2019 IL App (1st) 161254-U

No. 1-16-1254

Order filed February 14, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 17326
	)	
JOSE FIGUEROA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence and witness identification proved defendant guilty of first-degree murder beyond a reasonable doubt. We are unable to consider defendant's as-applied constitutional challenge to his sentence because he did not raise the issue in the trial court.

¶ 2 Following a jury trial, defendant Jose Figueroa was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and sentenced to 58 years in prison. On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt because the evidence

and identification testimony did not establish he was the shooter. He also contends that his 58-year prison sentence violates the proportionate penalties clause of the Illinois Constitution. We affirm.

¶ 3 Defendant was charged with six counts of first degree murder for shooting and killing Dwayne Wilks. At trial, Vikita McNeal testified that, on the evening of September 17, 2011, and the early morning hours of September 18, 2011, she and Wilks were at a party with about 40 or 50 people near Potomac Avenue and Karlov Avenue. Defendant was not there. At about 2:45 a.m., McNeal and Wilks left the party. Wilks walked to McNeal's car and McNeal went in a different direction to talk to someone, about 15 or 20 feet away from Wilks.

¶ 4 A car drove up on Karlov and McNeal heard "screeching, door closed, gunshots." She did not see anyone get out of the car. She initially heard two gunshots, looked in the direction where they came from, and saw defendant, whom she identified at trial, wearing a black hoodie sweater, light jacket, a white t-shirt, dark pants, and Adidas shoes. Defendant had a dark colored gun in his hand, ran behind Wilks, and shot Wilks when he was on the ground. Defendant ran east on Potomac. There was a streetlight on, nothing blocked her view of defendant, and she clearly saw that defendant was the person who shot Wilks.

¶ 5 McNeal called 9-1-1 and described the shooter. About 10 to 15 minutes after the shooting, the police brought defendant to the scene of the shooting. Defendant was wearing the "same hoodie, the jacket, everything that he had on" and McNeal identified him. McNeal spoke to an assistant State's Attorney (ASA) after the shooting and identified defendant in a photograph as the person who shot Wilks. She identified defendant in a photograph as the person who shot Wilks when she testified at the grand jury proceeding.

¶ 6 McNeal never saw a white pickup truck near the shooting. She testified that defendant "looked familiar from the party" and acknowledged she told the police after the shooting that the shooter had been at the party.

¶ 7 Anthony Pinson testified that, at about 12 a.m., on September 18, 2011, he and Pamela Jackson had a party in the basement of his home on Potomac. At 2:45 a.m., Pinson and Wilks, who was with someone Pilson thought was his sister, walked to their cars. Pinson saw a person, whom he identified at trial as defendant, standing about 120 feet away on the corner of Karlov and Potomac. The streetlights were working and Pinson saw defendant's whole body and side of his face. Defendant was wearing a black hoodie, black pants, white t-shirt, and "some Adidas." Defendant stood there for about five minutes. He then came off the corner and fired two gunshots at Wilks. Wilks stumbled and fell down. Defendant, who was about 75 feet from Pinson, ran to Wilks. Wilks covered his face and said "don't shoot." Defendant stood right over Wilks, shot him two times, and ran towards Pulaski, putting the gun in his waistband. Pinson did not see a white pickup truck.

¶ 8 After the shooting, Pinson told the detectives he did not see what had happened or the shooter. Pinson called the detectives at about 9 or 10 a.m. the morning after the shooting. Pinson initially did not want to get involved but changed his mind because "someone's son got hurt and killed for nothing." At the police station that day, Pinson viewed a lineup. He did not want to view it because he did not want to get involved.

¶ 9 When Pinson viewed the lineup, he did not identify defendant in the lineup as the person who shot Wilks. Instead, he identified someone else as the shooter. When he walked out of the lineup room, he told a police officer that he knew he picked the wrong person. The State showed

Pinson photographs of the lineup he viewed and he identified defendant as the person who shot Wilks. When Pinson testified at the grand jury proceeding on September 30, 2011, he identified defendant in a photograph as the person who shot and killed Wilks. Pinson had three prior convictions for residential burglary and two convictions for attempted residential burglary.

