

No. 1-11-1073

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 ) Plaintiff-Appellee, )  
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 ) v. )  
 ) No. 08 CR 17931  
 )  
 ) CHARLES KUCINSKY, )  
 )  
 ) Defendant-Appellant. )  
 )  
 ) Honorable  
 ) Mary Margaret Brosnahan  
 ) Judge Presiding.  
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JUSTICE SIMON delivered the judgment of the court.  
Justices Quinn and Connors, concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Defendant's right to a fair trial was not violated by improper comments during closing and rebuttal arguments, as the prosecutor did not argue that defendant intimidated a potential witness or suggest that the State knew of additional evidence of defendant's guilt and could have reasonably inferred that a defense witness testified untruthfully to deflect gang animosity away from her son. Defendant has forfeited his additional claims of prosecutorial misconduct and, moreover, the challenged comments do not constitute plain error because the remarks regarding the believability of a state witness' testimony, when considered in context, did not exceed the bounds of proper argument and any confusion caused by the prosecutor's comments as to the legal effect of prior inconsistent

statements was cured by the trial court when it instructed the jury on that subject. The State did not improperly comment on defendant's invocation of his right to silence, as a state witness only testified that he "attempted to interview" defendant and did not testify that defendant invoked his right to silence and any error was harmless because the State did not elicit the testimony or refer to defendant's silence during the remainder of the trial. The statutes under which defendant was sentenced are constitutional and do not violate the proportionate penalties clause of the Illinois Constitution because they serve valid purposes and do not improperly curtail a sentencing judge's discretion.

¶ 2 Following a jury trial, defendant Charles Kucinsky was found guilty of first degree murder and attempted first degree murder and sentenced to consecutive terms of 55 years imprisonment for first degree murder and 30 years imprisonment for attempted first degree murder. On appeal, defendant contends that the State violated his right to a fair trial by making improper comments during closing and rebuttal arguments and by improperly informing the jury that he had exercised his right to silence. Defendant also contends that the statutes under which he was sentenced violate the proportionate penalties clause of the Illinois Constitution. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Defendant was charged with multiple offenses, including the first degree murder of Carlos Gonzalez and the attempted first degree murder of Michael Espinosa, in connection with a shooting that took place on May 15, 2008. At trial, Espinosa testified that he was friends with Gonzalez and Juan Alicea.<sup>1</sup> Espinosa had never joined a street gang, but Gonzalez and Alicea were members of the Two-Six gang, which was engaged in a feud with the Latin Kings at the

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<sup>1</sup> While Alicea's surname is spelled in various different ways in the record and the briefs, we will use the spelling of "Alicea" in this order because it is most likely to be correct as it is the most common of the spellings used in the record and the briefs in the United States according to the 2000 U.S. Census. See "File B: Surnames Occurring 100 or more times," *available at* <http://www.census.gov/genealogy/www/data/2000surnames/index.html> (last visited May 17, 2013).

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time of the incident. The parties later stipulated that defendant was a member of the Latin Kings at that time.

¶ 5 Espinosa testified that on the morning of May 15, 2008, he and Gonzalez went to Alicea's house, which was located at 2844 South Kenneth Avenue in Chicago, to pick up Alicea on their way to school. Espinosa and Gonzalez arrived at Alicea's house between 10 and 10:30 a.m., and Gonzalez went to the door and rang the doorbell while Espinosa sat down on a ledge to the right of the doorway. Alicea's mother came to the window next to the door and waved her finger at Espinosa and Gonzalez, indicating that Alicea was not home. Espinosa and Gonzalez remained by the doorstep for a short time as they decided whether to leave without Alicea.

¶ 6 While sitting on the ledge, Espinosa saw defendant walking down the sidewalk toward Alicea's house. Defendant was five or six houses away, and Espinosa could see defendant's face and observed that defendant was wearing an opened black hoodie over a gray Chicago White Sox jersey and a pair of dark pants. Defendant stopped directly in front of Alicea's house and said "hey, what's up?" Espinosa turned to Gonzalez to see if he knew defendant, then turned back toward defendant, who was now pointing a gun in the direction of Espinosa and Gonzalez. Espinosa saw the gun emit a spark and heard a gunshot, looked at Gonzalez and saw that he had been shot in the chest, then turned away from defendant and got off the ledge as he could feel that he had been shot. Espinosa went into the backyard of the neighboring house and told a man in the yard to call 911. Espinosa heard eight or nine gunshots in total and was later taken to a hospital and treated for four gunshot wounds. Espinosa further testified that he viewed a photo lineup on July 7, 2008, and a physical lineup on August 19, 2008, and identified defendant as the

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shooter both times.

