FOURTH DIVISION
November 25, 2015

No. 1-13-2826

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 15317
	)	
TIMOTHY MOORE,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying motion for severance where evidence against codefendant was relevant to establishing defendant's guilt as accomplice to codefendant's crimes. Defendant's 120-year aggregate sentence for multiple convictions of armed robbery and aggravated criminal sexual assault is neither excessive nor unconstitutional. Case remanded for preliminary inquiry into defendant's posttrial claims of ineffective assistance of counsel and for correction of mittimus.

¶ 2 Defendant Timothy Moore was charged with numerous counts of armed robbery and aggravated criminal sexual assault. Defendant was tried jointly with codefendant Cortez Lyons and convicted of all counts. At trial, the evidence linking defendant to the offenses was weaker than the evidence against Lyons, who had been connected to the crimes by DNA evidence and his own inculpatory statement. After his trial, defendant moved to proceed *pro se* and indicated

that he wanted to raise issues with his trial attorney's performance. The trial court told defendant that he would only be able to raise his claims on appeal, as the court had already denied the motion for a new trial filed by defendant's trial attorney. At sentencing, where defendant elected to proceed with counsel, the trial court sentenced defendant, who was 19 years old at the time of the offenses, to an aggregate 120-year sentence.

¶ 3 On appeal, defendant raises several issues: (1) that his trial should have been severed from Lyons's because the evidence against Lyons was much stronger than the evidence against him; (2) that his aggregate, 120-year sentence was excessive; (3) that his 120-year sentence violates the eighth amendment as interpreted by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), which invalidated life-without-parole sentences for juveniles who commit offenses other than murder; (4) that the trial court erred in failing to conduct a preliminary inquiry into his posttrial claims of ineffective assistance of counsel; and (5) that his mittimus should be corrected to reflect the merger of three counts of aggravated criminal sexual assault.

¶ 4 We affirm defendant's conviction and sentence. Severance was not required where the evidence implicating Lyons was also admissible against defendant, as defendant was charged with Lyons's conduct under an accountability theory. Defendant's sentence is not excessive in light of the severity of his crimes. Nor is his sentence unconstitutional under *Graham* because *Graham* applies only to defendants under 18, whereas defendant was 19 years old at the time of his crimes. But we agree with defendant regarding his posttrial claim of ineffective assistance of counsel. The trial court incorrectly told defendant that he could not raise his claims of ineffective assistance until he appealed. Instead, the trial court should have conducted a preliminary inquiry

into defendant's claims. Thus, we remand for such a preliminary inquiry and for correction of defendant's mittimus.

¶ 5 I. BACKGROUND

¶ 6 The State charged defendant and Lyons with numerous counts of aggravated criminal sexual assault and armed robbery. Defendant was charged both as a principal, for conduct he committed, and as an accomplice to Lyons's conduct.

¶ 7 Before trial, defendant moved to sever his trial from Lyons's, arguing that Lyons had given the police a statement that also implicated defendant—and which was inadmissible against defendant—and that the strength of the evidence against Lyons would prejudice the jury against defendant, against whom the State had comparatively little evidence. At the hearing on defendant's motion, the Assistant State's Attorney trying the case indicated that she would not elicit evidence that Lyons inculpated defendant in his statement. While defense counsel acknowledged that the redaction of Lyons's statement eliminated one of the bases for the severance motion, he noted that the State would present DNA evidence implicating Lyons. According to defense counsel, this evidence would prejudice defendant "if the jury [saw] Lyons seated right next to [defendant] during the course of the jury trial." The State responded that the DNA evidence would not directly inculpate defendant, but that it would be relevant because "[t]hey are all accountable for each other's actions." The court denied the motion for severance, finding that the DNA evidence did not implicate defendant.

¶ 8 The three victims in the case, Eric Gutknecht, M.G., and R.S., who were 17 years old at the time of the incident, testified that, around 11 p.m. on November 21, 2006, they went to a gas station in Maywood, Illinois to purchase cigarettes. M.G. drove, R.S. sat in the front passenger seat, and Gutknecht sat in the back. M.G. went into the gas station while R.S. and Gutknecht

waited in the car. As M.G. went into the store, she saw a group of black men outside the store. She could not recall how many were in the group. As M.G. bought cigarettes in the store, the cashier told the group that he was going to call the police.

¶ 9 While M.G. was in the store, a man, whom both R.S. and Gutknecht identified as Lyons, approached M.G.'s car. Lyons offered to sell R.S. and Gutknecht a variety of drugs, and when he said that he could sell them marijuana, Gutknecht said he was interested. Lyons got in the backseat of the car and said they would need to go to his house to pick up the marijuana. As M.G. left the store, she saw Lyons getting into her car. Lyons gave M.G. directions to his house.

¶ 10 M.G. drove down a dead-end alley that led to a parking lot near an apartment complex. As Lyons opened the car door, the dome light came on, and he pulled out a gun. Lyons pointed the gun at Gutknecht's face and demanded that the three victims hand over all of their possessions. They complied.

¶ 11 Lyons left the car, and two other men, armed with guns, ran up to the other side of the car. Lyons said that they were there "to back [him] up." Gutknecht, M.G., and R.S. all identified one of these other men as Christopher Pittmon. Gutknecht identified the third man as defendant, but neither M.G. nor R.S. could identify the third man. Pittmon opened the back door to the car and pointed a gun at Gutknecht. The third man—defendant, according to Gutknecht—went to the front passenger side of the car and began to rummage through the glove compartment. After he finished, defendant walked to the driver's side of the car, and Lyons walked to the passenger side. Defendant looked around the driver's side of the car.

¶ 12 Lyons told M.G. to "get *** out of there," and that he would kill them if they told the police. As M.G. tried to put her keys into the ignition, the third man slapped the keys out of her

hand, put his gun to her head, and said, "Where the fuck do you think you're going?" R.S. told Lyons, Pittmon, and defendant that they could have "anything [they] want[ed]."

