FIFTH DIVISION
June 1, 2018

No. 1-14-2194

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 18454 (02)
	)	
VITO RICHMOND,	)	
	)	Honorable
Defendant-Appellant.	)	Vincent M. Gaughan,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where defendant's statements to the detectives were not involuntarily made and the trial court did not err in admitting certain evidence. Defendant's 68-year sentence, however, is vacated and the matter remanded for a new sentencing hearing, this court having found the sentence violates the eighth amendment of the United States Constitution.

¶ 2 Following a jury trial, 17-year-old defendant Vito Richmond was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2012)) and attempted murder (720 ILCS 5/8-4(a)

(West 2012)) and sentenced to 68 years' imprisonment in the Illinois Department of Corrections (IDOC). On appeal, defendant argues the trial court erred (1) in denying his motion to suppress and (2) admitting certain testimony which defendant contends were of his prior bad acts. Defendant further maintains that his sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012), and that the new juvenile sentencing provisions making firearm enhancements discretionary apply retroactively, requiring this matter to be remanded for resentencing. For the reasons that follow, we affirm the judgment of the circuit court finding defendant guilty of murder and attempted murder, but remand the matter for resentencing.

¶ 3 BACKGROUND

¶ 4 On August 3, 2011, 13-year-old Darius Brown (Darius) was shot and killed while playing basketball in Metcalfe Park located on South State Street in Chicago. During the shooting, the same shooter shot at Steve Barron (Barron) but he was not hit by the bullet. In October 2011, defendant and his codefendants Aramis Beachem (Beachem) and Jamal Streeter (Streeter) were charged by indictment with the first degree murder of Darius (720 ILCS 5/9-1(a)(1), 9-1(a)(2), 9-1(a)(3) (West 2010)), attempted first degree murder of Barron (720 ILCS 5/8-4(a) (West 2010)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). Defendant was tried separately and ultimately found guilty of first degree murder and attempted murder. The jury further found that the State had proved that defendant used a firearm in the commission of the offense.

¶ 5 Pretrial Proceedings

¶ 6 Prior to trial, defendant filed a motion to suppress his oral statements provided to the detectives following his arrest. In his motion, defendant asserted his statements should be excluded because he suffers from asthma and was in a distressed state at the time he was

questioned and made the statements. Defendant further alleged that shortly before his full confession, Detective Scott Reiff (Reiff) "thrust [him] against the wall and told [defendant] that he better confess or [he] would 'beat his a[***]!' "

¶ 7 At the suppression hearing, the State presented the testimony of Detective Robert Garza (Garza), who testified that defendant was arrested, transported to the police station, and placed in an interview room with an active audio and visual recording system that was engaged around 2:10 p.m. on October 12, 2011. Detective Garza testified he had reviewed the videotape of defendant in the interview room and testified that at 3:15 p.m. defendant did 29 pushups and thereafter requested a cigarette, which he smoked. Then at 3:46 p.m. defendant was provided with his asthma pump at his behest. Later, at 7:57 p.m. defendant did more pushups and then was provided with dinner. At 9:30 p.m. defendant was read his *Miranda* rights and the interview commenced. Defendant was again provided his asthma pump at 12:58 a.m. According to Detective Garza, defendant did not appear to be in distress or having trouble breathing at that time. At 1:36 a.m. Detective Reiff accompanied defendant to the bathroom. Defendant returned to the interview room at 1:41 a.m. Detective Garza testified that defendant did not complain that Detective Reiff threatened him nor did defendant complain of an asthma attack or difficulty breathing when he resumed his questioning. Detective Garza further testified that defendant appeared to be in the same physical condition as he was prior to going to the bathroom. Minutes later defendant informed the detectives that he was the shooter. At 2:15 a.m. defendant used his asthma pump and requested an asthma machine. Detective Garza testified he informed defendant that they did not have an asthma machine but inquired whether defendant wanted to go to the hospital. Shortly thereafter, defendant requested to go to the hospital. At 2:27 a.m. defendant was removed from the interview room and taken to an ambulance downstairs where he

was examined by the paramedics. At 2:33 a.m. defendant returned to the interview room where the paramedics examined him again. After the paramedics left, defendant used his asthma pump, which he was allowed to retain. According to Detective Garza, at no time thereafter did defendant inform him that he was in distress nor did defendant appear to be in distress. The interview concluded at 3:34 a.m.

¶ 8 On cross-examination, Detective Garza testified that defendant indicated he was cold and was provided white coveralls. Detective Garza further testified that, as an asthmatic himself, panic attacks can sometimes be confused for asthma attacks.

¶ 9 The State next presented the testimony of Detective Reiff who testified that on October 13, 2011, he did not interview defendant but was walking by the interview room when he heard defendant knocking at the door. He stopped at the door and defendant requested to go to the bathroom. Detective Reiff took defendant to the bathroom, which was located 20 or 30 feet away behind two solid doors. Detective Reiff then stood outside the locked bathroom door until defendant indicated he was finished. Detective Garza and Detective Jack Hollaran then accompanied defendant back to the interview room. Detective Reiff denied thrusting defendant against a wall and denied telling defendant that he better confess or he would "beat his a[***]."

