2017 IL App (1st) 143159-U
No. 1-14-3159
Order filed December 18, 2017

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINIOS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	No 10 CR 19469
v.	)	
	)	Honorable Noreen V. Love,
RAYMONE ADDISON,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's jury waiver was not invalid and the trial court did not consider improper factors at sentencing. Defendant's convictions for aggravated unlawful restraint must be vacated under the one act, one crime rule. Counsel cannot be deemed ineffective based upon a failure to make a futile motion.

¶ 2 Defendant, Raymone Addison, was convicted of two counts of armed robbery, two counts of the unlawful use of a weapon by a felon (UUWF), and two counts of aggravated unlawful restraint after Joshua Cox and Trevel Washington were robbed by three men at

gunpoint.[1] Defendant waived his right to a jury trial, was convicted, and was sentenced to 28 years in prison.

¶ 3 On appeal, defendant contends that his jury waiver in invalid because the trial court failed to ensure that he made a knowing, intelligent and voluntary waiver of his right to a jury trial. Defendant next contends that he was denied a fair sentencing hearing because the court improperly considered certain factors in aggravation. He further contends that his convictions for aggravated unlawful restraint must be vacated pursuant to the one act, one crime rule. Defendant finally contends that he was denied the effective assistance of counsel because counsel failed to move to reopen a suppression motion after a witness's testimony at trial "refuted" testimony at the suppression hearing. We affirm, but we vacate his convictions for aggravated unlawful restraint.

¶ 4 BACKGROUND

¶ 5 On October 9, 2010, Joshua Cox and Trevel Washington were at a gas station filling up Washington's green van with gas when they met several young women in a silver Pontiac. They agreed with the women that the women would follow them back to Washington's mother's house. After Cox and Washington talked to the young women for a short while outside of the house, the women left, saying they would be right back. The women returned a couple minutes later, and a couple minutes after that, three black men carrying guns approached Cox and Washington. At that point, the women drove away in the silver car.

¶ 6 One of the armed men came up to Cox and the other two armed men approached Washington. The man in front of Cox was 18 inches in front of him, close enough that, according

[1] Co-defendant D'Vonte Alexander's appeal has already been decided by this court. See *People v. Alexander*, 2017 IL App (1st) 142481-U (Oct. 30, 2017).

to Cox, they "could shake hands." The man said, "there ain't no phone calls for you church," as the man took Cox's cell phone from his pocket. The encounter was quick: the man took Cox's phone, took his earrings, and it was over.

¶ 7 The two men that approached Washington took his jewelry, consisting of two rosaries made of gold beads with a small cross. They also took his money, his wallet, and his cell phone from his pocket. The gun was nine inches from his face during the encounter. The men told Washington to lie on the ground, and they then took his earrings. The men told him to count to a thousand and go into the house. The men then ran away.

¶ 8 Cox and Washington went into the house and had Washington's sister call the police. They then returned to Washington's van to pursue the people that robbed them. They brought Washington's sister's cell phone which was still connected with the police. Washington drove the van in the direction that the offenders had fled. They quickly saw a silver car come out of an alley that looked similar to the silver car the girls were in just before the robbery. The car then "took off," and Washington and Cox pursued it.

¶ 9 While Washington was driving, Cox was updating the police on the situation by phone. He was speaking with Denise McCafferey, a 911 dispatcher. He told her that they had been the victims of an armed robbery and that they were pursuing the offenders and he provided her with the license plate number of the silver vehicle. Maywood Police Officer Eric Dent was dispatched to investigate. Washington and Cox chased the car "all over." They could see that there were three individuals in the car. Officer Dent, following the directions given by Cox, entered the I-290 expressway driving east towards Chicago when he saw the taillights of two vehicles dodging in and out of traffic. The officer observed that it was a green van chasing a silver car.

