2018 IL App (1st) 160158-U

No. 1-16-0158

Third Division
December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No.12 CR 17975 (01)
v.	)	Honorable Diane Cannon,
CLIFTON GOOD,	)	Judge, presiding.
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied a fair trial by the trial court or the State's comments during closing arguments. The court properly considered relevant sentencing factors and defendant's sentence did not violate his constitutional rights.

¶ 2 Defendant, Clifton Good, was sentenced to consecutive terms of 33 years and 32 years' imprisonment after a jury found him guilty of the attempted murders of Homer Gilbert and Allen Jackson. On appeal, he contends that: (1) he was denied a fair trial due to the trial court and the State's prejudicial remarks during closing arguments; (2) the trial court considered

improper aggravating factors in sentencing; (3) his sentence violates the Eight Amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution; and (4) trial counsel was ineffective for failing to raise these constitutional arguments in post-trial motions.

¶ 3 I. BACKGROUND

¶ 4 We begin with a brief overview of the events leading up to these proceedings and a discussion of the evidence adduced at trial. Additional facts will be discussed in connection with the issues to which they pertain. On July 28, 2012, defendant was arrested after being identified as one of the four assailants who fired multiple bullets at Homer Gilbert and Allen Jackson on July 9, 2012. Another assailant, Charles Suggs, was identified and charged as a co-defendant at a later date. A grand jury indicted defendant and Suggs on multiple charges related to the July 9 shooting. Suggs plead guilty to the charges prior to trial. Defendant's two-day jury trial concluded with the jury returning guilty verdicts on all counts.

¶ 5 A. The Shooting

¶ 6 Gilbert testified that on July 9, 2012, he worked in a general contracting business and had spent the whole day on a project at Harvard and 115th Street converting an abandoned building into a grocery store. Jackson, who served as the crew's foreman, was with Gilbert. Around 9 p.m., they finished cleaning the work site and packed their equipment into a 10-foot box trailer attached to the company truck.

¶ 7 Prior to leaving the work site, Gilbert was approached by two unfamiliar women asking for bus fare. Gilbert was carrying approximately $2,500 in cash on him which he had received that day for additional work on the store. Gilbert stated he "went into [his] pocket and sorted through some bills" before giving the women $3. Later, Gilbert and Jackson got

into the truck and drove away. Gilbert turned from 115th Street onto Stewart Street and saw the same two women walking down an alley with a group of four men wearing white t-shirts. Gilbert also heard a woman yelling "Allen" as he and Jackson continued down the street.

¶ 8 Gilbert asked Jackson if he knew and wanted to talk to the woman calling after them. Jackson did, so Gilbert stopped and reversed the truck to where the woman, later identified as Joanne McClennan, stood. Gilbert and Jackson remained in the truck idling in front of an elementary school. Gilbert looked around and saw people sitting outside on their porches, a group of people playing jump rope, and another group of girls sitting in the car next to his. McClennan stood by the truck's passenger window and spoke with Jackson. During their conversation, Gilbert noticed what appeared to be the same four men he saw earlier in the alley walking down the middle of the street and watching them through his windshield.

¶ 9 The men approached the truck, split into two groups, and stood on either side. Suddenly, two guns were pointed at Gilbert's head through the open window of the truck. Gilbert identified defendant as the assailant closest to him, who pressed the gun against his temple and demanded Gilbert "cut the car off, get out and give up the money." He then heard McClellan say, "What are you guys doing." Gilbert glanced at the guns wielded by the two assailants on the passenger side, but kept his attention focused on defendant.

¶ 10 Gilbert tried to remain calm and did not move or react. Defendant continued to issue demands to get out of the car and give up the money. The other assailants appeared confused by Gilbert's silence and looked at one another over the back of the truck. Gilbert felt the second assailant's gun start to come away from his head. However, defendant became more aggressive in his demands and with his gun. Gilbert realized that the situation was escalating and attempted to push the guns away with his left hand as he stepped on the gas.

¶ 11 Gilbert's escape attempt was slowed by the heavy trailer. Defendant and the other assailant standing near him opened fire. He heard six or seven shots and felt like his left hand had exploded. Jackson shouted that he had been shot and Gilbert saw blood coming from Jackson's pants. Jackson directed Gilbert to drive to the hospital. Gilbert soon realized that blood had also covered his shirt and he felt a sharp pain in his chest. Gilbert was hospitalized for one week and treated for a gunshot wound to his chest, which passed "through-and-through" a few centimeters from his heart, and two shattered fingers which required bone grafts.

¶ 12 Jackson testified consistently with Gilbert regarding packing up the trailer before stopping to speak with McClellan on Stewart Street. However, he did not see the women who approached Gilbert. As he spoke with McClellan, he was shocked by the sudden appearance of the gun-wielding assailants. As the men surrounded them, he turned away from McClellan to look at defendant on the driver's side saying "Give it up" or something similar to Gilbert. Jackson recalled that McClellan asked the men "What are you guys doing," to which one of them responded "Granny step off." The next thing he remembered was hearing gunshots.

