

2018 IL App (1st) 151948-U  
No. 1-15-1948  
Order filed September 20, 2018

Fourth Division

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 24063
	)	
FERNANDO MARTINEZ,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Presiding Justice McBride and Justice Gordon concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* We affirm defendant's conviction for first-degree murder and sentence of 65 years' imprisonment where the trial court did not commit manifest error in failing to appoint him new counsel after he raised posttrial *pro se* claims of ineffective assistance of trial counsel and his sentence was not excessive.
- ¶ 2 Following a jury trial, defendant Fernando Martinez was convicted of first-degree murder and sentenced to 65 years' imprisonment. On appeal, he contends that: (1) the trial court should have appointed him new counsel after he made posttrial claims that his trial counsel was

ineffective for failing to present evidence of his mental illness at trial to support a second-degree murder conviction; and (2) his sentence was excessive. For the reasons that follow, we affirm defendant's conviction and sentence.

¶ 3

## I. BACKGROUND

¶ 4 Following an altercation in the early morning of September 20, 2006, defendant shot and killed Juan Aguilar. Later in the day, the police arrested defendant. A grand jury subsequently indicted him on multiple counts of first-degree murder as well as multiple drug and weapons offenses.

¶ 5

### A. Pre-Trial

¶ 6 Since defendant's arrest in September 2006, his trial was delayed several years due to an ongoing issue concerning his fitness to stand trial. Numerous psychiatrists evaluated defendant and consistently diagnosed him with bipolar disorder, antisocial personality disorder and polysubstance dependence. Other, less common diagnoses included schizoaffective disorder and cognitive disorder. For his conditions, defendant was prescribed psychotropic medications.

¶ 7 In one psychiatric report, a psychiatrist found that, during the times defendant's bipolar disorder became exacerbated, he "demonstrated a variety of abnormalities in his thought process." In another report, a doctor wrote that defendant had "reportedly become increasingly violent" when using substances, such as heroin, cocaine and alcohol. In another report, defendant informed a psychiatrist that, as a teenager, he suffered head trauma as a result of being stomped on, but, at the time, he was uncertain if the incident caused any permanent damage. In yet another report, Dr. Robert Hanlon, a licensed clinical psychologist, diagnosed defendant with bipolar disorder which manifested itself in defendant being impulsive, having executive dysfunction, and misperceiving the intention and actions of others. Due to the nature of

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defendant's bipolar disorder, Dr. Hanlon opined that his behavior at the time of the alleged crime "was causally related to his mental illness."

¶ 8 Initially, on June 21, 2007, the trial court found defendant unfit to stand trial and ordered him to be hospitalized for mental health treatment. Six months later, a psychiatrist found his fitness restored with medication, but he was apparently re-evaluated the following month and deemed unfit for trial. On February 4, 2008, the court again found defendant unfit to stand trial and ordered him to be hospitalized further. In an April 2008 treatment report, a psychiatrist found that the "problem impeding [defendant's] fitness" was "psychosis," which evinced itself by an "impaired thought process" and "impaired judgment." However, on June 30, 2008, the trial court found defendant fit to stand trial with medication.

¶ 9 Over the next three years, the trial court did not find defendant unfit to stand trial, but, on August 9, 2011, it found defendant unfit to stand trial and ordered him to be hospitalized again. Three months later, a psychiatrist deemed defendant fit to stand trial with medication, but the record does not show that a fitness restoration hearing was held. On August 9, 2012, the court found defendant unfit to stand trial and once again ordered him to be hospitalized. Three months later, the court found defendant had been restored to fitness with medication.

¶ 10 Over the next year and a half, there were no court-issued findings of unfitness.<sup>1</sup> In May 2014, within five months of defendant's trial beginning, the trial court held another fitness hearing. The court ultimately determined that there was "no *bona fide* doubt as to defendant's fitness for trial" and asserted his "unfitness in the past was due to his own highly manipulative behavior," which was based on evidence from a psychiatrist and psychologist that defendant had

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<sup>1</sup> In February 2013, Judge Petrone began presiding over defendant's case.

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engaged in behavior with his prescribed medications in order to render himself unfit. At a final pretrial fitness hearing, this time a week before trial, the court again found defendant fit for trial.