¶ 13 In response to R.S.'s comment, defendant pulled down his pants, put his gun to M.G.'s head, and forced her to perform oral sex on him. Lyons also pulled down his pants, put his gun to R.S.'s head, and made her perform oral sex on him. Pittmon held his gun to Gutknecht in the backseat, punched Gutknecht several times, and told Gutknecht to watch defendant and Lyons rape M.G. and R.S.

¶ 14 Defendant and Lyons then switched places, so that defendant was next to R.S. and Lyons was next to M.G. Lyons forced M.G. to perform oral sex on him. Then defendant and Lyons ordered M.G. and R.S. to get out of the car and bend over onto the car seats. They then forced M.G. and R.S. to have vaginal intercourse with them. After raping M.G. for a while, Lyons told her to lie on the ground, where Lyons continued to rape her.

¶ 15 M.G., R.S., and Gutknecht heard police sirens. Defendant yelled, "Cops," and pushed R.S. into the car and closed the door behind her. Defendant and Pittmon ran away. Lyons got up, told M.G. to put her pants on, shoved her into the car, and ran away. M.G. started the car and began to back up, when she saw Lyons standing in the alley next to the parking lot, pointing his gun at the car. Lyons threw Gutknecht's coat, which he had taken earlier, onto the windshield and ran away. Police cars then arrived on the scene.

¶ 16 Paramedics took M.G. and R.S. to the hospital, where nurses administered rape kits. Semen was found on M.G.'s underwear and pants. Vaginal swabs from M.G. and R.S. were eventually tested and compared with buccal swabs from defendant and Lyons. M.G.'s vaginal swab had male DNA that matched Lyons. No semen was recovered from R.S.'s vaginal swab.

¶ 17 Evidence technician Terrance Powell testified that he recovered makeup kits, a black purse, a CD case, and CDs from a grassy area near the parking lot, in the direction that defendant and Pittmon had fled. M.G. identified the items as items they had taken from her.

¶ 18 Detective Randy Brown testified that, after speaking to Gutknecht at the police station, he went to the gas station where Lyons had approached M.G., R.S., and Gutknecht. Brown obtained security footage from November 21, 2006 and recognized defendant, Lyons, and Pittmon in the video. On November 25, 2006, the victims met Brown at the gas station to view the surveillance footage. Brown testified that met with each of them individually, but Gutknecht testified that he watched the video with M.G. and R.S. R.S. was too upset to watch the footage. M.G. identified defendant, Lyons, and Pittmon as her attackers. She also identified herself in the video. Brown testified that Gutknecht was only able to identify defendant as one of the attackers, but Gutknecht testified that he was only able to identify Lyons. Gutknecht testified that it was "a bad video" and "hard to tell" who was in it. Brown described the video as "clear," but also pixilated and "kind of fuzzy a little bit."

¶ 19 Later that day, Brown had M.G., R.S., and Gutknecht go to the police station, where he showed them photo arrays containing pictures of defendant, Lyons, and Pittmon. M.G. and R.S. both identified Lyons and Pittmon, but not defendant. Gutknecht identified defendant and Lyons, but not Pittmon. The police then began looking for defendant, Lyons, and Pittmon. Brown testified that they "[e]ventually" arrested all three.

¶ 20 After defendant, Lyons, and Pittmon were taken into custody, Brown arranged for each of them to appear in lineups in front of M.G., R.S., and Gutknecht. Neither M.G. nor R.S. could identify defendant in the lineup, but they both identified Lyons in a separate lineup.

¶ 21 Pittmon, who had agreed to plead guilty to robbery and receive a sentence of 35 years in prison in exchange for his testimony against Lyons and defendant, testified consistently with the victims' version of the incident. Pittmon testified that he was at the gas station with Lyons and defendant around 11 p.m. on November 21, 2006. When shown photographs taken from security footage at the gas station, he identified himself, Lyons, and defendant. Pittmon testified that defendant purchased a few items at the gas station and then they left. While they were outside the gas station, Lyons told Pittmon and defendant that he had "a lick," which, Pittmon testified, meant that Lyons had found someone to rob. Lyons told Pittmon and defendant to meet them in the alley behind his house. Both Pittmon and defendant had guns.

¶ 22 When Pittmon and defendant arrived in the alley, Pittmon saw Lyons halfway out of the backseat of M.G.'s car, holding a gun. Pittmon and defendant approached the car. Defendant opened the rear car door and struck Gutknecht. Pittmon described the sexual assaults in nearly the same way that M.G., R.S., and Gutknecht had. He added that defendant used a condom during the vaginal intercourse. During the sexual assaults, Pittmon kept his gun on Gutknecht, but he denied hitting Gutknecht.

¶ 23 Pittmon testified that he saw the police driving up the alley and told Lyons and defendant. Pittmon and defendant fled to Lyons's house, where they left their guns in the backyard. They went inside Lyons's basement for a while. Lyons's brother came down into the basement and asked where Lyons was. After defendant and Pittmon told Lyons's brother they did not know, they left and hid in an open garage they found. They did not see Lyons for the rest of the night.

¶ 24 Assistant State's Attorney Brian Volkman testified as to the content of Lyons's confession. Lyons told Volkman that he was at the gas station and that he spoke to a boy about selling him marijuana. Lyons said that, after he directed the boy and his two friends to the alley

behind his house, he "raped th[e] girl, [and] th[e] other girl gave him a blow job while [Pittmon] held a gun to th[e] boy's head."

¶ 25 Defendant admitted that he was at the gas station around 11 p.m., but denied participating in the robberies and sexual assaults. Defendant said that, after seeing Lyons and Pittmon at the gas station, he walked to his house, which was about five blocks away. He later spoke to Detective Brown, with whom defendant had had a personal relationship for 10 years, about applying for college, when Brown brought up the incident.

¶ 26 The trial court instructed the jury on the law of accountability. The jury found defendant guilty of all counts.

