2014 IL App (1st) 130550-U

FOURTH DIVISION
February 26, 2015

No. 1-13-0550



IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 8290 (02) |
| | ) | |
| TYREE HUGHES, | ) | The Honorable |
| | ) | Charles P. Burns, |
| Defendant-Appellant. | ) | Judge Presiding. |

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

**ORDER**

*HELD*: Trial court did not misapprehend identification evidence presented at trial in finding defendant guilty where third eyewitness did not identify defendant by name but did identify his clothing and hairstyle, corroborating two other eyewitnesses. In addition, Illinois Juvenile Court Act's exclusive jurisdiction provision is constitutional and does not violate eighth amendment or procedural or substantive due process concerns. Finally, upon concession by State, defendant's mittimus must be corrected to reflect an additional day of presentencing credit.

¶ 1 Following a bench trial, defendant Tyree Hughes (defendant), who was 17 years old at the time of the crimes at issue, was convicted of one count of aggravated battery with a firearm and two counts of aggravated discharge of a firearm. He was sentenced to concurrent terms of 10 and 8 years in prison. He appeals, contending that he was denied a fair trial when the trial court based its guilty finding on a misapprehension of the identification evidence presented at trial, that the Illinois Juvenile Court Act's exclusive jurisdiction provision violates his constitutional rights, and that his mittimus must be corrected to reflect an additional day of presentencing credit. He asks that we reverse and remand his cause for a new trial before a different judge or for a discretionary transfer hearing before the juvenile court; alternatively, he asks that we correct his mittimus. For the following reasons, we affirm his convictions and correct the mittimus.

¶ 2 BACKGROUND

¶ 3 Defendant and codefendant Maurice Rutledge[1] were charged with 12 counts of attempted first degree murder, 1 count of aggravated battery with a firearm and 3 counts of aggravated discharge of a firearm in relation to an incident that occurred on April 28, 2011. Defendant was 17 years old at that time.

¶ 4 The parties do not dispute the relevant testimony presented at trial. Katarisha Burch testified that, at approximately 2 p.m. on the day in question, she and her brother Michael were outside of their home at 8847 South Bishop in Chicago with their friend Nayoko Livingston when another friend, Andre Johnson, joined them. The four stood in the gangway of the Burches' house talking. Katarisha recounted that, after a few minutes, she notice four men approaching

[1]Codefendant is not a party to this appeal.

them; she stated that it was broad daylight and that she could see their faces clearly for several seconds. Of those in the group of men, Katarisha was able to identify defendant, having known him from when they attended elementary school together. Katarisha noted that defendant was wearing a hoodie and that his hair was in dread locks that were falling toward the front of his face. Katarisha was also able to identify codefendant because she knew him from a neighboring high school. Katarisha testified that defendant and codefendant were holding guns, were standing in the middle of their group, and then suddenly opened fired at the same time on Katarisha, her brother and their friends. Katarisha stated that there were no words exchanged between the two groups. Katarisha heard about 10 shots, during which time she tried to turn and run but was shot in the left leg; she fell to the ground with Nayoko and the two tried to scoot to the side of one of the houses to avoid more bullets. Katarisha was treated for a gun shot wound and a broken tibia. She later spoke to police and identified defendant and codefendant as the shooters. Katarisha further testified that she could not provide police with the name of the third member of that group and, on cross-examination, she denied ever telling police that the fourth person she saw among them was a man named Sergio Pennex.

¶ 5 Michael Burch, Katarisha's brother, corroborated much of her testimony. He testified that, on the afternoon in question, he was outside his home with his sister and their friends Nayoko and Andre; Michael admitted he and Nayoko were smoking marijuana at the time. After a while, Michael saw three men approaching their group. Michael testified that he recognized the man in the middle as defendant, since he had known him when they attended elementary school together. Michael averred that defendant "had a hoodie on with his twisties coming out of

his hoodie." Michael further testified that he knew another of the men, codefendant, also from school. Michael averred that when defendant, codefendant and the third man were approximately 30 to 40 feet away, they stopped, pulled out guns and shot approximately 10 bullets at Michael and his group. Michael ran to avoid the shots. Following the incident, Michael identified defendant and codefendant to police. On cross-examination, Michael denied ever telling police that the third man in the group was named Sergio Pennex.

¶ 6 Nayoko also corroborated Katarisha and Michael's testimony. She testified that on the afternoon in question, she was standing in the gangway of Katarisha and Michael's home talking to them and Andre. At one point, she turned and looked toward the alley, whereupon she saw "three boys" standing there, about 20 to 30 feet away. Nayoko did not recognize any of the men, but did notice their complexions and clothing. She stated that all of them were "brown skinned" and, of the three of them, the one standing in the middle of the group was wearing a black hoodie with braids coming out from under it, and another was wearing a red hat pulled toward his face. Nayoko heard the first shot fired and saw smoke coming from gun of the man in the middle. Nayoko tried to run, but she fell and Katarisha then fell on top of her. Nayoko heard approximately 10 gunshots.

