2019 IL App (4th) 170570-U

NO. 4-17-0570

FILED
April 9, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
BRETT M. WILSON,	)	No. 12CF51
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The mandatory consecutive nature of defendant's sentences, for offenses committed when defendant was 17 years old, does not violate the proportionate penalties clause of the Illinois constitution.

(2) Defendant was not prejudiced by the trial court's decision to order defendant to disclose to the State his expert witness's notes before the sentencing hearing.

(3) By not providing relevant authority to support his claim, defendant forfeited his argument the trial court gave improper weight at sentencing to hearsay evidence contained in a report provided by the Illinois Department of Corrections.

(4) Defendant has not established he was denied his constitutional right to the assistance of counsel when the trial court stated it determined defendant's sentence before hearing the recommendations of counsel.

(5) Defendant did not prove cumulative error denied him the right to a fair sentencing hearing.

¶ 2 In January 2013, a jury found defendant, Brett M. Wilson (born April 14, 1993), guilty of five counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and five counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)). The trial court sentenced defendant to five terms of natural life. On appeal, this court upheld defendant's convictions but found the natural-life sentences violated the eighth amendment's prohibition against cruel and unusual punishment (U.S. Const., amend. VIII). *People v. Wilson*, 2015 IL App (4th) 130512, ¶ 103, 44 N.E.3d 632. We remanded for resentencing. *Id.* ¶ 106.

¶ 3 In April 2017, the trial court sentenced defendant to consecutive terms of 9 years' imprisonment on each count of predatory criminal sexual assault of a child, for a total of 45 years. Defendant appeals, arguing (1) his sentences violate the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), (2) the court improperly allowed the State to obtain the defense expert's notes before sentencing, (3) the court erroneously gave weight to hearsay evidence in a report provided by the Illinois Department of Corrections (DOC) as the report lacked reliability and corroboration, (4) the court denied defendant his right to the assistance of counsel by fashioning his sentence before hearing the closing arguments of counsel, and (5) the cumulative effect of trial-court error denied defendant a fair sentencing hearing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2012, defendant was charged with committing the above offenses against three half-siblings: A.H. (born June 16, 2004), T.H. (born October 12, 2005), and J.H. (born April 15, 2003). Defendant, A.H., T.H., and J.H. have the same mother. Counts I through

III allege defendant committed mouth-to-penis penetration with each child, all under the age of 13, on October 19, 2010. Count IV alleges penis-to-mouth penetration with A.H. on June 16, 2011. Count V alleges penis-to-mouth penetration with A.H. on some day between October 1, 2011, and November 30, 2011. Counts VI through X allege aggravated criminal sexual abuse.

¶ 6 At trial, A.H., T.H., and J.H. testified, describing the assaults against them. A.H., age seven at the time of the first offense, described four separate occasions defendant had her put her mouth on his penis. After the first incident, defendant told A.H. they would go to foster care if she told anyone. J.H. testified, when he was seven or eight years old, defendant had him put his mouth on defendant's penis. J.H. also testified defendant told him they would go to foster care if J.H. disclosed the incident. T.H. testified he was six years old when defendant had him put his mouth on defendant's penis. Defendant denied the allegations in his testimony and presented evidence contradicting the children's testimony. The contradictory evidence included testimony indicating Tom H., the father of A.H., T.H., and J.H., sought multiple orders of protection against defendant and his mother and had previously influenced the children to make false statements. A more detailed summary of the witnesses and their testimony is unnecessary for the disposition of this appeal but can be found in our opinion following defendant's initial appeal. See *Wilson*, 2015 IL App (4th) 130512, ¶¶ 3-57.

¶ 7 In January 2013, the jury found defendant guilty on all charges. The trial court, relying on section 11-1.40(b)(1.2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/11-1.40(b)(1.2) (West 2010)), concluded the law required defendant be sentenced to natural life on all five counts of predatory criminal sexual assault.

¶ 8 On appeal, this court found defendant's natural-life sentences violated the eighth

amendment's probation against cruel and unusual punishment. *Wilson*, 2015 IL App (4th) 130512, ¶ 103. We reversed the natural-life sentences and remanded for resentencing. *Id.* ¶ 106.

¶ 9 In October 2016, the State filed a discovery request under Illinois Supreme Court Rule 413 (eff. July 1, 1982). According to the request, the State anticipated defendant would call psychologist, Brooke Kraushaar, to testify as an expert witness. The State requested discovery materials regarding compensation and any notes and materials related to the preparation of her report. The State alleged the evidence was relevant to the witness's credibility and bias and to determine whether the State would retain an expert in rebuttal.

¶ 10 The trial court conducted a hearing on the issue. Defendant argued Rule 413 did not authorize discovery before a sentencing hearing. The State countered disclosure of the requested information was authorized by Rule 413 or equitable considerations of fundamental fairness. The State noted defendant's use of a 16-page expert report evaluating defendant for the *Miller* factors (see *Miller v. Alabama*, 567 U.S. 460 (2012)) identified 48 items the expert relied upon that the State had not seen before, including "the Static 99R" and "the Stable 2007." The State maintained it would not be able to cross-examine the expert effectively without seeing the tools Dr. Kraushaar used.

¶ 11 The trial court granted the State's discovery request. The court looked to the supreme court rule regarding controlled expert witnesses (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)) and the accompanying committee comments. The court determined the purpose of the rule was to prevent unfair surprise. The court found "the courts have adopted a policy of fairness and due process and making sure that parties, whether it be, again, plaintiff, defendant, State, [or] defense, that parties be aware of what evidence could or might be submitted at the time of a

hearing in court."