¶ 10 At the Cicero Avenue off-ramp from the expressway, Officer Dent caught up to the two vehicles. Cox and Washington jumped out of their car and indicated that the silver car was the one in which the offenders were located. Officer Dent told Cox and Washington to get back in their vehicle and not to continue their pursuit. Cox and Washington did not abide and continued to follow behind the police car.

¶ 11 Officer Dent tried to get the silver vehicle to pull over by using his emergency lights and shining his spotlight into the vehicle, but the car would not pull over. The silver car ran a red light and turned southbound on Cicero Avenue. Officer Dent chased the vehicle into a parking lot for the Gatto Corporation where the silver car made a turn and crashed into a large truck. Three black males exited the crashed vehicle and fled on foot. Money was flying in the air as the men ran away. While Officer Dent had left the scene of the crashed car to apprehend the fleeing suspects, Cox and Washington went to the vehicle and retrieved money from the back seat that Washington believed to be his. The fleeing suspects did not make it far as they ended up trapped between a building and a large fence. Officer Dent ordered the men to the ground and back up arrived shortly and the men were taken into custody. The men were defendant and co-defendants D'Vonte Alexander and Darren Braxton.

¶ 12 When the officers returned to the crashed vehicle, they found a revolver on the rear passenger seat floorboard. They found a second weapon about 50 feet from the vehicle in the direction that the suspects fled. The officers later found a third gun 30-40 feet from the vehicle. Evidence was also recovered from the suspects' possessions including a silver chain with a cross, a diamond watch, and multiple sets of earrings.

¶ 13 Cox and Washington went to the police station a couple hours later. They separately identified co-defendant Raynice Paige in a photo array as one of the women they met at the gas station and that came to Washington's mother's house. They separately viewed physical lineups and identified defendant as one of the men that robbed them. Fingerprint evidence from the recovered firearms showed separate positive identifications for defendant and co-defendant Braxton. The third gun did not contain any marks suitable for analysis.

¶ 14 Detective Luis Vargas and an assistant state's attorney met with co-defendant Raynice Paige while she was in custody. Paige admitted that she was in the group of women that met Cox and Washington at the gas station and that another of the girls, "Serena," said that they should rob Cox and Washington because she observed that the men had lots of money and lots of jewelry. So, Paige told the detectives, she called her boyfriend, co-defendant Alexander, and told him to come to Maywood to rob Cox and Washington. Paige recounted that when she and the other women briefly left Washington's mother's house, they were contacting co-defendant Alexander, and then they went and talked to the victims for a while waiting for co-defendant Alexander to arrive to commit the robbery. Paige said she knew there was going to be a robbery, but did not know that guns would be involved.

¶ 15 Defendants were indicted by a grand jury on several counts. The trial court granted a motion filed by co-defendant Paige to sever her case from her co-defendants. At a subsequent court date, the trial court told the attorneys, "what I'd like you to do is talk to your clients, find out what they're interested in, bench or jury. If we have to do a double jury, we'll do a double jury, but I want to try all four defendants at the same time."

¶ 16 On November 12, 2012, the court held a hearing on defendant's motion to suppress based upon an allegedly suggestive identification. Detective Luis Vargas testified that on October 9, 2010, four people were taken into custody and brought to a police station. Vargas identified defendant in court as one of these people. The victims, Washington and Cox, then viewed line-ups, with each victim viewing the line-ups individually. Co-defendant Alexander was placed in the first line-up along with four other people. Co-defendant Braxton was placed in the second line-up and defendant was placed in the third line-up. The same four "fillers" were used in each line-up. Vargas acknowledged that the only changes from line-up to line-up were co-defendants and defendant. Each victim identified defendant. The line-ups took place over the course of 10 minutes.

¶ 17 During cross-examination, Vargas testified that each victim viewed the line-ups individually. Before each man viewed the line-ups, he explained that the suspect may or may not be in the line-up, that no one is required to make an identification and that it should not be assumed that Vargas knew which person in the line-up was a suspect. Vargas testified that line-ups are composed of people in custody at the time or from "the streets of Maywood." In this case, the fillers were from the "lockup." Defendant and co-defendants were allowed to choose where to stand during the line-ups and the fillers moved accordingly.