¶ 10 Tyrone Washington testified that, on September 17, 2011, he was at Pinson's party. At about 2:30 or 2:45 a.m. on September 18, 2011, Washington saw a person, whom he identified at trial as defendant, standing on the corner of Karlov and Potomac, about 20 to 25 feet away from him. Defendant was wearing a "black coat like a vest" with a hood. A streetlight was on in the corner and nothing obstructed Washington's view of defendant. Wilks walked towards the back of a car and defendant, who had a black handgun, started shooting him. He yelled "King Mother*** Love" when he started shooting. Washington was "stuck," could not run, and "[t]hat's what made my eye contact more visual to him, because I was stuck." Defendant's first shot hit the car. Wilks turned around and defendant shot at him again. Wilks put his hands up, defendant shot him again, and Wilks fell to the ground. Defendant ran toward Wilks, stood over him, and shot him again. Defendant ran east towards Potomac. Washington did not see a white pickup truck.

¶ 11 Washington testified that defendant did not have a ponytail. Although defendant had something on his head, his hoodie was blocking most of it and "as he ran the hoodie came down." Washington also testified he did not know if defendant had a "Doo Rag [*sic*] or what, but it fell down," and defendant had something on his head and it had to be a dorag or ponytail. Washington acknowledged that he testified under oath at the grand jury proceeding that he did

not know if defendant was wearing a "hood or a Doo Rag [*sic*], but there was like a ponytail that was in the middle back of his head that came down, or whatever."

¶ 12 Washington did not talk to the police after the shooting and left Chicago at 10:30 a.m. to go back to school. On October 10, 2011, at the police station, Washington identified defendant in a photographic array. When Washington was under oath at the grand jury proceeding, he identified defendant in a photograph as the person who shot Wilks.

¶ 13 Chicago police officer Joe Gathings testified that, at 2:45 a.m., on September 18, 2011, he received a call of a person shot on Potomac and the offender was described as a "male Hispanic, dark clothing" with dark hair. At Pulaski and Potomac, Gathings saw a man, whom he identified at trial as defendant, matching that description and "running like a bat out of hell." Gathings and his partner pursued defendant in their vehicle with their lights and sirens on. Defendant turned into an alley and Gathings exited his vehicle and pursued him on foot to the top floor of an apartment building landing. Gathings placed defendant in handcuffs and recovered a handgun from his pocket. Gathings kept the gun in his constant care and control until an evidence technician recovered it.

¶ 14 Gathings could not recall whether defendant had a ponytail but testified that defendant was not wearing a dorag. Defendant was the only person Gathings saw matching the description of the shooter and he did not see anyone else running away from the scene of the shooting.

¶ 15 Chicago police sergeant Arthur Young testified that, on September 18, 2011, McNeal identified defendant in a show-up at the scene of the shooting. During his investigation, Young spoke with Miguel Torres who had been at the party. Young noted in his report that Torres

physically resembled defendant's hair, facial appearance, and size and had tattoos indicating he was a member of the Latin Kings gang.

¶ 16 At the police station after the shooting, defendant received his *Miranda* warnings and agreed to speak with Young and his partner. Young's conversation with defendant was recorded and a DVD of the recording was admitted into evidence and published to the jury. Later that day, defendant had a conversation with an ASA in Young's presence. The conversation was recorded and the DVD of the recording was admitted into evidence and published to the jury.

¶ 17 In defendant's interviews with Young and the ASA, defendant stated that a passenger in a white truck started shooting at him when he was hanging out with three other people at Springfield Avenue and Potomac. Defendant and the people he was with drove around Karlov, where he recognized the white pickup truck from which someone had shot at him four times. Defendant's "guys" dropped him off at Springfield and Potomac and he retrieved his loaded gun from the garbage can where he stored it. He carried the gun in his jacket pocket, walked by the party, and waited at Karlov and Potomac for 10 to 20 minutes.