¶ 7 Defendant presented several alibi witnesses at trial. His mother testified that she was home all day on the day in question. She stated that defendant slept until about 11 a.m. when she woke him up to help her move some boxes. She further testified that, after he helped her, he went to the kitchen to make a sandwich and then let his friend Terrell Valentine inside, whereupon they spent the rest of the day, which was cloudy and rainy, together playing

videogames. She averred that defendant never left the house, not even to go to school. Terrell testified that he visited defendant that day around noon and, when he arrived at defendant's house, the two went upstairs and played videogames for four to five hours. Defendant's sister Tierra testified that she was home that day with defendant, their mother and their sister until 5 p.m. when she left for school. She stated that she remembered defendant and Terrell playing videogames all day, and that defendant never left the house. And, Qua'sha Johnson testified that she had gone to defendant's home to do his sister's hair that day; she averred that she saw defendant upstairs playing videogames with Terrell. She further stated that she left the home around 5 p.m., and never saw anyone leave the home while she was there. In addition to these alibi witnesses, defendant testified on his own behalf regarding his whereabouts. He averred that he woke up at 11 a.m. on the day in question at his home, that Terrell came over around noon, and that the two of them played videogames all day.

¶ 8 On cross-examination, defendant's mother stated that she went to the police station when defendant was arrested to inquire about him, but then left and did not tell police about his alibi; she never returned to the police station nor contacted any other authority. Likewise, Terrell, Tierra and Qua'sha also admitted that they never told police or any other authority in this matter about defendant's alibi for the day in question. And, although he denied shooting at anyone, defendant admitted he knew Katarisha and that he did not get along with Michael, whom he had known for several years. He further admitted that, on the day in question, he wore his hair in braids.

¶ 9 Also presented at trial was stipulated evidence that police recovered a .380 caliber live

round, two .380 spent cartridge casings and seven .40 spent cartridge casings. In addition, the parties stipulated that, contrary to their testimony, both Katarisha and Michael did tell police investigators at the time of the incident that a man named Sergio Pennex was one of the men they saw shoot at them: Katarisha told police she saw defendant and Sergio shooting at her; Michael identified defendant, codefendant and Sergio as present at the shooting; and 911 tapes related to the incident recorded an unknown caller identifying "two offenders," one named "Sergio" and the other "Tyree *** in dark clothing, 17, with braids."

¶ 10 Following the close of evidence, the trial court found defendant guilty of aggravated discharge of a firearm as to Michael and Nayoko, and aggravated battery with a firearm as to Katarisha. In issuing its decision, the court noted that this cause "turn[ed] on the credibility of the witnesses that have testified." It recounted that "[t]hree separate witnesses have come into court and testified for the State that this defendant, ***, who they knew for several years, was an individual who, along with a couple other people, *** came up through the back way and opened fire upon the group." The court found their testimony to be "consistent" with each other and with the forensic evidence presented. After acknowledging some inconsistencies in the testimony presented, including the weather that day and that Katarisha and Michael named another individual to police but denied doing so at trial, the court clarified that the witnesses "were consistent in all matters" relevant to defendant being one of the shooters. The court further noted that there was "no doubt" that this was not a "split second" identification case, since the eyewitnesses knew defendant and immediately identified him as a shooter. Finally, with respect to defendant's alibi testimony, the court again stated that it found "the testimony of the victims to

be credible in this matter" that defendant was one of the shooters, and specifically noted that it did not find his alibi to be "believable." The court then sentence defendant to concurrent terms of 8 and 10 years in prison.

¶ 11 ANALYSIS

¶ 12 Defendant presents three issues for our review. We address each separately.

¶ 13 I. Identification Evidence and Assessment of Credibility

¶ 14 Defendant's first contention on appeal is that he was denied a fair trial when the trial court based its guilty finding on a "misapprehension" that there were three eyewitnesses who identified him when in fact only two eyewitnesses did so at trial, thereby affecting the court's assessment of the witnesses' credibility. Defendant points to the trial court's colloquy, asserting that its recollection of three identifying eyewitnesses was incorrect and erroneous, since only Katarisha and Michael identified defendant by name whereas Nayoko noted only that the offender was wearing a black hoodie and had braids. Defendant concludes that because of this, and because Katarisha and Michael had been discredited by the stipulation at trial as having lied to investigators, the trial court's failure to recall the actual strength of the evidence against him denied him a fair trial requiring the reversal of his convictions and remand.