¶ 13 Jackson saw Gilbert try to grab one of the guns. However, a bullet fired from the driver's side of the car struck Jackson's left knee and passed through before lodging itself in his right knee. Jackson pleaded with Gilbert to take off because he had been shot. The pair arrived at the hospital where they were stabilized before being transferred to another trauma center. Jackson underwent knee surgery and had screws put in. However, the surgeons did not remove the bullet which now protrudes out of his right knee. After several days in the hospital, Jackson was released; however, he required nearly a year of physical therapy before he could walk again.

¶ 14 B. Identifying Defendant

¶ 15 After Gilbert was discharged from the hospital, he conducted a search online looking for "[a]nything that had to do with Stewart Street Boys, Stewart Boys, *** Stewart Gang, things like that" and found approximately 12 related videos online. Gilbert recognized defendant in one of the videos and shared the video with the police. A clip of the video without sound was entered into evidence and viewed by the jury.

¶ 16 The video clip featured groups of young men in the neighborhood around Stewart and 114th street. The video begins with title screens displaying the words "IDK Films," "Saun Don Feat. C Dot & Tebow," and "Stewart." The men are shown standing and sitting in front of several houses, at a playground, and around cars as they throw up hand signs, dance, and show off cash to the camera. Towards the end of the clip, Gilbert identified defendant among a group of young men dancing.

¶ 17 Gilbert testified that he also saw defendant in person on July 28, 2012. Gilbert returned to the area, where he had been shot, for the renovated grocery store's grand opening. The store owner and Gilbert were driving to pick up refreshments. At a stop sign, Gilbert looked out the window and saw defendant standing on the street corner. Gilbert stated he immediately recognized defendant and moved a distance away to where he felt safe to call the police. The police picked Gilbert up within minutes and they drove around the area until Gilbert spotted defendant again. Defendant was sitting on the front porch of a house, less than a block from the site of the shooting, with approximately seven other guys. Gilbert identified defendant for the police from the backseat of the police car leading to defendant's arrest that day.

¶ 18 Jackson testified that he was called to the police station on July 29, 2012, and he identified defendant from a lineup. He stated that he was certain of the identification because he had looked defendant in the eye before being shot and would never forget his face.

¶ 19 Alfonso Kennedy, a retired Chicago police officer, testified that in July 2012 he investigated the shooting. Kennedy interviewed both Gilbert and Jackson at the police station sometime between July 9 and July 28. During the interview, Jackson told Kennedy that his focus was on the offender on the passenger side of the vehicle holding the blue steel handgun and he could only identify the "smaller, light skinned defendant" on the passenger side of the truck.

¶ 20 On July 28, 2012, Kennedy and Sergeant Kimble accompanied Gilbert to a house where Gilbert had seen defendant. According to Kennedy, Gilbert identified defendant while "scooted down in the back" seat of the squad car. Kennedy and Kimble then left Gilbert in the car as they called other units to the area and approached defendant. In addition to arresting defendant, Kennedy and other officers created contact cards with the information of the other people present at the house.

¶ 21 Charles Suggs was one of the men whose information was collected on July 28. Kennedy later put together a photo array which included Suggs's picture. Jackson identified Suggs in the photo array and a physical lineup. Gilbert also identified Suggs in a lineup although he did not identify him on July 28 despite Suggs being present with defendant on the day of defendant's arrest.

¶ 22 C. Defendant's Alibi

¶ 23 Henry Good, defendant's father, testified that defendant lived with him, his wife, and several of defendant's siblings, during the summer of 2012. The family home is around 112th

and Normal. In early July 2012, defendant's uncle passed away and the funeral services were held in Mississippi. The entire family, except one son, left for Mississippi around 3 a.m. on Friday, July 6 and arrived at a relative's home around 2 p.m. After the service on Saturday, the family stayed the rest of the weekend and left Mississippi early in the morning on July 9, 2012. According to Henry, defendant and his family arrived home in Chicago around 7 p.m.

¶ 24 Henry testified that all the family members returning from the road trip stayed around the house swapping stories about the trip. Henry met up with a co-worker who helped him pick up his car from the city pound. He returned home from this errand between 8-9 p.m. and then also made a quick trip to the nearby liquor store to pick up drinks. Henry could not give a complete account of defendant's activities that night. However, he saw defendant walking around the house throughout the night, and testified that to his knowledge defendant never left the house and slept at home. Henry also briefly testified on redirect that defendant had a large forearm tattoo.