¶ 11 In the days leading up to trial, defendant submitted various motions, including a motion requesting the ability to argue that he was guilty but mentally ill without having to present testimony from a doctor opining that he was insane at the time of the alleged offense. The trial court denied the motion, finding that, in order for the defendant to argue guilty but mentally ill, he must also raise an insanity defense, and no doctor had concluded that he was insane at the time of the shooting.

¶ 12 Defendant also filed a motion to sever the counts charging him with drug and weapons offenses. The trial court granted the motion, leaving only the offense of first-degree murder before the jury.

¶ 13 **B. Trial**

¶ 14 At defendant's jury trial, the State's evidence showed that, at approximately 3 a.m. on September 20, 2006, Ernesto Centeno was awoken by a gunshot while he was sleeping at his house on the 2400 block of South Christiana Avenue in Chicago. Centeno went to his living room, looked out the window and observed defendant carrying his girlfriend, Cortney Greer, over a fence. Centeno also observed a body lying in front of his house, so he left his house and called 911. Once outside, he observed a man bleeding with a gunshot wound to his jaw. Police officers arrived at the scene shortly thereafter and spoke to Centeno, who initially did not tell them about defendant and Greer because he did not want to get involved. However, later in the day, he informed the police that he saw defendant and Greer outside shortly after hearing the gunshot. The individual with the gunshot wound was Juan Aguilar, and he died as a result of single gunshot to the jaw and neck area.

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¶ 15 At around 10 a.m., the police executed a search warrant, which named defendant, for a house on the 2400 block of South Christiana Avenue. During the execution of the warrant, the police found defendant and Greer in an attic lying on a mattress. During a search of clothing next to defendant, the police discovered a magazine for a semi-automatic weapon. The police subsequently arrested defendant and took Greer to the police station in handcuffs. The police interviewed Greer, who told them that defendant had shot Aguilar and used a semi-automatic firearm. She never told any officers or detectives that Aguilar had a firearm or another man took a firearm from Aguilar.

¶ 16 Later in the evening, Greer gave a statement to an assistant State's Attorney, wherein she stated that, on the previous night, she and defendant went to a friend's house and hung out. They came back to defendant's house around 3 a.m. and parked on the street across from his house. As they walked toward defendant's house, there were two men, including Aguilar who was on a bicycle on the sidewalk, blocking the gate to defendant's house. Greer tried to walk around Aguilar, but he grabbed her around the arms. As she tried to wrestle herself away from him, defendant pulled out a firearm from his waistband and pointed it at Aguilar, prompting Aguilar to put "up his arms." Greer ran behind defendant, and from approximately six feet away, he shot Aguilar once. Aguilar's friend ran away, and Greer and defendant proceeded to defendant's house. According to the assistant State's Attorney, Greer never mentioned Aguilar having a firearm, reaching for a firearm or that Aguilar's friend took a firearm from him.

¶ 17 The following day, Greer testified before a grand jury and recounted a similar narrative about the shooting, but added that defendant had copious amounts of alcohol before the shooting and was "completely wasted," which usually resulted in him being "high-tempered." Additionally, Greer stated that, when Aguilar grabbed her, he said, " 'what's up, white girl' " and

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asked if she had any “ ‘cousins or sisters’ ” for him. As she did in her statement to the assistant State’s Attorney, Greer repeated that, after she wrestled herself away from Aguilar, defendant pointed a firearm at him. But she added that Aguilar initially raised his arms but then put his hands back down and onto the handles of his bicycle. Then, defendant shot Aguilar once. In her testimony before the grand jury, Greer stated that she never saw any other firearms, but also that she could not be sure if Aguilar’s friend had one or did not have one.

¶ 18 At trial, Greer testified that she could not recall most of the details of the morning of September 20, 2006, because she “was really frightened” at the time. She could only recall that Aguilar grabbed her around the arms and that he was shot. Greer also testified that she remembered signing a statement, but did not remember talking to an assistant State’s Attorney and saying most of the details in the written statement she had signed. Additionally, Greer also remembered testifying before a grand jury, but did not recall stating that defendant shot Aguilar.

¶ 19 Greer further testified that, after being transported to the police station, a detective told her she was going to be charged with first-degree murder, and she eventually gave statements based on what the police wanted to hear so she would not be charged with a crime. Later, during cross-examination, she testified that, when Aguilar grabbed her, she was in fear for her life, and as she tried to pull away from him, he reached for his side and pulled out what she believed was a firearm. At that point, defendant pulled out his firearm and shot Aguilar. Afterward, Aguilar’s acquaintance picked up a firearm from the ground and ran away. Greer also testified that, in April 2013, she gave a statement to one of defendant’s attorneys, wherein she stated that Aguilar had reached for a firearm before defendant shot him.

