2018 IL App (4th) 160140-U

NO. 4-16-0140

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 31, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANTHONY MICHAEL DAVIS-DICKSON,	)	No. 14CF792
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel was not ineffective for failing to offer a jury instruction on involuntary manslaughter.

(2) Trial counsel was not ineffective for offering a second-degree-murder instruction on the theory of serious provocation.

(3) Trial counsel was not ineffective for failing to object to evidence regarding the death of defendant's brother.

(4) Trial counsel was not ineffective for failing to object to the presentation of purported other-crimes evidence.

(5) Trial counsel erred by introducing evidence of defendant's history of juvenile adjudications but the error was harmless.

(6) The State proved beyond a reasonable doubt that the murder for which defendant was convicted was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty qualifying defendant for an extended-term sentence.

(7) The trial court did not err in sentencing defendant to 35 years in prison.

¶ 2 A jury found defendant, Anthony Michael Davis-Dickson, guilty of the first degree murder of Ronald Smith. The jury further found the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 3 Defendant appeals on seven grounds.

¶ 4 First, defendant argues that his trial counsel was ineffective for failing to give the jury the option of involuntary manslaughter. He claims the evidence presented at trial would have supported a verdict of the lesser offense given that "counsel conceded that defendant attacked Smith." He argues that the evidence would have supported a finding that defendant acted recklessly, rather than with a specific intent to kill, had counsel presented this theory and had he appropriately instructed the jury. Given his reliance on the theory of defendant's absolute innocence, we find that counsel's decision not to present an option of involuntary manslaughter was strategic and not incompetence.

¶ 5 Second, defendant claims that trial counsel was ineffective when he presented to the jury the wrong theory of second degree murder. Counsel tendered a second-degree-murder instruction citing defendant's serious provocation. Defendant claims counsel should have tendered a second-degree-murder instruction citing defendant's belief that his actions were justified by his need to defend others. Again, counsel presented a defense of absolute innocence. Either second-degree-murder instruction was inconsistent with his strategy. However, with that said, we find it was not unreasonable for counsel to tender an instruction on serious provocation rather than justification because a justification instruction would have required the jury to find that defendant believed, whether reasonably or not, that he was justified in killing Smith. Such instruction would have completely undermined defendant's strategy of complete innocence.

¶ 6 Third, defendant claims his counsel was ineffective for failing to object to the State's evidence regarding his younger brother's death in 2003. The State presented evidence that the boy died from blunt force trauma to the head and abdomen. Therefore, the State argued, defendant knew such force could cause death. However, counsel used this information to argue in favor of defendant's conduct. We find this strategic decision is immune from defendant's claim of ineffective assistance.

¶ 7 Fourth, defendant contends his counsel was ineffective for failing to object to the admission of other-crimes evidence. After Smith's murder, defendant and the others allegedly beat and robbed two more individuals the same night. The State presented evidence, without objection, related to these two other incidents. We find counsel's failure to object was not unreasonable when the evidence was actually not other-crimes evidence but evidence related to defendant's other charged offenses for which he was on trial.

¶ 8 Fifth, defendant claims his counsel was ineffective for eliciting testimony from defendant of his history of juvenile adjudications. Because Illinois Rule of Evidence 609(d) (Ill. R. Evid. R. 609(d) (eff. Jan. 1, 2011)) generally prohibits the admission of juvenile adjudications, we find it was error for counsel to elicit such information from defendant during direct examination. However, defendant was unable to demonstrate prejudice.

¶ 9 Sixth, defendant argues the State failed to prove beyond a reasonable doubt that the murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. We disagree. We find sufficient evidence in the record to support the jury's finding on the issue making defendant eligible for an enhanced sentence.

¶ 10 Seventh, defendant complains that, assuming he was successful in his argument above, the trial court mistakenly used the potential range of punishment for an enhanced term to

fashion the imposed 35-year sentence. As stated, we find the State sufficiently proved defendant was eligible for an enhanced term and the imposed 35-year term was not an abuse of discretion.

¶ 11 Therefore, we affirm the judgment.

¶ 12 I. BACKGROUND

¶ 13 A. Charged Offenses

¶ 14 In July 2014, defendant was indicted on four counts of murder for the death of Ronald Smith. The charges stemmed from a June 2, 2014, incident where, at approximately 10 p.m., defendant and two others attacked and beat Smith, a homeless man, as he settled under a tree in O'Neil Park for the night. He died in the hospital about one month later. Count I alleged defendant, with the intent to do great bodily harm, struck Smith, causing his death (720 ILCS 5/9-1(a)(1) (West 2012)). Count II alleged defendant struck Smith, causing his death, while knowing such acts created a strong probability of great bodily harm to Smith (720 ILCS 5/9-1(a)(2) (West 2012)). Count III alleged defendant struck Smith, causing his death, while knowing such acts would cause his death (720 ILCS 5/9-1(a)(1) (West 2012)). Count IV alleged defendant struck Smith, causing his death, while knowing such acts created a strong probability of death (720 ILCS 5/9-1(a)(2) (West 2012)).

¶ 15 The State alleged defendant and his friends engaged in a series of attacks, beginning with Smith, as they made their way through town on the night of June 2, 2014, until the early morning hours of June 3, 2014. In relation to this series of attacks, defendant was also charged with (1) robbery, aggravated battery, and mob action related to the victim Patrick Reed in McLean County case No. 2014-CF-650 and (2) robbery, aggravated battery, and mob action related to the victim Andrew Lawrence in McLean County case No. 2014-CF-649.

¶ 16 On September 9, 2015, over defendant's objection, the trial court, the Honorable Robert L. Freitag presiding, granted the State's motion for joinder of the Reed and Lawrence cases. Accordingly, Judge Freitag denied defendant's motion to bar evidence of the Reed and Lawrence cases in the Smith case.

¶ 17 B. Defendant's Trial

¶ 18 Defendant's four-day trial, with the Honorable Scott D. Drazewski presiding, began on September 21, 2015. Defendant elected to have a bench trial in the Reed and Lawrence cases simultaneously with a jury trial in the Smith case.