¶ 25 Matill Johnson, defendant's older sister, testified consistently with Henry about travelling to Mississippi for her uncle's funeral service. However, she testified that the family arrived home and unloaded their luggage between 8:30 and 9 p.m. After unloading the luggage, Matill saw defendant leave with their other brother James Good to pick up James's girlfriend Shanel. Matill testified that defendant and James were only gone for about 10-15 minutes. This was around the same time that Matill saw her father Henry leave with his co-worker who lived down the street to pick up his car. Henry returned with the car approximately half an hour later and Matill saw defendant go into the backyard with others to look at the car. Matill was not with defendant the whole night but believed he remained at home the rest of the night.

¶ 26 Shanel Gartley briefly testified that defendant and James picked her up around 9 p.m. on July 9, 2012 from her house. They returned to the Good's house within 5-10 minutes. Shanel spent the night at the Good's house and did not see defendant leave the house that evening.

¶ 27 James testified that the family arrived home in Chicago between 7:30 and 8:30 p.m. He took defendant with him to pick up Shanel around 9 p.m. and recalled being gone from the house for five to ten minutes. He did not see defendant leave the house at any other time that night and they both stayed in the house overnight. On cross-examination, James was pressed about his statement to the state's attorney's investigator in September 2014 which omitted his short trip with defendant to pick up Shanel. James also testified that he did not hear gunshots that night, nor did he see anyone run by their house.

¶ 28 II. ANALYSIS

¶ 29 A. Right to a Fair Trial

¶ 30 Defendant contends that he was denied the right to a fair trial where the trial court's comment on the credibility of defendant's alibi evidence intruded on the jury's fact-finding role. Defendant further contends that the State made improper and prejudicial comments by (1) stating that a witness did not testify because she was afraid of suffering retaliation and (2) repeatedly calling him a coward. Lastly, defendant argues that even if we find each argument alone does not constitute reversible error, the cumulative effect of the trial court and prosecutor's comments denied him a fair trial.

¶ 31 1. Trial Court's Comment

¶ 32 Defendant takes issue with the following exchange during closing arguments:

"[MR. MORASK, Defense counsel:] Now, we presented evidence of alibi. And alibi is a tricky thing. You know, everybody thinks an alibi, well, you're just calling

people that they know, they all love you, they all have a reason to lie so they're going to say whatever it is you want them to say.

MR. PATTAROZZI [Assistant State's Attorney]: Objection.

THE COURT: Sustained. There's been no—Sustained. That had[*sic*] will be stricken, alibi."

Defendant concedes in his reply brief that the issue on appeal is not whether the court erred in sustaining the objection. Thus, we do not discuss the propriety of the objection. He instead argues that, in sustaining the objection, the court disparaged defendant's alibi defense in front of the jury.

¶ 33 Defendant contends that the trial court revealed an improper opinion towards defendant's alibi defense and prejudiced him before the jury. The State first responds that defendant forfeited review of this issue because he failed to object to the comment or raise the issue in a post-trial motion. Defendant argues that forfeiture rules must be relaxed in this situation under the doctrine outlined in *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963), because an attorney should not be expected to object to the judge's comments or conduct during proceedings before that same judge. The Illinois Supreme Court has clarified that the *Sprinkle* doctrine should be applied only in extraordinary circumstances where objections would have "fallen on deaf ears." *People v. McLaurin*, 235 Ill. 2d 478, 485-89 (2009). Defendant cites the court's indication that it would not entertain any sidebars during the trial as giving rise to an extraordinary circumstance because he had no avenue to discuss any objectionable remarks by the trial court. Defendant further argues that if *Sprinkle* does not apply, we should still consider his claim under both prongs of plain error review. Under the doctrine espoused in *Sprinkle* or under plain error, we must first determine whether any error

occurred. *People v. Herron*, 215 Ill. 2d 167, 184 (2005) (a plain error analysis begins with the determination of whether error occurred).

¶ 34 Judges have broad discretion in presiding over trials; however, they are not allowed to make comments or insinuations displaying their opinion on a witness's credibility or counsel's arguments. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009). Judicial comments can amount to reversible error if the defendant establishes that the comments were "a material factor in the conviction or were such that an effect on the jury's verdict was the probable result." *People v. Sims*, 192 Ill. 2d 592, 636 (2000). Defendant bears the burden of proof to demonstrate prejudice. *People v. Wells*, 106 Ill. App. 3d 1077, 1086 (1982). See also *People v. Heidorn*, 114 Ill. App. 3d 933, 937-38 (1983) (court's improper remarks were harmless error and did not warrant reversal where, in view of the total circumstances of the case, they had no effect on the jury's verdict).

¶ 35 Defendant claims that the court's comment to strike "alibi" communicated to the jury that the court did not find defendant's alibi witnesses credible. He claims that the jury would give great weight to the court's "disparaging" of his defense. The State responds that the court's comment was only intended to strike defense counsel's injection of his personal opinion on alibis and that the court expressed no opinion on defendant's alibi defense.