¶ 7 Brenda White testified that she was driving southbound on the 2800 block of South Kenneth Avenue between 10:15 and 10:30 a.m. on May 15, 2008, when she saw two young men sitting on a house porch and saw defendant walking northbound toward the two men. Defendant was wearing dark pants, a white t-shirt, and a gray hoodie with the hood pulled down. White had an unobstructed view of defendant and could see his face because he was walking toward her. Defendant stopped in front of the porch, pulled out a gun and pointed it at the men, then began firing the gun at them. White stopped her car when defendant began firing his gun and heard about five gunshots. When defendant stopped firing his gun, he turned and looked at White, who then pulled away in her car. As White drove away, she looked back and saw defendant enter a red car. White drove to a nearby auto repair shop to call 911 and saw defendant drive by while she was there. White also testified that she viewed a photo lineup on July 17, 2008, and a physical lineup on August 19, 2008, and that she identified defendant as the shooter both times. On cross-examination, White stated that when she spoke with police officers on the day of the shooting, she told the officers that while it appeared that the shooter had white skin, she thought the shooter was Hispanic based on his facial features.

¶ 8 Chicago police detective Kevin Cole testified that there was an ongoing conflict between the Two-Sixes and Latin Kings in May 2008, that an arrest warrant was issued for defendant on July 30, 2008, and that defendant was placed under arrest on August 18, 2008. Chicago police detective Terry Shields testified that on August 18, 2008, he went to a house on the 3000 block of South Christiana Avenue in Chicago with a unit of police officers and saw defendant appear at

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the window of that house when they arrived. The officers entered the house and proceeded to a closet in the attic area where Detective Shields found defendant lying down in a hole in the wall.

¶ 9 Marilyn Diaz, Juan Alicea's mother, testified for the defense that on May 15, 2008, she was living in the first floor apartment of the building at 2844 South Kenneth Avenue. At some point between 10 and 11 a.m. that morning, about 15 or 20 minutes after Alicea had left to go to school, Diaz heard a noise coming from the front of the house and looked out the front window. Diaz saw a man wearing a dark gray hoodie and dark pants walking northbound on the sidewalk toward her house. The hood was up and covered most of the man's head. Diaz could only see a little bit of the skin on the man's face and hands and testified that his skin was "olive color or darker." All of a sudden, the man began firing a gun in the direction of the house, and Diaz ran to the back of the house and called 911. Diaz subsequently viewed a series of photographs at a police station, but could not identify anyone as the shooter. On cross-examination, Diaz stated that Alicea was not a member of the Two-Six gang and that she did not know if members of the Two-Sixes or Latin Kings were present in her neighborhood.

¶ 10 Salvador Bueno testified for the defense that he lived on the block on which the shooting took place and that around 10:30 a.m. on May 15, 2008, he was outside and getting into his car when he heard gunshots and saw a person to his south and across the street firing a gun. After the shooting, the shooter ran south and cut through a gangway toward an alley. The shooter was wearing a hoodie and the hood was up, so Bueno was not able to get a good look at the shooter's face.

¶ 11 On cross-examination, Bueno stated that he lived about nine houses north of the scene of

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the shooting and that Alicea was a member of the Two-Six gang. Bueno also stated that he ran to the scene when the shooting ended and encountered a man named Chris, who arrived there just before him. Chris told Bueno that someone had been shot and to call 911, then ran away. Bueno further stated that he told the police that the shooter was light-skinned.

¶ 12 The parties stipulated that, if called, Chicago police detectives James Egan and Ted Przepiora would testify that they spoke with White on May 15, 2008, and that White never told them that she stopped her car during the shooting or that defendant looked at her or entered a car after the shooting. The parties also stipulated that, if called, Chicago police detective Gary would testify that she spoke with Espinosa on May 15, 2008, and that Espinosa never told her that defendant was wearing a White Sox jersey or that defendant was five or six houses away when he first saw defendant.

