2017 IL App (1st) 142894-U

THIRD DIVISION
March 22, 2017

No. 1-14-2894

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. 11 CR 12410 (01)
	)	
DEVIN BICKHAM, JR.,	)	The Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

HELD: Trial court did not abuse its discretion in denying defendant's pretrial motion for a continuance for a fitness examination under section 104-11(b) to determine whether a *bona fide* doubt existed as to his fitness to stand trial where the court properly determined that the motion was a dilatory tactic and otherwise had no merit under the circumstances. Trial court also did not abuse it discretion in sentencing defendant, where record clearly demonstrates it considered all relevant mitigating factors he cites on appeal. However, while we affirm his conviction for first degree murder with the contract murder factor and its accompanying sentence, we must, and with the State's concession, vacate his second, lesser, conviction for first degree murder and its accompanying sentence under the one-act, one-crime doctrine.

¶ 1 Following a jury trial, defendant-appellant Devin Bickham, Jr. (defendant), was convicted of two counts of first degree murder. The jury additionally found that defendant committed the murder with a firearm (sentencing enhancement factor) and pursuant to a contract, agreement or understanding to receive something of value or procured another to commit the murder for something of value ("contract murder" factor). Defendant was sentenced to 2 concurrent terms of 50 years in prison. He appeals, contending that the trial court abused its discretion when it denied his pretrial motion for a continuance for a fitness examination to determine whether a *bona fide* doubt existed as to his fitness to stand trial; that the trial court abused its discretion in sentencing him where it failed to adequately consider substantial mitigating factors; and that his sentence and mittimus must be corrected pursuant to the one-act, one-crime rule. He asks that we remand his cause for a fitness examination "and then a proper determination of whether a *bona fide* doubt" of his fitness for trial existed, reduce his sentence or remand for resentencing, and/or vacate one of his murder convictions and issue a corrected mittimus. For the following reasons, we affirm defendant's conviction for first degree murder with the contract murder factor and vacate his second, lesser, conviction for first degree murder; in addition, we otherwise affirm his sentence, with the modification to his mittimus that his second 50-year term for his lesser conviction for first degree murder is, accordingly, vacated.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with one count of first degree murder and one count of first degree murder with the contract murder factor in relation to events that occurred on the evening of July 11, 2011, in the parking lot of Dominican Priory Park in River Forest, Illinois. The

victim, Chevron Alexander, who was newly pregnant, was shot once in the face and three times in the shoulder while sitting in the front passenger seat of a parked car. Codefendant Devin Bickham, Sr., defendant's father, was also tried for the crime in a simultaneous but severed jury trial with defendant; he was convicted and sentenced to 95 years in prison. A third codefendant, Cardell Taylor, was tried separately and was also convicted; he was sentenced to 70 years in prison.[1]

¶ 4 Prior to trial, defendant's family retained Dr. Eric Ostrov, a psychologist, to conduct a psychological evaluation of him. Dr. Ostrov met with defendant twice (September 2013 and January 2014) and made a written report. Therein, Dr. Ostrov noted that defendant, who was 20 years old at the time of the crime, had an IQ of 84 (in the below average range); was depressed, impulsive and emotionally vulnerable; had, "to a slight extent," made plans to kill himself; and was suffering from anger and traumatic stress. He also noted that while defendant had a "chaotic childhood," defendant described himself as an extrovert and "warm" person who was competent, orderly and ambitious; defendant stated that he liked everything about himself except being in jail, where he never thought he would be, and he described a "supportive, warm and close" family. Defendant had completed high school, where he had many friends, received average grades and participated in extracurricular activities; at the time of the crime, he was enrolled in college as a criminal justice major and he had already completed one year of study. Dr. Ostrov observed that his "mood was not reflective of clinical depression," he had no psychotic symptoms, and he provided consistently logical and goal-directed statements during the

[1]The substantive issues and merits of the instant appeal pertain to defendant only.

interviews. Dr. Ostrov concluded that defendant had a personality disorder characterized by self-doubt, dependence and identity confusion, and that this could be treated with psychotherapy and, perhaps, psychotropic medication. Dr. Ostrov did not examine defendant with respect to his fitness to stand trial.

¶ 5 In May 2014, 3 days before jury selection in defendant's trial was to begin, and over 32 months since he had been arraigned, defense counsel[2] filed a motion for a continuance to conduct a fitness examination. In the motion, defense counsel explained that they had visited defendant the day before and noticed some odd behavior and "significant peculiarities," which counsel believed showed defendant had begun deteriorating mentally. Counsel further stated that defendant had been unable to participate in his defense at this last meeting and did not comprehend the seriousness of the charges. Noting Dr. Ostrov's report from months earlier, counsel opined that "there exists a *bona fide* doubt as to" defendant's competency and asked, pursuant to section 104-11(b) of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-11(b) (West 2012)), that the trial court appoint an expert to conduct a fitness examination, after which the court could then make a determination regarding defendant's fitness to stand trial.

¶ 6 The trial court denied defendant's motion, finding that it was both "a dilatory tactic" and that there was no *bona fide* doubt as to his fitness to stand trial. In addition to the State's observations of defendant, the trial court noted that it, too, had seen defendant on its call since

[2]We note for the record that defendant had multiple attorneys working on his case and representing him in court. For purposes of this decision, we refer to them collectively as "defense counsel."

August 2011, several times without his counsel present, and was able to communicate with him and observe him, and found that he "knows what's going on" and "is paying attention to everything." The court further noted that defense counsel had previously asked for a continuance at the last hearing on unrelated matters which had been denied, and that defense counsel had never before filed any motion based on defendant's psychological state nor raised any concern about his sanity or fitness in all the time before the instant motion. Accordingly, the court concluded that defendant had "brought nothing to this Court's attention that would rise to that level that there is a *bona fide* doubt" as to his fitness to stand trial.

¶ 7 The cause then proceeded to trial. Defendant's theory on the case was that his father had manipulated him into helping commit the murder because he knew defendant would do anything if he asked.

¶ 8 Mary Alexander, the victim's mother, testified that at the time of the murder, she lived with the victim and the victim's daughter in Chicago. In June 2011, Mary discovered that the victim and defendant's father were engaged and planned to marry in August 2011. However, Mary later discovered that defendant's father was already married. On the night of July 11, 2011, defendant's father came to Mary's home to visit the victim, and the three played cards. Mary noticed that when the victim left the table, defendant's father was texting on his cell phone. At 10 p.m., the victim left with defendant's father in his car. At 10:23 p.m., Mary received a call from defendant's father informing her that the victim had been shot. Mary averred that defendant's father was calm during the call.