¶ 36 We agree with defendant that the intent of the court's comment matters less than what the jury could have perceived the comment to mean. However, we do not agree with defendant's interpretation of the court's brief response to the State's objection. We do not find that the comment by the court injected any sign of hostility or had any disparaging effect on defendant or his defense. Defendant relies on an untenable interpretation of two words in the transcript to support his argument. Furthermore, the court stated in jury instructions, "Neither

by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be." A reasonable jury would not interpret the court's brief statements in ruling on the State's objection as disparaging defendant's alibi defense.

¶ 37 We also note that after the objection and ruling, defense counsel was allowed to continue arguing the merits of defendant's alibi without interruption or interjection. Defendant now complains that, after the objection and the "stricken, alibi" comment, his counsel did not use the exact word "alibi" for the remainder of closing arguments. The fact that the specific word was avoided does not detract from the fact that counsel was able to freely argue an alibi defense for the jury to hear and consider. Where the jury heard the alibi evidence and defendant's argument, the judge's comment could not have been a material factor in the jury's verdict. See *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 175 (citing *People v. Sims*, 192 Ill. 2d 592, 636 (2000)).We find that defendant has failed to meet his burden of proof on appeal. Having found no error, we must honor the procedural bar.

¶ 38 2. Prosecutor's Comments

¶ 39 Defendant argues that his conviction should be reversed because the State's improper remarks denied him a fair trial and resulted in his conviction. The State initially responds that defendant forfeited review of these issues by failing to preserve his claims. Defendant concedes that he failed to preserve these issues for appeal and asks this court to review the State's remarks under the plain-error doctrine. The plain error doctrine allows a reviewing court to consider unpreserved claims of error when: "(1) a clear or obvious error occurred 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, or (2) a clear or

obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Under plain-error review, the burden of persuasion remains with the defendant, and the first step is to determine whether any error occurred. *Id*. Absent error, there can be no plain error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 40 Defendant first argues that it was improper for the prosecutor to refer to him as a "coward." He maintains that the State improperly cultivated the jury's anger toward him by repeatedly calling him a "coward." The State responds that such a characterization does not amount to reversible error because the designation, although unfavorable, is warranted where defendant acted with co-offenders who bolstered his courage to act unlawfully. See *People v. Miller*, 101 Ill. App. 3d 1029, 1038-39 (1981).

¶ 41 During closing argument, the State stated the following:

> "It means that in Illinois the law recognizes that what one criminal can do, two can do better, and in this case four can do even better. There's strength in numbers. And criminals are cowards and they know that what they can do by themselves, they can do even better when they bring their three buddies along."

Later, the State returned to this notion and referred to defendant stating:

> "This is the face of the coward that won't let anybody drive down Stewart, his street, his turf, with hard earned cash because he wants it. This is the face of a coward who grabs three buddies and surrounded a truck of two hard working men and pointed guns in their face. This is the face of a coward who filmed him[*sic*] rap video in the children's play lot on that very same street."

¶ 42 The appropriate standard—*de novo* or abuse of discretion—for reviewing a prosecutor's allegedly improper comments is unresolved in our courts. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000). See also *People v. Green*, 2017 IL App (1st) 152513, ¶ 80 (noting that the districts of the appellate court remain divided on the issue). However, we do not need to determine which standard is appropriate at this time because our holding in this case would be the same under either. See *People v. Sandifer*, 2016 IL App (1st) 133397, ¶ 55 (declining to choose a standard of review and finding that it "need not resolve the appropriate standard of review" because under either standard the "holding is identical").

¶ 43 Prosecutors are afforded wide latitude in closing argument and have the right to comment upon the evidence presented and reasonable inferences based upon the evidence. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). We review the closing argument in its entirety and consider the challenged remarks in context to determine whether an error occurred. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). A prosecutor may not characterize a defendant as an "evil" person and cannot influence the jury to make a choice between good and evil. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). It is improper for the State to argue something which is only intended to inflame the passion or provoke the prejudice of the jury against the defendant without shedding any light on the question for decision. *People v. Smith*, 141 Ill. 2d 40, 60 (1990).

¶ 44 Even so, a comment that is simply unfavorable for the defendant does not warrant reversal of a conviction. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 45; *People v. Manley*, 222 Ill. App. 3d 896, 911-12 (1991). Improper comments during closing argument can constitute reversible error "only when they engender substantial prejudice against

defendant such that it is impossible to say whether or not a verdict of guilty resulted from those comments." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005) (citing *People v. Nieves*, 193 Ill. 2d 513, 533 (2000)). In *Manley*, the court rejected the argument that the State's reference to the defendant as a "depraved human being" warranted reversal. *Manley*, 222 Ill. App. 3d at 912. The court held that any prejudice suffered from the inflammatory remark was offset by the court's admonishment to the jury that counsel's comments during closing arguments should be disregarded when not based upon evidence. *Id*. Likewise, in *Jackson*, the court rejected an argument for reversal where the State characterized the defendant as a coward and the ultimate villain. *Jackson*, 2012 IL App (1st) 092833, ¶ 45. The court reasoned that references to the defendant as a coward and villain were "clearly the prosecutor's opinion and when measured against the instructions given by the court, [they] cannot be said to be substantially prejudicial." *Id*.