¶ 19 1. *The State's Case*

¶ 20 a. The Testimony of Sarah Dawdy

¶ 21 Sarah Dawdy testified that at approximately 10:30 p.m. on June 2, 2014, she and her friend, Shyanna Edwards, were "hanging out" at Sheridan School with three other people Dawdy did not know. She saw a man approximately 55 to 60 years old, later identified as Smith, walking through the bushes toward them from the direction of O'Neil Park. He was covered in blood. She noticed a wound on the left side of his forehead and that he appeared hurt in the area around his ribs, as he was holding the left side of his abdomen. Dawdy said Smith repeatedly stated he did not understand what had happened because he was not doing anything wrong. He said he was sleeping when the beating began. Edwards called the police. Dawdy saw three black males approaching from O'Neil Park. When the police arrived, Dawdy pointed to the black males walking down the street and identified them as the ones who had attacked Smith. Dawdy said she described them to the officer as follows: "I know one of them had dreads. The other one was wearing a white t-shirt with blue pants, shorts. And all I remember was seeing another red pair of shorts."

¶ 22 b. Testimony of Bloomington Police Officers

¶ 23 Bloomington police officer Joseph Michael Rizzi testified he was dispatched to Sheridan School regarding the battery that occurred at O'Neil Park. He said Smith was "bleeding profusely from his face" and appeared "out of it."

¶ 24 c. Testimony of Medical First Responders

¶ 25 Robert Fulcher and Charles Casagrande, firefighters and paramedics for the City of Bloomington, testified they were dispatched to Sheridan School at approximately 11 p.m. When they arrived, they found Smith bleeding from his head; however, Smith's main complaint was pain on both sides of his abdomen area. Smith told the paramedics he was asleep when he was attacked. Fulcher saw bruising that extended around Smith's entire back on both sides. The ambulance transported Smith to Advocate BroMenn Medical Center in Normal.

¶ 26 d. Testimony of Isaiah Dorch

¶ 27 Isaiah Dorch, age 15, testified that on the night of the incident he was at the skateboard ramp within O'Neil Park with his friend Jamaude Tutwiler a/k/a J.T., who introduced him to defendant and two others (later identified as Tory Washington and Willie Chambers). Sometime around 9 p.m., two females (Edwards and Averi Hicks) arrived and the group of seven moved from the picnic tables to the playground area. They were all "just hanging out talking." Later, defendant, Washington, and Chambers walked away from the group. J.T. left with Edwards, leaving Dorch and Hicks near the playground. Dorch could not see defendant but he heard a "scuffle." He then saw Smith walking near a building in the park trying to "get[] away maybe." Dorch saw defendant, Washington, and Chambers walk up behind Smith. One of the three pushed Smith to the ground. Dorch said: "[O]nce they got him on the ground, they might

have hit him maybe.". Dorch said the entire group, including him, "just got out of the park after that." He saw Smith leaving the park as well but in the opposite direction.

¶ 28 Dorch said he let defendant wear his yellow jacket as they walked away from the park. As they walked near Constitution Trail, J.T., defendant, and either Washington or Chambers approached a man and asked him for a cigarette and to use his cell phone. Dorch and the other male (either Washington or Chambers) waited on the trail for a bit but then began walking. The other three soon caught up, coming from behind them. Dorch said he did not hear anything but voices while the three were away but he believed they may have gotten into a fight because when they came back there was blood on Dorch's jacket. They returned with a cell phone that they all passed around. They next encountered a man walking toward them but on the other side of the street. He had on headphones. The rest of the group approached him, leaving Dorch by himself. He said he heard "a loud hit," like someone was hit in the face. He then saw the man fall to the ground. Dorch did not see who hit him. The group took the man's headphones and cell phone. Dorch got his jacket back from defendant after that. Dorch said defendant ran off when he saw the police. Dorch denied taking part in any of the attacks.

¶ 29 e. Testimony of Averi Hicks

¶ 30 Averi Hicks, age 16, testified she and Edwards went to the skate park in O'Neil Park at approximately 3 p.m. on June 2, 2014. She said they stayed until 9 p.m. hanging out with J.T. and Dorch. They then moved to the playground equipment. Defendant, Washington, and Chambers joined them but soon walked away toward the swimming pool area. When the group was hanging out by the restrooms, defendant, Washington, and Chambers ran over. Hicks described them as "amped up," "panicking," and "ready to go." Hicks and Edwards left the park. She said she saw a police car with its lights activated as they were leaving.

¶ 31 f. Testimony of Shyanna Edwards

¶ 32 Edwards, age 15, testified she was 14 years old on the night of the incident. Edwards's testimony was substantially similar to Hicks's testimony, as she corroborated much of Hicks's version of the events. She said she and Hicks went to the skate park because "[t]hat's where everybody went." They visited with defendant, Washington, Chambers, Dorch, and J.T. Edwards said when defendant, Washington, and Chambers left the group, she looked over and saw a person laying on the ground and "punches getting thrown" by the three men. When those three rushed back over to the group, they announced they had just beaten somebody up. She described them as "hyped." Edwards and Hicks separated from the group and headed home.

¶ 33 g. Testimony of Victim Patrick Reed

¶ 34 Patrick Reed, age 34, testified that, at approximately 11 p.m. on June 2, 2014, he began to walk home from his friend's house. He was walking on the Constitution Trail with his headphones on listening to music. He was "abruptly" surrounded by at least three men when one of them punched him in the nose. Reed said he fell to the ground and "covered up in like a fetal position." The men continued to hit him all around his body. He estimated he was hit 20 times. His wallet and cell phone were missing. He did not call the police, but the police contacted him after his identification card was found on the ground. The police had recovered his cell phone and returned it to him.

¶ 35 h. Testimony of Victim Andrew Lawrence

¶ 36 Andrew Lawrence, age 23, testified he walked alone to a tavern during the early morning hours of June 3, 2014. He was wearing headphones connected to his cell phone that was in his pocket. He said he noticed "a group of kids" walking toward him. As he walked past them,

he "was hit and knocked to the ground." They kicked and hit him for "a minute or two," took his headphones and cell phone, and then ran off. He found a policeman and reported the incident.