¶ 13 Based on this evidence, the jury found defendant guilty of first degree murder and found that the State had proven the allegation that defendant discharged a firearm that proximately caused Gonzalez's death during the commission of that offense. The jury also found defendant guilty of attempted first degree murder and found that the State had proven the allegation that defendant discharged a firearm at Espinosa during the commission of that offense. The court conducted a sentencing hearing at which it determined that defendant faced a minimum sentence of 71 years imprisonment because he was subject to sentencing enhancements for discharging a firearm during the commission of the crimes and consecutive sentencing and sentenced him to consecutive terms of 55 years imprisonment for first degree murder and 30 years imprisonment for attempted first degree murder.

¶ 14

## ANALYSIS

¶ 15

### I. Prosecutorial Misconduct

¶ 16 Defendant contends that his right to a fair trial was violated when the prosecutor made improper comments during closing and rebuttal arguments. A prosecutor is generally accorded wide latitude regarding the content of closing and rebuttal arguments and may comment on the evidence and any fair and reasonable inference the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In reviewing allegations of prosecutorial misconduct, the comments at issue must be examined in their entirety and placed in the proper context. *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987). The regulation of the substance and style of closing and rebuttal arguments is within the trial court's discretion and the court's determination of the propriety of a prosecutor's remarks will not be reversed absent an abuse of that discretion. *People v. Simms*, 192 Ill. 2d 348, 396-97 (2000).

¶ 17 In the event a prosecutor's comment is determined to be improper, we will not disturb the jury's verdict unless the improper comment caused substantial prejudice to the defendant. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). The question of whether a prosecutor's statement is so egregious that it warrants a new trial is a legal issue and is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 18

#### A. Witness' fear of testifying

¶ 19 Defendant asserts that the prosecutor improperly argued that another eyewitness would have testified had he not been too afraid of defendant. During rebuttal, the prosecutor stated that Bueno testified that another person was present at the scene of the shooting and argued that the

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other person ran away because "[i]t is no easy thing to walk into a courtroom at 26th Street and start pointing people out like him who are willing to pull a trigger 9 times in broad daylight."

Defense counsel objected to the comment, and the court overruled the objection.

¶ 20 Defendant maintains that the challenged comment was improper because it was not based on the evidence and it suggested that a witness had decided not to testify because he was afraid of defendant. A prosecutor may not argue assumptions or facts that are not based upon the evidence (*People v. Adams*, 2012 IL 111168, ¶ 17) and may not suggest that a witness was afraid to testify because the defendant threatened or intimidated him if there is no evidence to support that claim (*People v. Johnson*, 385 Ill. App. 3d 585, 604 (2008)).

¶ 21 In this case, the prosecutor did not argue that defendant or the Latin Kings intimidated a potential witness, as the prosecutor did not refer to any threats or acts of intimidation and noted that the witness ran away from the scene of the crime before defendant, or anyone else, could have threatened or intimidated the witness. Instead, the prosecutor suggested that the witness did not testify due to a general reluctance to testify at a murder trial. While there was no evidence presented at trial regarding the reason this witness did not testify, any prejudice resulting from the prosecutor's comment was minor and insubstantial where the prosecutor did not attribute any fear on the part of the absent witness to defendant. *Johnson*, 385 Ill. App. 3d at 606; *People v. Cox*, 377 Ill. App. 3d 690, 708 (2007).

¶ 22 Defendant cites to *People v. Mullen*, 141 Ill. 2d 394 (1990), in support of his claim, but we determine that *Mullen* is distinguishable from this case. In *Mullen*, our supreme court held that a prosecutor's comment during rebuttal argument that a State witness had been reluctant to



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testify because he did not want to be shot in the back constituted plain error because it clearly suggested that the defendant threatened or intimidated witnesses so they would not testify against him and there was no evidence that the defendant threatened or intimidated any witnesses. *Id.* at 405. In this case, however, the prosecutor did not suggest that defendant threatened or intimidated any witnesses, but instead implied that the witness did not testify due to a general reluctance to testify at a murder trial.

¶ 23 Defendant also maintains that the prosecutor's comment was improper because it implied that the State was aware of additional evidence of defendant's guilt that it was unable to present at trial. A prosecutor may not suggest during closing or rebuttal argument that evidence of the defendant's guilt existed, but could not be brought before the jury. *People v. Emerson*, 97 Ill. 2d 487, 497 (1983). The prosecutor, however, did not imply that the State was aware of additional evidence of defendant's guilt, as there was no indication that the witness would have testified adversely to defendant.