¶ 45 We cannot say that the State committed a clear or obvious error in calling defendant a coward. The State did not attempt to influence the jury to make a choice between "good and evil." In calling attention to the fact that defendant acted with three others and used guns to intimidate the victims, the State attempted to highlight that defendant's actions were emboldened by the disparity in power between the victims and the assailants. The jury was later instructed that that comments made by counsel during opening statements and closing arguments were not evidence and that such comments should be disregarded when not based upon evidence adduced. Even if the term "coward" was used to specifically inflame the jury, we find that, similar to the cases of *Manley* and *Jackson*, any prejudice was offset by the trial court's admonishment. Thus, we hold that defendant has not proven that the State's reference

to defendant as a coward constituted a material factor in defendant's conviction or resulted in substantial prejudice to defendant.

¶ 46 In his second challenge to the State's closing arguments, defendant claims he was prejudiced by the State's unsupported argument that an eyewitness to the offense did not testify because she was afraid of retaliation. As support, he cites *People v. Mullen*, 141 Ill. 2d 394 (1990), where the court found it was highly prejudicial for the State to suggest without supporting evidence that witnesses were reluctant to testify because they were afraid that the defendant would shoot them in the back in retaliation. *Mullen*, 141 Ill. 2d at 405.

¶ 47 During closing argument, defense counsel stated the following: "The only other person who testified—You know, we didn't hear from Ms. McClellan who is Allen Jackson's friend who was next to the car on the passenger's side at the time that this incident occurred. But we heard from Mr. Jackson." In rebuttal, the State argued as follows:

> "The defense says where is she? Where is she? Well, gee, where do you think she would be? Remember she is talking to Allen Jackson at the time that the four individuals come and flank the truck, that they all have guns, one being the defendant. She's still talking and they just reach around her. Why? Because she knows what's up and they know what's up. Do you think after the car gets shot at like that by people she knows—Remember, she's—Allen told you she said, what are you guys doing? Do you think she's going to come into this court and testify against the guy that she knows because she was there when he was willing to pull that trigger? This is what happened in a neighborhood where armed robbery happens quite frequently, witnesses don't come to court because they know if he's willing to shoot for a buck, he's willing to shoot not to be convicted."

Defense counsel objected on the grounds that the evidence did not support these statements. The court overruled the objection stating that "[t]he jury has heard the evidence." The State responds that the complained of comments were both based on the evidence presented and responsive to defense counsel's statements and therefore proper.

¶ 48 As previously stated, we look at the closing arguments in their entirety and overturn a guilty verdict only where the prosecutor's comments resulted in substantial prejudice. Improper comments alone will not warrant reversal unless they are a material factor in convicting the defendant. *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. Here, the State did not explicitly suggest that defendant had threatened McClellan to prevent her from testifying. See *People v. Green*, 2017 IL App (1st) 152513, ¶¶ 88-91 (finding that there is a difference between improper insinuations that a defendant had threatened witnesses to change their testimony and a proper argument that a scared witness recanted where the State makes no specific reference to what had scared the witness). The State argued that, having been present during the commission of the offense, any witness in McClellan's position would believe a defendant was willing to use violence to avoid a conviction in the same way he was willing to during the offense. These statements did not allege that defendant had specifically threatened the witness or posit that the State knew of any witness interference. Rather, the statements generalized a theory of why witnesses, like McClellan, would be unwilling to testify in court.

¶ 49 Moreover, a defendant cannot claim error where the prosecutor's remarks are in reply to and invited by defense counsel's argument. *People v. French*, 2017 IL App (1st) 14181572, ¶ 48. In this case, defense counsel first argued that the State's case could not be believed because it was uncorroborated and highlighted McClellan's missing testimony as support. In

response, the State argued that there was a plausible explanation for McClellan's absence from the trial. Thus, the defendant cannot be heard to complain where his counsel invited the State's response.