¶ 10 Relevant portions of defendant's videotaped interrogation were entered into evidence. The videotape corroborated Detective Garza's testimony. The videotape further demonstrated that defendant was placed in the interview room at 2 p.m. and was wearing jeans, a t-shirt, and sneakers. Thereafter, he requested a cigarette, smoked it, and vomited. Defendant was then transferred to a different interview room and shortly thereafter requested his asthma pump. Defendant then informed the detectives he was cold and was provided a hooded sweatshirt. Defendant continued to complain of being cold and one of the detectives found him coveralls to

wear. The videotape shows that as the detective hands defendant the coveralls, the detective says that it is "surprising" how warm the coveralls can be and also gives defendant a hat. The detective then asks defendant if he would like a cup of hot coffee, to which defendant replies affirmatively. Despite these measures, defendant continued to complain of being cold throughout his time in the interview room.

¶ 11 At the conclusion of the testimony and evidence, the trial court inquired whether defendant was seeking to suppress "all of the statements going back to 3:46 p.m. on October 12th when he's given the asthma inhaler or are you only asking to suppress statements that take place after he is treated by the paramedics at about 2:37 [a.m.]?" Defense counsel replied that he was seeking to suppress all of the statements made as the evidence demonstrated defendant was in distress. Specifically, defense counsel argued that defendant was cold and having an asthma attack.

¶ 12 After considering the witness testimony, the video evidence presented, and the arguments of counsel, the trial court denied defendant's motion to suppress statements. The trial court observed that when defendant requested his asthma pump at 3:46 p.m. on October 12, the detectives were on notice that defendant suffered from asthma. The trial court concluded that defendant's allegation that he had an asthma attack that afternoon was contradicted by defendant's behavior. The videotape captured defendant doing 29 pushups at 3:15 p.m. and 16 pushups at 7:57 p.m. Thereafter, defendant expressed no signs of distress until 2:15 a.m. upon returning from the bathroom. At that time, he requested an asthma machine, but no machine was available. Detective Garza offered to take defendant to the hospital, an offer defendant accepted a short time later. The paramedics were telephoned and the interrogation of defendant ceased. Defendant was then taken down to the back door of the police station where he was examined by

the paramedics. Defendant was then brought back up to the interview room where he was reexamined by the paramedics. They confirmed that his lungs were clear and his blood pressure was reasonable. At Detective Garza's suggestion, the paramedics indicated that defendant could be suffering from a panic attack and they left. Defendant was given his asthma pump. When viewed in its totality, the trial court concluded that the State met its burden that the detectives did nothing either to physically or psychologically coerce a confession, nor did they seek to overbear defendant's will, nor did they take advantage of some naturally occurring circumstance, such as an asthma attack to overbear defendant's will. Accordingly, the trial court determined that defendant's statements were voluntarily made.

¶ 13 Trial

¶ 14 As defendant does not challenge the sufficiency of the evidence, we recount here only the evidence necessary to the disposition of this appeal.

¶ 15 The State's evidence established the following. On August 3, 2011, at 5 p.m. a group of young adults, including Barron, Darius, Ronald Craig (Craig), and Oaklei Lofton (Lofton), were playing basketball in Metcalfe Park. Barron was wearing a red Washington Nationals hat, which signified that he was a member of the Welch World faction of the Gangster Disciples. At that time, Welch World and another faction of the Gangster Disciples streetgang, the Avenue Boys, were in a dispute. As a consequence of this dispute codefendant Streeter's sister Princess had been shot and killed. As Barron and the other children were playing basketball, a white Nissan Altima drove past slowly. Shortly thereafter, a grey Charger drove by and multiple shots were fired out of the passenger side windows. Darius, who had been running alongside Barron when the gunshots rang out, was struck with a bullet and killed. Evidence technicians recovered nine spent casings from State Street in front of Metcalfe Park; five were fired from a .45-caliber

handgun and four were discharged from a 9-millimeter handgun.

¶ 16 Detective Garza was assigned to investigate the case. A day after the offense, an interview with Barron led Detective Garza to believe defendant might be involved. Two weeks later, Chicago police officers engaged in a controlled purchase of a .45-caliber handgun from Clarence Whitelow (Whitelow) (who was acquainted with codefendants Beachem and Streeter) with the assistance of a confidential informant, Kevin Daniels (Daniels).[1] Whitelow testified that a few days prior to August 3, 2011, Beachem came to his house and gave him a .45-caliber handgun. Then, during the day on August 3, 2011, Beachem returned with Streeter to Whitelow's house to retrieve the handgun. Shortly thereafter, Beachem returned the handgun to Whitelow. Later, Whitelow sold the handgun to Daniels. Justin Barr (Barr), a forensic investigator with the Illinois State Police, concluded that the five .45 shell casings recovered from the crime scene were fired from the .45-caliber handgun purchased from Whitelow. Barr also testified that the four other shell casings recovered were .380 auto caliber and that those shells were equivalent to a "9 millimeter Browning Court."