¶ 27 Defendant's attorney filed a motion for a new trial, which he later amended. At the hearing on the motion for a new trial, defendant asked if he could say something. The court told defendant to talk to his lawyer, but defense counsel said, "Judge, I think he just wants to make a statement to the Court." The State objected to defendant making a statement during the hearing and the court said, "You will have your opportunity at sentencing to make statements." Defendant said that he had "a motion [he wanted] to file." The court responded, "Well, if you want to file a motion, you can do that later. But now we're going to deal with this motion that's in front of me which is a motion for a new trial ***."

¶ 28 After the trial court denied the motion for a new trial, defendant filed a motion seeking to waive his right to counsel and proceed *pro se*, and asking the court to order the State to turn over its discovery, to provide him with transcripts of his trial, and to grant him a continuance to prepare a supplemental motion for a new trial. The court passed the case so that defendant could talk to his attorney about the consequences of proceeding *pro se*. When the trial court recalled

the case, defendant's trial counsel requested a continuance to speak to defendant and his family about proceeding *pro se*.

¶ 29 At the next court date, defendant said that he still wanted to proceed *pro se*. The trial court admonished him of the consequences of proceeding without representation, inquired into defendant's competence and experience, and found that defendant was capable of exercising his right to represent himself. The court explained that defendant would be representing himself at sentencing, and defendant asked, "What about—how can I attack what he did or didn't do as far as the motions or his performance?" The court responded that defendant could only do so on appeal. The court reminded defendant that it could not give him legal advice if he decided to proceed *pro se*. Defendant said that he was not asking for the court's advice, and the court replied, "That's what you're asking me to do. You're asking me the legal question about how to proceed to complain about something that your lawyer might have done[.]"

¶ 30 Defendant explained that, in order to proceed *pro se*, he would need discovery from the State and the trial transcripts, as he requested in his motion to proceed *pro se*. He added, "I didn't go *pro se* just to be sentenced. I went *pro se* to get certain things on the record that he didn't put on the record." The trial court explained that defendant would only be proceeding *pro se* for purposes of sentencing, as it had already ruled on defendant's motion for a new trial. The court appointed defendant's trial attorney as standby counsel for sentencing and continued the case.

¶ 31 At the sentencing hearing, defendant withdrew his motion to proceed *pro se* and said that he wanted his trial attorney to represent him. In aggravation, the State presented testimony from Officer Luis Vargas, who had previously arrested defendant for selling drugs. Vargas testified that, as he was handcuffing defendant, defendant elbowed him in the face. Another officer arrived to assist Vargas, and defendant kicked Vargas in the groin and hit the other officer in the

face and chest with his elbows. The charges against defendant relating to this incident were still pending at the time of sentencing.

¶ 32 Officer John Dahlberg testified that he arrested defendant for drinking in public on December 11, 2006. When he searched defendant, he found five small bags of cannabis. Dahlberg testified that it was "a misdemeanor amount" of cannabis. Dahlberg charged defendant, but he could not say what happened to the case.

¶ 33 Officer Jackowiak testified that, on February 6, 2007, he arrested defendant after he saw defendant chase an individual down the street and punch that person in the face. Jackowiak learned that defendant was on bond at the time he punched the man because defendant had a bond slip in his pocket. Jackowiak could not recall whether he attended any court dates for that case.

¶ 34 Officer Timothy Moran testified that he pulled defendant over on May 23, 2007 for not wearing his seatbelt. As Moran approached the car, he saw defendant put something in the center console, which turned out to be a bag of 13 grams of cannabis. On cross-examination, Moran admitted he could not recall whether he or his partner recovered the bag or whether the contents ultimately tested positive for cannabis.

¶ 35 M.G. and R.S. also read victim impact statements in as aggravating evidence. M.G. described the "state of constant fear" she lived in as a result of the attack, her difficulty sleeping, and the emotional pain she experienced due to the attack. She also felt "violated, degraded, humiliated, [and] disgusting" after she had been raped. She also described, in detail, the humiliating experience of having the rape kit performed on her in the hospital, as well as the side effects of the drugs she was prescribed to avoid contracting a sexually transmitted disease.

¶ 36 R.S. said that she thought about the attack every day. She "excessively wash[ed]" herself because she always felt dirty. She experienced panic attacks that caused her to vomit. She also experienced constant fear, insomnia, and nightmares. She said that she felt "a little sense of relief and peace knowing that [defendant and Lyons were] in prison and not free to do what they did again."

¶ 37 In mitigation, defense counsel argued that none of the officers who had testified had testified regarding an offense of which defendant had been convicted. And counsel noted that defendant had no prior convictions at all. Counsel also highlighted the fact that defendant was 19 years old at the time of the offense (26 at the time of sentencing). He argued that defendant had support from his family—both parents and two siblings—that would assist in his rehabilitation. Counsel also noted that defendant had been employed at a grocery store before the offense. Finally, he noted that defendant expressed sympathy for the victims in the presentence investigation report, although he maintained his innocence.

¶ 38 In allocution, defendant said he was not the "monster" that the State had portrayed him to be. He also said that he prayed that the victims "will be all right."

¶ 39 The trial court found that defendant's actions "caused or threatened serious harm," adding, "Other than death itself I can't think of any more serious harm to a woman's body or her psyche than sexual assault." The court noted that, although defendant "had no prior convictions," the State had presented evidence that defendant "was not new to the criminal system," as he was on bond when he committed the robberies and sexual assaults. The court noted that defendant had "expressed no remorse at all." The court discussed the impact of defendant's actions on the victims, the victims' families, and defendant's own family. The court concluded:

> "I believe there's sufficient factors in aggravation to extend your sentence. I believe the sentence I am about to impose is necessary to deter others from committing the same crime. I believe that your behavior and your conduct was brutal. Brutal. And that you acted in concert and as partners that night. You planned to do something when you went to that gas station. You brought weapons. *** You saw your targets, you got them to a secluded location. It was pre-arranged on your parts to meet."