¶ 24 B. Diaz's motivation to lie

¶ 25 Defendant asserts that the prosecutor improperly argued that Diaz testified untruthfully out of fear of defendant's gang, the Latin Kings. During rebuttal, the prosecutor argued that Diaz was concerned that Alicea was the target of the shooting, defense counsel objected, and the court overruled the objection. The prosecutor also argued during rebuttal that "to draw away any, any chance of something like that happening again, [Diaz] chose and I'll demonstrate it through her testimony, to actively change the case, to lie to you, to exonerate someone from the Latin Kings so as not to draw [their] ire." Defense counsel objected to this comment, and the court overruled

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the objection.

¶ 26 Defendant maintains that the prosecutor's comments that Diaz was motivated to lie out of a fear that the Latin Kings would harm her son were improper because they were not supported by the record. However, Espinosa testified that Gonzalez and Alicea were members of the Two-Six gang and that the Two-Sixes and Latin Kings were engaged in a feud at the time of the shooting. In addition, the parties stipulated that defendant was a member of the Latin Kings at that time. From that evidence, the prosecutor could reasonably infer that Diaz was concerned that Alicea was the target of the shooting and that she, therefore, testified untruthfully to deflect animosity directed toward her son by the Latin Kings. As such, the prosecutor's comment was not improper and the trial court did not abuse its discretion by permitting the remark.

¶ 27 C. Improper bolstering of White's testimony

¶ 28 Defendant asserts that the prosecutors improperly bolstered the State's evidence during closing and rebuttal arguments by voicing their personal opinions regarding the believability of White's testimony. During closing, the prosecutor argued that defendant's face was "etched" in White's mind and that White was "not going to forget the defendant's face," and during rebuttal the prosecutor commented that White's identification of defendant was "beyond any scientific measurement."

¶ 29 The State initially responds that defendant has forfeited this claim by failing to object to the comments at trial. To preserve a claim of improper argument for review, the defendant must object to the statement both at trial and in a written posttrial motion. *Wheeler*, 226 Ill. 2d at 122. Defendant did not object to either of the comments he now challenges or raise those claims in a

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posttrial motion and, therefore, has failed to preserve this claim for appellate review.

¶ 30 Defendant, citing *Wheeler*, 226 Ill. 2d 92, maintains that this court may review his claim regardless of defense counsel's failure to object to the comments because we must consider the prosecutor's arguments in their entirety in determining whether reversible error has occurred. In *Wheeler*, the defendant challenged numerous comments made by the prosecutor during closing argument, but failed to properly preserve his challenges to a number of the statements. *Id.* at 122. Our supreme court stated that it would focus its attention on the statements to which proper objections had been made, but that because closing arguments must be viewed in their entirety and challenged remarks must be viewed in context, statements to which proper objections were not made could be considered to the extent they added to the context surrounding remarks to which proper objections had been made. *Id.* at 122-23. Therefore, under *Wheeler* we may only consider the prosecutor's comments regarding the certainty of White's identification of defendant to the extent they provide context to the comments to which proper objections have been made, and not as independent claims of error. As such, defendant has forfeited this claim by failing to object to the relevant comments at trial.

¶ 31 Defendant also maintains that this court may review his claim under the plain-error doctrine because the evidence in this case was so closely balanced that the prosecutor's remarks may have tipped the scales of justice against him and the error was so serious that it undermined the fairness of his trial. A reviewing court may consider unpreserved error under the plain-error doctrine when the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or the error is so

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serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). While it is generally improper for a prosecutor to vouch for the credibility of a witness, a prosecutor may comment on the evidence presented or reasonable inferences drawn therefrom, respond to comments made by defense counsel which clearly invite a response, and comment on the credibility of the witnesses. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010).

¶ 32 In this case, the defense attempted to establish that the identification testimony of Espinosa and White was unreliable and defense counsel argued during closing that White had misidentified defendant, and the prosecutors, therefore, were entitled to comment on White's credibility during closing and rebuttal arguments. The prosecutor's comments during closing that defendant's face was "etched" in White's mind and that White was not going to forget defendant's face, were made in the context of argument regarding the quality of White's opportunity to view defendant at the time of the shooting and her high degree of attention. The prosecutor's comment during rebuttal that White's identification of defendant was "beyond any scientific measurement" was prefaced by argument regarding White's opportunity to view defendant at the time of the shooting and was followed by comments regarding White's emotional reaction to witnessing the shooting. Accordingly, when the prosecutors' comments are taken in context and viewed in their entirety, it becomes apparent that the remarks did not exceed the bounds of proper comment. As such, there was no error to rise to the level of plain error to excuse defendant's forfeiture of this

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claim.