¶ 20 After the State rested its case, defendant requested that the jury be instructed on second-degree murder on two theories, one based on serious provocation and one based on an

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unreasonable belief of self-defense. The trial court denied the provocation instruction, but granted the instruction on an unreasonable belief of self-defense.

¶ 21 In defendant's case, he presented former Chicago police officer Carolyn Burgess who testified that, in June 2006, she observed Aguilar drinking alcohol on a public way. Aguilar was with an acquaintance who ran when the officer and her partner approached them. As the officer attempted to run after Aguilar's acquaintance, Aguilar gave the officer a "deflective push," which caused her to fall to the ground. Eventually, both men were apprehended. The case was never prosecuted. Defendant also called Jose Vaca, who testified that, in September 2001, Aguilar and two friends approached Vaca and another friend and beat them with golf clubs. The attack resulted in fractures to Vaca's skull. Although Aguilar was initially charged, the case was dismissed the following month when Vaca did not appear in court.

¶ 22 Defendant did not testify.

¶ 23 In closing argument, the State argued that defendant shot and killed Aguilar without any justification simply because he was mad at Aguilar for putting his arms around Greer. Defendant, however, argued that, based on Aguilar grabbing Greer and at one point reaching for his side, he reasonably believed he was in danger and shot his firearm in self-defense. Defendant posited that, because he only shot Aguilar once, this demonstrated that the shooting was only intended to neutralize the threat of Aguilar and thus, clearly in self-defense.

¶ 24 Following the parties' arguments, the trial court gave the jury various instructions, including on second-degree murder based on an unreasonable belief of self-defense. The court also provided the jury with three verdict forms: not guilty, guilty of first-degree murder and guilty of second-degree murder. The jury found defendant guilty of first-degree murder.

¶ 25

#### C. Posttrial Motions

¶ 26 After being found guilty, defendant filed a motion for new trial. Two months later, the trial court granted him leave to file an amended motion for new trial, wherein he raised 98 allegations of error. However, during his contemporaneous court appearance, he told the court that he wanted to represent himself to “address a couple issues.” The court responded that it would entertain the request the following court date after his attorneys had a chance to argue on the amended motion for new trial.

¶ 27 The following court date, defendant stated that he had reviewed his attorneys’ amended motion for new trial and found it “excellent” but still wanted to represent himself. After the trial court admonished defendant about the consequences of proceeding *pro se*, defendant remained adamant about representing himself, and the court granted his request. The court also offered defendant standby counsel, but he declined. Because defendant did not write his own motion for new trial, he adopted his attorneys’ motion, but asserted that he also had a motion for “ineffectiveness of prosecution.” The court continued the case for a hearing on his motion for new trial and his *pro se* motion.

¶ 28 At the subsequent court date, the trial court asked defendant to elaborate on his “motion about the ineffectiveness of [his] counsel.” Defendant made several claims, but pertinent to this appeal, he argued that his attorney was ineffective because she failed to instruct the jury about his “psychosis disorder” and “[a]lternative mitigating mental conditions.”<sup>2</sup> Defendant further claimed that counsel did not pursue an investigation about the head injury he suffered when he was younger that had resulted in brain damage, including his bipolar disorder and “psychosis disorder.” Lastly, defendant asserted that there was mitigating evidence to reduce his offense to second-degree murder that he was not allowed to present, but he failed to expound on what the

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<sup>2</sup> Although defendant had two attorneys representing him, he directed his complaints at only one.



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evidence exactly was when asked by the court. Defendant also claimed that his counsel prevented him from testifying at trial.

¶ 29 Trial counsel responded to defendant's allegations in court, asserting that she did not "know what psychosis condition is" and she had defendant "evaluated by numerous doctors." She stated that she was aware of defendant's head injury as she had "all the records" but after she presented his medical history to "experts," she could not put forth an insanity defense. Regarding mitigating evidence, she stated that "[m]itigation is something you present at sentencing" and she was prepared to present that evidence had she continued to represent him. Lastly, regarding defendant testifying, counsel stated that she advised him not to testify based upon his "erratic behavior," which she did not feel would leave a strong impression on the jury, but she denied making the ultimate decision for him.