¶ 9 Lavette Alexander, the victim's sister-in-law, testified that in June 2011, she was selling

t-shirts for charity when defendant's father offered to buy a large one for the victim, telling her that the victim needed room "for her stomach to grow." Alexander further testified that in late June and early July 2011, the victim and defendant's father argued "a lot."

¶ 10 Kimmie Martin testified that she had been married to defendant's father when defendant was a child and the two raised defendant together. She averred that defendant loved his father. Martin discovered that defendant's father was having affairs with other women during their marriage. Their relationship then consisted of separations and reunifications, with Martin living with defendant and his father in July 2011. However, defendant's father was never home and Martin knew he was seeing another woman, but did not know her identity. On the night of July 11, 2011, she returned home from work; defendant's father was not home and defendant left the house in his (defendant's) silver Chevy Impala later that evening.

¶ 11 Stephanie Fumo testified that she, Bryan Johnson and their friends were in Dominican Priory Park on the evening in question when she heard voices coming from the parking lot. She saw a man and a woman by a car. Later, at about 10:15 p.m., she and Johnson began to walk to Johnson's car in the lot when she now saw another man, wearing a short-sleeve baggy shirt and shorts, standing in the grass between the sidewalk and the lot, and the first man standing outside the car on its passenger side. Fumo stated that she then heard three popping noises which she thought were fireworks, and saw the second man run away. The first man began crying and yelling that his girlfriend had been shot and Fumo called 911. She could not positively identify anyone involved for police.

¶ 12 Johnson similarly testified that he was in the park with Fumo that night when he heard

three popping noises. He stated that as they walked toward the sounds, he saw a man in a white shirt and khaki cargo shorts standing alone at the front entrance of the parking lot and then running across the street. He next heard another man yell that his girlfriend had been shot. Johnson was also unable to positively identify anyone.

¶ 13 Officer Anthony Pluto of the River Forest Police Department testified that he received a call of a shooting in the parking lot of the park at 10:21 p.m. He arrived seconds later, whereupon defendant's father emerged from the bushes and ran toward his squad car, yelling that his girlfriend had been shot. Officer Pluto stated that while he sounded like he was crying, there were no tears on his face nor was there any blood on his clothes. Officer Pluto approached defendant's father's car and saw the passenger side window shattered and the victim slumped over in the front passenger seat, bleeding. Defendant's father described the shooter as a black male wearing a white shirt who fled the scene and got into a gray vehicle traveling east on Division Street. Officer Pluto broadcasted his description and was soon informed that another officer had just made a traffic stop of a matching car near the area.

¶ 14 Officer Pluto further testified that he drove defendant's father to the traffic stop for a show-up. Once there, defendant and codefendant Taylor were standing behind squad cars and near defendant's silver Impala. Officer Pluto averred that during the show-up, he asked defendant's father if these men were the ones who shot the victim, and defendant's father responded that they did not look at all like the assailants; he also stated that he did not recognize the Impala. As officer Pluto was about to go speak with his fellow officers, defendant's father stopped him and told him that defendant was his son. Officer Pluto further testified that police

recovered an empty .380 semi-automatic pistol, capable of holding 8 rounds, from underneath the driver's seat of the Impala, which was registered to "Devin Bickham."

¶ 15 Officer Dan Miller testified that he heard the dispatch call of shots fired at the park and the descriptions of the assailant and the car. Officer Miller spotted a silver Impala in the immediate vicinity of Harlem Avenue and, noting that the driver's shirt matched the description, curbed it. He and another officer ordered the driver and passenger to exit. The other officer looked inside the Impala and saw a gun. Officer Miller averred that, at this point, defendant began to explain that he had been driving when a black male threw the gun onto his lap. Officer Miller further testified that, as he moved defendant and Taylor in preparation for the show-up, he saw Taylor look at defendant and tell him that he wanted his money now.

¶ 16 Physical evidence presented at trial showed that gunshot residue tests were positive for Taylor's white shirt and defendant's father's hand, and negative for defendant's hands and clothes. It was also discovered that the gun in defendant's Impala had been a wedding gift to defendant's father years ago and that it contained DNA from at least three people; Taylor and defendant's father could not be excluded, and defendant was excluded. Four live rounds were recovered from outside defendant's father's car on the passenger side, as well as four fired shell casings, three bullets from inside the victim and one bullet in the seat of the car, for a total of eight. These were all .380 caliber and all fired from the gun recovered from defendant's car.

¶ 17 Additional evidence was presented at trial with respect to the cell phones of defendant, his father, Taylor and the victim. First, defendant's father's phone contained contacts for defendant, listed as "Son DJ," as well as for Taylor, listed as "Cuz Cardell Son DJ guy Dave."

Defendant's father had deleted his entire outbox of sent messages, but police were able to recover several of them from his phone. Additionally, the deleted messages were recovered on defendant's phone. All these together showed that earlier on the evening in question, defendant's father and the victim exchanged texts about playing cards and later discussed going somewhere afterwards on Harlem Avenue. Taylor then called defendant, defendant called his father, and his father called him within minutes of each other. Defendant and Taylor exchanged several more texts and calls, with defendant texting Taylor at 8:49 p.m., "Dey N the crib." At 9:32 p.m., defendant's father texted him, "We goin 2 da park." Defendant texted back, "I'm out here. Wat park," and defendant's father answered, "Idk." At 9:44 p.m., defendant's father texted him, "How close;" defendant texted back, "Passing Central;" and he later texted him, "on Lake." At 10:05 p.m., defendant's father called him for 17 seconds, and at 10:08 p.m., defendant called him back for 33 seconds. At 10:19 p.m., defendant's father called 911 and then the victim's house.

¶ 18 On July 12, 2011, defendant was interviewed twice by police; these videotaped interviews were presented to the jury. In the first, defendant essentially denied his involvement in the murder, stating initially that he accidentally ended up on Harlem Avenue and Division Street when a guy threw a gun into his car, but later that he and Taylor ended up near the park when Taylor told him to stop the car, Taylor got out, defendant heard three or four shots, Taylor ran back to the car and, admitting that he knew "what was up," defendant sped away.