¶ 33

D. Misstatement of law

¶ 34 Defendant asserts that the prosecutor misstated the law concerning impeachment by prior inconsistent statements. During rebuttal, the prosecutor referred to the jury instruction regarding prior inconsistent statements, Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.11), and said that defense counsel misstated the law during closing and that "everything from the first paragraph down, the only thing this instruction applies to are some questions that were asked to witnesses at the grand jury, not conversations they had with police." Defense counsel objected to the prosecutor's comment, and the court overruled the objection and told the jurors that they would have the instruction read to them and that they must follow the law. The prosecutor then said "that instruction from the first paragraph down applies to statements that are signed or sworn to in front of the grand jury." The court later instructed the jury pursuant to IPI Criminal 4th No. 3.11 and prefaced that instruction by stating "I want to read this instruction to you. It has to do with impeachment. There may have been some confusion in the arguments. As I told you at that time I want you to rely on the law and follow the law."

¶ 35 Defendant has forfeited this claim by failing to raise it in a posttrial motion (*Wheeler*, 226 Ill. 2d at 122), but maintains that we may consider the claim under the plain-error doctrine. The prosecutor's comments concerning IPI Criminal 4th No. 3.11, however, do not constitute plain error as any confusion caused by the comments was cleared up by the trial court, which told the jurors at the time the comments were made that they would have the instruction read to them after closing arguments and that they must follow the law and then prefaced the giving of the

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instruction by directing the jurors to follow the law as set forth in the instruction.

¶ 36 E. Cumulative error

¶ 37 Having determined that the prosecutor did not make multiple improper comments, we need not consider defendant's additional claim that he was denied a fair trial by the cumulative effect of the prosecutor's allegedly improper comments. As such, we conclude that defendant's right to a fair trial was not violated by the prosecutor's comments during closing and rebuttal arguments.

¶ 38 II. Right to Silence

¶ 39 Defendant contends that his right to a fair trial was violated because Detective Cole improperly informed the jury that defendant exercised his right to silence after his arrest. Under *Doyle v. Ohio*, 426 U.S. 610 (1976), a prosecutor may not comment on the defendant's refusal to answer questions if the defendant has invoked his right to remain silent. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). This court reviews the legal issue of whether a *Doyle* violation has occurred *de novo*. *People v. Dameron*, 196 Ill. 2d 156, 162 (2001).

¶ 40 The record shows that during direct examination, the prosecutor asked Detective Cole what he did in furtherance of his investigation after defendant was arrested, and Detective Cole answered "[o]n the 19th of August of 2008, I came to work when my partner and I attempted to interview [defendant]." Defense counsel objected and requested a mistrial and the court denied that request. The court found that the challenged testimony was not elicited by the State where Detective Cole's answer to the prosecutor's question was non-responsive and that the testimony did not indicate that defendant had invoked his right to silence.

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¶ 41 We agree with the trial court that Detective Cole's testimony does not constitute a *Doyle* violation because Detective Cole only testified that he had "attempted to interview" defendant, and he did not testify that defendant refused to answer questions or invoked his right to silence. In addition, even if Detective Cole impermissibly suggested that defendant exercised his right to silence, any error was harmless because the State did not elicit the challenged testimony and did not refer to defendant's silence during the remainder of the case. *Id.* at 164.

¶ 42 III. Proportionate Penalties Clause

¶ 43 Defendant further contends that this court should vacate the 20-year enhancement to his sentence for having discharged a firearm while committing the offense of attempted first degree murder and remand the case for resentencing because the statutes under which he was sentenced are facially unconstitutional or, in the alternative, unconstitutional as applied to him because they violate the proportionate penalties clause of the Illinois Constitution. Although defendant did not raise these claims before the trial court, we may review them on appeal because a constitutional challenge to a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 453-54 (1989). Also, while a constitutional challenge to a statute must be facial, rather than as applied, when there has been no evidentiary hearing and no findings of fact (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 228 (2010)), evidence was presented and findings of fact were made at defendant's trial and the record, therefore, provides this court with an adequate factual basis upon which to address defendant's claims.

¶ 44 Statutes carry a strong presumption of constitutionality, and this court should construe a statute so as to affirm its constitutionality if such a construction is reasonably possible. *People v.*

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*Johnson*, 225 Ill. 2d 573, 584 (2007). The party challenging the constitutionality of a statute has the burden of clearly establishing a constitutional violation. *People v. Jones*, 223 Ill. 2d 569, 596 (2006). We review the constitutionality of a statute *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008).