¶ 30 The trial court subsequently entered a written order, rejecting defendant's *pro se* claims of ineffective assistance of counsel. Concerning defendant's claim about his "psychosis disorder," the court found: "That is not a defense. Multiple evaluations were conducted of defendant, and he was found fit for trial in written orders of this court." The court also noted that trial counsel had requested a guilty but mentally ill verdict form before trial, but it had denied the motion. Regarding defendant's claim about "mitigation to reduce" his offense "to second-degree murder," the court stated that his counsel had successfully moved to present, and did present, evidence of Aguilar's propensity for violence through two witnesses. The court additionally noted that counsel had raised the defense of self-defense at trial and the jury was provided with instructions on second-degree murder. Lastly, regarding defendant testifying, the court dismissed any notion that counsel forced him not to testify, rather finding that defendant made that decision for himself.

¶ 31 In concluding its written order, the trial court observed that defendant's attorney worked hard over the course of many years representing defendant, was in constant communication with him about his case, and filed several motions on his behalf, including multiple regarding his fitness for trial and a 98-point amended motion for new trial. The court "seriously doubt[ed] whether defendant could have had any better representation" and "[h]is attack" on her performance was "completely unjustified." The court accordingly denied him the appointment of new counsel. It also denied his amended motion for new trial and set a date for sentencing.

¶ 32 D. Sentencing

¶ 33 On the date defendant was scheduled to be sentenced, he appeared in court and acted erratically and spoke incoherently. Based on his behavior, the trial court ordered a fitness hearing to determine whether defendant was fit to be sentenced. In doing so, the court stated that it had found defendant fit for trial "after an extensive hearing where three doctors testified," but it was "concerned" that the finding might be "stagnant" so it wanted to obtain "a fresh report to make sure [he] is fit for sentencing." Following a fitness hearing, the court found defendant fit for sentencing. However, the court did not find he could adequately represent himself at sentencing due to his "mental illness" and reappointed one of his trial counsels to represent him.

¶ 34 Pursuant to the trial court's order, a presentence investigative report of defendant was conducted, but he refused to participate in the interview portion. Still, the report detailed defendant's criminal background, which included two juvenile adjudications for possession of cannabis and possession of a stolen motor vehicle, as well as an adult criminal history consisting of convictions for unlawful use of a weapon in 1994, possession of cannabis in 1995, aggravated fleeing or attempting to elude a police officer in 1999, and possession of a stolen motor vehicle in 2001. Defendant had also been convicted of multiple misdemeanor offenses.

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¶ 35 Immediately before defendant's sentencing hearing, he pled guilty to a misdemeanor battery charge for punching a correctional officer in the face while in jail awaiting trial. The trial court sentenced him to 60 days in jail, time considered served.

¶ 36 At the sentencing hearing, the State presented four victim impact statements from members of Juan Aguilar's family and highlighted defendant's criminal history. The State dismissed any notion that Cortney Greer was "in danger" from Aguilar and posited that, after defendant shot Aguilar, he left the scene "nonchalantly" and hid from the police. Based on the victim impact statements, defendant's criminal background, the facts of the case and defendant's recent misdemeanor conviction, the State argued that a sentence in excess of 80 years' imprisonment was appropriate.

¶ 37 In mitigation, defendant's mother testified that defendant had a good heart and was a dedicated son and brother. According to her, when defendant was younger, he had been hit in the head, and as a result, his mind "changed" and he "wasn't well." Defendant made a lengthy statement, but focused on alleged issues from trial and other topics not relevant to his sentencing.

¶ 38 Defense counsel then argued that defendant had been transferred to a mental health facility at least four times since being arrested. She noted that, in her interactions with defendant when he was medicated and following successful mental health treatment, he would act normal, respectful and understand his circumstances, but when he was not taking his medications, he was a completely different person. Counsel stated that, prior to the shooting of Aguilar, defendant sought mental health treatment, which showed that he knew of his issues and was trying to remedy them. Counsel opined that, if defendant had also received substance abuse treatment prior to 2006, Aguilar would still be alive today. Counsel concluded that defendant "needs

professional help” and even the minimum sentence of 45 years’ imprisonment would be a death sentence for him given his mental health needs that would not be adequately addressed in prison.