¶ 37 i. Testimony of Smith's Treating Physician

¶ 38 Dr. Brian Gebhart, general surgeon and director of the trauma division at Advocate BroMenn Medical Center, testified as the State's expert in general surgery. On June 2, 2014, he performed emergency surgery on Smith for severe internal bleeding. He found Smith's spleen to be bleeding and very damaged. The doctor removed Smith's spleen and a portion of his small intestine. After "a period of time," Smith seemed to be improving. He was taken off the ventilator; he was eating; and he was able to walk some. Soon after, his condition worsened. He developed an infection and suffered multi-organ failure. In Dr. Gebhart's opinion, the surgery was a contributing factor to his decline due to his history of diabetes and cirrhosis of the liver.

¶ 39 On cross-examination, Dr. Gebhart opined that Smith's chronic conditions were not the result of the June 2, 2014, incident. On redirect examination, Dr. Gebhart clarified that the chronic conditions were not the cause of his death but they did interfere with his ability to recover after surgery.

¶ 40 j. Testimony of Normal Police Officers

¶ 41 Normal police officers Eugene Long, Ross Mucky, and Deborah Weir testified. Their combined testimony revealed they were on patrol in the early morning hours of June 3, 2014. They received a call of a battery and made contact with Lawrence. His description of his attackers was relayed over the radio. Moments later, Officer Weir located the suspects a few blocks away. Long went to meet Weir and the detained suspects. He said he observed "on many of them large amounts of what appeared to be blood." On Chambers, he noticed a large amount of blood on his shoes. J.T. had blood on him as well. Dorch was wearing a yellow jacket with a

small amount of blood on it. Weir had noticed Washington had Lawrence's headphones in his pocket and J.T. had Lawrence's cell phone.

¶ 42 k. Testimony of Tory Washington

¶ 43 Washington, age 20, testified that on June 2, 2014, he was at the skate park in O'Neil Park with defendant, Chambers, and J.T. They were skateboarding, smoking marijuana, "popping" Xanax, and drinking alcohol. At approximately 10 p.m., the group moved to the playground area. Defendant and Chambers left the group when they saw a shadowy silhouette of a person walking in the park. When they returned, they said there was " 'a guy over there by the swimming pool area.' " Defendant and Chambers left the group again and walked toward the swimming pool. He then saw the shadows of defendant and Chambers punching and kicking. When the two rejoined the group, defendant described "kind of what happened" and then "asked to hit the bottle again." Defendant told Washington that they " 'kicked the guy's ass.' " Defendant said they were going to do it again and asked Washington to come along. Washington, defendant, and Chambers walked back to where they saw "a guy laying under the tree." Washington said defendant "walked up to him, punched him in the head and face" approximately 10-15 times. Washington was standing at Smith's feet. Defendant was kicking and stomping Smith. Chambers was attacking Smith in the same manner as defendant. Washington said he punched Smith in the torso one time. When Smith stopped moving, Washington grabbed Chambers and told him to stop. Defendant continued attacking Smith. Washington said he and Chambers turned and walked away and defendant caught up to them. They saw Smith get up and make his way across the street. Washington said Chambers and defendant went after Smith intending to attack him again. Washington waited near the basketball

court until the other two came back. The three of them then walked toward the restrooms to get J.T. to let him know they "had to go." Washington said he pleaded guilty to Smith's murder.

¶ 44 Washington then testified about the group's encounter with Reed. He said he asked Reed for a cigarette. Reed obliged. Washington said he turned around to light the cigarette and he heard "a loud smack" and saw Reed on the ground. Washington saw defendant, J.T., and Chambers attacking Reed. He then explained the group's attack on Lawrence. Lawrence was walking in the opposite direction of the group. As they passed Lawrence, he greeted them. Washington said he acknowledged Lawrence's greeting and continued walking. He again heard "a loud smack." He turned around and saw Lawrence on the ground with defendant, Chambers, and J.T. attacking him.

¶ 45 l. Testimony of Pathologist

¶ 46 Dr. Amanda Youmans testified as the State's expert in the field of forensic pathology. She testified she performed the autopsy on Smith and, in her opinion, his organ failure and death resulted from "[b]lunt force trauma due to assault."

¶ 47 m. Testimony of Detective Jeremy Melville

¶ 48 Detective Jeremy Melville testified that on June 4, 2014, he was assigned to find defendant and arrest him. He went to defendant's grandmother's house. She said defendant was sleeping but she would go get him. Defendant appeared at the front door without shoes or a shirt. He indicated he would go to the police station but he needed to retrieve his clothes. Rather than return to the front door, defendant ran out of the back of the house. Melville pursued him but was not able to apprehend him.

¶ 49 n. Testimony of Arresting Officers

¶ 50 Bloomington police officers Scott Wold and Ty Carlton testified that on June 6, 2014, they arrested defendant at his residence. He had tried to run from the house, but Wold apprehended him.

¶ 51 o. Testimony of Jamaude "J.T." Tutwiler

¶ 52 J.T., age 17, testified as to his version of the events on the evening of June 2, 2014. He said the group was gathered near the pavilion in O'Neil Park. He said they had decided they were going to go around and beat people up that night. He said defendant was not part of that conversation. J.T. said as the evening grew closer, he and the group walked toward the bathrooms. He saw Washington and Chambers walking toward the trees near the swimming pool area and then they turned around heading back toward the pavilion. J.T. was reminded of his police interview on July 3, 2014, where he told the detectives he saw defendant with Washington and Chambers walking back and forth from the playground area to the trees two times. He denied telling police he heard a "boom" or that he saw Smith getting punched and kicked. He did not remember telling the police that he saw defendant punching Smith or that he told police they had "demolished" Smith the second time. He said Washington barged into the bathroom where J.T. was and said he had just beaten somebody up and they needed to leave. J.T. denied that defendant was involved in Reed's beating but he said it was defendant who had "laid out" Lawrence. He said defendant walked away when the police arrived.