¶ 45 In this case, defendant was convicted of first degree murder and attempted first degree murder and sentenced to consecutive terms of 55 years imprisonment for first degree murder and 30 years imprisonment for attempted first degree murder. Defendant was subject to a minimum sentence of 45 years imprisonment for first degree murder because the sentencing range for that crime was 20 to 60 years imprisonment (730 ILCS 5/5-4.5-20(a)(1) (West 2008)) and the court was required to add a 25-year term to defendant's sentence because he personally discharged a firearm that proximately caused death to another during the commission of that crime (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)). Defendant was subject to a minimum sentence of 26 years imprisonment for attempted first degree murder because that crime was a class X felony and the sentencing range for such a crime was 6 to 30 years imprisonment (730 ILCS 5/5-4.5-25(a) (West 2008)) and the court was required to add a 20-year term to defendant's sentence because he personally discharged a firearm during the commission of that crime (720 ILCS 5/8-4(c)(1)(C) (West 2008)). In addition, the court was required to impose consecutive terms of imprisonment because one of the offenses for which defendant was convicted was first degree murder. 730 ILCS 5/5-8-4(a)(i) (West 2008).

¶ 46 While the legislature has discretion in prescribing penalties for defined offenses, which includes the power to prescribe mandatory sentences that restrict the judiciary's discretion in



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imposing sentences, the legislative power to impose sentences is not without limitation, as the penalty must satisfy constitutional constrictions. *People v. Miller*, 202 Ill. 2d 328, 336 (2002).

Under the proportionate penalties clause of the Illinois Constitution, all criminal 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. A criminal penalty is 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 or identical offenses are given different sentences. *People v. Sharpe*, 216 Ill. 2d 481, 521 (2005). Defendant asserts that the statutes creating the sentencing enhancements at issue and mandating consecutive sentences, working together, violate the proportionate penalties clause of the Illinois Constitution because the resulting punishment is cruel, degrading, and shocking to the moral sense of the community.

¶ 47 Our supreme court has already held that the sentencing enhancements at issue are not so disproportionate to the relevant offenses as to shock the moral sense of the community. *Sharpe*, 216 Ill. 2d at 524-25. In addition, to succeed on a facial challenge of a statute's constitutionality, the challenging party must show that the statute would be invalid under any imaginable set of circumstances. *In re M.T.*, 221 Ill. 2d 517, 536 (2006). Here, defendant has not asserted that there are no set of circumstances under which the statutes at issue would be valid, but only claims that the statutes are unconstitutional when they work in concert with one another, as they have in this case. As such, defendant cannot succeed on a facial challenge of the statutes, and we now consider whether the statutes requiring the imposition of the sentencing enhancements at

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issue and consecutive sentences are unconstitutional as applied to defendant.

¶ 48 Defendant asserts that the statutes serve no valid purpose and unconstitutionally curtail a sentencing judge's discretion. However, the use of a firearm during the commission of a crime enhances the perpetrator's ability to kill the intended victims and increases the risk of harm to bystanders, and the sentencing enhancements at issue serve the valid purpose of providing an additional penalty for crimes committed with a firearm. *Sharpe*, 215 Ill. 2d at 524-25. Also, the legislature has the power to prescribe mandatory sentences that restrict the judiciary's discretion in imposing sentences. *Miller*, 202 Ill. 2d at 336. While defendant maintains that his sentence amounts to a *de facto* life sentence and that such a sentence is disproportionately harsh when the offenses he committed are compared with crimes for which the legislature has allowed the imposition of a life sentence, defendant may not challenge his sentence under the proportionate penalties clause by comparing it with the penalty for an offense with different elements. *Sharpe*, 216 Ill. 2d at 521. In addition, to the extent defendant references the legislative history behind the firearm enhancement statutes, that information is irrelevant as defendant is challenging the constitutionality of the statutes, and is not asserting that the trial court construed the statutes in such a way as to conflict with the legislative intent behind their enactment. Further, while defendant maintains that the minimum sentence of 71 years imprisonment is unduly harsh, we note that the trial court determined that a sentence in excess of the minimum was appropriate in this case as the court sentenced defendant to a total of 85 years imprisonment. We, therefore, conclude that the statutes under which defendant was sentenced are constitutional and do not violate the proportionate penalties clause of the Illinois Constitution.

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¶ 49

CONCLUSION

¶ 50 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 51 Affirmed.