¶ 15 As a threshold matter, there is a question between the parties with respect to the reviewability of this issue. They argue in their briefs as to whether it should be reviewed on its merits, whether it must be reviewed pursuant to plain error, or whether it has been forfeited. The State points out, and defendant readily admits, that, while he raised this issue in his posttrial motion, he did not make a contemporaneous objection following the trial court's statement during

its colloquy that three eyewitnesses had identified him as one of the shooters. Accordingly, the State insists that defendant has waived the issue. See, *e.g.*, *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (contemporaneous objection and mention in posttrial motion are required to preserve issue for review). The State further argues that plain error cannot be applied because defendant does not assert a substantive reasonable doubt claim on appeal and the evidence was not closely balanced. Defendant, meanwhile, first cites *People v. Mitchell*, 152 Ill. 2d 274, 324 (1992), for the proposition that his failure to contemporaneously object should be forgiven since he had just made note of this issue to the trial court immediately before it made the statement at issue. He then goes on to argue that, alternatively, his cause should still be reviewed pursuant to either prong of plain error because of the "diametrically-opposed evidence presented" at trial and the absence of any physical evidence corroborating the State's case, as well as the resultant "fundamental misunderstanding" by the trial court which affected his substantial right to a fair trial.

¶ 16 We note that defendant is correct that *Mitchell* states "a defendant need not interrupt a trial court to correct a trial court's misapprehension, after defense counsel has just argued the same to the court." See 152 Ill. 2d at 324. Pursuant to the record and contrary to the State's recollection of this cause, just prior to the trial court's colloquy, defendant did, indeed, comment at length in closing argument that Nayoko was unable to identify the shooters. Thus, we understand defendant's insistence that his failure to contemporaneously object during the trial court's colloquy recalling that evidence may not have necessarily been required to preserve the instant issue for review. See, *e.g.*, *People v. Williams*, 2013 IL App (1st) 111116, ¶ 107 (where

the defendant argued in closing that a witness made a statement, but the trial court then directly contradicted the defendant, the failure to object was excused). Moreover, even were this not the case, we also appreciate defendant's argument regarding plain error here. Clearly, this cause centrally focused on the credibility of the witnesses presented by the parties. The trial court noted as much in its colloquy. Thus, rather than a determination involving physical evidence, the trial court's (as the trier of fact) evaluation of the credibility of the witnesses' testimony was the sole crux of this case which, in turn, inherently involved defendant's substantial rights.

¶ 17 Ultimately, this discussion of forfeiture and plain error leads us to the conclusion that, in this particular cause, we should exercise our prerogative to review the instant issue, regardless of any technical missteps that may have occurred. See *People v. Hobson*, 2014 IL App (1st) 110585, ¶ 36 (reviewing court has such prerogative in cases involving plain error). Our state supreme court has repeatedly noted that, " '[w]hen error occurs in a close case, we will opt to "err on the side of fairness, so as not to convict an innocent person." ' " *People v. Naylor*, 229 Ill. 2d 584, 605-06 (2008), quoting *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007), quoting *People v. Herron*, 215 Ill. 2d 167, 193 (2005). Pursuant to the attendant circumstances, we choose to follow the same path and review this cause. See *Naylor*, 229 Ill. 2d at 606-08 (procedural default (*i.e.*, failure to raise issue in posttrial motion) excused where case turned exclusively on the trial court's assessment of the credibility of two police officers versus the defendant, with no additional evidence introduced to contradict or corroborate their different versions of the events; because "credibility was the only basis upon which defendant's innocence or guilt could be decided," court chose to review cause regardless of default).

¶ 18 With that said, however, we wholly disagree with defendant's contention that the trial court misapprehended the evidence presented resulting in an unfair trial. Regardless of whether we consider this issue on its merits or via plain error, in order for defendant to succeed, there must be a primary determination that an error occurred. See *People v. Simon*, 2011 IL App (1st) 091197, ¶ 89. Upon our review of the record before us, we do not find any such error on the part of the trial court here.