¶ 18 The trial court granted the motion to suppress the lineup identifications, finding that the line-ups were suggestive in that the "exact same four people" were in each one. The court explained that by the time the victims got to the third line-up, the one containing defendant, "they have seen those same four people twice before in a lineup and know that those are not the four people because they didn't select those four people in the first two lineups." The State then

requested, and was granted, a hearing to determine if it could show that the identifications had an independent origin.

¶ 19 At a May 13, 2013 court date, Washington testified that around 12:45 a.m. on October 9, 2010 he saw defendant on the street. Washington and Cox were talking to "girls" in a car and as the girls drove away, they "were held up." He turned around and saw "three guys" with guns. Defendant was one of those men. Washington testified that he was standing in front of his house at the time and that the house had a porch light and sensor lights in the yard. The streetlights were also on. Defendant's face was uncovered and Washington could hear him speaking to Cox. When defendant and his companions left, they walked backward toward the alley, that is, they faced Washington and Cox as they walked away. After a "couple seconds," Washington and Cox went inside.

¶ 20 During cross-examination, Washington testified that he "guess[ed]" that the girls left when they saw the men approaching from behind. Defendant and his companions had guns that were pointed at Washington's head and face. The men told Washington to sit down but he "laid down." He explained that he was "like on [his] arm." Washington could not hear what defendant said to Cox. Once Washington was on the ground, he looked up at the three men. He did not remember telling police that the three men ran away. He did remember telling the police that the men said to count to 1,000 and then began to run toward the back of the house. He next testified that he did not remember if the men walked or ran away.

¶ 21 During redirect examination, Washington testified that he could not hear what defendant said to Cox because the other two men were speaking to him. During recross-examination,

Washington testified that when he was on the ground, defendant was to his side and the other two men were in front of him.

¶ 22 Cox, who had a prior conviction for aggravated discharge of a firearm, testified that he was "just kicking it" with Washington when they "got robbed." He indentified defendant in court as one of the people who robbed him. Cox testified that after "the girls drove off so fast," he and Washington turned around and "then they [were] right there in our face." Cox testified that he and defendant were "face-to-face" and that Washington was "seven or eight feet" away. Defendant's face was not covered. All three men had guns. Cox testified that it was dark out, but that the streetlights and a porch light were on. Defendant took Cox's watch and rings and removed his phone from a pocket. Cox testified that the "robbery took about like 60 seconds" and that the three men "left right after that" by running away. They did not run away backwards.

¶ 23 After hearing argument, the trial court found that the State had established an independent basis for the identification of defendant.

¶ 24 At an August 26, 2013 court date, defendant's counsel indicated that she did not plan to proceed to a jury trial, but that she did not know if defendant was "going to forever give up his right to a jury trial." The court indicated that it was "not going to have this matter set and then have him come in and say, well, now I change my mind." Defendant's counsel restated that she "just [didn't] know if he wants to waive a right to a jury trial at this time, several months before the trial date is set [to begin]." The trial court then ordered defendant to return to court on November 1, 2013 to indicate whether he was going to proceed to a bench or a jury trial.

¶ 25 On November 13, 2013, defense counsel indicated that the matter was going to proceed to a bench trial. The following exchange then took place:

"THE COURT: All right. I have here, [defendant], what is known as a jury waiver. Is that your signature?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you know what a jury trial is?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand by presenting that document to me that you're giving up the right to have a trial by jury?

THE DEFENDANT: Yes, ma'am."

¶ 26 A week before the trial, on April 17, 2014, the trial court confirmed with all defendants that the case would be a bench trial. The trial court asked "And this is going to be a bench, is that correct?" Counsel for defendant answered in the affirmative. The court also addressed the parties' motions to sever and agreed that the court was "capable of determining what information applies to which defendant" and that it was not "going to apply anything that is not appropriate to your client in this matter." The trial court then confirmed in the presence of all the defendants that "you are all going by agreement to the next date. It will be by agreement to 4-25, and it will be for trial. It is going to be a bench. I will mark this final as to each defendant."