¶ 40 The court sentenced defendant to 30 years' incarceration on each court of armed robbery, with the armed robbery sentences to be served concurrently with each other. The court sentenced defendant to 30 years' incarceration for his aggravated criminal sexual assault of R.S. and 12 years' incarceration for his aggravated criminal sexual assault of M.G. The court also sentenced defendant to 30 years' incarceration for Lyons's aggravated criminal sexual assault of M.G. in the car, 6 years' incarceration for Lyons's aggravated criminal sexual assault of M.G. on the ground outside the car, and 12 years' incarceration for Lyons's aggravated criminal sexual assault of R.S. Based on the "nature and circumstances of the offense and the history and character of [defendant]," and the fact that consecutive sentences were necessary to protect the public from defendant, the court ordered that the sentences should run consecutively. In total, defendant was sentenced to 120 years' incarceration, with defendant being required to serve at least 85 percent of that sentence because the court found that his conduct "caused or threatened the serious bodily harm of the victims."

¶ 41 Defendant filed a motion to reconsider his sentence, arguing that the trial court failed to take into account his lack of a criminal history, "family situation, economic status, educ[a]tion or personal habits." The trial court denied the motion, saying that it had taken into account "all the factors in aggravation and mitigation that were presented to [it]." Defendant appeals.

¶ 42 II. ANALYSIS

¶ 43 A. Severance

¶ 44 Defendant first argues that the trial court erred in denying his motion for severance. We review the decision to deny a motion for severance for an abuse of discretion. *People v. Bean*, 109 Ill. 2d 80, 93 (1985).

¶ 45 The general rule is that defendants jointly indicted should be jointly tried unless fairness to one of the defendants requires separate trials. *Id.* at 92. In other words, one of the defendants must show that he will be prejudiced by a joint trial. *Id.* The two most common forms of prejudice occur when: (1) "a codefendant has made hearsay admissions that implicate the defendant; and (2) the defendants' defenses are "so antagonistic that a severance is imperative to assure a fair trial." *People v. Daugherty*, 102 Ill. 2d 533, 541-42 (1984). But " '[a]ny set of circumstances which is sufficient to deprive a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial.' " *Bean*, 109 Ill. 2d at 95 (quoting *People v. Braune*, 363 Ill. 551, 556 (1936)). Our supreme court has noted that, when evaluating prejudice, " 'the quantity and type of evidence adduced against the co-defendants[ ] is a vital consideration in evaluating the necessity for severance.' " *People v. Byron*, 116 Ill. 2d 81, 93 (1987) (quoting *United States v. Sampol*, 636 F.2d 621, 646 (D.C. Cir. 1980)).

¶ 46 In this case, defendant acknowledges that he and Lyons's defenses were not antagonistic and that Lyons's redacted confession, which excluded any references to defendant, did not prejudice him. Instead, defendant argues that a joint trial with Lyons prejudiced him because the State presented very strong evidence against Lyons, while its evidence against him was comparatively weak. The State argues that defendant was not prejudiced by this evidence where

the evidence inculpating Lyons was relevant to establish defendant's accountability for Lyons's crimes.

¶ 47 We find the State's argument to be persuasive. Defendant does not argue that the State introduced substantial evidence against Lyons that was *inadmissible* against him. To the contrary, because the State charged defendant as an accomplice to Lyons's crimes, they had to prove that Lyons committed those crimes. See *People v. Chirchirillo*, 393 Ill. App. 3d 916, 924-25 (2009) (accomplice could not be held liable for principal's crime where State failed to prove that principal committed crime); see also 2 LaFave, Substantive Criminal Law § 13.3(c) (2003) ("[T]he guilt of the principal must be established at the trial of the accomplice as part of the proof on the charge against the accomplice"). There was nothing prejudicial about the DNA evidence linking Lyons to the crime, the victims' identifications of Lyons, or Lyons's confession, when each of those pieces of evidence was relevant to establishing Lyons's guilt as a principal and, by extension, defendant's guilt as an accomplice.

¶ 48 And although the State did not have to prove the identity of the principal in order to establish defendant's guilt (*People v. Cooper*, 194 Ill. 2d 419, 435 (2000)), it was still required to prove that one of defendant's accomplices committed the robberies and sexual assaults. *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 33. In this case, there were only two people for whose actions defendant could be held accountable: Lyons and Pittmon. Since Pittmon, as a witness for the State, testified that he did not sexually assault either M.G. or R.S., the State had to prove the Lyons did in order to establish defendant's guilt as an accomplice. Thus, the evidence linking Lyons to the sexual assaults—the DNA, the victims' identifications, the confession—was relevant and admissible in defendant's trial.

¶ 49 Defendant notes that "prosecuting a person on a theory of accountability does not require the prosecution to conduct a joint trial," citing the principle that a defendant may be prosecuted as an accomplice even if the principal has not yet been convicted. While it is true that the State does not need to convict a principal before prosecuting an accomplice, in such a circumstance, the State must still prove that the principal committed the underlying offense. See *Chirchirillo*, 393 Ill. App. 3d at 925. And, while it may be true that joint trials are not always necessary when prosecuting a principal or accomplice, it is *defendant's burden* to show that separate trials are necessary because a joint trial would prejudice him. In this case, where the allegedly prejudicial evidence against Lyons was relevant and admissible against defendant, we see no prejudice.

¶ 50 Defendant cites *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), and *Sampol*, 636 F.2d 621, but these cases are distinguishable. In *Mardian*, the defendant was charged with five counts of conspiracy to obstruct justice for impeding a grand jury investigation into the Watergate scandal. *Mardian*, 546 F.2d at 975, 977-78. The defendant was tried with three other codefendants, whom, unlike the defendant, the government had charged with obstruction of justice and perjury. *Id.* at 977. Also, the government charged the codefendants with 40 additional counts of conspiracy to obstruct justice for which the defendant was not charged. *Id.* at 977-78. And, "most significantly," defendant was not charged "with any activity after July 21, 1972, roughly one month after the break-in, although it was alleged that the conspiracy continued up to the date of the indictment, March 1, 1974." *Id.* at 978. At the joint trial, "a substantial part of the testimony [focused] on events after [the defendant] ceased active participation" in the conspiracy. *Id.* The court held that the defendant's trial should have been severed from the codefendants', because, "where there is a great disparity in the weight of the evidence, strongly

establishing the guilt of *some defendants*, the danger persists that that guilt will improperly 'rub off' on the others." (Emphasis added.) *Id.* at 977.