¶ 19 In his second police interview, defendant eventually confessed his role in the murder. He described that his father had asked him if he knew of anyone who would kill the victim for him because he wanted to end their relationship. Accordingly, in April or May 2011, defendant put

his father in touch with codefendant Taylor, their former neighbor. Defendant's father agreed to give codefendant Taylor money for the murder; defendant was not sure about the amount, but he knew codefendant Taylor was going to give him (defendant) $100 for driving codefendant Taylor to the murder. Defendant's father gave defendant money and a gun in late May 2011 to give to codefendant Taylor, which he did. Defendant further recounted that on the night in question, he called his father who had told him he was going to a park, but his father did not know which one yet. Defendant's father was at a store on Division Street, and defendant drove there with codefendant Taylor, waited for him, and then followed him to the park. Defendant stated he knew that the murder was going to happen that night.

¶ 20 At the close of evidence, the jury found defendant guilty of first degree murder, and that the State had proved the added factor that defendant, or one for whose conduct he was responsible, committed the murder pursuant to a contract, agreement or understanding to received money or something of value in return, or that he procured another to commit the murder for money or something of value. Defendant then filed a posttrial motion, with his counsel stating it was a "bare bones motion for a new trial" as he did not yet have the trial transcript. Following a continuance, the court eventually denied the motion.

¶ 21 The cause then proceeded to sentencing. The victim's mother presented an impact statement detailing the effects of the victim's death on her family, including on the victim's daughter. Although she forgave defendant, she asked that he be sentenced to the maximum. Defendant presented two witnesses in mitigation. His maternal aunt, Idela Johnson, testified that defendant's father was very manipulative and preyed on women and defendant. She noted that

defendant was a "good kid," was in school, had never been arrested, and helped his family. She also presented a petition signed by more than 200 people from the neighborhood in support of defendant. His mother, Francine Johnson, testified that defendant, who lived with his father after the two separated when he was a young child, idolized his father. His father would take him everywhere, involve him in his relationships with other women, use him as an excuse to get out of the house, and force him to babysit his other children. She also recounted several times when defendant would call her and tell her that his father wanted him to do something he did not want to do, and she would intervene. Johnson described that defendant was helpful and never got into trouble, but that he was "desperately in need" of his father's approval. Defendant spoke on his own behalf, expressing remorse. And, his presentence investigation report (PSI) confirmed he had no prior convictions or arrests, graduated from high school and completed his first year of college.

¶ 22 Taking into account the 15-year firearm enhancement, the trial court sentence defendant to 50 years in prison. The court agreed with defense counsel that defendant's father was the worst of the participants involved in the murder, and his manipulation was clear. Apart from him, the court found that defendant came from what appeared to be a decent home of loving people. The court also noted that defendant did not have any problems with gangs, drugs, alcohol or crime; he was educated and had even completed a year of college. However, in aggravation, the court explicitly found that defendant knew the difference between right and wrong, had planned the crime and knew the intent of his actions was to commit murder. Additionally, much time had passed between the planning and the murder; the court declared that

defendant had time to decide not to participate, as he used to do when he sought his mother's help with his father. Thus, the court reasoned that, while he did not deserve the maximum sentence because he was not the "monster" his father was, he did not deserve the minimum sentence because he had an opportunity to stop the crime but chose not to do so.

¶ 23 ANALYSIS

¶ 24 Defendant presents three issues on appeal. We address each separately.

¶ 25 I. Fitness Examination

¶ 26 Defendant's first contention on appeal is that the trial court abused its discretion when it denied his pretrial motion for a continuance for a fitness examination to determine whether a *bona fide* doubt as to his fitness to stand trial existed. He asserts that the court erred by applying a *bona fide* doubt standard in evaluating defendant's motion, which merely asked for a fitness examination, not a fitness hearing, under section 104-11(b) of the Code (725 ILCS 5/104-11(b) (West 2012)), and that, by denying the motion, the court failed to properly consider relevant factors in its decision. From this, he insists that a restrospective fitness hearing is required.

¶ 27 As a threshold matter, the State points out, and defendant concedes, that this issue is waived and forfeited for our review, as defendant failed to raise it in a posttrial motion. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007); *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Yet, he urges us to consider it as one of plain error arguing under that doctrine's second prong his substantive due process rights were violated, and/or one of ineffective assistance of counsel arguing that there was no strategy in counsel's failure to argue this "meritorious issue" in a posttrial motion. Briefly, with respect to the second prong of plain error, we note that the burden

is squarely upon defendant to show a clear and obvious error occurred and it was so serious as to affect the fairness of his trial. See *Piatkowski*, 225 Ill. 2d at 565; *Herron*, 215 Ill. 2d at 186-87; accord *People v. Walker*, 232 Ill. 2d 113, 124 (2009). However, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; *Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("the first step is to determine whether error occurred"); see also *People v. Manskey*, 2016 IL App (4th) 140440, ¶ 89 (where record raises no *bona fide* doubt as to a defendant's fitness, failing to follow a procedure in article 104 of the Code "does not *necessarily* violate due process," since article 104 does not determine the requirements of due process (emphasis in original)). Similarly, with respect to ineffective assistance of counsel, the defendant again has the burden, as he is required to establish both that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *People v. Edwards*, 195 Ill. 2d 142, 162 (2001), and *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003) (the defendant must overcome the presumption that counsel's action was sound trial strategy and show probability sufficient to undermine confidence in the outcome of his trial). However, just as with plain error, if it is determined the defendant did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided and our discussion ends there. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999) (in such instance, examination of performance prong is not warranted).

¶ 28 Because, as we explain below, there was no error in the instant cause in the trial court's

denial of his motion, we find no plain error here. Moreover, as the situation at hand does not amount to ineffective counsel resulting in prejudice to defendant, we likewise find no merit in preserving this issue for review under an ineffective assistance of counsel claim. Instead, because the evidence presented does not support defendant's argument that he was entitled to a continuance based on his motion in order to conduct a fitness examination, his claim fails.