¶ 18 Defendant stated that "some guy" came out of the party and tried to jump in the passenger side of "the truck." Defendant started shooting at the man and the driver. He fired two or three shots and then went closer to them. The man getting into the passenger side fell down, the truck left, and defendant ran up to the man and started shooting at him, aiming at his "[h]ead, everything." He shot the man two times when he was on the ground and then ran. Defendant stated he thought he shot the man three times when the man was standing up and two times after he "went down." He did not recognize the man he shot and knew he hit him when he was

standing over him because "it was an easy shot." Defendant states he was in the "MLD" gang but went to the "Kings" territory to "shoot at them cause they shot at me."

¶ 19 The State entered a stipulation between the parties that a forensic investigator would testify that she recovered four expended shell casings and a .40-caliber semiautomatic pistol from the scene of the shooting. She received a fired bullet from hospital personnel that was recovered from Wilks' body. She also recovered defendant's black jacket and administered a gunshot residue test to defendant's hands. She inventoried all items pursuant to Chicago Police Department protocol. The State entered a stipulation between the parties that an expert in the field of forensic identification would testify that the fired bullet recovered from Wilks' body and the four shell casings recovered from the scene of the shooting were fired from the firearm recovered from defendant.[1]

¶ 20 Forensic scientist Ellen Chapman testified that she tested the right and left cuffs of defendant's jacket for gunshot residue. She concluded that the sampled areas taken from the right and left cuffs contacted gunshot residue or were in the environment of a discharged firearm. Chapman analyzed the gunshot residue kit administered to defendant's hands and concluded that defendant either discharged a firearm, contacted a gunshot residue-related item, or had his left hand in the environment of a discharged firearm. Chapman testified that it was not possible for her to determine that defendant shot a weapon or that he was present when a gun was discharged. She could not eliminate the possibility that the gunshot residue had been transferred to defendant.

[1] The expert would testify that the bullets matched the firearm in "exhibit 31." Officer Gathings identified exhibit 31 at trial as the firearm he recovered from defendant.

¶ 21 The State entered a stipulation between the parties that Wilks' cause of death was multiple gunshot wounds and the manner of death was homicide.

¶ 22 It was stipulated between the parties that Pamela Jackson would testify that Torres, a Latin Kings gang member, was at the party and defendant was not there. The parties stipulated that defendant told the detectives that he had been an "MLD" since he was 12 years old.

¶ 23 In closing argument, defense counsel argued that defendant was mistakenly identified, defendant made up stories in his statements to the detectives and ASA, and the gunshot residue evidence supports that he merely picked up the gun, not that he was the shooter. Defense counsel also argued that the shooter yelled "King mother*** love," which is something Torres, who looked like defendant, would have yelled as a member of the Latin Kings gang. The jury found defendant guilty of first degree murder, including personal discharge of a firearm. The court subsequently denied his motion for a new trial.

¶ 24 At sentencing, in aggravation, the State published a letter written by Wilks' mother. It argued that the facts were "truly horrific" and it was a "[c]old, calculating murder." The State requested the court sentence defendant to natural life in prison. In mitigation, defense counsel read letters from defendant's aunt and mother. Defendant argued he was 18 years old and under the influence of ecstasy at the time of the offense. He argued he did not have any strong male influences in his life, he had changed since the time of the offense, and did not have a history of violent offenses. Defendant requested the court sentence him to as close to the minimum as possible.

¶ 25 In imposing sentence, the court noted defendant was 18 years old at the time of the offense, just barely over the age that would make him a juvenile. It stated the sentencing range

was "obviously significant" and "[t]he fact that he was 18 at the time doesn't lessen the fact that he murdered a man basically for no reason whatsoever, no logical reason whatsoever." The court sentenced him to 58 years in prison, which included a 25-year firearm enhancement, noting that it considered the factors in aggravation and mitigation, the letters submitted by the parties, and the arguments.

¶ 26 Defendant first contends on appeal that the State's evidence and identification testimony did not establish he was the shooter beyond a reasonable doubt. He argues the witnesses' identifications of him were unreliable and their accounts of the shooting contained numerous discrepancies.