¶ 27 The case went to trial as four simultaneous but severed bench trials. After opening statements, the trial court briefly halted the proceedings with a concern. The trial judge noted that it only had written jury waivers for three of the defendants in the file and could not locate the jury waiver for defendant. Although defendant's counsel represented that defendant had indeed executed a jury waiver, the trial court had defendant execute another written waiver. The

trial court also admonished defendant again that, by executing the waiver, he was giving up his right to a jury trial and asked defendant if he knew what a jury trial was.

¶ 28 At trial, the testimony was basically consistent with the background stated above. Although Cox testified that he "did not remember much" about October 9, 2010, he did remember that "three dudes" robbed him and Washington. The men were African-American and had guns. Cox did not recall looking at a photo array at a police station. Washington also testified that three African-American men with guns robbed him and Cox. He identified defendant as one of those men, and co-defendant Paige as one of the "girls" in the silver car. However, Washington did not remember looking at multiple line-ups; rather, he remembered looking at one line-up but did not remember who he identified. Detective Vargas, however, testified that Cox and Washington identified Alexander, Paige, and Braxton in his meeting with them just hours after the robbery. Detective Vargas produced evidence of the photo array initialed by Cox and Washington identifying Paige and confirmed that Cox and Washington identified Alexander and Braxton in a physical lineup. Cox and Washington also testified that property recovered from defendants that was depicted in police photos appeared to be their property, particularly Cox's earrings, which were returned to him by police following the incident. The trial court found defendant guilty of armed robbery, aggravated unlawful use of a weapon, UUWF, and aggravated unlawful restraint.

¶ 29 At sentencing, the State argued that defendant had a prior felony conviction and that one month after he was sentenced to probation in that case, he committed the offenses in the instant case. Additionally, while he was in jail he "picked up another case, an aggravated battery to a correctional officer." The State indicated its "understanding that that case will be disposed of

with a misdemeanor battery once the sentencing is completed on this matter." The State also argued that defendant had belonged to a gang for seven years before leaving the gang in 2012.

¶ 30 The defense argued in mitigation that "the only thing" in defendant's background was the case for which he was sentenced to probation. Additionally, defendant had a four-year-old child, had never been to prison before and had cut ties with his gang while he was in jail. The defense further argued although defendant had a "pending aggravated battery which *** is going to be reduced to a misdemeanor" and while not admitting any of the facts, that that case happened "early" in defendant's custody and that since then defendant had been "a model prisoner." The defense also stated that defendant was unable to finish school because he had to help take care of his family financially.

¶ 31 When the trial court asked whether defendant had anything he wanted to say, defendant answered in the negative. The court then stated that "maybe" it was "misreading something" because defense counsel indicated that defendant left school to support his family, but that defendant told a probation officer that he had never been gainfully employed. The court concluded that defendant "probably left school because, like other young gangbangers, he [did not] think it was worthwhile." The court did not understand how defendant brought "a child into this world that he can't support" or what "a model prisoner" meant. The court noted that when two of defendant's co-defendants stood before the court they "talked about what a stupid mistake they made," were remorseful about their actions and "indicated they still had hopes to be able to do something with their lives when they were released from the penitentiary." However, defendant "has shown no remorse." The court concluded that these were "very serious offenses" and that this was not defendant's "first time getting into trouble." Defendant was sentenced to

two 28-year prison terms for the armed robbery convictions, two 5-year prison terms for the UUWF convictions and two 5-year prison terms for the aggravated unlawful restraint convictions. All sentences were to be served concurrently.

¶ 32 Defendant appeals arguing: (1) that his jury waiver was invalid; (2) that the trial court improperly considered certain evidence in aggravation; (3) that certain of his convictions must be vacated under the one act, one crime principle; and (4) that he was denied the effective assistance of counsel when counsel failed to move to reopen the suppression hearing at trial.