¶ 19 During a bench trial, a trial court's misapprehension of evidence crucial to the defense may violate the defendant's right to due process. See *Mitchell*, 152 Ill. 2d at 321; accord *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976); see also *Simon*, 2011 IL App (1st) 091197, ¶ 91 (trial court's failure to recall and consider such evidence may result in denial of due process). However, where the record does not affirmatively indicate that the fact-finder was mistaken, there is a presumption that the trial court considered only competent evidence in reaching its verdict. See *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977) (this is rebutted only with affirmative evidence in record). Moreover, in a bench trial, the trial court has the responsibility to both weigh the evidence and to make reasonable inferences from that evidence. See *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978); accord *Simon*, 2011 IL App (1st) 091197, ¶ 52. Thus, it is in the direct purview of the trial court to adjudge the credibility of the witnesses, resolve any inconsistencies in their testimony, determine the weight to afford the evidence presented based on this, and draw reasonable inferences therefrom. See *People v. Deleon*, 227 Ill. 2d 322, 332 (2008); accord *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); see also *Simon*, 2011 IL App (1st) 091197, ¶ 94, citing *Berland*, 74 Ill. 2d at 305-06. We, as a reviewing court, will not substitute

our own judgment for that of the trial court in this regard. See *Deleon*, 227 Ill. 2d at 322; *Steidl*, 142 Ill. 2d at 226.

¶ 20 Having reviewed defendant's claim, we do not find that the trial court's cited statement was necessarily inconsistent with the testimony presented against him in his cause. Defendant takes issue with the trial court's statement in its colloquy that "[t]hree separate witnesses have come into court and testified for the State that this defendant, ***, who they knew for several years, was an individual who, along with a couple other people, *** came up through the back way and opened fire upon the group." Clearly, the three witnesses at issue are Katarisha, Michael and Nayoko, all of who testified at trial. Katarisha and Michael identified defendant as the shooter both at the scene of the shooting and at trial. They knew defendant from elementary school, they recognized him in the opposing group that day, they noted he was wearing a hoodie and had braids in his hair, they placed him as standing in the middle of the other men in his group, and they saw him shoot at their group. Nayoko stated that she did not recognize any of the men in the opposing group. However, she did unequivocally testify with respect to their complexions and clothing. She stated that all the men were dark-skinned. Then, and with particularity, she stated that the man in the middle of the group who shot at them was wearing a black hoodie and that his hair was in braids, which were coming out from under the hoodie.

¶ 21 Contrary to defendant's claim, while Nayoko did not actually identify him by name as the shooter, it was a reasonable inference made by the trial court, based on all the evidence, that she was, indeed, a third identifying eyewitness. Again, Katarisha had testified that, on the day in question, she saw, in broad daylight, four men approach her group of friends; that she saw their

faces clearly for several seconds; that she recognized defendant among them, wearing a hoodie with braids falling toward his face; and that defendant, while standing in the middle of his companions and along with them, opened fire on her and her friends. Michael corroborated the same version of events. He, too, knew defendant, he identified defendant as standing in the middle of the opposing group and he testified that defendant, who was wearing a hoodie and "twisties" in his hair, opened fire on them. Nayoko's recount of the events was in direct line with that of Katarisha and Michael, and she provided the same physical description of the shooter, down to his skin color (dark), his position in the opposing group (in the middle), his clothing (a hoodie) and his hairstyle (braids falling toward his face). Defendant himself admitted that, at the time of the incident, he wore his hair in braids. From all this, that the trial court inferred there were three, and not just two, identifying eyewitnesses, was more than a reasonable inference from the evidence presented.

¶ 22 Moreover, the trial court's decision that defendant, and particularly his alibi testimony as presented via his witnesses, was not believable was not based solely on Nayoko's testimony or its conclusion that there were three, rather than two, identifying eyewitnesses. Katarisha and Michael's testimony as to defendant being a shooter was never rebutted by defendant. The court summarized this evidence before reaching its verdict. It noted that there was "no doubt" that this was not a "split second" identification case. Instead, not only was defendant known to the victims, but they immediately described and identified him as the shooter to police. The court also found their testimony to be "consistent" with each other and with the forensic evidence presented. It further addressed outright the stipulated evidence that Katarisha and Michael lied to

investigators regarding another man as being present at the scene. The court directly evaluated this, but determined that it had no effect because the witnesses "were consistent in all matters" relevant to the cause that defendant was one of the shooters. And, the court also specifically considered defendant's alibi testimony, as presented by him and his four witnesses. It did not find this testimony to be believable and, in direct contradiction, stated that if found "the testimony of the victims to be credible in this matter" that defendant was one of the shooters. Clearly, the trial court recalled all the evidence presented in this cause and drew reasonable inferences therefrom while determining the credibility of all the witnesses–the State's as well as defendant's. The record affirmatively supports this and, without a showing that the trial court improperly recalled Nayoko's testimony or improperly considered the crux of the defense when rendering its verdict, we cannot find any error or that defendant was denied a fair trial.