¶ 29 The denial of a continuance is within the sound discretion of the trial court, and we may not disturb its decision in that respect absent a clear abuse of its discretion. See *People v. Chapman*, 194 Ill. 2d 186, 241 (2000). In this context, there is no " 'mechanical test' " to determine whether the court's denial of a continuance violated a defendant's substantive right. *People v. Gardner*, 282 Ill. App. 3d 209, 215 (1996), quoting *People v. Lott*, 66 Ill. 2d 290, 297 (1977). Rather, a reviewing court may look at different factors. These include the defendant's diligence; his right to a speedy, fair and impartial trial; the interests of justice; counsel's inability to prepare for trial; the history of the case; its complexity; the seriousness of the charges; docket management; judicial economy; and inconvenience to the parties and witnesses. See *Walker*, 232 Ill. 2d at 125-26; accord *People v. Balfour*, 2015 IL App (1st) 122325, ¶ 48. Ultimately, the determination of whether an abuse of discretion occurred in the trial court's decision to deny a continuance turns on the facts and circumstances of each individual case. See *Lott*, 66 Ill. 2d at 297. We will find an abuse of discretion only when the court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would have taken the court's view. See *People v. Banks*, 2016 IL App (1st) 131009, ¶ 70; accord *People v. Weeks*, 2011 IL App (1st) 100395, ¶ 30, quoting *Walker*, 232 Ill. 2d at 125 ("[i]n the context of continuances, reversal is warranted where

denial of a continuance 'in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights' ").

¶ 30 We find no abuse of discretion here.

¶ 31 As noted, the trial court denied defendant's motion for continuance for two reasons: it found the motion to be a dilatory tactic, and it concluded that the motion had no substantive merit. With respect to the first reason, there is much in the record before us to support the trial court's determination. The history of this cause saw it pending for some 32 months, due for the most part to continuances requested by defense counsel. Defendant was arraigned in September 2011. It was not until April 2013 when his counsel first raised any mention about a psychological evaluation, and this was to state that a psychologist would be evaluating him, but only with respect to the voluntariness of his statement to police. A month later, defense counsel told the court that the particular psychologist they had hired had stopped performing such evaluations, and they needed to hire a new psychologist. At the next court date, defense counsel told the court that the new psychologist was in the process of interviewing him and should be done soon. Defendant's case was called three weeks later; his counsel did not appear. The following week, counsel informed the court that the evaluation was now in progress and would be completed by the next court date. Yet, on that date, defendant had still not been evaluated. It was now the end of August 2013, and defendant's trial was set for October 2013. As late as mid-September 2013, defense counsel again informed the trial court that the evaluation had not yet been completed. The court admonished counsel to have the report at the next court date.

¶ 32 However, the delays continued. In October 2013, defense counsel still did not have a

report prepared and did not appear in court. Eventually, defense count explained to the court that they anticipated the report to be done soon and reiterated that they were having defendant evaluated specifically in relation to their strategic decision of whether to file a motion to suppress his statements to police. Counsel also told the court that they were "pretty sure" they would not be filing such a motion based on their conversations with the psychologist, but wanted to wait for the written report before making that determination. Defense counsel then failed to appear for multiple subsequent hearings, but did attend one in late October 2013 to inform the court that defendant would not be filing a motion to suppress his statements. At this point, defense counsel asked the court for permission to allow the psychologist to evaluate defendant a second time; when the court asked why, since they had just explained they would not pursue a motion to suppress, defense counsel told the court that they would not be using the evaluation at trial, but perhaps would present it during mitigation at a potential sentencing hearing. The court allowed this and set a new trial date for January 2014.

¶ 33 At a December 2013 hearing date, defense counsel again reiterated their position, telling the court that they would not be filing any motion based on a "psychiatric defense," but anticipated using the psychological evaluation for mitigation at sentencing. Counsel then failed to appear for scheduled hearing dates at the end of December 2013 and January 2014. Later, the State pointed out to the trial court that a date had been set for May 2014 in codefendants' cases at which the State hoped to try all three of them; defense counsel agreed, but then proceeded to fail to appear at several subsequent court dates. Meanwhile, on April 11, 2014, Dr. Ostrov completed his written psychological report of defendant, which, in line with defense counsel's

position, did not evaluate defendant for fitness to stand trial.

¶ 34 At the final status date on April 21, 2014, counsel for codefendant Taylor asked for a continuance in his matter, as he was in the middle of his candidacy for associate judge. Defense counsel also asked for a continuance, alleging that they had just received discovery about a witness. The court, finding that defense counsel had long known about this witness, denied their motion. Defense counsel never mentioned anything with respect to defendant's fitness to stand trial. Trial was then set for May 5, 2014.

¶ 35 On May 2, 2014, defense counsel raised the instant motion for continuance, asserting for the first time that they had concerns with respect to defendant's fitness to stand trial. Counsel stated that they based their doubts on their conversation with defendant the night before and insisted that they needed time to perform a fitness evaluation. In denying the motion as dilatory, the court made clear for the record several of its considerations. First, it noted that defendant had been on its call for just shy of three years and that, due to the many times his counsel did not appear, the court had several occasions to communicate with him personally; defendant always made eye contact, paid attention and stated the he understood what was happening. Additionally, the court pointed out that the State had several opportunities to speak with defendant, as there had originally been the potential for him to testify against his codefendants; the court noted that the State, too, "had a great view of what *** [was] going on in his head" and found no concerns about his fitness. Moreover, the court clarified with defense counsel that the prior evening "would not have been the first time" they had ever spoken to defendant about the case. Yet, never once had defense counsel filed a motion or raised concerns about his fitness or sanity

which, according to the court, were it really a concern, was something that "would have been done months ago." The court empathized that "if I was sitting in a jail cell on the eve of trial knowing that I'm facing murder charges, *** I think that I would probably have some emotional problems too," but again noted that "no motions" were filed "saying you know what, maybe there [is] something wrong" with respect to defendant's fitness. And, once again noting that it had just denied defense counsel's motion for continuance at the last court date, the court reasoned that the instant motion was nothing more than "a dilatory tactic."

¶ 36 When viewed as a whole, the record reveals that the trial court was rightly concerned with several factors involved in its decision to deny the instant continuance, including the history of the case and defense counsel's lack of diligence in preparing for trial. Additionally, and most significant, from the outset, defense counsel never indicated that it was ever concerned with defendant's fitness to stand trial. The only mention they made concerning his psychological state was, initially, in relation to their strategic decision of whether to file a motion to suppress his statements to police, and later, when they decided to change strategies, only in relation to mitigation at sentencing. This is what defense counsel repeatedly explained to the trial court. And, this never changed over the 32 months of pretrial preparation, nor did it change after the psychological report was finally submitted in writing. It only changed on the Friday (May 2, 2014) before the scheduled Monday (May 5, 2014) start of trial, when defense counsel raised this issue for the first time, seeking a continuance after they had just been denied a continuance at the prior court hearing, which had been the final status date.