¶ 27 When we review the sufficiency of the evidence, we must determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On review, we consider the evidence in the light most favorable to the State. *People v. Green*, 2017 IL App (1st) 152513, ¶ 102. In a jury trial, as here, it is the jury's responsibility to determine the credibility of the witnesses and the weight to be given to their testimony, resolve conflicts in the evidence, and draw reasonable inferences therefrom. *Green*, 2017 IL App (1st) 152513, ¶ 102. We will not retry a defendant and must give due consideration to the fact that the jury saw and heard the witnesses. *People v. Sullivan*, 366 Ill. App. 3d 770, 782 (2006). The jury must determine the defendant's guilt or innocence and we will only reverse a conviction if the evidence is so improbable as to create a reasonable doubt of the defendant's guilt. *People v. Cox*, 377 Ill. App. 3d 690, 696 (2007).

¶ 28 To prove first degree murder, the State must prove beyond a reasonable doubt that the defendant killed another individual without lawful justification and, in performing the acts which caused the death, the defendant, as charged here, intended to kill or do great bodily harm to that individual or another, or knew that such acts will cause death to that individual or another, and during the commission of the offense, he personally discharged a firearm that proximately caused death. 720 ILCS 5/9-1(a)(1) (West 2010).

¶ 29 The evidence was sufficient for the jury to reasonably conclude that defendant was guilty of first degree murder and defendant was the person who shot and killed Wilks. Defendant admitted to retrieving a gun, waiting outside the party for at least ten minutes, and shooting Wilks three times when he was standing and two times when he was on the ground. See *People v. Hayes*, 319 Ill. App. 3d 810, 818 (2001) ("Confessions are one of the most probative and damaging types of evidence that can be admitted against a defendant."). Defendant admitted he knew he hit Wilks because it "was an "easy shot" when he was standing over him and he went to the area "[t]o go shoot at them cause they shot at me."

¶ 30 The physical evidence and witnesses corroborated defendant's admission. Officer Gathings saw defendant running from the area of the shooting and, when he pursued defendant in his police car with lights and sirens, defendant ran from him, from which the jury could infer defendant's consciousness of guilt. *People v. Williams*, 266 Ill. App. 3d 752, 760 (1994) ("A trier of fact may infer consciousness of guilt from evidence of a defendant's flight from the police."). Gathings recovered a gun from defendant and the four shell casings recovered from the scene and the fired bullet recovered from Wilks' body came from that recovered gun. The forensic scientist concluded that the left and right cuffs of defendant's jacket contacted gunshot residue or

were in the environment of a discharged firearm. She also concluded that defendant either discharged a firearm, contacted a gunshot residue-related item, or his left hand was in the environment of a discharged firearm.

¶ 31 Further, three witnesses, McNeal, Washington, and Pinson, testified that they observed the shooting and they each identified defendant before trial and at trial as the shooter. See *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) (a positive identification by one eyewitness who had ample opportunity to observe is sufficient to support a defendant's conviction). Each witness testified that, after defendant fired the first two gunshots, he ran over to Wilks and shot him when he was on the ground. McNeal testified she could clearly see that defendant was the person who shot Wilks and she identified defendant as the shooter about 10 to 15 minutes after the shooting. Washington testified that nothing obstructed his view of defendant and, about three weeks after the shooting, he identified defendant in a photographic array as the person who shot Wilks. Pinson testified he saw defendant stand on the corner for five minutes and he could see his whole body and side of his face. Pinson identified defendant as the person who shot Wilks when he testified at the grand jury proceeding.

¶ 32 Viewing the evidence in the light most favorable to the State, we conclude that the jury could reasonably find defendant guilty of first degree murder for the shooting death of Wilks. The finding was not so improbable as to raise a reasonable doubt of defendant's guilt.