¶ 39 The trial court eventually sentenced defendant to 65 years’ imprisonment, 40 years’ for the first-degree murder of Aguilar and an additional 25-year enhancement for personally discharging a firearm that resulted in Aguilar’s death. In arriving at defendant’s sentence, the court highlighted at length his mental illnesses, including his bipolar disorder, but noted that multiple doctors had found him to be “highly manipulative” and someone who had caused his own unfitness. The court reiterated that, while defendant had *bona fide* mental illnesses, they did not prevent him from being fit for trial with medication. The court also recounted the facts of the case, highlighting that Aguilar had grabbed Greer around her arms and asked if she had any friends for him, and while his behavior might have been “annoying” and impolite, it was not the type of provocation to justify the shooting. The court additionally detailed defendant’s criminal background, which it described as an “extensive history” of “violence.”

¶ 40 The trial court next focused on the statutory aggravating and mitigating factors, finding several aggravating factors present, including that defendant’s conduct caused serious harm, he had a prior criminal history, and the sentence was necessary to deter others. Regarding the mitigating factors, the court found that he had two children who he helped care for as well as his mother. It also reiterated that defendant did not initiate the confrontation with Aguilar, but determined that Aguilar’s behavior did not constitute strong provocation to be considered a statutory mitigating factor.

¶ 41 Defendant subsequently filed an unsuccessful motion to reconsider his sentence, arguing in part that it was excessive. This appeal followed.

¶ 42

## II. ANALYSIS

¶ 43 On appeal, defendant raises two contentions of error, both related to posttrial procedures. First, he argues the trial court erred when it failed to appoint him new counsel after he raised *pro se* claims of ineffective assistance of trial counsel. Second, he argues his sentence was excessive.

¶ 44 A. Denial of *Krankel* Motion

¶ 45 We begin by addressing defendant's contention that the trial court erred in failing to appoint him new counsel after he made claims that his trial counsel had been ineffective. Specifically, defendant argues that new counsel should have been appointed because his trial counsel possibly neglected his case when she failed to present evidence of his mental illness to support the theory at trial that defendant committed second-degree murder based on an unreasonable belief of the need to defend himself.

¶ 46 Both the United States and Illinois Constitutions guaranteed a criminal defendant the right to effective assistance of counsel. *People v. Hale*, 2013 IL 113140, ¶ 15 (citing U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, § 8). Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), Illinois courts utilize a two-part test to determine whether a defendant received ineffective assistance of counsel that focuses on his attorney's performance and on the resulting prejudice. *People v. Brown*, 2017 IL 121681, ¶ 25. Under the performance prong of the *Strickland* test, which is relevant here, the critical inquiry is whether the attorney's performance fell below an objective standard of reasonableness. *Id.*

¶ 47 Generally, there is a strong presumption that trial counsel's actions or inactions were the product of a reasonable trial strategy. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference

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accorded counsel's decisions on review." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). In fact, counsel is generally immune from claims of ineffective assistance of counsel based on challenges to strategic choices. *Enis*, 194 Ill. 2d at 378. Among the decisions our courts have consistently found to be strategic are what theory of defense to pursue at trial (*People v. Morris*, 2013 IL App (1st) 110413, ¶ 74), what evidence to present at trial (*People v. Williams*, 2017 IL App (1st) 152021, ¶ 38), and what witnesses to present at trial (*People v. Rogers*, 2015 IL App (2d) 130412, ¶ 71). However, in certain circumstances, counsel's failure to support a defense with available evidence may be ineffective assistance. *People v. York*, 312 Ill. App. 3d 434, 437 (2000) (explaining that these circumstances include when counsel failed to investigate and present information that could have corroborated the defendant's trial testimony, failed to subpoena emergency 911 recordings, or failed to interview a witness before testifying at trial).