¶ 23 In support of his contention, defendant relies on *Bowie*, 36 Ill. App. 3d 177, *Mitchell*, 152 Ill. 2d 274, and *Williams*, 2013 IL App (1st) 111116, cases in which errors were found to have occurred based on a misapprehension by the trial court of the evidence presented at trial. However, each of those is distinguishable. In all three of them, the trial court's misapprehension was clearly and affirmatively indicated on the record. For example, in *Bowie*, the trial court stated during closing arguments that there had been no testimony that the defendant was bleeding, yet the record showed that the defendant had, indeed, testified to the bleeding on direct examination. See *Bowie*, 36 Ill. App. 3d at 180. In *Mitchell*, the trial court stated that it did not recall the defendant testifying that he felt unable to leave a police interrogation during a suppression hearing. See *Mitchell*, 152 Ill. 2d at 307. The record there showed, however, that

the defendant had testified that the police had told him he could not leave. See *Mitchell*, 152 Ill. 2d at 306-07. And, in *Williams*, the trial court recalled that a defense expert had testified that the offender "certainly was defendant" when, in fact, this witness had actually stated repeatedly that there was no such certainty. See *Williams*, 2013 IL App (1st) 111116, ¶ 85. Thus, in all three of these cases, there was no question that the trial court incorrectly recalled the evidence in considering the crux of the defense and in rendering its verdict.

¶ 24 However, the same did not occur in the instant cause, which more clearly resembles what occurred in *Simon*. There, a witness testified that he saw a victim approach the defendant, turned his back and then heard shots. See *Simon*, 2011 IL App (1st) 091197, ¶ 94. The trial court stated that the witness testified he saw the victim approach "and thereafter the defendant got out and shot him several times." *Simon*, 2011 IL App (1st) 091197, ¶ 90. The trial court also stated that the witness was "perhaps the most compelling" of all those who had testified. *Simon*, 2011 IL App (1st) 091197, ¶ 96. While the defendant argued on appeal that the trial court's statement incorrectly implied that the witness had viewed the entire shooting, the *Simon* court noted that this was only one possible reading of its statement. See *Simon*, 2011 IL App (1st) 091197, ¶ 95. Instead, it concluded that it was just as possible to read the trial court's statement as recounting the witness' testimony and drawing a reasonable inference from that testimony. See *Simon*, 2011 IL App (1st) 091197, ¶ 95. Accordingly, the *Simon* court found no error on the part of the trial court. See *Simon*, 2011 IL App (1st) 091197, ¶ 95; see also *People v. Roman*, 2013 IL App (1st) 102853, ¶¶ 21-24 (also distinguishing *Bowie* and *Mitchell* and holding that because the trial court properly recalled the crux of the defense, because the defendant did not present any testimonial

evidence that the court failed to recall, and because the evidence presented corroborated the witnesses' accounts, the trial court's "incorrect reference," when considered in context, did not amount to a misapprehension of the State's evidence or to the denial of a fair trial).

¶ 25 Likewise, in the instant cause, there was no clearly evident misapprehension by the trial court of the evidence presented at trial when it considered the crux of defendant's defense and rendered its verdict. Again, both Katarisha and Michael testified that defendant, who was wearing a hoodie and had braids in his hair, approached them while in the middle of a group of men, pulled out a gun and started shooting at them. They had known defendant for several years from school and they corroborated each other as to his identity, his appearance and where he was standing at the time of the incident. Although Nayoko did not identify defendant by name, she, too, corroborated Katarisha and Michael's testimony by stating that one of the shooters was a dark-skinned man who was standing in the middle of the opposing group wearing a black hoodie and braids in his hair. With the additional admission in testimony from defendant that he wore his hair in braids at the time of the incident, it was more than reasonable for the trial court to draw the inference, based on the evidence, that Nayoko was a third eyewitness identifying defendant as a shooter. See, *e.g.*, *People v. Bennet*, 329 Ill. App. 3d 502, 513 (2002) ("[i]nconsistency between certain eyewitnesses' testimony does not necessarily establish reasonable doubt"); *People v. Hruza*, 312 Ill. App. 3d 319, 326 (2000), and *People v. Vasquez*, 313 Ill. App. 3d 82, 103 (2000) (such discrepancies go only to the weight that is to be afforded to witnesses' testimony, which is for the trial court as the trier of fact to determine, not the reviewing court).

¶ 26 Moreover, the record clearly demonstrates that the trial court here reviewed the testimony at issue immediately prior to rendering its verdict and its determination that defendant's defense and alibi were not credible was not based solely on Nayoko's testimony. Rather, the court was particular in addressing every noted inconsistency at trial. For example, it mentioned the discrepancy in the weather (Katarisha had testified it was sunny while defendant's mother had testified it was cloudy and rainy), noted the discrepancy in the number of assailants (Katarisha had testified there were four while Michael and Nayoko had testified there were three), and recounted the stipulation regarding Katarisha and Michael's identification to police of another man. However, after summarizing all of the testimony, the trial court found that it was "consistent" with each other and with the forensic evidence presented as to the most relevant matter at issue, namely, that defendant was one of the shooters and, conversely, that defendant's defense, namely, his alibi, was not "believable." See, *e.g.*, *People v. Lewis*, 165 Ill. 2d 305, 356 (1995), and *People v. Brooks*, 187 Ill. 2d 91, 130 (1999) (a single witness' identification of the defendant is sufficient to sustain his conviction as long as that witness viewed the offender under circumstances permitting a positive identification, including the witness' opportunity to view the offender, degree of attention, accuracy of description, level of certainty, length of time between crime and identification, and familiarity with the defendant prior to the crime).