¶ 33 Defendant nevertheless asserts that the witnesses confused defendant with party attendee Miguel Torres, the presence of gunshot residue on defendant's hand and clothing does not show he was the shooter, and defendant's statement contains glaring inaccuracies and outright fabrications that negate the possibility that he was telling the truth. These arguments were

presented to the jury and, in finding defendant guilty, it rejected them. See *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 63. The jury, as fact finder, had to determine the witnesses' credibility, weigh the evidence, and draw reasonable inferences from the evidence. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). It was not required to disregard the inferences that flow from the evidence or search out any possible explanation consistent with defendant's innocence and raise them to reasonable doubt. See *People v. Branch*, 2018 IL App (1st) 150026, ¶ 29. We see no reason from the evidence presented to disturb the jury's finding.

¶ 34 Even though the witnesses' identifications of defendant were corroborated by his admission and the physical evidence, defendant contends the witnesses' identifications were unreliable. When identification is an issue, the State must prove beyond a reasonable doubt the identity of the individual who committed the offense. *People v. White*, 2017 IL App (1st) 142358, ¶ 15. Vague or doubtful identification testimony is insufficient to support a conviction. *Joiner*, 2018 IL App (1st) 150343, ¶ 47. However, as previously noted, a positive identification by one eyewitness who had ample opportunity to observe is sufficient to support a defendant's conviction. *Piatkowski*, 225 Ill. 2d at 566.

¶ 35 When we review the reliability of identification testimony, we consider the factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *People v. Slim*, 127 Ill. 2d 302, 307 (1989). These factors include: (1) the witness's opportunity to view the defendant during the offense; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the subsequent identification; and (5) the length of time between the crime and the identification. *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010). It is the fact finder's

responsibility to determine the reliability of a witness's identification (*In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007)) and we will not substitute our judgment for that of the fact finder on questions involving witness credibility (*People v. Negron*, 297 Ill. App. 3d 519, 530 (1998)). The *Biggers* factors demonstrate that the witnesses' identifications of defendant were reliable.

¶ 36 The first factor, the witnesses' opportunity to view defendant, favors the State. All three witnesses testified that there was a streetlight on in the area. McNeal and Washington testified that nothing blocked their views of defendant and Pinson testified he could see defendant's whole body and side of his face. Pinson testified that defendant stood on the corner for 5 minutes and there was about 30 seconds between the first and last gunshot. See *People v. Reed*, 80 Ill. App. 3d 771, 777-78 (1980) (the witness's observations of the defendant for 10 seconds was sufficient, noting "[i]t is not required that the validity of the identification be based upon perfect conditions for observation or that the time for observation be of a prolonged nature").

¶ 37 The second factor, the witnesses' degree of attention, favors the State. Each witness gave detailed descriptions of the shooting. McNeal testified that, after defendant fired the first two gun shots, defendant, who had a dark colored handgun, ran behind Wilks, shot him while he was on the ground, and fled. Washington testified that defendant's first shot hit the car, Wilks turned around, and defendant, who had a black handgun, shot at Wilks. Wilks put his hands up, defendant shot him again, after which Wilks fell to the ground. Defendant ran over to Wilks, shot him, and fled. Pinson testified that defendant came off the corner and fired two shots at Wilks, hitting him in the upper body. Wilks fell down, defendant ran to Wilks, and Wilks covered his face and said "don't shoot." Defendant stood over him, shot him two times, and fled. The witnesses' detailed recollections demonstrate that they had a high degree of attention on the

shooting. See *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 105 (finding the witness had a high degree of attention where he provided a detailed recollection of what the defendant did from the moment he approached the witness until he fled).

¶ 38 With respect to the third factor, the accuracy of the witnesses' prior descriptions, there was no testimony about the witnesses' prior descriptions of defendant. However, if this factor were to favor any party, it would favor the State. McNeal testified that defendant was wearing a black hoodie sweater, light jacket, a white t-shirt, dark pants, and Adidas shoes and that, when she identified him 10 to 15 minutes after the shooting, he was wearing the same clothes. She identified defendant's black jacket at trial. McNeal's description at trial was consistent with defendant's own description of his clothing, as he stated in his interview after the shooting that he was wearing a jacket that was "like a vest" with a hood and a sweater.