¶ 51 Similarly, in *Sampol*, the defendant was charged with making false declarations to a grand jury and "misprision of a felony" for trying to cover up the murder of a Chilean Ambassador to the United States. *Sampol*, 636 F.3d at 629. But he was tried along with two codefendants, whom the State charged with the actual murder. *Id.* The court held that the defendant's trial should have been severed because "[t]here was a substantial disparity between the lesser offenses he was charged with and those that directly involved the murders and conspiracy." *Id.* at 630. The court noted that the "entirely disparate levels and allegations of culpability" between the defendant and the codefendants would likely have created "confusion of the evidence and prejudice toward [the defendant]." *Id.* at 643. Moreover, the testimony at trial "created the false impression that [the defendant] was involved in the [murder] conspiracy." *Id.* at 644. The court, noting that "the quantity and type of evidence adduced against the co-defendants[ ] is a vital consideration in evaluating the necessity for severance," stressed that the jury had to hear extensive evidence regarding "an intentional and extremely violent assassination scheme," in which defendant played no role until the assassination had been completed. *Id.* at 646. The court concluded, "The amount and provocative nature of the evidence required to prove the charges against [the] co-defendants so exceeded and varied from that which was *necessary and relevant to the charges against [the defendant]* that it was unfair to him, and unrealistic to expect a jury not to be influenced by such *extraneous* testimony ***." (Emphases added.) *Id.* at 647.

¶ 52 The key fact distinguishing this case from *Mardian* and *Sampol* is that, in those cases, the juries in the joint trials heard extensive evidence against the codefendants that *did not apply to*

the charges against the defendants. Thus, in assessing the defendants' guilt, the juries in *Mardian* and *Sampol* could have been influenced by evidence that had no bearing on the minor charges the defendants faced. But in this case, the evidence inculpating Lyons was not simply evidence against Lyons; it was also evidence against defendant, who acted as Lyons's accomplice. Severed trial or not, the jury in defendant's case would have heard evidence linking Lyons to the offenses had the State pursued an accountability theory against defendant. We do not find *Mardian* or *Sampol* persuasive and do not find that defendant's joint trial with Lyons unfairly prejudiced him. We affirm the trial court's denial of defendant's motion to sever his trial.

¶ 53 B. Excessive Sentence

¶ 54 Defendant next contends that his 120-year sentence is excessive because it fails to take into account his "demonstrated rehabilitative potential, as illustrated by his high school education, work history, young age, strong family ties, and relatively minor and non-violent criminal background." The State argues that the trial court considered these factors in sentencing defendant and that the serious nature of the offenses and the harm caused by defendant justified the sentence.

¶ 55 A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Where a sentence is within the prescribed statutory range, we will not find an abuse of discretion unless the sentence is "greatly at variance with the purpose and spirit of the law." (Internal quotation marks omitted.) *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 134. We defer to the trial court's decision regarding the appropriate sentence for an offense because the trial court, " 'having observed the defendant and the proceedings, has a far better opportunity to consider [sentencing] factors than the reviewing court, which must rely on the "cold" record.' " *Alexander*, 239 Ill. 2d at 212-13 (quoting *People*

v. Fern, 189 Ill. 2d 48, 53 (1999)). The trial court is in a superior position to weigh the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court is thus far better suited to balance the need to protect society against the rehabilitative potential of the defendant. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 111.

¶ 56 We will not reweigh the sentencing factors considered by the trial court, even if we would have balanced them differently. *Stacey*, 193 Ill. 2d at 209. When mitigating factors are presented to the trial court, we presume that the trial court considered them in sentencing the defendant. *People v. Burton*, 184 Ill. 2d 1, 34 (1998); *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). This presumption will be overcome only if there is explicit evidence on the record that the trial court did not consider the mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010).

¶ 57 In this case, defendant argues that the trial court failed to consider several mitigating factors that his attorney brought to the court's attention. But there is nothing on the record to show that the trial court disregarded those factors. To the contrary, the trial court expressly stated that it had considered all of the aggravating and mitigating factors presented to it.

¶ 58 Moreover, the appalling nature of defendant's crimes warranted a lengthy sentence. As the trial court noted, defendant, along with his two accomplices, plotted to rob the victims after luring them to a secluding location. After robbing them at gunpoint, he and Lyons proceeded to viciously rape the two 17-year-old female victims at gunpoint while forcing their male friend to watch and threatening to kill them. And, according to the victims, defendant and his cohorts took delight in their suffering, making demeaning comments throughout the horrific, prolonged ordeal. At defendant's sentencing hearing, the victims of the aggravated criminal sexual assault

described in detail the lasting impact that defendant's actions had had on their lives. We will not second-guess the trial court's conclusion that the heinous nature of defendant's conduct, and the need to protect the public from him, outweighed any mitigating factors.

¶ 59 Defendant focuses on his age—19 years old at the time of the offense—arguing that, as a young adult, his brain was less developed in areas regulating his impulse control and judgment. But this crime was anything but a spur-of-the-moment lapse in impulse control. Instead, it was a carefully planned act of predation. The trial court could have easily concluded that the deliberative nature of defendant's crime undermined any possibility that he committed the offense due to youthful impulse.

¶ 60 Finally, with respect to defendant's lack of criminal history, history of employment, family support, and graduation from high school, we reject the notion that any of these factors were significant enough to diminish defendant's culpability or the danger he presented to society. And, even if we would weigh these factors differently, that does not make the trial court's sentence excessive.