¶ 48 Pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), when a defendant has challenged the performance of his trial counsel, the trial court must undertake an inquiry into the factual basis of those claims to determine whether or not the defendant needs the appointment of new counsel to investigate his *pro se* claims of ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. The court can accomplish this initial inquiry by having a brief discussion with the defendant about his allegations, discussing the allegations with trial counsel, or making a determination based on merit of the allegations and its knowledge of counsel's performance. *Id.* ¶ 12. After this inquiry, if the court determines that the defendant's claims are meritless or pertain to matters of trial strategy, it need not appoint new counsel and may simply deny the *pro se* motion. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). But if the defendant's claims show possible neglect by trial counsel, the court should appoint him new counsel, who can then investigate his claims and present them at a hearing. *Id.* We will only reverse the trial court's decision to deny the defendant

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the appointment of new counsel if the ruling was manifestly erroneous. *People v. Cook*, 2018 IL App (1st) 142134, ¶ 106. Manifest error is error that is indisputable, plain and clearly evident. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 49 Defendant's argument that his trial counsel possibly neglected his case focuses on the offense of second-degree murder, which is considered a lesser-mitigated offense of first-degree murder (*People v. Wilmington*, 2013 IL 112938, ¶ 48), because the offenses share the same elements, but the presence of a mitigating factor reduces the offense from first-degree murder to second-degree murder. *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 53. One such factor is where the defendant, at the time of the killing, believed that the circumstances justified his use of self-defense, but his belief was unreasonable. 720 ILCS 5/9-2(a)(2) (West 2006). The distinction between first-degree murder and second-degree murder "is the recognition by law of human failings under stress and this distinction is designed to aid the person who, through no fault of his or her own, finds him or herself in a situation where one's judgment may be impaired." *People v. Williams*, 215 Ill. App. 3d 800, 808 (1991). However, to reduce first-degree murder to second-degree murder, the defendant must actually believe, though unreasonably, that another person is a physical threat. *People v. Yates*, 195 Ill. App. 3d 66, 70 (1990).

¶ 50 Defendant highlights that, before trial, Dr. Robert Hanlon opined that his behavior at the time of the shooting "was causally related to his mental illness" and numerous other doctors diagnosed him with mental health conditions, including bipolar disorder, and found that his conditions impaired his judgment and thinking. Defendant argues that such evidence directly supported a theory of second-degree murder based on an unreasonable belief of self-defense because the evidence could explain why he believed he was justified in defending himself with a firearm. Yet, according to defendant, when trial counsel was asked to respond to his claim that

she failed to present evidence of his mental illness, she failed to explain why she did not present this evidence and instead asserted that she could not raise an insanity defense.

¶ 51 In this case, we cannot find the trial court's decision to not appoint defendant new counsel was manifest error. The court conducted a detailed investigation of the factual circumstances surrounding all of his *pro se* claims of ineffective assistance of counsel and allowed trial counsel an opportunity to respond to the allegations. After this thorough inquiry, the court entered a written order, finding in relevant part that a psychosis disorder is not a defense, but that counsel argued self-defense at trial while also providing the jury with second-degree murder instructions. The court added that counsel presented two witnesses to support the self-defense theory to show that Aguilar had a propensity for violence. Given that the trial court presided over the case, was intimate with the facts, in particular defendant's mental health issues, and observed trial counsel's representation of defendant before and during trial, it was in the best position to determine whether counsel possibly neglected defendant's case to warrant the appointment of new counsel.

¶ 52 Additionally, defendant's criticisms of trial counsel's choice of evidence and witnesses are plainly based on matters of trial strategy (see *Williams*, 2017 IL App (1st) 152021, ¶ 38; *Rogers*, 2015 IL App (2d) 130412, ¶ 71), which are entitled to a strong presumption of reasonableness. See *Enis*, 194 Ill. 2d at 378. In light of these facts, the trial court had a proper justification to summarily reject defendant's claims. See *Moore*, 207 Ill. 2d at 78; see also *People v. Chapman*, 194 Ill. 2d 186, 230-31 (2000) (holding that the defendant's allegations of ineffective assistance of trial counsel did not show possible neglect and the trial court did not err in failing to appoint new counsel for him where his claim concerned trial counsel's failure to call two witnesses which was purely a matter of trial strategy).