¶ 27 Ultimately, we find that defendant has failed to show that any error occurred, as the record does not affirmatively indicate a misapprehension of the evidence by the trial court or its failure to recall the crux of the defense. Rather, the trial court here merely connected a witness' testimony with a reasonable inference drawn from the evidence presented. See *Simon*, 2011 IL

App (1st) 091197, ¶ 95; see also *Roman*, 2013 IL App (1st) 102853, ¶¶ 21-24. Accordingly, without such improper recall, and with other evidence to support its verdict, we find no error on the part of the trial court.

¶ 28 II. Constitutionality of Exclusive Jurisdiction Provision

¶ 29 Defendant's next contention on appeal involves section 5-120 of the Illinois Juvenile Court Act of 1987, entitled "Exclusive jurisdiction." 705 ILCS 405/5-120 (West 2010). He asserts that this provision violates the eighth amendment and his substantive and procedural due process rights because it automatically treats all 17-year-olds charged with felonies, such as he was here, as adults during prosecution and sentencing without any consideration of their youthfulness and its attendant circumstances. He relies primarily on the line of United States Supreme Court cases which includes *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005),[2] stating they hold that fundamental differences between juvenile and adult minds make children under 18 less culpable than adults for the same offenses and, thus, asserting that additional constitutional protections for these juvenile offenders are required. Because

[2]Briefly, the Supreme Court held in *Roper* that the eighth amendment forbids the death penalty for juvenile offenders, finding that they "cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 568. Next, it found in *Graham* that the eighth amendment prohibits a sentence of life without the possibility of parole for juveniles who did not commit homicide. See *Graham*, 560 U.S. at 74-75. Then, in *J.D.B.*, it concluded that a child's age can be a relevant consideration in the *Miranda* custody analysis. These holdings culminated in *Miller*, wherein the Supreme Court held that the eighth amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, including those convicted of homicide, stating that a judge must first have the opportunity to examine the circumstances involved. See *Miller*, 132 S.Ct. at 2469.

section 5-120 does not provide such additional protections, defendant insists that it amounts to cruel and unusual punishment, denies juveniles their inherent liberty interests and does not bear a rational relationship to the State's interest in protecting the public from the most dangerous of juveniles.

¶ 30 We note at the outset here that, in addressing a challenge to the constitutionality of a statute, we begin with the presumption that the statute is constitutional. See *People v. Greco*, 204 Ill. 2d 400, 406 (2003); accord *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). If reasonably possible, a court must construe the statute so as to uphold its constitutionality and validity. See *Greco*, 204 Ill. 2d at 406; accord *Malchow*, 193 Ill. 2d at 418. The party challenging the statute's constitutionality has the burden of demonstrating its invalidity. See *Greco*, 204 Ill. 2d at 406; accord *Malchow*, 193 Ill. 2d at 418. Whether the statute is constitutional is reviewed under a *de novo* standard. See *Greco*, 204 Ill. 2d at 406; accord *Malchow*, 193 Ill. 2d at 418.

¶ 31 The exclusive jurisdiction provision states, in relevant part:

> "[p]roceedings may be instituted under the provisions of this Article concerning any minor who prior to the minor's 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance, and any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance classified as a misdemeanor offense." 705 ILCS 405/5-120 (West 2010).

As the parties note, this statute automatically treats all 17-year-olds charged with felonies as adults during their prosecution and sentencing. See 705 ILCS 405/5-120 (West 2010). Much like the automatic transfer provision of section 5-130 of the same statute which removes even younger juvenile offenders to the criminal system if they are charged with "five serious named felonies," the exclusive jurisdiction provision essentially removes this class of juveniles (17-year-olds charged with felonies) from adjudication under the juvenile system and places their causes within the criminal system. See 705 ILCS 405/5-120, 130 (West 2010).

¶ 32 While we consider the decisions issued by the Supreme Court in *Miller*, *J.D.B.*, *Graham*, and *Roper* to be significant in their recognition of the physiological differences between juvenile and adult minds and their relevance regarding culpability and rehabilitative potential, we cannot deny the more recent decisions issued by our own courts in this state that have addressed the exact same concerns raised by defendant here and have specifically rejected all of them.