¶ 37 Moreover, and as we have just mentioned, at long last, and after the trial court's grant of

defense counsel's request to have defendant evaluated a second time, Dr. Ostrov's written report was finally completed, in writing, on April 11, 2014. This was three weeks before defense counsel asked for the instant continuance. As the court noted, not only would genuine fitness concerns have been on defense counsel's minds long before that date, but these certainly would have been at their immediate forefront once that report was completed. And, yet, defense counsel did not raise these concerns until the eve of trial.

¶ 38 Defendant acknowledges this, but argues that his counsel's decision to request a continuance did not come sooner because it was based on their meeting the previous evening, during which time defense counsel alleges they noted a change in his psychological state causing them to then have *bona fide* concerns. As defendant explains, it was not as if defense counsel failed to provide information for Dr. Ostrov's report and thus caused the delay, but, rather, his fitness changed in the days before trial and the trial court, who was not a doctor, based its determination on old pretrial observations of him that were no longer relevant. While we address this in more detail below, suffice to say, the record shows the trial court actually took this all into account in reaching its decision. As noted earlier, it empathized with defendant, recognizing that anyone in his shoes would display some sort of emotional issues on the eve of his first degree murder trial, the outcome of which would undoubtedly affect his life forever. But, the record is clear that the court looked at other appropriate factors that balanced this, including legitimate, continuing concerns both with the age of the case and with the genuineness of counsel's efforts to postpone trial, in order to conclude that the continuance, under the circumstances, should be denied.

¶ 39 Given that defense counsel had consistently told the court that the only reason they were looking into defendant's psychological state was for pretrial suppression and/or sentencing mitigation purposes, and given that they never raised any concern over his fitness to stand trial in the 32 months of pretrial preparation, we do not find that the trial court's determination that defense counsel's motion for a continuance for a fitness examination made on the eve of trial was a dilatory tactic was improper. From its colloquy, it is clear that the court considered the reasons for defense counsel's request and was well aware of the situation. At the same time, the court was also aware that the case had been pending for almost three years and knew both the history of the matter and, to an extent, defendant himself, with whom the court had dealt on a personal level the multiple, and several, times defense counsel did not appear in court. Pursuant to all this, as well as the record itself, the trial court did not abuse its discretion in denying the continuance. See, *e.g.*, *Weeks*, 2011 IL App (1st) 100395, ¶ 33 (trial court's denial of the defendant's motion for continuance, made four days before trial, to await doctor's opinion as to sanity, was not abuse of discretion where court determined that counsel had not been diligent in obtaining opinion and case had been pending for over two years).

¶ 40 Even if the trial court's determination that defense counsel's motion for continuance for a fitness examination was a dilatory tactic were somehow to be found unreasonable or arbitrary, the second basis it cited for its decision to deny that continuance is clearly supported by the record. That is, in addition to finding this to be nothing more than an effort to delay the start of trial, the court further found that the motion was substantively meritless, stating that defense counsel "brought nothing to this Court's attention that would rise to that level that there is a

bonafide doubt that [defendant] is having some issues." Defendant argues that pursuant to statute, namely, section 104-11(b), the trial court used the wrong standard when it mentioned *bona fide* doubt at this stage. He insists, instead, that his counsel merely asked for a simple fitness examination, which did not require the trial court to evaluate this pursuant to a *bona fide* standard; rather, as he alleges, the fitness examination would have helped the court determine if there was a *bona fide* doubt to order a fitness hearing to then determine his ability to stand trial. We disagree with defendant's argument here.

¶ 41 Under Illinois law, a defendant is presumed fit to stand trial. See 725 ILCS 5/104-10 (West 2012). He is deemed unfit when, because of a mental or physical condition, he cannot understand the nature and purpose of the proceedings against him or cannot assist in his defense. See 725 ILCS 5/104-10 (West 2012). Accordingly, fitness refers simply to the defendant's ability to function within the context of trial not to his sanity or competence in other areas and a person may be fit for trial although his mind may otherwise be unsound. See *People v. Eddmonds*, 143 Ill. 2d 501, 519 (1991). The trial court is required to order a fitness hearing if a *bona fide* doubt is raised with respect to the defendant's fitness to stand trial, *i.e.*, a real, substantial and legitimate doubt. See *Eddmonds*, 143 Ill. 2d at 518. But, whether a *bona fide* doubt exists is within the discretion of the trial court, which is in the best position to observe and evaluate the defendant. See *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 53; see also *People v. Lucas*, 140 Ill. App. 3d 1, 8 (1986) (ultimate issue as to whether *bona fide* doubt of fitness exists rests with trial court and not with experts).

¶ 42 Section 104-11 has two subsections that operate in tandem. These state:

> "(a) The issue of the defendant's fitness for trial *** may be raised by the defense, the State or the Court at any appropriate time ***. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.
>
> (b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bona fide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in this case. An expert so appointed shall examine the defendant and make a report as provided in Section 104-15." 725 ILCS 5/104-11 (West 2012).

In the instant cause, defendant's motion for continuance was premised on section 104-11(b). Again, he now insists that the trial court erred in denying his motion by stating that he had not raised a *bona fide* doubt of his fitness to merit an examination, explaining that this threshold was not required in determining whether a simple fitness *examination* under section 104-11(b), not a fitness *hearing*, should take place. In other words, he claims that the trial court used an improper standard (finding that a *bona fide* doubt had not been raised) and failed to order an expert to examine him before making that conclusion.

¶ 43 However, defendant's assertions completely misconstrue the dictates of section 104-11. Under subsection (a), the trial court is required to order a fitness hearing if a *bona fide* doubt is raised, by the defendant, the State or the trial court, with respect to the defendant's fitness to

stand trial. See 725 ILCS 5/104-11(a) (West 2012) (mandating that the trial court "shall order a determination" of the defendant's fitness once a *bona fide* doubt is raised). However, subsection (b) is entirely discretionary. Under that subsection, which becomes operable when a defendant requests that an expert be appointed to first examine him for fitness to then determine if a *bona fide* doubt exists, as occurred in the instant cause, the trial court "in its discretion, may order an appropriate examination," but it is not required to do so. 725 ILCS 5/104-11(b) (West 2012). If, instead, the court does not believe there is a *bona fide* doubt, or that it needs the assistance of an expert to make that conclusion, it need not grant the defendant's request nor order the examination. Again, section 104-11(b) is clear that this determination is discretionary and belongs solely to the trial court. See 725 ILCS 5/104-11(b) (West 2012).