¶ 61 C. Eighth Amendment and Proportionate Penalties

¶ 62 In a supplemental brief, defendant challenges his sentence on constitutional grounds. Specifically, he contends that the trial court's imposition of a *de facto* life sentence runs afoul of the United States Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48, 82 (2010), which held that the eighth amendment prohibits the imposition of life without parole on juveniles convicted of non-homicide offenses.

¶ 63 The eighth amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The proportionate penalties clause of the Illinois Constitution states that "[a]ll penalties shall be

determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The proportionate penalties clause places two limits on the legislature's ability to prescribe criminal sentences: (1) it prohibits criminal penalties that are "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community"; and (2) it prevents offenses with the same elements from having different sentences. (Internal quotation marks omitted.) *People v. Sharpe*, 216 Ill. 2d 481, 487, 521 (2005). When interpreting the first of these restrictions, our supreme court has held that the proportionate penalties clause is coextensive with the eighth amendment's proportionality requirement. *People v. Patterson*, 2014 IL 115102, ¶ 106. Because defendant's proportionate-penalties challenge in this case is based on the first restriction in the proportionate penalties clause, we analyze his eighth-amendment and proportionate-penalties arguments by the same standards.

¶ 64 The fundamental flaw with defendant's argument is that he is not a juvenile. In *Graham*, the Court drew a clear line: states may not impose life-without-parole sentences for non-homicide offenses for juveniles under 18. *Graham*, 560 U.S. at 74-75. But defendant was 19 years old when he committed his crimes. Defendant cites no case from Illinois or any other jurisdiction that has extended *Graham* to 19-year-olds. And, although we recognize that, in certain cases, it may be difficult to distinguish a 17-year-old defendant from a 19-year-old defendant, we see nothing in the record to indicate that defendant was particularly immature or underdeveloped.

¶ 65 Moreover, in *Graham*, the Court discussed at length why a categorical approach—striking down all life sentences for non-homicide offenders under 18—was preferable to a case-

by-case approach. *Id.* at 77-79. If we were to make an exception for defendant in this case, we would be using the very case-by-case approach that *Graham* eschewed.

¶ 66 Nor does defendant suggest an alternative categorical rule. He does not argue that we expand *Graham* to include all 19-year-olds. Nor would we, as defendant has cited no case law suggesting that the well-reasoned rule set out in *Graham* should be reconfigured.

¶ 67 While defendant does cite some research suggesting that the portions of the brain responsible for impulse control continue to develop into an individual's mid-20s, we are not persuaded that this limited evidence necessitates an expansion of *Graham* to encompass 19-year-olds. While the Court cited scientific evidence in *Graham* in support of its holding (*id.* at 68-69), it also relied on statistical evidence showing a national consensus against life sentences for juveniles convicted of crimes other than homicide. *Id.* at 62-67. Defendant cites no evidence to suggest that there is a national consensus against life sentences for sexual assaults and armed robberies committed by 19-year-old adults. To the contrary, as the Supreme Court has noted, most states consider 18 to be the age of majority. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."); see also *United States v. Montenegro-Recinos*, 424 F.3d 715, 717 (8th Cir. 2005) (age of majority is 18 in most states).

¶ 68 Defendant makes much of the fact that the sentencing statutes applicable to him required the imposition of at least a 100-year sentence. But *Graham* was not focused on mandatory minimum sentences—it prohibited life without parole for any juvenile offender, whether mandatory or discretionary. See *Graham*, 560 U.S. at 55-56 (defendant's minimum sentence in *Graham* was five years' incarceration; his discretionary life without parole sentence for non-

homicide offense was still unconstitutional). And in any event, the trial court sentenced defendant to 120 years' incarceration, beyond any mandatory minimum. Nothing in the record suggests that the trial court would have given defendant an aggregate sentence below 100 years if it had the opportunity. Defendant's discussion of the mandatory minimum sentence is irrelevant.[1]

¶ 69 Defendant also argues that the United States Supreme Court's recent eighth-amendment jurisprudence—specifically, *Roper*, *Graham*, and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012)—shows that trial courts must consider a juvenile offender's age when fashioning a sentence. There are two problems with defendant's argument. First, as we discussed above, defendant is not a juvenile, and nothing in *Roper*, *Graham*, or *Miller* suggested that their holdings should apply to any offenders past the age of 18. Second, the trial court in this case did have an opportunity to consider defendant's youth. Defense counsel highlighted defendant's age at the sentencing hearing. The trial court simply found that any diminished culpability or rehabilitative potential inherent in defendant's age was outweighed by the severity and brutality of defendant's crimes. Thus, the rationale of *Roper*, *Graham*, and *Miller* is not persuasive here.

¶ 70 D. *Krankel* Inquiry

¶ 71 Next, defendant contends that the trial court erred in failing to conduct an adequate inquiry into his posttrial claims of ineffective assistance of counsel.

¶ 72 In *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), our supreme court held that a defendant who raises a claim that his trial attorney was ineffective should be represented by independent

[1] For the same reason, we do not need to address the State's argument that the 15-year firearm enhancements were not in effect at the time that defendant was sentenced and that the minimum sentence was thus only 36 years. Regardless of the minimum, under *Graham*, life without parole may not be imposed for juveniles who commit crimes other than murder.

counsel—not his trial attorney—when presenting those claims. Following *Krankel*, the Illinois Supreme Court clarified that new counsel is not automatically required in every case in which a defendant raises a posttrial claim of ineffective assistance. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, before appointing new counsel, the trial court should "examine the factual basis of the defendant's claim." *Id.* at 77-78. If the trial court finds that the claim lacks merit or questions an attorney's reasonable strategic choice, then the trial court may deny the defendant's motion without appointing new counsel. *Id.* at 78. But if the claim shows "possible neglect of the case," new counsel should be appointed. *Id.* When the trial court makes this inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary." *Id.* The trial court may also discuss the defendant's claims with the defendant, or base its decision on the *pro se* allegations and the court's own knowledge regarding counsel's performance. *Id.* at 78-79.