¶ 53 p. Testimony of Willie Chambers

¶ 54 Chambers, age 18, testified as to his version of the events on June 2, 2014. He said as he, defendant, and Washington gathered at the playground equipment, someone pointed out Smith lying on the ground near the swimming pool area under the trees. They "went over there and beat him up." Chambers said he punched Smith in the face though he was not the first

one to do so. Chambers said he and Washington punched, kicked, and stomped Smith. Defendant only punched him. They stopped the attack. Smith got up, took his cart, and walked away. Chambers, Washington, and defendant returned to the playground area. Minutes later, the three returned to Smith and beat him again. They all stopped at the same time. Chambers said he apologized to Smith and then took his Goldfish crackers. Defendant and Washington ran back to the playground equipment. Approximately 15 minutes later, the police arrived. The three of them plus J.T. ran to the Kroger grocery store on their way to Normal. Chambers identified each individual from the Kroger surveillance video. Defendant was wearing a yellow hooded sweatshirt. Chambers said he and J.T. decided to play "point them out knock them out" when they left Kroger. They continued walking until they met Reed. Chambers said defendant, Washington, and J.T. beat up Reed. They then continued walking until they saw Lawrence on the ground. He denied that anyone in the group beat him up. But, the police stopped Washington because he had Lawrence's headphones in his pocket. Defendant separated from the group and was not there when police stopped the rest. Chambers, like Washington, had pleaded guilty to Smith's murder.

¶ 55 q. Testimony of the Lead Detective

¶ 56 Bloomington police detective Michael Fazio testified he was the lead detective for Smith's homicide. He said he interviewed J.T. on July 3, 2014. The video of the interview was published to the jury. Fazio also interviewed defendant on June 11, 2014, and July 7, 2014. The first interview was conducted in the presence of defendant's mother. The video of this interview was published to the jury. In this interview, defendant denied taking part in Smith's beating. He said Washington, Chambers, and J.T. attacked Smith more than once. They then walked to Normal where they encountered Reed. Defendant said he hit Reed once and then

walked off. The group then encountered Lawrence. Defendant said he did not take part in Lawrence's beating but he watched as Washington, Chambers, and J.T. punched and kicked him.

¶ 57 The State rested.

¶ 58 2. *Defendant's Case*

¶ 59 a. Testimony of Kyle Fairchild

¶ 60 Defendant called Kyle Fairchild, who testified he and his girlfriend, Kyla Emily Smith, were at O'Neil Park on June 2, 2014, at approximately 8:30 p.m. They were sitting on a bench and talking when Chambers approached them from behind and punched Fairchild in the face. Fairchild stood up and questioned Chambers, but three or four of Chambers's friends joined in and attacked Fairchild. Fairchild said defendant was not involved. Fairchild knew defendant, as they had "been friends for many years."

¶ 61 b. Testimony of Lori A. Dragomir

¶ 62 Defendant's mother, Lori A. Dragomir, testified that she learned of the June 2, 2014, events "a couple days afterwards." The police had gone to her house looking for defendant. After Dragomir learned defendant had been arrested, she went to the Bloomington police department and spoke with Fazio. She was present during defendant's first interview. On July 7, 2014, Fazio called her and advised her to come to the police department. During the second interview, Dragomir acknowledged referencing the death of defendant's brother. The following exchange occurred:

"Q. *** What happened?

A. With [defendant]'s brother?

Q. Yes.

A. He was killed.

Q. When?

A. December 4, 2003.

Q. How did he die?

A. Blunt force trauma to the head and abdomen.

Q. Was anybody ever arrested for that?

A. No.

* * *

Q. How old was [defendant] when this occurred?

A. 2003, so he would have been 8.

Q. Did you make him aware of the circumstances of the death of his brother?

A. We didn't tell [defendant] until he was in high school what happened.

Q. How old was he then?

A. Probably about 15, 16 — about 15.

Q. How many conversations did you have with him about the death of his brother?

A. We never talked about it.

Q. Other than that one time?

A. Yes. When we finally told him, because it was very traumatizing for our family, that we just—we kept it from [defendant] because he just didn't need to know."

¶ 63 On cross-examination, the prosecutor asked Dragomir about defendant's brother's death. Dragomir confirmed that because of this death, defendant was aware that "somebody

could die" from blunt force trauma to the head and stomach. She said she only heard defendant say he pushed Smith to the ground; she did not hear him say he kicked Smith or hit him in the head.

¶ 64 c. Testimony of Defendant

¶ 65 Defendant, age 19, took the witness stand and responded to his counsel's questions about his prior juvenile record. He said he was adjudicated delinquent on two charges, in 2012 and 2013, for retail theft and possession of stolen property, respectively.

¶ 66 Defendant testified as to his account of the events on June 2, 2014. He said he met Chambers, Washington, and J.T. at O'Neil Park in the early afternoon. He had known J.T. the longest, since kindergarten. He recalled Fairchild getting attacked at approximately 9:30 p.m. Defendant said Chambers attacked Fairchild after "mention[ing] something about [Fairchild] having something in his car." Chambers, Washington, and J.T. had called defendant over asking him to hit Fairchild first. Defendant refused and walked back to a bench where he had been with Dorch, Edwards, and Hicks. Defendant saw J.T., Chambers, and Washington hit Fairchild in the face multiple times. Fairchild left the park, and everyone plus Trevor Kelly went to the playground area. After approximately 30 minutes, Dorch and Hicks "branch[ed] off their own way[]" and J.T. and Edwards went to the bathroom, leaving defendant with Chambers, Washington, and Kelly. Defendant denied drinking alcohol but admitted smoking approximately one gram of cannabis and taking one Klonopin pill. He said he felt no effects from either. He recalled Chambers and Washington walking off and talking about something, but defendant did not hear the conversation. When they came back, they mentioned a man (Smith) sitting under a tree. They pointed him out to defendant. At that point, defendant saw two girls (approximately 11 to 13 years old) walking past Smith. According to defendant, the girls asked defendant to

come over there. Defendant said he "ran over there and pushed the guy down." Chambers and Washington "jumped him." Chambers picked Smith up and slammed him to the ground "and that's when the beating started." Defendant did not do anything else to Smith, but he did not try to stop the beating either. Defendant ran to get J.T. and Edwards from the bathroom. Defendant said he left the park but not before he saw Chambers and Washington attack Smith a second time. Defendant told Chambers and Washington that they had to leave. Defendant walked off, and soon the other two followed him, but they indicated they wanted to find Smith for a third beating. They ran off and jumped a fence, but they reportedly were unable to locate Smith. The police arrived, so the group ran from the park. Defendant rested.