¶ 39 The fourth factor, the certainty of the witnesses' subsequent identifications favors the State. All three witnesses identified defendant before trial and at trial as the shooter and the record does not indicate that they expressed any uncertainty when they made their identifications. See *People v. White*, 2017 IL App (1st) 142358, ¶ 19 (where the witness made a positive identification, the court noted that "no evidence in the record shows any uncertainty" in the witness's identification). Further, McNeal identified defendant 10 to 15 minutes after the shooting, Washington identified him in a photographic array about one month after the shooting, and Pinson identified him in a photograph at the grand jury proceeding. Thus, the length of time between the crime and the witnesses' subsequent identifications of defendant, the fifth factor, favors the reliability of the identifications. See *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (finding an identification made one year and four months after the crime was reliable).

¶ 40 Defendant takes issue with Washington's identification testimony because he testified that defendant had a ponytail or a do-rag on his head even though defendant did not have either of these on his head when he was apprehended. Defendant also asserts that Pinson's testimony was not reliable because he purposely misidentified defendant when he initially viewed the lineup. The jury heard Washington's testimony about what defendant was wearing on his head and Pinson's testimony about purposely misidentifying someone other than defendant. It was the jury's role to judge the credibility and weigh the evidence and, after doing so, it found the witnesses credible and that they made positive identifications. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 34.

¶ 41 Accordingly, after viewing the evidence in the light most favorable to the State and weighing the *Biggers* factors, we conclude that a rational trier of fact could have found that the witnesses' identifications of defendant were sufficiently reliable to prove him guilty beyond a reasonable doubt of first degree murder.

¶ 42 Defendant's second contention is that his 58-year prison sentence for an offense committed when he was 18-years-old is a *de facto* natural life sentence and violates the proportionate penalties clause of the Illinois Constitution. He argues the court imposed the sentence without considering additional mitigating factors related to his age, such as his impetuosity, maturity, ability to consider the risks and consequences of his behavior, vulnerability to outside pressures and negative influences, and potential for rehabilitation.

¶ 43 The State argues that defendant's challenge is an as-applied challenge to the constitutionality of his sentence and is subject to forfeiture. It therefore argues defendant forfeited his claim because he failed to raise his claim in a postsentencing motion. See *People v.*

Lewis, 234 Ill. 2d 32, 42 (2009) (a defendant forfeits a sentencing issue not raised in the trial court in a written postsentencing motion).

¶ 44 Following our supreme court's recent decision in *People v. Harris*, 2018 IL 121932, which we discuss below, we conclude that we are unable to consider defendant's challenge because he did not raise his challenge in the trial court and the record is, therefore, not sufficiently developed in terms of defendant's specific circumstances to evaluate his claim. See *Harris*, 2018 IL 121932, ¶¶ 40, 46; *People v. Herring*, 2018 IL App (1st) 152067, ¶ 104. In defendant's reply brief, he concedes that his as-applied challenge based on proportionate penalties raised for the first time on appeal is controlled by *Harris*.

¶ 45 As background, in *Roper v. Simmons*, 543 U.S. 551, 574 (2005), the United States Supreme Court concluded that the death penalty could not be imposed on juveniles who were under the age of 18 at the time of the offense. In doing so, the Supreme Court noted that there are general differences between juveniles under the age of 18 and adults, such as the lack of maturity and susceptibility to negative influence and peer pressure. *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Later, in *Miller v. Alabama*, 567 U.S. 460, 479 (2012), the United States Supreme Court held that a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders violates the eighth amendment to the United States Constitution. The Supreme Court noted that a mandatory sentence without parole for juveniles precludes the court from considering a defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. The *Miller* protections for juveniles under the eighth amendment do not apply to adult offenders. *People v. Pittman*, 2018 IL App (1st) 152030, ¶ 31.