¶ 33 Principal among these is our state supreme court's decision in *People v. Patterson*, 2014 IL 115102 (*Theis*, *J.*, *dissenting*). There, our supreme court held that the automatic transfer provision, *i.e.*, section 5-130, does not violate the eighth amendment or due process, procedurally or substantively. See *Patterson*, 2014 IL 115102, ¶¶ 89-111. The court reasoned that the provision is not punitive in nature but only governs the relevant forum in which a juvenile is to be tried and, consequently, it only provides a legitimate and purely procedural mechanism for adjudication, not an actual or selective punishment to be imposed for a limited group of juveniles. See *Patterson*, 2014 IL 115102, ¶¶ 104-05. Our supreme court went further to examine assertions of unconstitutionality in light of *Miller*, *Graham* and *Roper*, and specifically

dismissed them, reiterating that "access to juvenile courts is not a constitutional right because the Illinois juvenile justice system is a creature of legislation." *Patterson*, 2014 IL 115102, ¶¶ 104, 110 (declaring that those U.S. Supreme Court cases have a limited application to constitutional claims in the context of the "most severe of all criminal penalties," the death penalty and life without parole, and, thus, do not affect causes involving anything less). Thus, our supreme court upheld the automatic transfer provision's constitutionality. See *Patterson*, 2014 IL 115102, ¶¶ 104-05.

¶ 34 The instant cause merits the same outcome. The issue presented before us differs from *Patterson* only most minimally in that it involves the exclusive jurisdiction provision of section 5-120 instead of the automatic transfer provision of section 5-130. This is a difference without distinction. As noted earlier, under the former, younger juveniles (15- and 16-year-olds) are automatically transferred from the juvenile to the criminal forum for trial and sentencing if charged with one of five serious named felonies. See 705 ILCS 405/5-130 (West 2010). Under the latter, older juveniles (17-year-olds) are automatically excluded from the juvenile forum, and their causes moved to the criminal forum, if they are charged with a felony. 705 ILCS 405/5-120 (West 2010). Pursuant to both sections, there is no punishment imposed on the juvenile defendant. Instead, these provisions only provide a mechanism for determining where his case should be tried and in what forum his guilt should be adjudicated. Section 5-120 is reasonably designed to achieve this goal, in the same manner as our supreme court found section 5-130 to be. Without any punishment imposed, defendant's citation to *Miller*, *J.D.B.*, *Graham*, and *Roper* are inapplicable here, just as our state supreme court concluded in *Patterson*, and his

constitutional challenges must fail.

¶ 35 We find further, and even more direct, support for our decision in *People v. Harmon*, 2013 IL App (2d) 120439, from our sister jurisdiction. Though that cause predates *Patterson*, it applied the same rationale therein to a constitutional analysis specifically involving, as in the instant cause, section 5-120's exclusive jurisdiction provision. The defendant in *Harmon* raised the same constitutional concerns as defendant here, arguing that section 5-120 violated his constitutional rights via both the eighth amendment and due process (procedural and substantive). See *Harmon*, 2013 IL App (2d) 120439, ¶¶ 50, 58. He, too, relied primarily on *Miller*, *J.D.B.*, *Graham* and *Roper*'s broad rationale underlying those decisions that, because an offender's age is relevant to these constitutional concerns, criminal procedure laws that fail to take a defendant's youthfulness into account are flawed. See *Harmon*, 2013 IL App (2d) 120439, ¶ 47. The cause presented in *Harmon* was essentially identical to the instant cause.

¶ 36 Upon review, the *Harmon* court wholly rejected the defendant's constitutional arguments under both eighth amendment and due process concerns and, after analyzing the *Miller* line of U.S. Supreme Court cases, found that it was inapplicable to the issues at hand, thereby defeating the defendant's claims. See *Harmon*, 2013 IL App (2d) 120439, ¶¶ 54-56, 62. First, with respect to eighth amendment concerns, the *Harmon* court pointed out that *Miller*, *J.D.B.*, *Graham* and *Roper* stood for the proposition that a court must have the chance to take into account mitigating circumstances before sentencing a juvenile to the harshest possible penalty, which, pursuant to those cases, included the death penalty and life imprisonment without the possibility of parole. Because those sentences were not at issue in *Harmon* (that defendant had been sentenced to

concurrent terms of 20 years and a consecutive 5-year term), the rationale underlying them simply was inapplicable. See *Harmon*, 2013 IL App (2d) 120439, ¶ 54. In addition, the *Harmon* court directly analogized the exclusive jurisdiction provision to the automatic transfer provision and noted that several appellate courts had already previously considered and rejected the same argument the defendant was raising. See *Harmon*, 2013 IL App (2d) 120439, ¶¶ 55-56, citing *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66, *People v. Markley*, 2013 IL App (3d) 120201, ¶ 23, and *People v. Pacheco*, 2013 IL App (4th), 110409, ¶ 58. This was because, just as the automatic transfer provision, the exclusive jurisdiction provision does not impose a punishment but, rather, only specifies the forum in which a defendant's guilt is to be adjudicated. See *Harmon*, 2013 IL App (2d) 120439, ¶ 55. Accordingly, the *Harmon* court concluded that section 5-120 does not violate the eighth amendment. See *Harmon*, 2013 IL App (2d) 120439, ¶ 66.