¶ 17 A surveillance videotape recovered from a property across from Metcalfe Park captured a white Nissan Altima followed by a dark-colored Charger driving past the basketball court at 5 p.m. on the day of the shooting. In the course of his investigation, Detective Garza learned that a white Nissan Altima (which was registered to Beachem's girlfriend) had been recovered from a junk yard in Indiana. The vehicle was processed for fingerprints and gunshot residue. One latent fingerprint was lifted from the vehicle, and matched a female named Jamie Rene Wheaton. The results of the gunshot residue tests indicated that the sample areas "may not have been in the environment" of a discharged firearm.

[1] The record indicates that Daniels died prior to the trial.

¶ 18 Subsequent interviews with the eyewitnesses (Barron, Craig, and Lofton) revealed that at least one individual who had a dreadlock hairstyle was observed shooting out of the right hand side passenger window of the Charger. Defendant, however, did not have such a hairstyle at that time. None of the eyewitnesses could identify the shooters. Barron also informed the detectives (and testified similarly) that a couple weeks prior to the shooting he was on Roosevelt Road waiting for the bus when he observed defendant and Streeter coming towards him. According to Barron, he believed that defendant and Streeter were going to "jump" him, so he ran away. Barron believed that they wanted to "jump" him because he was a member of Welch World.

¶ 19 On October 12, 2011, defendant was taken into custody and questioned. Defendant's interview was videotaped and relevant portions were published to the jury. The videotape demonstrated that, after being provided and waiving his *Miranda* rights, defendant initially denied any involvement in the offense. Over the course of his interview, defendant's story changed from merely being present in the white Altima during the offense to shooting a handgun out of the passenger side of the grey Charger. Ultimately, defendant informed the detectives that on the day of the offense, he met up with Beachem, Streeter, Beachem's brother Vince, and an individual known only as "C4" and discussed "firing up" Metcalfe Park, where Welch World was known to frequent. Defendant got into the backseat of the grey Charger, with Beachem driving and Streeter in the front passenger seat. Before they left, however, defendant called his sister to see if she was at the park. After defendant was informed by his sister that she was at home, Beachem handed defendant a .380-caliber handgun while Streeter was armed with the .45-caliber handgun. Beachem followed the white Altima (driven by Vince with C4 in the front passenger seat) southbound on State Street. Those individuals in the white Altima then called Streeter to confirm that Welch World members were at Metcalfe Park. Defendant and Streeter

then drove to Metcalfe Park and began firing their respective handguns out of the right-hand passenger side of the Charger towards the fence line.

¶ 20 After hearing closing arguments, the jury deliberated and ultimately found defendant guilty of murder and attempted murder. The jury further found that defendant committed these offenses while using a firearm.

¶ 21 Sentencing

¶ 22 At the sentencing hearing, the State produced victim impact statements from Darius's mother, Stephanie Brown, and Darius's two siblings. The State also presented the presentencing investigation report which indicated that, since being incarcerated, defendant had earned his high school diploma. After producing its evidence in aggravation, the State requested the trial court sentence defendant "appropriately." Defendant then presented his evidence in mitigation. Defendant stressed his age at the time of the offense, his potential for rehabilitation, and denied any gang affiliation. In allocution, defendant addressed the court and expressed his remorse for Darius's death. Defendant requested that he receive the minimum possible sentence.

¶ 23 After considering the evidence in aggravation and mitigation, including the presentence investigation report, the trial court sentenced defendant to 22 years for first degree murder plus a 20-year mandatory firearm enhancement and six years for attempted murder plus a 20-year mandatory firearm enhancement for a total of 68 years' imprisonment to be served consecutively. Defendant's motion to reconsider the sentence was denied. This appeal followed.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues the trial court erred (1) in denying his motion to suppress and (2) when it admitted certain testimony regarding defendant's prior bad acts. Defendant further maintains that his sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. 460

(2012), and that the new juvenile sentencing provisions making firearm enhancements discretionary apply retroactively, requiring this matter to be remanded for resentencing. We address each claim in turn.

¶ 26 Motion to Suppress

¶ 27 Defendant argues the circuit court erred when it denied his motion to suppress his statement to the detectives. According to defendant, the detectives violated his fifth amendment right to not be compelled to be a witness against himself when his statement was not voluntary, but the result of physical and psychological coercion. See U.S. Const., Amend. V; Ill. Const. 1970, art. I, § 10. Specifically, defendant maintains the moment he gave his confession "he was in the throes of a panic attack" or, in the alternative, was having an asthma attack. Defendant also asserts that during his 11-hour long interrogation, he consistently complained about being cold, and, by being cold in the interview room, he was physically coerced into confessing.

¶ 28 In response, the State maintains the trial court properly denied defendant's motion to suppress where the record demonstrates that defendant was not coerced and provided his statement of his own free will.

¶ 29 When reviewing a trial court's ruling on a motion to suppress, we apply a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Under this standard, we accord great deference to the trial court's findings of fact and reverse those findings only if they are against the manifest weight of the evidence. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). A trial court's factual findings are against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *People v. Harris*, 2015 IL App (1st) 133892, ¶ 20. We, however, review *de novo* the trial court's ruling as to whether suppression is warranted. *People v.*

Chambers, 2016 IL 117911, ¶ 76; *People v. Braggs*, 209 Ill. 2d 492, 505 (2003).