¶ 67 3. *Verdict*

¶ 68 On September 25, 2015, the jury found defendant guilty of first degree murder and found the murder was accompanied by an exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ *69* 4. *Sentencing*

¶ 70 On November 24, 2015, after denying defendant's posttrial motion, the trial court proceeded to a combined sentencing hearing. The court noted that on October 6, 2015, it had entered guilty verdicts against defendant in the Reed and Lawrence cases. The State sought an extended-term sentence based upon the jury's finding of exceptionally brutal and heinous behavior, which would increase the potential sentencing range to 60 to 100 years. The court sentenced defendant to 35 years in prison.

¶ 71 On December 16, 2015, defendant filed a motion to reconsider his sentence, which the trial court denied on February 22, 2016.

¶ 72 This appeal followed.

¶ 73 II. ANALYSIS

¶ 74 Defendant files this direct appeal, raising a total of seven contentions of error. First, he claims his trial counsel rendered ineffective assistance when he failed to (1) present an involuntary manslaughter defense, (2) ensure that the jury was instructed on the justifiable use of force, (3) object to the irrelevant evidence regarding the death of his brother, (4) object to the admission of other-crimes evidence related to the victims Reed and Lawrence, and (5) prevent the admission of defendant's prior juvenile adjudications. Second, defendant challenges his sentence, claiming (1) he is entitled to a new sentencing hearing because the State failed to prove he was extended-term eligible in that it failed to prove beyond a reasonable doubt that the crime was accompanied by exceptionally brutal or heinous behavior and (2) the trial court erred by mistakenly relying on the extended-term range when fashioning defendant's sentence. For the reasons that follow, we affirm.

¶ 75 A. Ineffective Assistance of Counsel

¶ 76 A claim of ineffective assistance of counsel is analyzed under the familiar two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Henderson*, 2013 IL 114040, ¶ 11. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004) (citing *Strickland*, 466 U.S. at 687). In doing so, the defendant must overcome a "strong presumption" that counsel's conduct was the result of sound trial strategy, not incompetence. *People v. Pecoraro*, 175 Ill. 2d 294, 319-20 (1997).

¶ 77 "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35. "However, if the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 78 1. *Failure to Present Involuntary Manslaughter Defense*

¶ 79 The defense theory presented at trial was that defendant had nothing to do with Smith's murder. Defendant claimed Chambers and Washington killed Smith. That is, counsel relied on an all-or-nothing defense strategy. Nevertheless, defendant claims it was unreasonable for counsel not to present the jury with the option of the lesser offense of involuntary manslaughter.

¶ 80 "The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death." *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Involuntary manslaughter requires a less culpable state of mind than first degree murder. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). An individual commits first degree murder when he kills another without lawful justification and he intends or knows that his acts "will cause death" or knows that his acts "create a strong probability of death or great bodily harm." 720 ILCS 5/9-1(a)(1), (2) (West 2012).

¶ 81 A person commits involuntary manslaughter if he performs acts that are "likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2012). A person acts recklessly "when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the

standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2012).

¶ 82 A trial court may give an involuntary murder instruction only if the instruction is supported by "some credible evidence in the record that would reduce the crime of first-degree murder to involuntary manslaughter." *People v. Sipp*, 378 Ill. App. 3d 157, 163 (2007). However, it "is well established in Illinois that a counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of another, is a matter of trial strategy." *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 76. As our supreme court has stated: "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence" and therefore are "generally immune from claims of ineffective assistance of counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). "A defendant can overcome the strong presumption that defense counsel's choice of strategy was *sound* if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." (Emphasis in original.) *People v. King*, 316 Ill. App. 3d 901, 916 (2000).

¶ 83 Here, counsel argued to the jury that the evidence presented at trial demonstrated that defendant pushed Smith to the ground in defense of the two young girls nearby who allegedly felt threatened by Smith. After he pushed Smith, defendant walked away from the area. According to defendant's testimony and counsel's argument, defendant only pushed Smith with the intent of protecting the girls. He did not intend for Smith to be killed as Smith's actions did not justify death. After defendant pushed Smith and walked away, counsel argued, Chambers and Washington beat Smith to such an extent that it eventually led to his death. Any theory that defendant acted recklessly by performing acts that were likely to cause great bodily harm or

death, *i.e.*, that he committed involuntary manslaughter, would have been incompatible with the theory presented.

¶ 84 From the outset, counsel attempted to distance defendant from the conduct of the others. He encouraged the jury to believe defendant's account that defendant merely came to the aid of the young girls who had requested his help. Defendant did only what was necessary to stop Smith from harassing the girls. Defendant pushed Smith and then left the scene. His conduct and mental state, counsel argued, did not demonstrate any intent to kill. Counsel argued that defendant's acts were not likely to cause death or great bodily harm to Smith. Giving the jury an option of anything short of a full acquittal would have been irreconcilable with counsel's trial strategy. Any theory besides absolute innocence would have required defendant to admit to causing Smith's death in some capacity.

¶ 85 Counsel's decision to pursue its theory and not request an involuntary-manslaughter instruction was not an unreasonable strategic decision. Counsel chose to argue that the State failed to prove its case. The fact that this argument was ultimately unsuccessful does not mean counsel's conduct fell below an objective standard of competence. Reasonable strategic decisions, even if ultimately unsuccessful, do not support a claim of ineffective assistance of counsel. See *People v. Odle*, 151 Ill. 2d 168, 172-74, (1992) (a defense strategy is not constitutionally defective if unsuccessful); *Minniefield*, 2014 IL App (1st) 130535, ¶ 89 ("[R]easonable strategy decisions, even if ultimately unsuccessful, do not make an attorney's performance fall below those of prevailing norms."); *People v. Morrow*, 2013 IL App (1st) 121316, ¶ 61 (finding no ineffective assistance where counsel pursued the theory of the defendant's complete innocence in the killing rather than a justification for it); *People v.*

Chapman, 262 Ill. App. 3d 439, 451 (1992) ("[T]he fact that a defense tactic was unsuccessful does not retrospectively demonstrate incompetence.").

¶ 86 Because defendant presented evidence to support his theory, we conclude that counsel's strategy was not unsound. *Cf. People v. Bryant*, 391 Ill. App. 3d 228, 241-42 (2009) (concluding counsel's conduct was substandard where he failed to present any evidence to support his stated defense). Thus, we find defendant cannot demonstrate on this record that counsel's performance fell below an objective standard of reasonableness to satisfy the first prong of the *Strickland* standard. *People v. Deleon*, 227 Ill. 2d 322, 338 (2008) ("The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.").