¶ 33 ANALYSIS

¶ 34 I. Jury Waiver

¶ 35 Defendant argues that his jury waiver was invalid. To support his claim, defendant contends that the trial court failed to ensure that he knowingly and voluntarily waived his constitutional right to a jury trial, so he is entitled to a reversal of his convictions and a new trial.

¶ 36 The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). A defendant may, of course, waive the right to a jury trial, but any such waiver, to be valid, must be "understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2012). Whether an accused knowingly and understandingly waived his or her right to a jury trial, is based upon the facts and circumstances of each particular case and not upon the application of any set formula. *People v. McGee*, 268 Ill. App. 3d 582, 585 (1994). We review whether defendant knowingly waived his right to a jury trial *de novo*. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7.

¶ 37 In the case at bar, defendant did not assert that his jury waiver was not knowing and voluntary before trial, during trial, or in any postjudgment proceedings. For the first time on

appeal, defendant argues that the court erred in failing to obtain a knowing and voluntary jury waiver. Defendant acknowledges that he did not raise this challenge below and that we must review the unpreserved challenge under the plain error doctrine. *People v. West*, 2017 IL App (1st) 143632, ¶ 11. In doing so, our initial step is to determine whether there was an error at all. *Id*. There was not.

¶ 38 Defendant acknowledges that he signed and delivered a written jury waiver to the court. He acknowledges that he was represented by counsel. He acknowledges that the trial court addressed the individual defendants directly and ensured that the signature on the jury waiver belonged to each defendant, that each defendant understood the waiver meant that the defendant was giving up the right to a trial by jury now and forevermore. He acknowledges that he responded "yes" when the court asked him on two different occasions if he knew what a jury trial was. In fact, the only time that defendant expressed any concern regarding a jury waiver was when defense counsel indicated that defendant was reluctant to execute a jury waiver three months in advance of trial.

¶ 39 Here, in the lead up to trial, there were several indications that defendant's waiver was knowing and voluntary. The trial court confirmed on multiple occasions, with defendant in open court, that all of the defendants wanted a bench trial. One week before trial, after addressing each defendant individually about the fact that none of them would be presenting any witnesses in their case in chief, the trial court confirmed the trial date with the defendants and informed them that "you are all going by agreement to the next date. It will be by agreement to 4-25, and it will be for trial. It is going to be a bench. I will mark this final as to each defendant." Again, defendant raised no issue. After trial began, when the trial court could not find defendant's

written jury waiver, the trial court had defendant execute another written waiver in open court and re-admonished him about his rights and what he was giving up. Defendant made no indication that he wanted a jury trial at that time.

¶ 40 Defendant, however, argues that the waiver is invalid because it was executed after only "perfunctory" admonishments. Defendant points out, among other things, that he had little experience with the criminal justice system and was "only 18 years old" at the time he waived his right to a jury trial.[2]

¶ 41 Here, the trial court admonished defendant regarding his signed jury waiver on November 13, 2013:

> "THE COURT: All right. I have here, [defendant], what is known as a jury waiver. Is that your signature?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And do you know what a jury trial is?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And do you understand by presenting that document to me that you're giving up the right to have a trial by jury?
>
> THE DEFENDANT: Yes, ma'am."

¶ 42 Defendant claims error on the basis that all the trial court did was inquire "whether he knew what a jury trial was and that he was giving up his right to such a trial." Defendant

[2] Although defendant contends that he was 18 years old at the time that he waived his right to a jury on November 13, 2013, defendant's presentence investigation report lists his date of birth as April 21, 1992. Thus, in November 2013, defendant would have been 21 years old.

complains that "the court did not even ask [him] if he actually *wanted* to give up his right to a jury trial." (Emphasis in original).