¶ 30 In determining whether a defendant's statements are voluntarily made, this court must look to the totality of the circumstances surrounding the making of the statements. *People v. Richardson*, 234 Ill. 2d 233, 253 (2009). The factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *Id.* at 253-54. Also, where the defendant is a juvenile, the greatest care must be taken to assure that the statement was not coerced or suggested, and that the statement was not the result of ignorance of rights or of adolescent fantasy, fright, or despair. *Id.* at 254. No single factor is dispositive as to the voluntariness of a confession. *People v. Murdock*, 2012 IL 112362, ¶ 30. Rather, "the test of voluntariness is whether the individual confessed freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession." *Id.*[2]

¶ 31 Defendant argues that at the time of his statement to the detectives he was only 17 years old and was suffering from either an asthma attack or a panic attack. He further argues that he was "freezing" cold for the 11 hours he was in the interview room. In sum, defendant maintains that his will was overborne by the fact that he was kept in a cold room and felt that using his inhaler was necessary to assist in his breathing. Thus, under these conditions, defendant concludes that his statement was not made voluntarily.

[2] We observe that defendant raises no arguments regarding the "concerned adult factor," which considers whether the juvenile, either before or during the interrogation, had an opportunity to consult with an adult interested in the juvenile's welfare. See *Richardson*, 234 Ill. 2d at 254. We note, however, that the videotape demonstrates defendant requested to speak with his mother, but withdrew his request shortly thereafter and did not again indicate he wanted to speak with her.

¶ 32 Upon review, we agree with the trial court that the totality of the circumstances indicate defendant's statements were voluntary. We first consider defendant's age, experience, educational background, and intelligence. Defendant, at age 17, "is on the older end of the juvenile scale." *Murdock*, 2012 IL 112362, ¶ 44. The questioning of defendant revealed that he had been attending high school as a junior and was able to answer the detective's questions intelligently, demonstrating he had sufficient mental capacity. Moreover, the videotape also revealed that defendant had been in contact with law enforcement officers prior to being questioned in this cause. The evidence presented at the suppression hearing further demonstrated that he was able to understand and give full, concise, and clear answers to the questions posed to him. Thus, defendant appears to be of at least normal intelligence and mental capacity for someone his age.

¶ 33 Second, there is no evidence of physical or mental abuse. The testimony at the suppression hearing along with the videotape indicate that the detectives never made any threats toward defendant. Defendant was not handcuffed during the interview. The videotape further demonstrated that the detectives engaged in a nonconfrontational conversation with defendant regarding his involvement in the shooting. There is also no evidence of any police trickery employed to extract information from defendant. This absence of trickery weighs in favor of voluntariness. See *In re Marvin M.*, 383 Ill. App. 3d 693, 705 (2008).

¶ 34 Third, we consider defendant's physical condition. There is no question that defendant consistently informed the detectives that he was cold and requested additional clothing while he was detained, but this fact alone does not warrant reversal. This is merely one factor to consider within the totality of the circumstances of the interview. See *Murdock*, 2012 IL 112362, ¶ 55 ("No single factor is dispositive, and each case is fact specific and must be evaluated on its own

specific set of circumstances."). We observe that the detectives provided defendant with extra clothing they had available, a hooded sweatshirt, a hat, and coveralls. When they had no other clothing to provide him they suggested hot coffee, which defendant consumed. The videotape further demonstrates that the detectives, who were both dressed in a shirt and pants, did not appear to be cold themselves. Moreover, defendant did not complain to the paramedics of being cold, nor did the paramedics indicate defendant felt cold to the touch. Notably, defendant cites no case law where a confession was rendered involuntarily made due to a defendant being cold. Thus, we conclude that the fact defendant felt cold prior to giving his statements does not render them involuntary or require their suppression.

¶ 35 Defendant further maintains, in regard to his physical condition, that he was suffering from a panic attack or an asthma attack. This is not demonstrated by the record. First, the paramedics did not diagnose or treat defendant for a panic attack. While one detective inquired whether it might be a panic attack, the paramedics did not definitively state he was suffering from one, but in fact informed the detective that defendant was "more calm" than either of them at the moment based on defendant's vital signs (defendant had a heart rate of 62 beats per minute and blood pressure of 114/58). Second, after examining defendant, the paramedics concluded defendant was not having an asthma attack. Third, defendant signed a waiver indicating he did not desire to go to the hospital. All of these facts are contrary to defendant's contention that he felt so restrained in his breathing that his will was overborne during the interview.

¶ 36 Moreover, defendant did not express his desire to go to a hospital until after he confessed to firing a weapon out of the vehicle. Specifically, defendant admitted to firing the .380 handgun at 1:43 a.m. At 1:59 a.m. the detectives left the room. Approximately 10 minutes later, the detectives returned and asked defendant to identify photographs of Beachem, Streeter, and others

involved in the offense by signing his name to the photographs. In the videotape, defendant inquires whether his codefendants will find out that he identified them, and the detectives respond that they will not see the photographs. It is after this exchange that defendant requests to go to the hospital. Thus, it is apparent from the videotape that defendant was more concerned about his codefendants becoming aware that he implicated them than he was about his confession.