¶ 87 2. *Second Degree Murder*

¶ 88 Defendant claims counsel rendered ineffective assistance by tendering the wrong second-degree-murder instruction. In response to the State's allegation that defendant's conduct constituted intentional homicide, counsel asked that the jury be instructed on the mitigating factor of serious provocation. That is, counsel requested the jury be instructed that *if* it found the State had sufficiently proved the elements of first degree murder, that the jury considers the possibility that defendant attacked Smith because he was provoked to do so. A person commits second degree murder if one of two mitigating circumstances exists at the time of the killing: (1) he is acting under a sudden or intense passion resulting from serious provocation by the victim but negligently or accidentally causes the victim's death or (2) he believes the circumstances justify his killing of the victim but his belief is unreasonable. 720 ILCS 5/9-2(a) (West 2012). In this case, the jury was instructed on the former theory but not the latter, which defendant claims was objectively unreasonable on counsel's part.

¶ 89 Serious provocation is defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2012). The categories of provocation that courts have recognized as sufficient to warrant a second-degree-murder instruction based on serious provocation are: (1) mutual quarrel or combat; (2) substantial physical injury or assault; (3) illegal arrest; and (4) adultery with one's spouse. *People v. Page*, 193 Ill. 2d 120, 133 (2000). Defendant argues that none of those categories applied to the facts presented. Rather, defendant argues the jury should have been tendered an instruction that would explain that Smith's killing was justified because defendant believed (though it may have been an unreasonable belief) that the circumstances demanded such.

¶ 90 It is clear from the record that the evidence and counsel's argument did not support a serious-provocation instruction. Nothing in the record suggested Smith provoked defendant in any way. Defendant testified that he acted to defend the girls and protect them from Smith. Accordingly, counsel argued that defendant felt he had to act fast to prevent Smith from assaulting the girls. This reported defense of others is not the equivalent of provocation. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 92. Counsel should have recognized the difference.

¶ 91 However, counsel's failure to tender a justified-killing instruction was not unreasonable. As stated above, defendant did not suggest through his testimony or other evidence that he believed, whether reasonably or unreasonably, that Smith's killing was justified. Tendering a justified-killing instruction would have undermined defendant's strategy and his credibility. Again, defendant's trial strategy was an all-or-nothing approach. Defendant testified he did nothing to Smith but push him down. According to him, he did not knowingly, intentionally, or recklessly perform any act that caused Smith's death. He *did* testify he pushed Smith because he believed either reasonably or unreasonably that he had to in order to protect the

girls. This is vastly different than defendant testifying that he performed acts that he reasonably or unreasonably knew would kill Smith. In other words, defendant believed he was justified in pushing Smith, not justified in killing Smith. A second-degree-murder instruction is not appropriate when there is no evidence to suggest that Smith's murder was based on defendant's subjective, whether a reasonable or mistaken, belief that the use of such force *sufficient to cause Smith's death* was justified.

¶ 92 The only evidence presented on the issue of justification was defendant's testimony that he was, in his mind, justified in pushing Smith to the ground. He produced no evidence to suggest his conduct in any way lead to Smith's death. Thus, there was no reason for counsel to tender a second-degree-murder instruction under either theory, as either would have undermined defendant's strategy of complete innocence.

¶ 93 As we stated above, counsel's sound strategic decisions are not subject to an incompetency analysis, and therefore, we find defendant cannot successfully frame an ineffective-assistance-of-counsel claim regarding this issue. See *People v. Smith*, 195 Ill. 2d 179, 188 (2000) ("Matters of trial strategy are generally immune from claims of ineffective assistance of counsel.").

¶ 94 3. *Evidence of Brother's Death*

¶ 95 Defendant's mother, Lori A. Dragomir, testified at trial that defendant's younger brother died from blunt force trauma to his head and abdomen in 2003, when defendant was eight years old. On cross-examination, without objection, Dragomir agreed that because of this death, defendant was aware that "somebody could die" from blunt force trauma to the head and stomach. Defendant claims his counsel was ineffective when he failed to object to this irrelevant

testimony. Like the claims above, this too falls into the category of trial strategy for the purposes of an ineffective-assistance-of-counsel analysis.

¶ 96 In his closing argument, counsel addressed Dragomir's testimony by stating as follows:

> "Again, while this murder was tragic, it was not brutal in the part that [defendant] participated in. [Defendant] pushed Mr. Smith. He should not have done that in retrospect; on the other hand, sudden provocation does not allow for reflection by definition. He went and acted, and I disagree with counsel that the death of his brother would have caused him to act despite that. I think the death of his brother caused him to appreciate the fact that people can get hurt. I think the death of his brother caused him to act to prevent those two little girls from suffering a similar fate."

¶ 97 It is apparent that counsel used Dragomir's testimony in reference to the fate the girls *could* have suffered, not the fate Smith did suffer. This reference falls in line with counsel's strategy at trial. Defendant said he did not punch or kick Smith, he left the area after his initial push, and he therefore had no direct knowledge of the blunt force trauma Smith endured after defendant walked away. On the other hand, armed with the knowledge that blunt force trauma could cause death, defendant was ready to act in the defense of the girls. This strategy, again whether successful or not, was supported by the evidence presented by defendant, and as such, that strategy cannot be considered substandard performance on counsel's part. See *Smith*, 195 Ill. 2d at 188.

¶ 98 4. *Other-Crimes Evidence*

¶ 99 Defendant next contends counsel was ineffective for (1) failing to object to the evidence regarding the attacks on Reed and Lawrence, (2) failing to object to the State's argument about how those attacks demonstrated that defendant exhibited wanton cruelty in the attack on Smith, and (3) failing to object when photos of Reed and Lawrence were given to the jury during deliberations.

¶ 100 Prior to the trial, counsel moved to exclude evidence of the two assaults against Reed and Lawrence. At the hearing, the State requested joinder of all three cases, claiming all three attacks were part of a common scheme. Judge Freitag allowed the State's request for joinder and denied defendant's motion to exclude evidence.