¶ 44 Our recent decision in *People v. Washington*, 2016 IL App (1st) 131198, provides insight into section 104-11(b), its relation to section 104-11(a), and the trial court's obligations thereunder. In *Washington*, we noted that our supreme court in *People v. Hanson*, 212 Ill. 2d 212 (2004), explained that if a trial court is not convinced that a *bona fide* doubt of the defendant's fitness has been raised, it "has the discretion under section 104-11(b) to grant his request to appoint an expert" to help the court in that determination. *Washington*, 2016 IL App (1st) 131198, ¶ 75, citing *Hanson*, 212 Ill. 2d at 217. But, again, it is not required to do so. See *Washington*, 2016 IL App (1st), 131198, ¶ 75; *Hanson*, 212 Ill. 2d at 217 ("[i]f the trial court is not convinced *bona fide* doubt is raised, *it has the discretion under section 104-11(b)* to grant the defendant's request for appointment of an expert to aid in that determination," but it is not required to do so (emphasis added)). If the court chooses to grant the defendant's request for an

examination, and, once the examination is completed, the court determines there is a *bona fide* doubt, a fitness hearing becomes mandatory under section 104-11(a). See *Washington*, 2016 IL App (1st) 131198, ¶ 75, citing *Hanson*, 212 Ill. 2d at 217. But, "[c]onversely, if 'the trial court finds no *bona fide* doubt, no further hearings on the issue of fitness would be necessary.' " *Washington*, 2016 IL App (1st) 131198, ¶ 75, quoting *Hanson*, 212 Ill. 2d at 217.

¶ 45 Clearly, the *Washington* court highlighted the distinction our supreme court in *Hanson* reiterated between subsections (a) and (b); the former mandates a fitness hearing if the court is convinced that a *bona fide* doubt of fitness has been raised, but the latter does not because it is discretionary. Rather, when the trial court is presented with a request by a defendant to appoint an expert to examine him, and when the trial court is not convinced that a *bona fide* doubt of fitness has been raised, it has the discretion, under section 104-11(b), to do one of two things. It may choose to grant the defendant's request for the appointment of an expert to help it determine if a *bona fide* doubt has truly been raised; if it does, and if, after the completion of the examination, the court determines that there is, indeed, *bona fide* doubt, then the matter reverts to section 104-11(a) and a fitness hearing becomes mandatory. However, at the same time under section 104-11(b), the court is not required to do this. That is, as we explained in *Washington*, if, upon the defendant's request for appointment of an expert, the court is convinced that no *bona fide* doubt exists at the outset, then it need not do anything further. This is because, in this instance, if the court has determined that there is no *bona fide* doubt, no further hearings on the issue of fitness are necessary under section 104-11(b). See *Washington*, 2016 IL App (1st) 131198, ¶ 75, citing *Hanson*, 212 Ill. 2d at 217.

¶ 46 In the instant cause, the trial court denied defendant's request for the appointment of an expert under section 104-11(b) because it determined, at the outset, that there was no *bona fide* doubt as to his fitness to stand trial. Accordingly, under that section, the court was not required to do anything further. The court based this on several considerations and made them known for the record. For example, the court discussed at length its review of defendant's behavior and demeanor in the many times he appeared before it in the last 32 months before trial. The court noted that defendant always made eye contact and responded appropriately. Particularly, the court mentioned that, in those instances when defense counsel was not present, the court communicated with defendant, who spoke to the court, paid attention and clearly knew what was occurring. Additionally, the court commented that the State, which had spoken to defendant several times in an effort to have him testify against his codefendants, never indicated that he exhibited any signs of unfitness to stand trial. Rather, he was aware of the charges against him, his potential sentence and his right to testify. Moreover, the record verifies that defendant understood his right to plead guilty, his choice to have a jury or bench trial, and the trial process in general. Based on all this, the trial court properly determined, in its discretion, that there was no *bona fide* doubt as to defendant's fitness. Accordingly, and contrary to defendant's insistence, it was not required under section 104-11(b) to grant his request for a fitness examination.

¶ 47 Citing the statements of defense counsel in their motion, as well as Dr. Ostrov's psychological evaluation, defendant claims that there was at least sufficient doubt as to his fitness and that the examination was, therefore, necessary. However, not only does he again ignore the trial court's discretionary powers under section 104-11(b), which we have just discussed at

length, but he still cannot demonstrate that a *bona fide* doubt is supported by the record here. Even were we to bypass the discretionary nature of section 104-11(b), we note that our courts have held that " 'there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." ' " *Hanson*, 212 Ill. 2d at 222, quoting *Eddmonds*, 143 Ill. 2d at 518, quoting *Drope v. Missouri*, 420 U.S. 162, 180 (1975). A non-exclusive list of factors relevant to a determination of whether a *bona fide* doubt of fitness exists includes the rationality of the defendant's behavior and demeanor at trial, counsel's statements concerning his competence, and any prior medical opinions on the issue of fitness. See *Hanson*, 212 Ill. 2d at 223, citing *Eddmonds*, 143 Ill. 2d at 518. We have already discussed that, in the instant cause, the court made several comments about defendant's behavior and demeanor, which it observed over 32 months of pretrial preparation, and there is absolutely nothing in the record indicating that these were anything other than interested, rational and appropriate, with no concerns ever expressed by the court, the State, or defense counsel, for that matter. With respect to defense counsel's statements in their motion for continuance, while they expressed their concern of a *bona fide* doubt of defendant's fitness, "an assertion by counsel that a defendant is unfit does not, of itself, raise a *bona fide* doubt of competency." *Eddmonds*, 143 Ill. 2d at 519; accord *Hanson*, 212 Ill. 2d at 224. Moreover, the trial court here weighed the fact that defense counsel's concern came on the eve of trial when they had otherwise never, in the 32 months prior, expressed that defendant was uncooperative or not participating meaningfully in his defense. It also considered that, while a defendant's fitness can change, any defendant would be extremely emotional this close to his first degree murder trial. And, as to the final factor, we would note

that Dr. Ostrov the only doctor to evaluate defendant did not evaluate him with respect to his fitness to stand trial. In fact, defense counsel, who had never thought of raising this issue, never asked him to do so. Furthermore, nothing in his report indicated that defendant was not competent to stand trial. While Dr. Ostrov diagnosed defendant with a personality disorder characterized by self-doubt, dependence and identity confusion and noted that he could benefit from psychotherapy or medication, he made clear that defendant was not clinically depressed, had no psychotic symptoms and provided consistent, logical and goal-directed statements during his interviews. Accordingly, after reviewing the relevant factors, there is nothing in the record here to support defendant's assertion that sufficient evidence existed indicating a *bona fide* doubt of his fitness to stand trial which would have mandated the trial court to grant his request for a fitness examination .