¶ 37 Fourth, the length of defendant's detention and interview does not render his statements involuntary. Defendant was detained in the interview room from 2 p.m. until 3:30 a.m. the following day. While this time frame may be slightly lengthy, defendant's interview did not commence until 9:30 p.m. and there were frequent breaks (during which time defendant would fall asleep) until the interview was concluded. In fact, the total time defendant was interviewed by the detectives was not more than two-and-a-half hours. The interview time was reasonable and we cannot say it contributed to a coercive atmosphere that would render defendant's statements involuntary. See *In re G.O.*, 191 Ill. 2d 37, 56 (2000).

¶ 38 In sum, under the totality of the circumstances, we find defendant's statements to be voluntary. In a motion to suppress, the true test of voluntariness is whether the defendant "made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the [defendant's] will was overcome at the time he or she confessed." (Internal quotation marks omitted.) *Id.* at 54. In this case, while defendant was cold during the interview process, it did not prevent him from being able to clearly communicate with the detectives or understand the questions posed to him. Defendant appeared mostly calm and collected on the videotape during the questioning. The detectives treated defendant respectfully, inquired about his well being, asked if he wanted to go to the bathroom or was hungry, provided him with multiple breaks

during the questioning, and gave him food and drink. Defendant was never threatened physically or psychologically. Furthermore, the detectives took defendant's complaints about his breathing seriously and provided him with warm clothing as well as his asthma inhaler and called the paramedics upon request. Under the totality of the circumstances, and considering all the factors, defendant made his statements freely and voluntarily, without compulsion or inducement, and we uphold the trial court's denial of defendant's motion to suppress. See *Murdock*, 212 IL 112362, ¶ 55.

¶ 39 In the alternative, defendant maintains that he was denied effective assistance of counsel regarding his motion to suppress because his trial counsel only argued that his statement was involuntary because he was suffering from an asthma attack. Defendant asserts that his trial counsel's performance fell below an objective standard of reasonableness because his argument for suppression was directly refuted by the videotaped evidence. Defendant maintains that had trial counsel argued the arguments as provided herein, his motion would have been granted and his statements would have been suppressed.

¶ 40 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Henderson*, 2013 IL 114040, ¶ 11. In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under Strickland, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "The defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Henderson*, 2013 IL 114040, ¶ 11.

¶ 41 In asserting a claim of ineffectiveness, the defendant must overcome a strong presumption that his or her counsel's inaction resulted from sound trial strategy and not incompetence. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). Generally, the decision of whether to file a motion to suppress is a matter of trial strategy and "therefore one in which the court will not indulge a hindsight analysis to determine whether the attorney's decision was reasonably adequate under the circumstances." *People v. Morris*, 229 Ill. App. 3d 144, 157 (1992) (citing *People v. Bryant*, 128 Ill. 2d 448, 458 (1989)). Hence, to prevail a defendant must demonstrate that a reasonable probability existed that the motion would have been granted and the outcome of the trial would have been different had the evidence been suppressed. *Morris*, 229 Ill. App. 3d at 157.

¶ 42 Defendant fails to satisfy his burden under *Strickland*. Based on our aforementioned conclusion that under the totality of the circumstances defendant voluntarily made the statement, defendant cannot demonstrate that a reasonable probability existed that but for defense counsel's ineffectiveness the motion to suppress would have been granted. See *id.* Thus, defense counsel's performance in failing to specifically raise that defendant was suffering from a panic attack and was cold during the interview did not fall below an objective standard of reasonableness. See *People v. Wilson*, 164 Ill. 2d 436, 454 (1994) (the failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile).

Accordingly, we reject defendant's claim that defense counsel was ineffective. See *Henderson*, 2013 IL 114040, ¶ 51.

¶ 43 Evidentiary Issue

¶ 44 Defendant next contends that the trial court erred in allowing Barron to testify that weeks prior to the shooting he observed defendant and Streeter at a bus stop and believed they were "fixing to jump on [him]." According to defendant, this testimony was pure conjecture and highly prejudicial, as it insinuated that defendant had intended to harm Barron weeks before the shooting. Defendant maintains that the introduction of this testimony, particularly without a proper jury instruction, denied him a fair trial. In the alternative, defendant asserts that his counsel was ineffective for failing to raise a timely objection to preserve this claim of error and for failing to request the proper jury instruction.

¶ 45 In response, the State asserts the trial court did not err in admitting evidence of a prior bad act on the part of defendant where Barron did not testify that defendant had committed a prior bad act. Thus, because no prior bad act occurred, there can be no error and defendant's contentions should be rejected.

¶ 46 Defendant acknowledges that he failed to properly raise this issue before the trial court, thus forfeiting his claim on appeal. Defendant, however, requests that this court review his claim under the plain-error doctrine. Illinois Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales

of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Defendant carries the burden of persuasion under both prongs of the plain-error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id.* Therefore, we will review the issue to determine if there was any error before considering it under the plain-error doctrine.