¶ 43 Defendant's argument is unavailing. As defendant acknowledges, there is no special set of words or specific admonition that must be used for a jury waiver to be valid. *People v. Bannister*, 232 Ill. 2d 52, 66 (2008). The fact that defendant "wanted" to give up his right to a jury was obviously implied from the circumstances where he signed a written waiver and presented it to the court for the purpose of waiving his right. Defendant presents no evidence or even a convincing theory to show that he did not actually want to waive his right to a jury trial. All of the evidence and indications are to the contrary. Defendant was represented by counsel and continually acted consistent with wanting to waive his right to a jury trial. His opening brief on appeal is the first ever expression of anything other than defendant's desire to be tried by the court. He does not argue that his counsel was ineffective for a failure to prevent him from signing a jury waiver.

¶ 44 Defendant relies on several decisions of this court and the Illinois Supreme Court in an attempt to show that the trial court failed to adequately explain the nature of the rights defendant was giving up. Defendant claims that the trial court "did not explain what either a bench or jury trial would entail" nor did it explain "the constitutional nature of the right, nor who sits on a jury, nor how a jury is selected, nor the different roles of a jury and a judge during a jury trial, nor that a jury must unanimously agree that the State proved he committed the charged offense beyond a reasonable doubt." However, what defendant ignores is that the court asked him directly, twice, in the presence of counsel, if he knew what a jury trial was, and defendant said "yes." Defendant finally argues that the fact that he was represented by counsel should not lead to a presumption

that the waiver was made knowingly. A jury waiver is generally valid where defense counsel waives that right in open court and the defendant does not object to the waiver. *West*, 2017 IL App (1st) 143632, ¶ 10. The defendant bears the burden of establishing that his jury waiver was invalid. *Id*. It is not as if this case requires a presumption to be applied against defendant; defendant has done nothing to show that the waiver was invalid.

¶ 45 II. Sentencing

¶ 46 Defendant next contends that he was deprived of a fair sentencing hearing because the trial court improperly considered certain factors in aggravation. Specifically, he argues that the trial court considered that he did not make a statement in allocution, his "irrelevant past membership in a gang" and the "bare charge" in a pending case. Defendant acknowledges that he has forfeited this issue on appeal by failing to raise it in a timely filed postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well-settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). However, he argues that we may review this issue under the plain error doctrine.

¶ 47 Plain error review of a forfeited sentencing issue is available when a defendant demonstrates that a clear or obvious error occurred and satisfies the burden of showing either that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that it denied the defendant a fair sentencing hearing. *Id.* at 545. "The first step of plain-error review is to determine whether any error occurred." *People v. Lewis*, 234 Ill. 2d 32, 43 (2009); *West*, 2017 IL App (1st) 143632, ¶ 11. Here, we find no error.

¶ 48 The question of whether a court relied on an improper factor in imposing sentence is a question of law that we review *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49. When determining an appropriate sentence, the trial court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2012). When such factors have been presented for the court's consideration, it is presumed that the trial court considered all relevant factors, unless the defendant makes " 'an affirmative showing that the sentencing court did not consider the relevant factors.' " *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11 (quoting *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38). "For evidence to be admissible in a sentencing hearing, it is required only to be reliable and relevant, a determination that is within the trial court's discretion." *People v. Rose*, 384 Ill. App. 3d 937, 941 (2008). The mere mention of an improper factor in passing does not mean that the court relied on that factor in determining the appropriate sentence (*People v. Beals*, 162 Ill. 2d 497, 509-10 (1994)), because a trial court is presumed to have recognized and disregarded incompetent evidence unless the record affirmatively reveals the contrary (*People v. Shumate*, 94 Ill. App. 3d 478, 488 (1981)).

¶ 49 Defendant first argues that the trial court improperly considered, in aggravation, his decision to remain silent and not offer any testimony on his behalf during sentencing. He argues that the trial court negatively compared him to co-defendants, who expressed remorse for their actions at sentencing. Defendant relies on *People v. Pace*, 2015 IL App (1st) 110415, ¶¶ 100-01, for the proposition that a trial court errs when it construes a defendant's silence as a lack of remorse and considers that lack of remorse as aggravation at sentencing.