¶ 101 Defendant argues here that the nature of Reed's and Lawrence's injuries did not make it more or less probable that Smith's murder was accompanied by exceptionally brutal or heinous behavior. And thus, the details of those injuries were irrelevant to prove that defendant's acts in murdering Smith were exceptionally brutal or heinous and indicative of wanton cruelty. He claims counsel was ineffective for failing to object to the introduction of this evidence.

¶ 102 Counsel did not object to the testimony regarding Reed's broken nose, the "big gash" on his head, the cut on his elbow, or the fact that he was "covered in blood." Likewise, counsel did not object to the testimony that Lawrence had some "pretty serious" blood on his face, clothes, hands, and leg. Nor did counsel request a limiting instruction regarding this testimony. During closing argument, the prosecutor argued, without objection: "How else do we know that their intent was cruel? Because they were doing this all evening."

¶ 103 Further, without objection, the State gave the jury photos of Reed's and Lawrence's injuries during deliberations. For these reasons, defendant claims counsel's conduct fell below an objective standard of reasonableness.

¶ 104 Defendant does not seem to challenge the admission of the "other crimes evidence" on the issues of whether they were based on the same intent, common plan, or scheme. Rather, he contends the "other crimes evidence" regarding the extent of Reed's and Lawrence's injuries was irrelevant to prove that Smith's murder was accompanied by exceptionally brutal or heinous behavior.

¶ 105 Joinder is allowed when separate offenses "are based on the same act or on two or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2012). Judge Freitag previously determined that joinder was appropriate and that all three of defendant's cases should be tried together. The propriety of the order allowing joinder is not before us on review. Because the offenses were ordered to be joined, the State was allowed to introduce evidence of *all* of the offenses.

¶ 106 That is, the offenses related to Reed and Lawrence were not "uncharged" or other crimes, as referenced in Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th), for the jury to consider. Rather, this substantive evidence related to each of the charged offenses and not to another act or crime for which defendant was not on trial. Therefore, there was no need for a limiting instruction.

¶ 107 Accordingly, defendant's other-crimes-evidence argument is misplaced. Here, the jury and the trial court heard evidence of only *charged* offenses, not improper other-crimes evidence. Because Judge Freitag had previously determined that all three offenses were part of the same comprehensive transaction, any objection to the introduction of the evidence of the crimes against Reed and Lawrence would have been overruled.

¶ 108 Defendant cites *People v. Thigpen*, 306 Ill. App. 3d 29, 37 (1999), to support his claim that it is error to allow extensive details of other-crimes evidence because of the danger of

unfair prejudice. Defendant's reliance is misplaced, as *Thigpen* did not involve the joinder of offenses. Rather, the reviewing court weighed the prejudicial effect of the admission of the other-crimes evidence against its relevance to ensure that unnecessary detail of the other crimes did not resonate with the jury. *Id.* at 37-39.

¶ 109 In this case, we conclude counsel's performance was not deficient when he did not object to the evidence regarding Reed and Lawrence. The evidence of those crimes was properly admitted as joined offenses that were part of the same comprehensive transaction as Smith's murder. We find no error and no unfair prejudice.

¶ 110 5. *Juvenile Adjudications*

¶ 111 Counsel elicited from defendant the fact that he had been adjudicated delinquent in 2012 for retail theft and in 2013 for possession of stolen property. Defendant contends that because this testimony needlessly impeached him and damaged his credibility, counsel's questions constituted substandard performance.

¶ 112 Illinois Rule of Evidence 609(d) provides that "[e]vidence of juvenile adjudications is generally not admissible under this rule." Typically, defense counsel would object to the State's attempt to introduce such evidence at trial. In this case, counsel did not fail to object to the admission of the evidence. Without an apparent justification for doing so, counsel voluntarily elicited the evidence from his client. We find this was error, as no reasonable attorney under similar circumstances would have had his client testify about his prior juvenile record.

¶ 113 Having found error, we must now determine whether that error prejudiced defendant by analyzing the issue under the second prong of the *Strickland* standard. The question

is whether there is a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *Strickland*, 466 U.S. at 694.

¶ 114 In *People v. Bond*, 405 Ill. App. 3d 499 (2010), the defendant alleged his trial counsel was ineffective when he elicited on redirect examination specifics about the defendant's juvenile record. The defendant claimed the introduction of this inadmissible evidence prejudiced him. *Id.* at 504. The State claimed counsel's introduction of the evidence served to avoid the adverse impact of the prosecutor introducing certified copies of the adjudications, since the trial court had denied the defendant's motion *in limine* to exclude them. *Id.* at 505.

¶ 115 This court first addressed the underlying issue, *i.e.*, the propriety of the trial court's order denying the defendant's motion *in limine*. *Id.* at 506. We found error, concluding the trial court should have excluded the defendant's juvenile adjudications. *Id.* at 512. With that said, we proceeded to *Strickland*'s second-prong analysis and conducted a harmless-error review. *Id.* After doing so, we found the evidence against the defendant was overwhelming. *Id*.

¶ 116 Likewise, after conducting a harmless-error analysis here, we conclude the same. We find it unreasonable to assume that the mention of defendant's two juvenile adjudications played *any* role in the jury's guilty verdict or that it in any way affected the jury's determination of defendant's credibility. The jury heard multiple witnesses implicating defendant in the murder. It is unlikely that the jury did not believe defendant's version of the events because he was adjudicated delinquent on two occasions. Instead, it is likely the jury did not believe defendant's version of the events because it was an unbelievable tale. The State's evidence against defendant was nothing short of overwhelming, and therefore, defendant cannot demonstrate prejudice sufficient to support a claim of ineffective assistance of counsel.

¶ 117 B. Sentence

¶ 118 1. *Proof of Exceptionally Brutal or Heinous Behavior*

¶ 119 Defendant argues the State failed to sufficiently prove that Smith's murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. In support of his argument, he contends the group did not plan to kill Smith, the two attacks on Smith were brief, and the group used no weapons. Defendant acknowledges that Smith suffered serious injuries such as broken bones, subdural hemorrhaging, and irreparable damage to his spleen and small intestine. However, although serious, the beating should not have been characterized as "exceptionally brutal or heinous behavior indicative of wanton cruelty[,]" especially since Smith did not die directly from the beating itself.