¶ 47 Evidence of other crimes is admissible if it is relevant for any purpose other than to demonstrate the defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other-crimes evidence is admissible to establish *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged. *People v. Robinson*, 167 Ill. 2d 53, 62-63 (1995). Even where relevant, however, the evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect. *People v. Moss*, 205 Ill. 2d 139, 156 (2001). The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010); see Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *Becker*, 239 Ill. 2d at 234.

¶ 48 When the State seeks admission of other-crimes evidence, it "must first show that a crime took place and that *the defendant committed it or participated in its commission*." (Emphasis in original.) *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991). Proof that the defendant committed

the crime, or participated in its commission, need not be beyond a reasonable doubt, but such proof must be more than a mere suspicion. *Id.* at 456.

¶ 49 In this case, Barron's testimony did not implicate defendant in the commission of any crime. Barron testified that a few weeks prior to the shooting he was waiting for the bus when he observed defendant and Streeter coming towards him. According to Barron, he believed that defendant and Streeter were going to "jump" him because he was a member of a rival streetgang, so he ran away. Defendant and Streeter did not give chase. Accordingly, as Barron did not testify that defendant committed any bad act, we conclude that the trial court did not abuse its discretion when it allowed Barron to so testify. See *People v. Pikes*, 2013 IL 115171, ¶ 20 (where a defendant is not involved in the commission of a crime, "it is not an 'other crime' for purposes of evaluating its admissibility" under the other-crimes doctrine).

¶ 50 Having found no error occurred, there can be no plain error. See *Piatkowski*, 225 Ill. 2d at 565. Thus, it follows that defendant's arguments that trial counsel was ineffective for failing to object to Barron's testimony and failing to ensure the jury was properly instructed regarding this evidence fail.

¶ 51 Sentencing

¶ 52 On appeal, defendant raises two arguments as to why his sentence must be vacated and the matter remanded for a new sentencing hearing. First, defendant argues his sentence of 68 years' imprisonment violates the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) as applied to him. Defendant asserts that the operative sentencing statutes combined to produce a mandatory 68-year sentence, which is effectively a *de facto* life sentence where he will not be released from IDOC until he is 81 years of age. Second, defendant maintains his sentence was

an abuse of discretion where the trial judge failed to meaningfully account for his youth and rehabilitative potential.

¶ 53 The applicable sentencing statutes mandated that the trial court add firearm enhancements to his sentences for murder and attempted murder; that his murder and attempted murder sentences be served consecutively; and that he must serve the entire murder sentence and 85 percent of the attempted murder sentence. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012) (25 years to be added to murder sentence if firearm used proximately causes death or great bodily harm); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2012) (20 years to be added to attempted murder sentence if firearm used); 730 ILCS 5/5-8-4(d)(1) (West 2012) (murder and attempted murder sentences to be served consecutively); 730 ILCS 5/3-6-3(a)(2)(i)-(ii) (West 2012) ("truth in sentencing" mandates defendant must serve 100 percent of murder sentence and 85 percent of attempted murder sentence).

¶ 54 Although the trial court essentially sentenced defendant to the minimum sentence (he received 22 years for first degree murder, not the minimum 20 years), his aggregate sentence totals 68 years (of which defendant must serve at least 66 years). Defendant, relying on *Miller* and its progeny, asserts that this lengthy term is actually a mandatory *de facto* life sentence, which violates the federal constitution and the proportionate penalties clause of the Illinois Constitution.

¶ 55 In response, the State asserts that a sentence guaranteeing a geriatric release is not equivalent to an actual or *de facto* life sentence. In this instance, defendant is eligible for release at age 81, thus, the State argues, *Miller* does not apply because he is not serving a sentence without the possibility of parole.

¶ 56 The eighth amendment of the United States Constitution prohibits "cruel and unusual

punishments." U.S. Const., amend. VIII. This provision prohibits not only "inherently barbaric punishments" but those "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11.

¶ 57 A strong presumption exists that statutes are constitutional and courts will uphold a statute whenever reasonably possible, resolving all doubts in favor of the statute's validity. *People v. Patterson*, 2014 IL 115102, ¶ 90. In addition, the challenging party has the burden of rebutting this presumption. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 43. We review a statute's constitutionality *de novo*. *Patterson*, 2014 IL 115102, ¶ 90.

¶ 58 Defendant argues that his sentence is unconstitutional under *Miller*. In *Miller*, the Supreme Court held that life without parole is unconstitutional for juvenile offenders if the sentence is mandatory. *Miller*, 567 U.S. at 470. The Court reasoned that minors are constitutionally different from adults for sentencing purposes, being more impulsive and vulnerable to negative influences and peer pressures than adults, and further lack fully-formed characters so that their actions do not necessarily indicate irreversible depravity. *Id.* at 471-77. The Court, however, continued to allow such sentences when they were based on judicial discretion. *Id.* at 479. The Court made *Miller*'s holding retroactive in *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 736 (2016), and also instructed that states could remedy a *Miller* violation by allowing juvenile offenders with mandatory life sentences to become eligible for parole. *Id.* at ___, 136 S. Ct. at 736. "So far, the Supreme Court has reserved these rulings for the most severe punishments: death or life imprisonment." *People v. Evans*, 2017 IL App (1st) 143562, ¶ 11.