¶ 50 However, on November 23, 2016, our supreme court entered a supervisory order directing the court to vacate its judgment in *Pace* and reconsider its judgment in light of *People*

v. Reyes, 2016 IL 119271, to determine if a different result was warranted. The case was then disposed of in an unpublished order. See *People v. Pace*, 2017 IL App (1st) 110415-U. As a result, this decision cannot be relied upon by defendant.

¶ 51 We disagree with defendant's conclusion that the trial court held his decision not to speak at sentencing against him. Initially, we note that a trial court may consider "the lack of penitent spirit" when determining the appropriate sentence because this is a factor that may have a bearing on a defendant's potential for rehabilitation. See *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984). However, in the case at bar, the record reveals that the trial court mentioned co-defendants' expressions of remorse in passing before turning to the specifics of defendant's case. Considering the record as whole, the complained-of statements were a minimal part of the trial court's sentencing decision; rather, the court focused on the fact that defendant had been convicted of "very serious offenses," and that this case was not the first time that defendant had gotten "into trouble." See *People v. Miller*, 2014 IL App (2d) 120873, ¶ 37 (when considering whether reversible error has occurred, a reviewing court should focus on the record as a whole, rather than a few words or statements from the trial court).

¶ 52 Defendant next contends that the trial court improperly considered his past membership in a gang in aggravation, when such membership was "irrelevant" and a protected activity under the First Amendment. Defendant further argues that the trial court made a prejudicial and speculative comment when it stated that defendant was a "young gangbanger" who "probably left school" because he did not "think it was worthwhile."

¶ 53 Defendant's contention that his gang membership was protected activity under the first amendment is without merit. See *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) ("the

Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment"). To the extent that defendant contends that the trial court should have not considered his gang membership at all because it was "irrelevant," we disagree. A sentencing court may consider defendant's gang membership when considering, *inter alia*, his general moral character, his habits, his social environments, his age, his natural inclination or aversion to commit crime and the circumstances that motivated his conduct. See *People v. Zapata*, 347 Ill. App. 3d 956, 966 (2004).

¶ 54 We are similarly unpersuaded by defendant's argument that he was prejudiced by the trial court's statement that defendant "probably" left school because he, "like other gangbangers" did not find it "worthwhile." A review of the record reveals that this comment was a direct response to the defendant's argument in mitigation that defendant was unable to finish school because he had to help his family financially. The trial court then noted that defendant told a probation officer that he had never been employed. Given the discrepancy between what defendant told the probation officer and the defense's argument at trial, we cannot say that the trial court engaged in improper speculation when questioning defendant's actual motivation for leaving school.

¶ 55 Defendant finally contends that the court improperly relied on a pending charge in aggravation. Specifically, defendant argues that because the State mentioned a pending battery charge at sentencing, "one cannot have confidence that the bare pending charge did not cause" the trial court to increase defendant's sentence.

¶ 56 The trial court may not consider pending charges and bare arrests when determining what sentence to impose. *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). However, the mere fact

that a trial court has knowledge of prior arrests before imposing sentence does not amount to reversible error because the trial court is presumed to have disregarded incompetent evidence. *Shumate*, 94 Ill. App. 3d at 488. To justify reversal, "the record must affirmatively disclose that the arrest or charge was considered by the trial court in imposing sentence." *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984). "It is the defendant's burden to affirmatively establish that the sentence was based on improper considerations." *Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 57 In the case at bar, there is no indication the trial court considered defendant's pending battery charge. After the State mentioned the pending charge, the defense responded that following that incident, defendant had been a "model prisoner." The court did not directly mention the pending charge; rather, the court repeated that "after the incident in jail he is now a model prisoner" and indicated that the court did not know what "that means, a model prisoner." Based on this record, defendant has failed to affirmatively establish that the trial court based defendant's sentence on this pending charge. *Id.*

¶ 58 Having found no error (*Lewis*, 234 Ill. 2d at 43), there can be no reversible error and this court must honor defendant's procedural default.