¶ 120 Further, defendant claims, his testimony that he was justified in merely pushing Smith over so as to prevent Smith from harming the young girls logically precluded any indication that he had engaged in brutal or heinous conduct. Finally, defendant points to his reaction of shock and remorse when he learned of Smith's death and his expression of remorse at sentencing when he apologized to Smith's family as exemplifying compassion and negating any indication of brutality or cruelty on his part.

¶ 121 To impose an extended-term sentence, the State must prove beyond a reasonable doubt that the defendant's actions constituted exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-5-3.2(b)(2) (West 2012); see also *People v. Holman*, 2014 IL App (3d) 120905, ¶ 62. When analyzing the sufficiency of the evidence, our approach is the same as it is when we consider whether the evidence proves a defendant guilty of a crime beyond a reasonable doubt. We ask whether, in the light most favorable to the State, any rational trier of fact could have found the essential elements of the extended-term factor beyond a reasonable doubt. *Holman*, 2014 IL App (3d) 120905, ¶ 62.

¶ 122 Ordinarily, the maximum sentence for first degree murder is 60 years. 730 ILCS 5/5-4.5-20(a)(1) (West 2012); *People v. Swift*, 202 Ill. 2d 378, 392 (2002). If, however, the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the trial court may impose an enhanced sentence of 60 to 100 years (730 ILCS 5/5-4.5-20(a)(2) (West 2012); 730 ILCS 5/5-5-3.2(b)(2) (West 2012)) or natural life imprisonment (730 ILCS 5/5-8-1(a)(1)(b) (West 2012)). In 2000, the United States Supreme Court held that any factual finding that increases a defendant's sentence beyond the statutory maximum, such as a finding that the crime was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty, must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Swift*, 202 Ill. 2d at 392.

¶ 123 In accordance with *Apprendi*, *Swift*, and section 5-5-3.2(b)(2) of the Code of Corrections (730 ILCS 5/5-5-3.2(b)(2) (West 2012)), the jury in this case was provided with a special interrogatory that stated:

> "If you find the defendant is guilty of first degree murder, you should then go on with your deliberation to decide whether the State has proved beyond a reasonable doubt the allegation that when the defendant committed the offense of first degree murder the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty."

¶ 124 The jury was instructed as to the definitions of "brutal," "heinous," and "wanton cruelty" as follows: "The word 'brutal' means cruel and cold blooded, grossly ruthless, or devoid of mercy or compassion. The word 'heinous' means enormously and flagrantly criminal, hatefully or shockingly evil, or grossly bad. The term 'wanton cruelty' means consciously seeking to inflict pain and suffering on the victim of the offense."

¶ 125 There are several factors courts may consider in determining whether a defendant's actions constituted exceptionally brutal or heinous and indicative of wanton cruelty. *Holman*, 2014 IL App (3d) 120905, ¶ 63. These factors include:

> "[(1)] whether the offense was premeditated, [(2)] whether the defendant was provoked to act, [(3)] the senseless nature of the act, [(4)] the number of wounds inflicted, [(5)] the danger created by the act, [(6)] the extent of the injury inflicted, [(7)] whether the defendant exhibited remorse, [(8)] whether the defendant inflicted prolonged pain or torture, [(9)] whether defendant shot the victim at close range, and [(10)] whether defendant inflicted mental suffering on the victim." *Id.* ¶ 63.

¶ 126 However, we are not limited to these characteristics and must, instead, evaluate the facts surrounding the present case. *People v. Nester*, 123 Ill. App. 3d 501, 504-05 (1984). In this case, the jury heard evidence that Smith was severely beaten, not out of anger or for retribution or vengeance. He was not beaten into submission for the purpose of a robbery or as part of a gang requirement. Rather, according to defendant, Smith was severely beaten "for fun" or for "basically no reason."

¶ 127 Defendant argues that "[a]ll murders are brutal and heinous to a certain degree" (*People v. Andrews*, 132 Ill. 2d 451, 466 (1989)) but not all meet the standard of "*exceptionally* brutal and heinous" (emphasis in original) (*People v. Lindsay*, 247 Ill. App. 3d 518, 531 (1993)). His case, he argues, is one that does not meet the heightened statutory standard. We disagree.

¶ 128 The jury determined that defendant took part in a senseless, savage, and unprovoked attack of a helpless individual. Rather than carrying out a one-punch knockout for enjoyment, defendant and the others attacked Smith with brutal stomps, kicks, and punches after

he was down and defenseless. To make matters worse, the group attacked him a second time for presumably more enjoyment. The severity of Smith's injuries demonstrated defendant's actions were devoid of mercy, required extreme force, and were gratuitously violent, which is sufficient to support the extended-term sentence. See *People v. La Pointe*, 88 Ill. 2d 482, 501 (1981), *People v. Ratzke*, 253 Ill. App. 3d 1054, 1071 (1993). We find the State presented sufficient evidence for the jury to find beyond a reasonable doubt that defendant engaged in exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 129 2. *Propriety of Sentence*

¶ 130 Based upon our finding that the State sufficiently proved defendant was eligible for an enhanced sentence, the trial court had the option of imposing a term between 20 years and natural life. 730 ILCS 5/5-4.5-20(a)(1) (West 2012); 730 ILCS 5/5-8-1(a)(1)(b) (West 2012). After considering the presentence investigative report, as well as the factors in mitigation and aggravation, the court sentenced defendant to 35 years in prison.

¶ 131 The sentencing judge is vested with wide discretion "in order to permit reasoned judgments as to the penalty appropriate to the particular circumstances of each case." *La Pointe*, 88 Ill. 2d at 492. A sentence imposed by the trial court is presumptively correct, and only where such a presumption has been rebutted by an affirmative showing of error will a reviewing court find that the trial court has abused its discretion. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 29. No such showing has been made here.

¶ 132 According to the record before us, the trial court carefully considered all relevant and applicable factors, including the potential range of punishment available, before sentencing defendant to 35 years. The trial court is in a much better position to fashion an appropriate sentence based on the totality of circumstances. Without a viable demonstration to the contrary,

we conclude the court did not abuse its discretion in sentencing defendant to 35 years in prison upon his conviction for first degree murder—a conviction upon which the jury found was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty.

¶ 133 III. CONCLUSION

¶ 134 For the reasons stated, we affirm defendant's conviction and sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 135 Affirmed.