¶ 46 Here, defendant, who was 18 years old at the time of the offense, is not asserting a claim under the eighth amendment. He argues his sentence violates the proportionate penalties clause of the Illinois Constitution. This provision states: "All 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; see also *Pittman*, 2018 IL App (1st) 152030, ¶ 33. Under this provision, "a sentence may be deemed 'unconstitutionally disproportionate if *** the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.' " *People v. Perez*, 2018 IL App (1st) 153629, ¶ 40 (quoting *People v. Miller*, 202 Ill. 2d 328, 338 (2002)).

¶ 47 The defendant in *Harris* argued for the first time in the appellate court that his 76-year sentence for an offense committed when he was 18 years old violated the proportionate penalties clause of the Illinois Constitution. *People v. Harris*, 2016 IL App (1st) 141744, ¶ 31, *aff'd in part, rev'd in part*, 2018 IL 121932. This court found that the defendant's 76-year sentence violated the proportionate penalties clause because it shocked the moral sense of the community "to send this young adult to prison for the remainder of his life, with no chance to rehabilitate himself into a useful member of society." *Harris*, 2016 IL App (1st) 141744, ¶ 69.[2]

¶ 48 However, our supreme court reversed that finding, stating that, because the defendant did not raise his as-applied constitutional challenge in the trial court, the trial court did not hold an evidentiary hearing or make any findings of fact on his specific circumstances. *Harris*, 2018 IL 121932, ¶¶ 40, 63. It therefore found that the defendant's challenge was premature, noting *Miller*

[2] This court found that the defendant's sentence did not violate the eighth amendment because he was over the age of 18 and not a juvenile. *People v. Harris*, 2016 IL App (1st) 141744, ¶ 56, *aff'd in part, rev'd in part*, 2018 IL 121932.

did not apply directly to his circumstances, as he was an adult, and the record did not contain evidence about how the evolving science on juvenile and brain development that formed the basis for the *Miller* decision applied to the defendant's specific facts and circumstances. *Id.* ¶¶ 45-46. The court did not consider the merits of the defendant's challenge and concluded that his claim was more appropriate for another proceeding. *Id.* ¶ 48.

¶ 49 Here, defendant and the State correctly agree that defendant's sentencing claim is an as-applied challenge. Defendant argues that his 58-year sentence, which included a mandatory 25-year firearm enhancement (730 ILCS /5-8-1(d)(iii) (West 2016)) and the requirement that he must serve the entire sentence with no sentencing credit (730 ILCS 5/3-6-3(a)(2)(i) (West 2016)), is a *de facto* life sentence and in violation of the proportionate penalties clause of the Illinois Constitution. He argues that the reasoning behind *Miller* regarding juvenile offenders should apply to his specific circumstances as an 18-year-old young adult at the time of the offense and that the court failed to consider additional mitigating factors related to his youth when it sentenced him. Defendant's claim is therefore an as-applied challenge. See *Harris*, 2018 IL 121932, ¶ 37 (concluding that the defendant's claim was an as-applied challenge because he contended that, as applied to his specific circumstances, his sentence violated the Illinois Constitution).

¶ 50 However, as defendant concedes, he did not raise his claim in the trial court. Thus, the trial court did not hold an evidentiary hearing or make any findings of fact on defendant's specific circumstances. See *id.* ¶ 40. The record includes the presentence investigation report (PSI), which includes only basic information about defendant. Although the parties discussed defendant's history of drug and alcohol abuse at the sentencing hearing when making corrections

to the PSI, there was no sworn testimony and the court did not make any factual findings about this matter or his susceptibility to peer pressure as a young adult. See *People v. Landerman*, 2018 IL App (3d) 150684, ¶ 56. Accordingly, because defendant did not raise his as-applied constitutional challenge in the trial court and there was no evidentiary record made in the trial court, we are unable to consider defendant's claim. See *id.* ¶ 48; *Herring*, 2018 IL App (1st) 152067, ¶ 104; *Landerman*, 2018 IL App (3d) 150684, ¶ 57.

¶ 51 For the reasons explained above, we affirm defendant's conviction.

¶ 52 Affirmed.