¶ 73 A claim of ineffective assistance does not need to be in writing before a trial court's duty to inquire is triggered. *People v. Patrick*, 2011 IL 111666, ¶¶ 29-30. Rather, the defendant "must only bring the claim to the trial court's attention." *Id.*

¶ 74 Where, as in this case, the trial court makes no determination on the merits of a posttrial claim of ineffective assistance of counsel, we apply *de novo* review. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 75 The dispute in this case centers on whether defendant did enough to trigger the trial court's duty to inquire into defendant's *pro se* claims. Defendant claims that the trial court affirmatively prevented him from even raising his claims of ineffective assistance so that the trial court could inquire into them. The State contends that the trial court had no obligation to inquire

further because defendant's allegations focused on his ability to proceed *pro se*, and he never raised any claims regarding his attorney's performance with sufficient specificity.

¶ 76 A review of the record shows that defendant tried to bring his claims of ineffective assistance of trial counsel to the trial court's attention but was rebuffed by inaccurate statements from the trial court. After the trial court granted defendant's posttrial request to proceed *pro se*, which he filed after his motion for a new trial had been denied, the Assistant State's Attorney asked for the case to be set for sentencing. In response to the State's request, defendant said, "What about—how can I attack what he did or didn't do as far as the motions or his performance?" The trial court answered, "That's what happens during appeals," which, the court said, happen "after sentencing." The Assistant State's Attorney then objected to the trial court giving defendant legal advice. Defendant said that he was not asking for the trial court's advice, and the court replied, "That's what you are asking me to do. You're asking me the legal question about how to proceed to complain about something that your lawyer might have done[.]" The following colloquy then took place:

> "THE DEFENDANT: I mean you're telling me that—
>
> MS. O'BRIEN [Assistant State's Attorney]: I'm going to object, Judge.
>
> THE DEFENDANT: (Continuing) —I can't put a motion in—
>
> MS. O'BRIEN: I'm objecting—objecting—I'm objecting to—I'd like the record to reflect that the Court did not say that. And, Judge—
>
> THE COURT: First of all, you're not even allowing him to talk, to get on the record what he wants to say, and then let me make the ruling.

MS. O'BRIEN: Well, Judge, there's not a pleading for him to be talking to you. First of all, you've allowed him to proceed *pro se* on his motion. Then he has—he has other—he has other things that he's requesting.

So, if he wants to request those things, we can have a hearing on it. But for him to just put random things on the record I think is not appropriate.

THE COURT: The way a lawyer proceeds is to put things in writing, sir."

The trial court then explained that it was denying defendant's request for the State to turn over discovery and for his trial transcripts because those things were "not relevant to the sentencing phase of the case." Instead, the court said, those things would be provided "during the appellate part of this case." The court added, "You can't appeal anything until we sentence you and there's a final order from which you can appeal."

¶ 77 Defendant said that the trial court had denied him his ability to go *pro se* by refusing to give him the transcripts. The trial court said that it had not, adding:

"What I said to you is your motion to proceed *pro se* is granted. The State will tender things to you that relate to [the] sentencing phase of this case. *But we are not going to rehash trial issues because there's already been a motion for new trial that's been denied.* We are going to the sentencing phase. Do you understand now what I've said?" (Emphasis added.)

Defendant said that he understood and said he no longer wanted to proceed without an attorney: "I didn't go *pro se* just to be sentenced. I went *pro se* to get certain things on the record that he didn't put on the record."

¶ 78 Initially, we note that the trial court was clearly aware that defendant had a claim of ineffective assistance, as it said that defendant was asking "about how to proceed to complain

about something that [defendant's] lawyer might have done[.]" But, instead of inquiring into the factual basis of defendant's claim, the trial court prevented him from raising his claim by telling defendant that the case was proceeding to sentencing, and that his claim could only be brought on appeal.

¶ 79 Moreover, the trial court's reasons for declining to hear defendant's ineffectiveness claim were incorrect. First, when defendant initially asked how to bring up problems with his trial attorney's performance, the court said that he would have to wait and do so on appeal. This was inaccurate, as claims of ineffective assistance of counsel may be raised during posttrial proceedings and, in fact, such a procedure is favored. See *Patrick*, 2011 IL 111666, ¶ 41 (judicial economy served by *Krankel* procedure because it "promote[s] consideration of *pro se* ineffective assistance claims in the trial court and *** limit[s] issues on appeal"). Second, the trial court told defendant that he would have to put his claims in writing because that was "[t]he way a lawyer proceeds." But, as we noted above, posttrial claims of ineffective assistance do not need to be in writing in order to trigger a *Krankel* inquiry. *Id.* ¶¶ 29-30. Third, the trial court told defendant that the case was proceeding to sentencing, and that it would not listen to any trial issues because it had already denied defendant's motion for new trial, which he had filed with the assistance of his trial attorney. But a defendant may trigger a *Krankel* inquiry at any time after trial; he is not required to comply with the requirements of filing a posttrial motion. See, *e.g.*, *id.* ¶ 30 (defendants not required to comply with statute governing posttrial motions when raising claim of ineffective assistance because "[a] *pro se* posttrial motion alleging ineffective assistance of counsel is not a new trial motion"); *People v. Washington*, 2015 IL App (1st) 131023, ¶¶ 8-9, 15 (trial court should have conducted *Krankel* inquiry when defendant said he had claim of

ineffective assistance at sentencing hearing). The trial court should have let defendant raise his claim.

¶ 80 For similar reasons, we reject the State's argument that defendant did not make his claim with sufficient specificity to trigger a *Krankel* inquiry. Instead of letting defendant make his claim, the trial court told him that the case was proceeding to sentencing only and said that he could not raise claims about trial proceedings until he appealed the case. Defendant had no means of making a more specific claim of ineffective assistance because he was told, incorrectly, that he could not do so until he had appealed.