¶ 50 Defendant cites *Mullen* as similar to the case at bar. However, *Mullen* is distinguishable because the court found that the State had first characterized the witnesses as "scared young boys" in its closing argument. *Mullen*, 141 Ill. 2d at 406. Thus, the State could not argue that its comments were responsive to defense counsel's arguments where the State initiated the reference to and later commented again on the witnesses' fear. *Id.*

¶ 51 We find defendant's case similar to *Green* where the defense counsel attempted to discredit the State's key witness by arguing that his uncorroborated testimony should not be trusted where the State failed to obtain the testimony of other witnesses who were present during the offense. *Green*, 2017 IL App (1st) 152513, ¶ 93. The State then argued in rebuttal that their witness was credible and explained that other witnesses could not be found because of the community's hostility toward the police and a general unwillingness to cooperate. *Id*. ¶¶ 92-94 The court ruled that the State's remarks were proper as a response to the defense's argument. *Id*. ¶ 94

¶ 52 Defendant has not met the substantial burden of showing that the State's remarks during closing argument resulted in prejudice which constituted a material factor in his conviction. The comments of which defendant complains were proper and fell far short of the clear or obvious error needed to avert forfeiture and we cannot say that defendant was denied a fair trial. As we have found no error in the State's comments, there can be no plain error. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 64.

¶ 53 3. Cumulative Error

¶ 54 Defendant further argues that when his three claims are reviewed together, they constitute cumulative error resulting in prejudice that denied him his constitutionally protected right to a fair trial. However, we have found each of his above claims meritless. Having found no error, we cannot find that there was prejudicial cumulative error. See *People v. Caffey*, 205 Ill. 2d 52, 118 (2001) (defendant was not entitled to a new trial on the basis of cumulative error where no error occurred at all).

¶ 55 B. Sentencing

¶ 56 During the sentencing hearing, the court acknowledged that it had reviewed the presentence investigation report. Defendant noted that the report contained incorrect references to a gang affiliation. The State presented victim impact statements from Gilbert, who appeared in person, and Jackson, who submitted a written statement, detailing the permanent injuries to their physical well-being, earning capacity, as well as their mental and emotional states. In his statement, defendant's father asserted defendant's innocence. Defendant also addressed the court and proclaimed his innocence. He rejected the notion that he would steal from others, citing his connections to the community and opportunities to earn money legitimately. Defendant also spoke to his own past experience of being shot in the leg while walking in his neighborhood.

¶ 57 The State argued for consecutive sentences because severe bodily injury had occurred. 730 ILCS 5/5-8-4 (d)(1) (West 2012) ("The court shall impose consecutive sentences *** [where] one of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury"). Defense counsel argued that the State had failed to prove severe bodily injury because of the lack of medical evidence regarding the extent of the victim's injuries. In its ruling, the court found

that despite the lack of medical evidence, the victims testified clearly and credibly. It stated that a gunshot wound to the chest which passed through near one's heart was sufficient to demonstrate severe bodily injury. The court continued, "[I]t's really a situation where we have, by the grace of God, victims surviving ***. It's quite likely that these could have been two murders that the defendant was facing with a mandatory life sentence."

¶ 58 The court commented on defendant's criminal history noting his "arrests after arrests" in reference to a battery conviction as a juvenile for which defendant was sentenced to supervision, which was later changed to probation, and which ultimately, was terminated unsatisfactorily. Lastly, the court noted that defendant came from a loving family who had supported him. The court sentenced defendant to 33 and 32 years for the attempted murders of Homer Gilbert and Allen Jackson, respectively, to be served consecutively for a total of 65 years' imprisonment. The remaining counts, for which the jury returned guilty verdicts, merged.

¶ 59 The court denied defendant's motion to reconsider which argued that: (1) defendant's sentence was excessive in view of defendant's background and his participation in the offense, (2) the court improperly considered factors that were implicit in the offense as aggravation, and (3) that consecutive sentencing was improper because severe bodily injury was not shown.

¶ 60 1. Factors in Aggravation

¶ 61 Defendant argues that the trial court improperly considered factors inherent to the crime itself and his prior arrest as a juvenile when sentencing him. He asks this court to vacate his sentence and remand for resentencing.

¶ 62 A trial court's sentencing determination is afforded great deference because the trial court is in the best position to determine the appropriate sentence. *People v. Reed*, 376 Ill. App. 3d 121, 127 (2007). The trial court has wide latitude in assigning any sentence within the applicable statutory range, given that it does not consider incompetent evidence, improper aggravating factors, or fail to consider pertinent mitigating factors. *People v. Perkins*, 408 Ill. App. 3d 752, 762–63 (2011). On appeal, sentences within the statutory limits are reviewed for abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Only when a sentence greatly varies from the spirit and purpose of the law or is so manifestly disproportionate to the nature of the offense may a reviewing court alter a sentence. *Id* "Relevant factors in determining an appropriate sentence include the nature of the crime, protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects and youth." *People v. Starnes*, 374 Ill. App. 3d 132, 143 (2007). We cannot alter a sentence simply because we may weigh the sentencing factors differently. *Alexander*, 239 Ill. 2d at 212-213. Moreover, we will "consider the record as a whole, rather than focusing on a few words or statements by the trial court." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). "An isolated remark made in passing, even though improper, does not necessarily require that defendant be resentenced." *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007) (quoting *People v. Fort*, 229 Ill. App. 3d 336, 340 (1992)).