¶ 53 Furthermore, we note that apparently neither the trial court nor defense understood defendant's *pro se* claims concerning his mental illness to refer specifically to counsel's failure to present such evidence in support of a second-degree murder conviction, which is why counsel never specifically addressed the reason she chose not to present this evidence, including the testimony of Dr. Hanlon. However, there could have been various reasons. For instance, evidence about defendant's mental illness would not have necessarily helped defendant's case. Although trial counsel focused her closing argument on convincing the jury that defendant was justified in shooting Aguilar based on self-defense, or a reasonable belief of the need to defend himself, counsel did request jury instructions on second-degree murder based on an unreasonable belief of self-defense and a corresponding verdict form. At all times during the case, counsel's primary goal was to have the jury acquit defendant based on self-defense and to have second-degree murder as the backup option if an acquittal on self-defense did not succeed. Given this strategy, counsel could have determined that evidence of defendant's mental illnesses would have detracted from the jury's consideration of self-defense, *i.e.*, a reasonable belief of the need to defend himself, and made defendant seem irrational and impulsive at the time of the shooting, rather than controlled and reasonable, which could have suggested to the jury that his belief of the need to defend himself was actually unreasonable. In this regard, counsel could have concluded that presenting evidence of defendant's mental illnesses would have lessened the chance of an acquittal, the best possible result for defendant and counsel's primary defense.

¶ 54 On the other hand, because an obviously critical component to a defense premised upon an unreasonable belief of self-defense is an actual, subjective belief of the need to use self-defense (see *People v. Washington*, 2012 IL 110283, ¶ 56), counsel also could have determined that evidence of defendant's mental illnesses would not have provided any meaningful insight

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into that actual, subjective belief. See *People v. McDonald*, 329 Ill. App. 3d 938, 951 (2002) (finding the trial court properly refused to provide the jury with an instruction on second-degree murder based on an unreasonable belief of self-defense where the expert testimony at trial “did not establish the defendant actually perceived” the victim and his family to be “an imminent physical threat”); *Yates*, 195 Ill. App. 3d at 69-70 (finding the trial court properly refused to provide the jury with an instruction on second-degree murder based on an unreasonable belief of self-defense where the expert testimony at trial “did not establish that the defendant actually perceived the victim’s blackmail attempt as a physical threat”); *Gutierrez v. Anglin*, 706 F.3d 867, 872-74 (7th Cir. 2013) (relying on *McDonald* and *Yates* and rejecting the defendant’s action for a writ of *habeas corpus* premised on his trial counsel’s failure to present evidence of his history of mental illness to support the theory at trial of second-degree murder because that history “would have been of little to no help as to the critical issue of whether he actually believed that he was physically threatened”). In other words, while expert testimony could have provided insight into defendant’s history of mental illnesses and the manifestation of symptoms, counsel may have determined that this evidence offered little insight into how defendant actually, subjectively perceived Aguilar on the morning of the shooting. Thus, counsel could have decided not to present such evidence because of its minimal impact on the critical issue to an unreasonable belief of self-defense theory of whether defendant himself actually believed that he was physically threatened by Aguilar.

¶ 55 Because defendant’s criticisms of trial counsel’s choice of evidence and witnesses are matters of trial strategy, and there were various reasons why counsel might have chosen not to present evidence of defendant’s mental illnesses at trial, her performance was objectively

reasonable and there was no basis to find that counsel possibly neglected his case. Consequently, the trial court's failure to appoint defendant new counsel was not manifest error.

¶ 56 Additionally, given that there were various reasonable trial strategies that involved not presenting evidence of defendant's mental illnesses, we must reject defendant's further argument that his attorney failed to present this evidence based on an erroneous belief that it would have only been relevant to the issue of sanity. Although counsel responded to defendant's allegations and asserted that she could not raise an insanity defense, nothing in the record indicates to us that she represented defendant under a mistaken belief that evidence of his mental illnesses would have only been relevant to the issue of sanity.

¶ 57 Defendant also argues that his trial counsel never mentioned his alleged intoxication at the time of the shooting in closing argument to support a second-degree murder conviction. However, when defendant made his *pro se* claims of ineffective assistance of counsel to the trial court, he never claimed that counsel failed to present evidence of his alleged intoxication to the jury. Consequently, defense counsel never responded to such an allegation and the court never analyzed such an allegation. Because his alleged intoxication at the time of the shooting was not raised in the trial court, we will not entertain this argument made for the first time on appeal. See *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 25 (stating generally that, where the defendant fails to raise an argument before the trial court, the appellate court will not consider that argument on review). Accordingly, the trial court properly decided against appointing defendant new counsel.

¶ 58 B. Excessive Sentence

¶ 59 Defendant next contends that his 65-year sentence for first-degree murder was excessive in light of the substantial mitigating evidence present, specifically his mental illnesses, his

addiction to drugs and alcohol, and the mitigating facts of the case itself. Additionally, defendant argues that the trial court overstated his criminal background in rendering his sentence.