¶ 59 Although the juvenile defendant in *Miller* was sentenced to a mandatory term of life imprisonment, our supreme court in *People v. Reyes*, 2016 IL 119271, ¶ 9, applied the holding in *Miller* to a "mandatory term-of-years sentence that cannot be served in one lifetime." The juvenile defendant in *Reyes*, who was 16 years old when he committed the offense, received a mandatory minimum sentence of 20 years' imprisonment for first degree murder, plus a mandatory 25-year firearm enhancement, and 26 years for each of his two attempted murder convictions consisting of the minimum 6-year sentence for attempted murder plus a 20-year mandatory firearm enhancement. *Id.* ¶ 2. Pursuant to statute, the defendant was required to serve his sentences consecutively; therefore, he "was sentenced to a mandatory minimum aggregate sentence of 97 years' imprisonment" and "required to serve a minimum of 89 years" before being eligible for release. *Id.*

¶ 60 The State conceded, and the court agreed, "that defendant will most certainly not live long enough to ever become eligible for release." *Id.* ¶ 10. Our supreme court reasoned that such a sentence "has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison." *Id.* ¶ 9. The court held that to sentence a juvenile defendant to a mandatory term "that is the functional equivalent of life without the possibility of parole," without consideration of the mitigating factors of youth set forth in *Miller*, "constitutes cruel and unusual punishment in violation of the eighth amendment." *Id.*

¶ 61 In this case, defendant was sentenced to the statutory minimum for attempted murder and two years above the minimum for first degree murder. See *id.* ¶ 2. Likewise, defendant here committed offenses in a single course of conduct that subjected him to a sentence of 68 years, just two years above the legislatively mandated minimum, with the earliest opportunity for

release after 64 years. His sentence included two mandatory firearm enhancements. Because defendant was 16 years old at the time he committed the offenses, the sentencing scheme mandates that he will remain in prison until at least the age of 81. In our view, this constitutes a mandatory *de facto* life sentence in violation of the eighth amendment. See *id.* ¶ 9.

¶ 62 In reaching this conclusion, we find *People v. Buffer*, 2017 Il App (1st) 142931, to be instructive. In that case, the 16-year-old defendant was found guilty of murder for the shooting death of the victim, including that he personally discharged the firearm that caused the victim's death. *Buffer*, 2017 IL App (1st) 142931, ¶ 3. The defendant was sentenced to 25 years for murder plus a mandatory 25-year firearm enhancement for a total of 50 years' imprisonment with 3 years of mandatory supervised release. *Id.* ¶¶ 26, 42. In sentencing the defendant, the trial court also indicated that it considered not only the gravity of the offense, but also the defendant's potential substance abuse issues, treatment, potential for rehabilitation, and age. *Id.* While the defendant's case was pending, the United States Supreme Court decided *Miller*, but nonetheless his conviction was affirmed. *Id.* ¶¶ 29, 31. Thereafter, the defendant filed a postconviction petition arguing his 50-year sentence was a *de facto* life sentence that violated the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 35. His petition, however, was summarily dismissed by the circuit court as being frivolous and patently without merit. *Id.* ¶ 36.

¶ 63 Similar to defendant in the case at bar, on appeal Buffer maintained his 50-year sentence was a *de facto* life sentence that violated his constitutional rights both under the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 41. In addition, the defendant asserted that because of the interaction of the sentencing statutes, including the mandatory firearm enhancement statute and the truth in

sentencing statute, the trial court was prevented from exercising any discretion or taking into consideration his youth and rehabilitative potential. *Id.* ¶ 42.

¶ 64 In considering whether the defendant's sentence constituted a *de facto* life sentence, the *Buffer* court stated, "While our supreme court in *Reyes* extended *Miller* to *de facto* life sentences because they 'cannot be served in one lifetime' it left open the question of what age constitutes a 'lifetime' and who gets to make that determination." *Id.* ¶ 57. The *Buffer* court went on to acknowledge the varying opinions of our appellate court as to when it is appropriate for a court of review to reflect on questions of biology and statistics, specifically those regarding an inmate's projected life span. *Id.* (citing *People v. Harris*, 2016 IL App (1st) 141744, ¶ 52; *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 57 (recognizing that appellate courts "need a consistent and uniform policy on what constitutes a *de facto* life sentence")). But ultimately, the court found the defendant's 50-year sentence was a *de facto* life sentence, as he would not have a "meaningful opportunity for release." *Id.* ¶ 62.