¶ 48 Having so concluded, and based on the circumstances presented, we find no clear or obvious error in the trial court's use of its discretion to deny defendant's motion for continuance premised upon his request for the appointment of an expert to conduct a fitness examination under section 104-11(b). And, ultimately, without error, defendant's claims of plain error and ineffective assistance of counsel with respect to this issue both fail.

¶ 49 II. Sentencing

¶ 50 Defendant's second contention on appeal is that the trial court abused its discretion in sentencing him to 50 years in prison because it failed to adequately consider substantial mitigating factors. He insists that, because of this, his sentence must be reduced or his cause remanded for resentencing. We disagree.

¶ 51 Again, as a threshold matter, defendant concedes that he has waived this issue for review and urges us, instead, to review it pursuant to both prongs of the plain error doctrine (that the sentencing evidence was closely balanced and the court's error was substantial) and/or ineffective assistance of counsel (that there was no conceivable strategy for counsel's failure to file a posttrial motion to reconsider his sentence). Acknowledging these claims, we are reminded, as we discussed earlier, that before accepting such conclusions, we must first determine whether there was error in order to reach plain error or ineffective assistance of counsel. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (in context of sentencing hearing); accord *Piatkowski*, 225 Ill. 2d at 565; see also *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010) (the defendant has the burden under plain error review to demonstrate the applicability of the two prongs to his sentencing hearing); *Brooks*, 187 Ill. 2d at 137 (the defendant has the burden to show prejudice under ineffective assistance of counsel claim; without this, review of performance prong need not be conducted). However, because, based on our thorough review of the record before us, we do not find any error or prejudice here, we, in turn, cannot find any plain error or ineffectiveness on counsel's part and defendant's claim fails. See *Walker*, 232 Ill. 2d at 124 (plain error rule does not apply if a clear and obvious error did not occur); *McGee*, 398 Ill. App. 3d at 794 (absent error, there can be no plain error); see also *Brooks*, 187 Ill. 2d at 137.

¶ 52 Turning to the merits of defendant's arguments, we begin by noting several general principles, as the law regarding sentencing is well established. The trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because

the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *People v. Price*, 2011 IL App (4th) 100311, ¶ 36 (trial court's sentence must be based on the particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. Ultimately, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 53 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it

is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). And, "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131. For example, while it is true that a sentencing court is to keep in mind the "objective of restoring the offender to useful citizenship" (Ill. Const. 1097, art. 1, § 11), it is not required to give that more weight than the seriousness of the crime, protection of the public, punishment and deterrence. See *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998). Nor is it required to do this with a defendant's youth (see *People v. Hoskins*, 237 Ill. App. 3d 897, 900 (1992)), his rehabilitative potential (see *Wilburn*, 263 Ill. App. 3d at 185), or his lack of a criminal history (see *People v. Tijerina*, 381 Ill. App. 3d 1024, 1041 (2008)). And, critically, a sentence within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210.

¶ 54 First degree murder is generally punishable by a term of 20 to 60 years in prison. See 730 ILCS 5/5-4.5-20 (West 2012). However, in the instant cause, defendant's crime was accompanied by a 15-year firearm enhancement, increasing the applicable sentencing range to 35 to 75 years. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2012). Additionally, the jury found the

contract murder factor as well, making defendant's crime punishable by a natural life sentence. See 720 ILCS 5/9-1(b)(5) (West 2012); 730 ILCS 5/5-8-1(a)(1)(b) (West 2012). Therefore, the applicable sentencing range here was 35 years to life in prison. Defendant was sentenced to 50 years in prison. Clearly, this was well within sentencing range and, thus, is presumed proper.

¶ 55 In challenging his sentence, defendant asserts that the trial court did not properly consider or weigh several factors, specifically, his "chaotic childhood" and psychological impairments, his lack of criminal background, his youth and rehabilitative potential, his remorse and the financial costs to the public of his incarceration. It is our view that the record wholly belies defendant's assertions here.

¶ 56 First, with respect to his childhood and psychological evaluation, defendant claims the court made no mention of Dr. Ostrov's report describing his past as "chaotic," "complicated" and "unstable," as well as his low IQ, his plans to kill himself and his need for psychotherapy, nor of the fact that his childhood centered on his relationship with his father and made him particularly susceptible to going along with his father's plan for the victim's murder. This is incorrect. Although the court did not mention Dr. Ostrov's report by name, it clearly reviewed defendant's childhood and took into account several aspects of it. That is, the court spent much time discussing defendant's father, who had appeared before it as well. The court specifically found him to be "a monster" and "the most despicable person alive on the face of the earth." It also noted that the relationship between defendant and his father involved much manipulation in the past. However, at the same time, the court reasoned that, "with the exception of [his] father, [defendant] came from what appears to be a very decent home of loving caring people." The

court's conclusion was supported by the lengthy testimony on his behalf from his aunt and biological mother, who both spoke at his sentencing hearing and unrelentingly described him as a good, dedicated, family-oriented and educated person. His aunt even presented the court with a petition signed by over 200 people in their neighborhood attesting to defendant's good character. Defendant was never abused or neglected, was not involved in drugs or gangs, and was always able to turn to his mother, who intervened for him in his relationship with his father. And, as for Dr. Ostrov's report, while it did mention the buzzwords defendant now cites, it also made clear that defendant did not suffer from depression or psychosis and that he described himself as a warm, outgoing person with a supportive family who liked everything about himself, except that he was in jail. All this was presented to the trial court and, from its colloquy, wherein it made several comments regarding his childhood and psychological state, we do not find defendant's claim that the court did not consider this to be valid.

¶ 57 Next, defendant asserts that the trial court failed to consider "the very significant fact" that he has no criminal background. He goes further to say that the court's only mention of his lack of a criminal history "was as though it were an *aggravating factor* rather than a mitigating factor" (emphasis in original), and cites the trial court's statement that defendant "had no problems in [his] life as far as gangs, drinking, drugs, crime." However, the record is clear that the trial court thoroughly considered defendant's lack of criminal history. This was argued not only by defense counsel, but it was contained in defendant's PSI, which the trial court noted it had before it, and was even mentioned by the State, as well as those who testified on defendant's behalf. Moreover, the court clearly recognized this fact in its colloquy when it made the

comment defendant now cites. We fail to see, though, how this comment that defendant had "no problems" with crime turned his lack of criminal history into an aggravating factor, as he asserts. Reviewing its context, the court made this statement, which was true, right after it discussed that he had an aunt and mother who cared for him, helped him and wisely kept their distance from his father, and right before it noted that defendant was educated and had a family who believed he had been manipulated by his father. That defendant did not have a criminal history was in no way lost on, or considered aggravating by, the trial court.

