st) 121717, ¶ 113. This presumption can be overcome only with explicit evidence from the record that mitigating factors were not considered by the trial court. *Peoples*, 2015 IL App (1st) 121717, ¶ 113.

¶ 60 Here, defendant has not shown, nor have we found, any explicit evidence from the record that mitigating factors were not considered by the trial court. In fact, as demonstrated above, the record shows quite the opposite. The trial court explicitly stated each piece of information gleaned from the PSI and specifically made note of the mitigating factors. As such, we must presume that the trial court considered them in determining the sentence. Accordingly, the trial court committed no error in sentencing defendant.

¶ 61 It follows then that defendant's trial counsel was not ineffective for failing to raise this issue in a post-sentencing motion as there was no error in sentencing defendant, thus defendant was not prejudiced. *Gabriel*, 398 Ill. App. 3d at 346.

¶ 62 D. Correction of the Mittimus

¶ 63 Finally, defendant contends that the mittimus should be corrected to reflect that she was convicted of heinous battery under Count 1 and not Count 9. We agree as Count 9 was *nol prossed* by the State. As we have the right to correct the mittimus at any time without remanding the matter to the trial court (See *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)), we order the correction of the mittimus to reflect defendant's conviction of Count 1 and not Count 9.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court is affirmed and the mittimus corrected.

¶ 66 Affirmed; mittimus corrected.