¶ 59 III. One Act, One Crime Rule

¶ 60 The State concedes that defendant was improperly convicted of multiple crimes arising from singular physical acts. Defendant's convictions for the aggravated unlawful restraint of Cox and Washington (counts 14 and 15), are for the same conduct giving rise to his convictions for the armed robbery of Cox and Washington (counts 1 and 2). In accordance with the State's concession, and under the proper application of the rule, defendant's convictions for aggravated unlawful restraint must be vacated.

¶ 61 IV. Ineffective Assistance of Counsel

¶ 62 Defendant finally contends that he was denied the effective assistance of counsel because counsel did not move to reopen the suppression hearing when Washington's testimony at trial "refuted" his testimony at the suppression hearing. Defendant argues that although Washington identified defendant at trial, his testimony regarding events was "hazy and ambivalent."

¶ 63 When evaluating an ineffective assistance of counsel claim, this court applies the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Pursuant to *Strickland*, a defendant claiming ineffective assistance "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

¶ 64 Generally, a court has the authority to allow a litigant to reopen its case under appropriate circumstances. *People v. Hopson*, 2012 IL App (2d) 110471, ¶ 19. Factors to consider in this analysis include: (1) whether the failure to introduce the evidence was inadvertent; (2) any surprise or unfair prejudice to the other party; (3) the importance of the new evidence; and (4) whether there were cogent reasons that justified denying the motion to reopen. *Id.* Although the "general rule is that collateral estoppel bars a rehearing on a motion to suppress in the same proceeding," there is an exception for those cases where the defendant shows " 'exceptional circumstances or any evidence in addition to that submitted upon the first hearing which had become available for submission in connection with the motion to suppress.' " *People v. Gilliam*, 172 Ill. 2d 484, 505-06 (1996) (quoting *People v. Holland*, 56 Ill. 2d 318, 321 (1974)). See also *People v. Johnson*, 100 Ill. App. 3d 707, 708 (1971) ("It is well established that in the absence of

additional evidence or exceptional circumstances, the doctrine of collateral estoppel bars the relitigation of an order sustaining or denying a pretrial motion to suppress evidence.").

¶ 65 In the case at bar, defendant argues the change in the strength of Washington's testimony from a "a high degree of certainty" identification of defendant pre-trial to "uncertainty and reticence about the robbery" at trial was sufficient to constitute "new evidence" that would justify reopening the hearing on a previously litigated issue, that is, the identification of defendant. We disagree.

¶ 66 We are unpersuaded by defendant's argument that Washington's trial testimony was "new evidence" that would have warranted reopening the suppression hearing. This is not a case where a witness offered newly discovered evidence or even changed his identification testimony; rather, this is a case where, by the time of trial, a witness testified that he no longer recalled certain details of the offense. At trial, Washington testified consistent with his testimony at the suppression hearing that defendant was one of the men who robbed him; although he did testify that he did not remember looking at multiple line-ups or who he identified in the line-up that he remembered viewing. Ultimately, in the case at bar, defendant has not shown that Washington's trial testimony falls under the exception to the general bar on a rehearing on a motion to suppress in the same proceeding. See *Gilliam*, 172 Ill. 2d at 505-06 (absent exceptional circumstance or new evidence that has become available since the suppression hearing, collateral estoppels bars a defendant from relitigating a motion to suppress). Accordingly, because the trial court would have had no basis to rehear the suppression motion, defendant cannot establish that he was denied the effective assistance of counsel. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (counsel cannot be deemed ineffective based upon the failure to file a futile motion).

¶ 67 V. CONCLUSION

¶ 68 Accordingly, we: (1) affirm defendant's convictions for armed robbery and UUWF; (2) vacate his convictions for aggravated unlawful restraint (counts 14 and 15); and (3) direct the clerk of the circuit court to correct the mittimus to reflect that the convictions for aggravated unlawful restraint are vacated.

¶ 69 Affirmed as modified.