¶ 63 Defendant argues that the court improperly considered as an aggravating factor that the victims could have died even though it is inherent in the nature of the offense of attempted murder. The prohibition is "against the use of a single factor both as an element of a defendant's crime and as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed." *People v. Gonzalez*, 151 Ill. 2d 79, 83–84 (1992).

In murder cases, consideration of the victim suffering serious harm, which is inherent in the offense, as an aggravating factor is improper; however, consideration of the "force employed and the manner" of death is a proper aggravating factor. See *People v. Joe*, 207 Ill. App. 3d 1079, 1086 (1991) (citing *People v. Saldivar*, 113 Ill. 2d 256, 271 (1986)).

¶ 64 Contrary to defendant's argument, the court's comments regarding the fact that victims could have died were made in reference to whether or not serious bodily harm was proven to justify concurrent sentencing. The court did not repeat such statements when discussing the mitigating and aggravating factors in determining defendant's sentence. Although defendant argues that it must have been on the court's mind, we trust that our trial court judges consider only those appropriate sentencing factors unless there is evidence to the contrary. As this was the only instance in the record that the court mentioned the fact that the victims could have died, and it was an appropriate comment in context, we find that the court did not improperly consider this as a factor in aggravation.

¶ 65 Defendant also argues that the court improperly considered his juvenile arrest as a factor in aggravation. Defendant contends that consideration of "bare arrests or pending charges" violates a defendant's right to fair sentence because these constitute unreliable evidence. However, the trial court did not raise the issue of pending charges or bare arrests. Rather, the trial court noted that defendant had been arrested as a juvenile and rehabilitation efforts following that arrest had failed. Defendant was initially given a sentence of supervision, yet he violated the terms of his sentence twice. The trial court's comments about defendant's arrests were an expression of the court's view that defendant's rehabilitative prospects were low. A defendant's rehabilitative prospects are a relevant and appropriate factor to consider in sentencing. *Starnes*, 374 Ill. App. 3d at 143.

¶ 66 Defendant's claims focus on a few comments in isolation to argue that the court considered improper aggravating factors during sentencing. Viewed in context, we find that the court's comments were made in relation to proper sentencing factors.

¶ 67 2. Constitutional Challenges

¶ 68 Defendant further challenges his sentence as unconstitutional on two grounds: (1) he contends that the Eighth Amendment protections against *de facto* life sentences afforded to minors during sentencing should be extended to him, where he was only 18 years and 9 months old at the time of his offense; and (2) he contends that the mandatory sentencing scheme precluded the court from meaningfully considering his youth and rehabilitative potential in violation of Illinois' proportionate penalties clause. Alternatively, defendant contends that trial counsel's failure to raise an as-applied constitutional challenge during his motion to reconsider constituted ineffective assistance of counsel.

¶ 69 The State responds that defendant's challenges are improper on appeal because they were not raised before the trial court and therefore forfeited. Further, the State contends that defendant's attempt to circumvent the procedural bar by arguing ineffective assistance of counsel should fail because defendant cannot establish prejudice or counsel's deficiency.

¶ 70 a. Eight Amendment

¶ 71 The Eight Amendment of the United States Constitution prohibits "cruel and unusual punishment" and is applicable to the states through the Fourteenth Amendment. U.S. Const., amends. VIII, XIV; *People v. Davis*, 2014 IL 115595, ¶ 18. Cruel and unusual refers not only to "inherently barbaric punishments" but those "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010). In *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the United States Supreme Court held that "mandatory life without parole for those under the age of 18

at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Lengthy sentences for juveniles operate as *de facto* life sentences and implicate *Miller* protections as well. See *People v. Reyes,* 2016 IL 119271 (holding that a 97-year prison term constituted a *de facto* life sentence).

¶ 72 Although defendant was 18 years and 9 months old at the time of his offense, he argues that the *Miller* analysis for minors under the age of 18 should be applicable to him. He cites several cases (see e.g., *People v. Williams*, 2018 IL App (1st) 151373, ¶ 19; *People v. Harris*, 2016 IL App (1st) 141744; and *People v. House*, 2015 IL App (1st) 110580, ¶¶ 94-95) arguing that this court has rejected a bright-line rule distinguishing minors from adults at the age of 18. Defendant then contrasts his case with *People v. Gipson*, in which this court rejected an as-applied challenge under the Eighth Amendment by a defendant who was 15 years old at the time of his offense. 2015 IL App (1st) 122451. In *Gipson*, this court held that the defendant was not subject to *de facto* life sentence because his projected release date and life expectancy provided for him to "spend the last several years of life outside of prison." *Id.* ¶ 66. Defendant argues that, unlike the defendant in *Gipson*, his projected life expectancy shows he will not survive his prison sentence and we therefore must reverse his sentence.