¶ 58 The same is true for the other factors defendant raises, namely, his age and rehabilitative potential, his remorse, and the financial costs of his incarceration. Defendant insists that his youth made him "most susceptible" to his father's influence but was not indicative of "irretrievable depravity," as he otherwise was educated, had a good character and supportive family, and already proved himself to be a model prisoner. He also insists that the court did not consider his remorse, even though he made a point to apologize to the victim's family in open court, and that the cost to the public for his incarceration is too great to support its duration. The trial court did note that defendant was 20 years old at the time he committed the crime; he was young, but he was, years over, an adult. Additionally, the court remarked repeatedly that he was, indeed, educated he had graduated high school and completed a year of college, where he even studied criminal justice. And, yes, he did apologize to the victim's family. For all intents and purposes, we agree that the record shows defendant was an otherwise "good" person and that the trial court noted this as well. But, as the trial court stated, "all signs point to" him "knowing the difference between right and wrong." All these factors, in the court's view, cut against his

arguments in mitigation. Instead, the court concluded, based on the evidence, which included defendant's own statement to police, that he knew, without a doubt, on the night in question that the intent of his actions was to take the victim's life. He had often asked for his mother's help when his father wanted him to do something he was uncomfortable with; yet, this time, when the stakes were the greatest, he did not. The victim did not have to die simply because that was what defendant's father had in mind; defendant "had the power to save [the victim's] life," but he did not do it. And, as far as any financial considerations, the court made clear that, in its view, the worst act is to take another's life and, as defendant did so, "there is a price [he] must pay."

¶ 59 Ultimately, the trial court's colloquy in the instant cause clearly demonstrates that the sentence it rendered was thoroughly contemplated, appropriate, fair and based on a balance of all the aggravating and mitigating factors presented at defendant's sentencing hearing, including those he now cites on appeal. Contrary to his contention, what is undeniably clear is that the court conducted an intensive analysis of all the factors presented; it was quick to note many in mitigation and praised defendant for them, but it could not overlook those it found to be in aggravation. From all this, we find no excessiveness or disproportionality. That is, while the court acknowledged the applicable mitigating factors, it found more weighty the fact that despite all of these, defendant knew about and helped plan the murder as early as April or May 2011, more than two months before its commission, when he put his father in contact with codefendant Taylor and, in turn, gave Taylor money and the gun used in the crime, as given to him by his father. Defendant had much time to think about what was happening and had the opportunity, as he did throughout his childhood, to ask his family for help in dealing with this uncomfortable

thing his father wanted him to do. Definitively, the trial court stated that it did not believe he should receive the maximum sentence because he was in no way the same type of person as his father. However, while it noted he did not have a "bad heart," the court made clear defendant, regardless of any influence upon him, "had the opportunity to end this event before it got to where it got to" and, thus, did not deserve the minimum sentence, either. The court's attempt at balancing these competing interests is obvious in the record and, that its decision was not one favorable to defendant, alone, cannot support the conclusion that the sentence it rendered was excessive.

¶ 60 Critically, defendant's sentence was actually much closer to the minimum available here than the maximum and, ultimately, it was within the appropriate sentencing range for his instant conviction, making it presumptively proper. Moreover, the fact remains that defendant, knowing for months that his father wanted to kill the victim, went out of his way to find someone his father could pay to do so and served as the go-between for them. He accepted the gun and money his father gave him, passed them on to codefendant Taylor, and then, after calling and texting his father on the evening in question to find his exact location where defendant knew he was waiting with the victim drove codefendant Taylor to the park with the knowledge and intent that he was assisting codefendant Taylor in fulfilling the plan to shoot and kill the victim on behalf of his father. Therefore, based on all this, we reject defendant's arguments regarding the court's alleged failure to consider the factors he raises herein and find, instead, that his sentence, which was properly within the applicable sentencing range for the crime of which he was convicted, was, contrary to his contention, not excessive in light of the circumstances presented. Simply put, the

trial court here did not abuse its discretion in sentencing defendant.

¶ 61 III. One-Act, One-Crime Doctrine

¶ 62 Defendant's final contention on appeal is that one of his convictions for first degree murder must be vacated because it violates the one-act, one-crime doctrine. He notes that, because he was convicted of two counts of first degree murder, but there was only one decedent, his convictions were based on the same, and sole, physical act and these multiple convictions cannot stand. As the State concedes, defendant is correct.

¶ 63 Briefly, we note that our state supreme court set forth the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551, 566 (1977), which held that multiple convictions are improper if they are based on precisely the same physical act and, since then, our courts have made clear that a defendant may not be convicted of multiple offenses based on the same act. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); *People v. Crespo*, 203 Ill. 2d 335, 342-43 (2010); accord *People v. Burney*, 2011 IL App (4th) 100343, ¶ 86 (where a single act is involved, multiple convictions are improper); see also *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 64 In the instant cause, defendant was found guilty of first degree murder (count 1), and first degree murder with the additional element of the contract murder factor (count 2). He was sentenced to terms of 50 years in prison on each of these, to run concurrently. However, "[w]here but one person has been murdered, then there can be but one conviction of murder." *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). Moreover, when multiple convictions have been entered in such circumstances, only one conviction for the most serious of the murder charges may stand, and the convictions based on less serious charges of murder must be vacated.

See *Cardona*, 158 Ill. 2d at 411-12; accord *People v. Bishop*, 2014 IL App (1st) 113335, ¶ 11.

¶ 65 Therefore, and in line with the State's concession on this issue, we hold that defendant's conviction under count 1 (and its accompanying sentence) violated the one-act, one-crime doctrine and must be vacated.

¶ 66 CONCLUSION

¶ 67 For all the foregoing reasons, we affirm defendant's conviction and sentence for first degree murder with the additional contract murder factor (count 2); we vacate his conviction for first degree murder (count 1) and its accompanying concurrent sentence in light of the one-act, one-crime doctrine; and we modify his mittimus accordingly.

¶ 68 Affirmed in part, vacated in part, mittimus corrected.