¶ 81 We find *Washington*, 2015 IL App (1st) 131023, to be instructive. There, at the defendant's sentencing hearing, he said, " 'I would like to file a verbal motion for ineffective assistance of counsel.' " *Id.* ¶ 9. The trial court responded, " 'All motions are required to be in writing, sir.' " *Id.* The court said that defendant could file a motion, but also noted that defense counsel had " 'been anything but ineffective.' " *Id.* The defendant then withdrew his motion, saying that he could not put it in writing because he had no access to the law library in the jail. *Id.* On appeal, the court noted that the trial court's requirement that the defendant put his ineffectiveness claim in writing was improper, as defendants may bring oral claims of ineffective assistance after trial. *Id.* ¶ 13. And, the court stated, although the defendant notified the trial court of "the possibility of an ineffective assistance claim," the defendant "was not given the opportunity to tell the court what it was he was complaining about because he was cut short by the court's repeated comments that he had to put the complaint in writing." *Id.* ¶ 14. The court noted that, "had the [trial] court simply asked the nature of the alleged ineffectiveness, the trial court would have been in a position to determine whether further inquiry or the appointment of

counsel was required." *Id.* The court concluded that the trial court failed to make an appropriate preliminary inquiry into defendant's claims of ineffective assistance. *Id.*

¶ 82 Like *Washington*, in this case, the trial court effectively prevented defendant from raising his posttrial claim of ineffective assistance, even though it was aware of the possibility of such a claim. Like the court in *Washington*, we conclude that the trial court should have inquired into the nature of defendant's claim in order to determine whether further inquiry was necessary.

¶ 83 The State cites *People v. Taylor*, 237 Ill. 2d 68 (2010), *People v. Ward*, 371 Ill. App. 3d 382 (2007), and *People v. Radford*, 359 Ill. App. 3d 411, but these cases are distinguishable from this case. In *Taylor*, the supreme court rejected the notion that the defendant had made an "implicit" claim of ineffective assistance when, at his sentencing, he said that he would have taken a plea deal had he known that he faced a sentencing range of 6 to 30 years in prison. *Taylor*, 237 Ill. 2d at 76-77. Unlike *Taylor*, this case did not involve a so-called "implicit" claim; defendant said he wanted to complain about his attorney's performance, and the trial court acknowledged the same.

¶ 84 Similarly, in *Ward*, at sentencing, the defendant said that his attorney did not present " 'a lot of evidence' " at trial and asked the court to " 'take all that into consideration.' " *Ward*, 371 Ill. App. 3d at 394. The court held that this statement was too ambiguous and general to require a *Krankel* inquiry. *Id.* at 432. Notably, the court found "no indication of the circuit court limiting [the] defendant's articulation of his grievances when the court first inquired if he had anything to say." *Id.* at 433. Here, unlike *Ward*, the record shows that the trial court limited defendant's ability to articulate his claims when it told him he could only raise his claim on appeal.

¶ 85 Finally, in *Radford*, the defendant sent the court a *pro se* letter saying that one of the jurors at his trial was biased against him and that, " 'if [his] witness was called and [his] lawyer

would have did a halfway good job [the defendant] would be at home with [his] family.' " *Radford*, 359 Ill. App 3d at 414. The trial court held a hearing where it discussed the possibility of juror bias with defendant's trial attorney and gave defense counsel an opportunity to investigate the claim. *Id.* at 415. On appeal, we held that the statement about defense counsel not doing a good job was insufficient to merit further inquiry because it was too general. *Id.* at 416-17. And, we noted, the defendant did not make a more specific claim at the hearing on his *pro se* letter. *Id.* at 417. In this case, unlike *Radford*, defendant did not make a general complaint regarding his lawyer because he was never given the opportunity to make that complaint in the first place. Instead, he was told that he could not raise issues regarding his trial attorney until he appealed the case.

¶ 86 Because defendant was not given an opportunity to make his *pro se* claims of ineffective assistance to the trial court, we remand for the limited purpose of conducting a preliminary inquiry into defendant's claims of ineffective assistance pursuant to *Krankel* and *Moore*.

¶ 87 E. One-Act, One-Crime/Mittimus Correction

¶ 88 In his opening brief, defendant urged us to vacate one of his aggravated criminal sexual assault convictions because the State did not divide the allegations of its indictment between Lyons's penetration of M.G. in the car and Lyons's penetration of M.G. on the ground outside of the car. The State countered that independent acts of sexual penetration may support independent convictions for aggravated criminal sexual assault. In his reply brief, defendant withdrew this issue and conceded that the State was correct. We agree with the State and defendant's concession. See *People v. Segara*, 126 Ill. 2d 70, 77-78 (1988) (multiple acts of penetration may support multiple sexual assault convictions).

¶ 89 The parties also agree that defendant's mittimus should be corrected to reflect the merger of three counts of aggravated criminal sexual assault. Specifically, the parties say that count 6 should merge with count 5 because both were predicated on defendant's oral penetration of M.G., that count 45 should merge with count 44 because both were predicated on defendant's vaginal penetration of R.S., and that count 47 should merge with count 46 because both were predicated on defendant's accountability for Lyons's oral penetration of R.S.

¶ 90 The one-act, one-crime rule prohibits multiple convictions where more than one offense is based on the same physical act. *People v. Crespo,* 203 Ill. 2d 335, 340 (2001). Where multiple convictions are based on the same act, they merge with one another. See, *e.g.*, *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007). We agree with the parties that defendant's mittimus should reflect the merger of count 6 into count 5, count 45 into count 44, and count 47 into count 46, as they were based on the same acts by defendant and Lyons. We order the clerk of the circuit court to correct the mittimus to reflect the merger of these counts.

¶ 91 III. CONCLUSION

¶ 92 For the reasons stated, we affirm defendant's conviction and sentence. Defendant was not prejudiced by his joint trial and his sentence was not excessive or unconstitutional. But we remand this case for the limited purpose of conducting a preliminary *Krankel* inquiry and for correction of defendant's mittimus to reflect the merger of count 6 into count 5, count 45 into count 44, and count 46 into count 47.

¶ 93 Conviction and sentence affirmed; remanded with directions; mittimus corrected.