¶ 73 We reject defendant's reliance on these Illinois appellate court cases for an extension of *Miller* to young adults over the age of 18. In *People v. Harris*, decided during the pendency of this case, our supreme court stated that, "for sentencing purposes, the age of 18 marks the present line between juveniles and adults." 2018 IL 121932, ¶ 61. Thus, the court rejected any claim for extending *Miller* and the related Eighth Amendment analysis to offenders older than 18. *Id*. Therefore, defendant's argument must fail.

¶ 74 b. Proportionate Penalties

¶ 75 Defendant argues that the court was stripped of its discretion to consider his age, the characteristics of youth, and his capacity for rehabilitation in violation of the proportionate penalties clause where it was required to sentence him to a minimum of 62 years' imprisonment. Defendant faced a sentencing range of 6 to 30 years for attempted murder which is a Class X felony. 720 ILCS 5/8-4(a); 5/9-1(a)(1); 730 ILCS 5/5-4.5-2.5(a) (West 2012). Defendant was also subject to a mandatory 25-year enhancement for each count of attempted murder where the jury found that his use of a firearm proximately caused great bodily harm to each of the victims. 720 ILCS 5/8-4(c)(1)(D) (West 2012).

¶ 76 The Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, Art. I, § 11. To succeed on a proportionate penalties claim, the defendant must show either (1) that the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, (2) that similar offenses are compared and the conduct that creates a less serious threat to the public health and safety is punished more harshly; or (3) that identical offenses are given difference sentences. *People v. Klepper*, 234 Ill. 2d 337, 348-49 (2009); see also *People v. Miller*, 202 Ill. 2d 328, 338 (2002).

¶ 77 Defendant fails to sufficiently argue that his sentence shocks the moral sense of the community, is punished more harshly than similar offenses, or that he was given a different sentence from another defendant with an identical offense. Defendant's argument focuses on drawing comparisons between his case and *People v. Brown*, 2015 IL App (1st) 130048, ¶ 46, *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 69, and *People v. House*, 2015 IL App (1st) 110580, ¶ 101. However, the cases of *Brown* and *Gipson*, are inapposite because they involved juvenile offenders rather than young adults. See *People v. Thomas*, 2017 IL App

(1st) 142557, ¶ 33 (distinguishing between the analysis under the proportionate penalties clause applicable to juvenile and adult offenders in regards to mandatory firearm enhancements). Furthermore, *House* is distinguishable because the defendant in that case was found guilty under a theory of accountability and did not pull the trigger. *House*, 2015 IL App (1st) 110580, ¶ 101.[1] Conversely, defendant here was convicted after both victims identified him as the assailant who opened fire when they did not comply with his demands to give up their money. Thus, the analysis in *House* which considered a less serious offense and therefore warranted a less serious sentence is inapplicable here.

¶ 78 Defendant briefly argues that his potential for rehabilitation was shown by his statements during allocution, his cooperation with the presentencing interview, and his stable home life and we should remand for resentencing or shorten his sentence outright. However, we do not find that his sentence violates the proportionate penalties clause. Thus, we are not at liberty to second-guess the trial court and reweigh the sentencing factors to impose a different sentence. Additionally, the trial court's findings suggest that the court would have imposed a similar sentence even if it had discretion. The trial court found that defendant came from a stable, loving family and yet had been arrested before and unable to successfully complete his sentence as a juvenile. Furthermore, defendant continually denied his involvement in the offense and showed no remorse. The offense was serious in nature and defendant was the main aggressor out of the four assailants. Thus, the trial court found that a lengthy sentence was appropriate and we do not disagree.

¶ 79 c. Ineffective Assistance

[1]See also *People v. Pittman*, where we reviewed *House* in considering a defendant's argument that his mandatory natural life sentence shocked the moral sense of the community. *Pittman*, 2018 IL App (1st) 152030, ¶¶ 34-38. We found in *Pittman*, as we do in this case, that *House* is inapplicable where there is no union of a mandatory sentencing statute with guilt under a theory of accountability. *Id*. ¶¶ 37-38 (citing *People v. Ybarra*, 2016 IL App (1st) 142407, ¶ 27).

¶ 80 Defendant's ineffective assistance claim for defense counsel's failure to raise an as-applied challenge in his motion to reconsider sentence also fails. To prove a claim of ineffective assistance of counsel, defendant is required to show that his attorney's performance was deficient, and that, but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). As we have determined defendant's constitutional challenges to be without merit, defendant cannot satisfy either prong of *Strickland*.

¶ 81 III. CONCLUSION

¶ 82 For the reasons stated, we affirm defendant's conviction and sentence.

¶ 83 Affirmed.