¶ 65 In so concluding, the *Buffer* court, like the court in *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 26, took judicial notice of the United States Sentencing Commission Preliminary Quarterly Data Report, which indicated that "a person held in a general prison population has a life expectancy of about 64 years and that this estimate probably overstates the average life expectancy for minors committed to prisons for lengthy terms." (Internal quotation marks omitted.) *Buffer*, 2017 IL App (1st) 142931, ¶ 59. The *Buffer* court observed that this proposition was also adopted by the appellate court in *Harris*. See *Harris*, 2016 IL App (1st) 141744, ¶¶ 53-54 (agreeing with *Sanders* that the lower life expectancy of minors committed to prison for lengthy terms was "not surprising given the harshness of a lifetime spent in a state penitentiary."). The *Buffer* court further noted that "while our supreme court has not yet

attempted to delineate what constitutes a lifetime, in finding *de facto* life sentences unconstitutional, it relied heavily on the reasoning of the Wyoming Supreme Court in *Bear Cloud v. State*, 2014 WY 113, ¶ 33," which "explicitly found that an aggregate 45-year sentence imposed on a 16-year-old triggered the eighth amendment's prohibition against mandatory life sentences." *Buffer*, 2017 IL App (1st) 142931, ¶ 61 (citing *Bear Cloud*, 2014 WY 113, ¶¶ 31-37).

¶ 66 We further find *People v. Joiner*, 2018 IL App (1st) 150343, to be instructive. Recently in *Joiner*, this court concluded that the 16-year-old defendant's 71-year sentence violated the eighth amendment of the United States Constitution and remanded the matter for resentencing. *Id.* ¶ 90. Similar to defendant here, after a bench trial Joiner was convicted of first degree murder and attempted murder. *Id.* ¶ 3. The trial court further specially found that Joiner personally discharged a firearm during the commission of these offenses. *Id.* The trial court then imposed the mandatory minimum sentences for each of his convictions along with the mandatory firearm enhancement, which amounted to a 71-year sentence. *Id.* ¶ 31. After applying the truth in sentencing statute (730 ILCS 5/3-6-3 (West 2012)), it was apparent that Joiner would be required to serve a minimum of 66 years before he would be eligible for release. *Id.* In concluding that Joiner's sentence violated the eighth amendment, this court found that akin to the cases of *Buffer*, *Harris*, and *Ortiz*, Joiner's sentence amounted to a mandatory *de facto* life sentence. *Id.* ¶ 88. The *Joiner* court further found that when sentencing the defendant, "the trial court was limited by the sentencing scheme and thus did not expressly consider the factors that the *Miller* court found to be imperative when sentencing a juvenile to a mandatory, unsurvivable prison term." *Id.* ¶ 90. Accordingly, this court vacated Joiner's sentence and remanded the matter for a new sentencing hearing. *Id.* ¶ 95.

¶ 67 While the *Buffer* court ultimately determined the 16-year-old defendant's 50-year sentence was a mandatory *de facto* life sentence, the case before us is much stronger and is nearly identical to the facts of *Joiner*. Here, defendant was 17 years old when he committed the offenses and was sentenced to 68 years' imprisonment, with the possibility of being released in 64 years, making him 81 years of age on his projected parole date. An examination of similar cases involving mandatory *de facto* life sentences reveals that defendant's 71-year sentence compares favorably with other *de facto* life sentences. See *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 42 (78-year sentence); *Harris*, 2016 IL App (1st) 141744, ¶ 54 (76-year sentence); *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23 (60-year sentence, allowing release at age 75); *Buffer*, 2017 IL App (1st) 142931, ¶ 62 (50-year sentence, allowing release at age 69); *People v. Smolley*, 2018 IL App (3d) 150577, ¶ 22 (65-year sentence).

¶ 68 Furthermore, as in *Joiner*, it is apparent from the record that "the trial court was limited by the sentencing scheme and thus did not expressly consider the factors that the *Miller* court found to be imperative when sentencing a juvenile to a mandatory, unsurvivable prison term." *Joiner*, 2018 IL App (1st) 150343, ¶ 90. Consequently, "[u]nder these circumstances where the *Miller* factors were not utilized in imposing a discretionary sentence of natural life without the possibility of parole, a juvenile defendant is entitled to relief." *Id.* ¶ 90. Thus, in accordance with our case law, we conclude defendant's sentence, where he would be released at the earliest at age 81, is a mandatory *de facto* life sentence in violation of the eighth amendment. See *id.*; *Buffer*, 2017 Il App (1st) 142931, ¶ 62.

¶ 69 Section 5-4.5-105

¶ 70 Lastly, defendant acknowledges in his reply brief that section 5-4.5-105 does not apply retroactively pursuant to our supreme court's holding in *People v. Hunter*, 2017 IL 121306, ¶ 48,

thus conceding the argument. As discussed above, however, we are remanding this matter for resentencing. 730 ILCS 5/5-4.5-105(b) (West 2016). Accordingly, where "a defendant's sentence is vacated on appeal and the matter remanded for resentencing, under section 4 of the Statute on Statutes, the defendant may elect to be sentenced under the law in effect at the time of the new sentencing hearing." *Id.* ¶ 54.

¶ 71 CONCLUSION

¶ 72 For the reasons stated, we affirm defendant's conviction. Defendant's sentence, however, is vacated and the matter is remanded to the circuit court for resentencing.

¶ 73 Affirmed in part; vacated in part; remanded.