¶ 60 Generally, the sentencing range for first-degree murder is between 20 and 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 2006). However, where, during the commission of the offense, the defendant has personally discharged a firearm resulting in death, the trial court must add at least 25 years' imprisonment and up to natural life imprisonment to the sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). Consequently, the sentencing range for defendant was between 45 years' and natural life imprisonment.

¶ 61 The Illinois Constitution requires trial courts to impose sentences according to the seriousness of the offense and with the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11. The most important factor in determining a sentence is the seriousness of the offense. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. And although substantial mitigating evidence may be present, it is not entitled to greater weight than the seriousness of the offense. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). In determining the proper sentence, trial courts are given broad discretionary powers (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), and a sentence will not be reversed absent an abuse of that discretion. *People v. Geiger*, 2012 IL 113181, ¶ 27. Reviewing courts give such deference to the trial court because it had "the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Additionally, when mitigating evidence has been "presented to the trial court, it is presumed, absent some indication other than the sentence itself to the contrary, that the court considered it." *People v. Busse*, 2016 IL App (1st) 142941, ¶ 23.

¶ 62 When a sentence falls within the statutory range, it is presumed to be proper (*People v. Knox*, 2014 IL App (1st) 120349, ¶ 46), and may only be “deemed excessive and the result of an abuse of discretion” where it is “greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *Stacey*, 193 Ill. 2d at 210. When reviewing the trial court’s sentence, “the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently.” *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 63 In the present case, because defendant’s 65-year sentence for first-degree murder is within the statutory range for the offense, we must presume it is proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, we do not find the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. Defendant shot and killed Juan Aguilar after Aguilar put his arms around defendant’s girlfriend and asked her if she had any cousins or sisters for him. As the trial court noted, Aguilar’s behavior was boorish and juvenile, but the evidence did not credibly reveal that he posed a physical threat to defendant. At its core, defendant’s shooting was for no other reason than because Aguilar had disrespected defendant’s girlfriend. See *Kelley*, 2015 IL App (1st) 132782, ¶ 94 (the most important factor in determining a sentence is the seriousness of the offense).

¶ 64 Although defendant claims there is substantial mitigating evidence that warrants a reduction in his sentence, the trial court was plainly aware of all this evidence and considered it. With regard to defendant’s mental health issues, initially, we note such information is not inherently mitigating. See *People v. Coleman*, 183 Ill. 2d 366, 406 (1998); *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 64. Nevertheless, throughout the time it presided over defendant’s case, the court took his mental health seriously, including ordering *sua sponte* a fitness hearing

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prior to sentencing. Additionally, the court presided over multiple pretrial fitness hearings, reviewed numerous mental health reports of defendant's and observed the testimony of doctors who evaluated him. And critically, during defendant's sentencing hearing, the court discussed at length his mental health issues. Nothing from the record shows that the court failed to adequately consider defendant's mental health.

¶ 65 With regard to defendant's substance abuse issues, while the trial court did not explicitly discuss them while explaining its sentence, we presume the court considered "all relevant factors and any mitigation evidence presented." *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. Given that defendant's substance abuse issues were constantly referred to in his mental health reports and included as diagnoses, we have no doubt that the court was aware of this issue and considered it in sentencing defendant. We also reject any notion that the court failed to give adequate weight to the facts of the case. In discussing the sentence, the court observed that defendant did not initiate the confrontation with Aguilar, but concluded that Aguilar's behavior did not constitute strong provocation to mitigate his sentence. Lastly, contrary to defendant's argument, we find the court accurately characterized defendant's criminal history as "extensive" given his multiple felony and misdemeanor convictions.

¶ 66 In essence, defendant seeks to have this court weigh the sentencing evidence differently than the trial court, a request that we cannot accommodate. See *Knox*, 2014 IL App (1st) 120349, ¶ 46 (the reviewing court will not re-weigh the evidence the trial court relied on in sentencing the defendant, and it may not substitute its judgment for the trial court merely because it could or would have weighed the evidence differently). Accordingly, defendant's 65-year sentence for first-degree murder was not excessive.

¶ 67

### III. CONCLUSION

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¶ 68 For the foregoing reasons, we affirm the judgment and sentence of the circuit court of Cook County.

¶ 69 Affirmed.