¶ 37 Second, with respect to due process, the *Harmon* court likewise held that the exclusive jurisdiction provision did not violate procedural or substantive concerns. It noted that Illinois precedent has already found that the automatic transfer provision does not violate a juvenile's due process rights and, again by analogy, it found that "the same reasoning applies with equal force to the closely related exclusive jurisdiction provision." *Harmon*, 2013 IL App (2d) 120439, ¶¶ 59-60, citing *People v. J.S.*, 103 Ill. 2d 395, 404 (1984), *People v. M.A.*, 124 Ill. 2d 135, 147 (1988), *People v. Jackson*, 2012 IL App (1st) 100398, ¶¶ 16-17, and *People v. Croom*, 2012 IL App (4th) 100932, ¶ 16. Again, because the section is a forum statute and not a sentencing, or penalty/punishment, statute, due process concerns are not applicable. See *Harmon*, 2013 IL App (2d) 120439, ¶ 62.

¶ 38 Defendant repeatedly asserts that we should not follow Illinois precedent because it "long predate[s]" *Miller*, *J.D.B.*, *Graham* and *Roper* and because it was "wrongly decided" and "no longer good law." However, we find no reason to depart from the holdings of *Patterson* and *Harmon* and those cases relied on therein, none of which have been overruled in any way, shape or form. Though the case law they cite may be a bit older, *Patterson* and *Harmon*, as decided by our very state courts and addressing our particular state juvenile statutes, actually postdate the *Miller* line of cases. Moreover, section 5-120's exclusive jurisdiction provision, just like section 5-130's automatic transfer provision, does not impose any penalties; it merely dictates the appropriate forum, as determined by the legislature, in which the guilt of a 17-year-old defendant charged with a felony is to be resolved. Without more, eighth amendment and due process concerns are not involved here. This is so even in light of *Miller* and its accompanying cases, which discuss the "harshest possible" penalties faced by juveniles of capital punishment and mandatory life imprisonment without the possibility of parole. Defendant here was not subject to such penalties and, accordingly, we do not find those cases to comprise a persuasive basis to declare the exclusive jurisdiction provision unconstitutional as violative of the eighth amendment or due process. Further, our state courts have directly addressed the *Miller* line of cases, have reviewed them in relation to existing Illinois case law, and have found that the latter remain on solid footing. See *Patterson*, 2014 IL 115102, ¶¶ 89-111, and *Harmon*, 2013 IL App (2d) 120439, ¶¶ 50-62 (and cases cited at length therein).

¶ 39 Ultimately, defendant provides us with no viable legal basis to deviate from *Patterson* and, particularly, *Harmon*, which specifically addresses section 5-120's constitutional validity.

Thus, based on this existing precedent, we reject his arguments that the exclusive jurisdiction provision is unconstitutional and conclude, just as our state courts already have, that his arguments to the contrary cannot stand.

¶ 40 III. Presentencing Custody Credit

¶ 41 Defendant's final contention on appeal is that he should receive one additional day of presentencing custody credit. He states that he was in custody for 578 days prior to being sentenced, not 577 as the trial court noted in its sentencing order. Based on the record, and as the State concedes to defendant's calculation, we agree.

¶ 42 Pursuant to Illinois Supreme Court Rule 615(b)(1) (Ill. S.Ct. R. 615) (eff. Jan. 1, 1967), a reviewing court on appeal may correct the mittimus at any time, without remanding the cause to the trial court. See *People v. Rush*, 2014 IL App (1st) 123462, ¶ 36. A defendant is entitled to credit for any part of a day he spends in custody prior to sentencing, not including the day of sentencing. See *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). As he points out, and as confirmed by the record, defendant here was taken into custody on May 7, 2011, and was sentenced on December 5, 2012. This totals 578 days, not 577 days as credited to him by the trial court. Therefore, we correct his mittimus to reflect this additional day's credit, for a total of 578 days.

¶ 43 CONCLUSION

¶ 44 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court, with a correction to defendant's mittimus.

¶ 45 Affirmed, mittimus corrected.