¶ 12 Defendant's sentencing hearing on remand was held in April 2017. Defendant's best friend, mother, and grandmother testified to defendant's difficult upbringing, maturation, and caring character.

¶ 13 Defendant also presented the expert opinion of Dr. Kraushaar, a clinical and forensic psychologist. Dr. Kraushaar testified she conducted a psychological examination of defendant. She agreed in the "last several years" increased legal attention had been given to resentencing defendants who were juvenile offenders. Her evaluation of defendant included consideration of the "*Miller* factors." Dr. Kraushaar considered defendant's age and maturity and how those factored into his arrest and conviction. Dr. Kraushaar examined factors unique to juveniles, circumstances of his family and upbringing, and defendant's rehabilitative potential. Dr. Kraushaar compared the teenage brain to the brain of an adult:

> "Adolescents are like unfinished products. They are not done growing so to speak. The brain does not really reach full maturity until about ages 22 to 24. And so teenagers are operating with a different part of their brain called the limbic system. I don't want to get too technical. But if anybody in here has ever had a panic attack before, like a wave of terror that washes over your body and you can feel it in your body, like something bad is about to happen, that's your limbic system. But that's also the part of the brain that is dominant in a teenager. That's why sometimes teenagers can be a little bit more emotional, more impulsive. They

> also tend to have a weaker future orientation. They don't necessarily think about how their actions can affect the future and they more live in the moment. And so it's not until about age 22 to 24 that that frontal lobe, which is more in charge of judgment impulse control, planning, that part becomes dominant as an adult. But as a teenager, this more emotional part of the brain is in charge. And so because the brain is not done developing, kids have this unique capacity to rehabilitate themselves as they get older because their actions as a teenager don't necessarily reflect who they are as an individual on the whole."

¶ 14 Dr. Kraushaar testified, in forming her opinions, she consulted the trial transcripts, the victim interviews, polygraph results, the incident reports, and orders of protection. Dr. Kraushaar also interviewed defendant, his parents, and his grandmother. Dr. Kraushaar spent approximately six hours with defendant. During her time with defendant, she conducted a clinical interview, mental-status examination, intelligence tests, a personality-assessment instrument, and some risk-assessment measures. On the Wechsler Adult Intelligence Scale, which measured four different areas of intelligence, defendant performed very well. His verbal comprehension area had a score in the 86th percentile. In the area of perceptual reasoning, he scored in the 92nd percentile. He scored in the 90th percentile for working memory. Defendant's intelligence quotient (IQ) measured at 123, the superior range of intellectual functioning. Dr. Kraushaar opined defendant was a "smart young man."

¶ 15 According to Dr. Kraushaar, defendant indicated no glaring signs of

psychopathology. He tended to be a little bit guarded. Defendant did not like to talk about his feelings. He was not an impulsive person but maybe liked "a little adventure from time to time." Defendant tended to avoid social situations because he was careful and suspect. Defendant was a "very private person" and was "even-tempered."

¶ 16 Dr. Kraushaar conducted a test called "Stable-2007," a test for recidivism. The test examined empathy and how well people relate and have concern for others. The test measured impulsivity and problem-solving skills. It also looked at deviant sexual kinds of interests. Defendant placed in the moderate risk range. Defendant scored "a little bit below other people in prison for similar offenses."

¶ 17 Defendant reported having positive social influences in his life. He felt connected with family and friends. Defendant cared very deeply, and he tended to feel pretty well-integrated socially in prison. He was optimistic about himself and his future. He did not experience loneliness or feel rejected, even though sex offenders may feel very rejected and ostracized. According to Dr. Kraushaar, defendant seemed to have good self-control and problem-solving skills. Defendant did not have unhealthy sexual preoccupation. He did not emotionally identify with children nor was he sexually attracted to them. Defendant did not indicate psychological facts associated with recidivism. Defendant did not meet the criteria for mental illness. Defendant did not "pose much in the way of risk in terms of sexual reoffending."

¶ 18 According to Dr. Kraushaar, when defendant committed the offenses, defendant was "still operating with a less mature, potentially a little bit more emotional, a little bit more impulsive, not[-]quite[-]thinking[-]about[-]the[-]future type of brain." Dr. Kraushaar believed defendant matured based on her observations when she met him. There were no indications, such

as a history of juvenile delinquency or conduct problems, to indicate "he is like some unalterable criminal character." Dr. Kraushaar opined defendant's "rehabilitation potential is very good."

¶ 19 Dr. Kraushaar observed defendant was reared in a chaotic home environment in which his siblings experienced abuse. Defendant did not demonstrate lasting psychological damage from this upbringing.

¶ 20 On cross-examination, Dr. Kraushaar, when asked about the recidivism tests, acknowledged only a small number of sexual offenders fall within the high-risk category and most fall within the moderate range. Dr. Kraushaar testified she did not receive the records from the DOC until after she filed her report. The State introduced a report of defendant's job-placement history at the DOC, which indicated 22 jobs and multiple "segregation" notations. When the State asked Dr. Kraushaar whether defendant's inability to maintain a job factored into her decisions, the doctor replied she would need more information than what appeared on the page.

¶ 21 The State further questioned Dr. Kraushaar about her notes. The State specifically asked about Dr. Kraushaar's note of the following: "How can I weave Tom's vindictive litigious nature into the story, or should I avoid that?" Dr. Kraushaar opted instead to let her account and evaluation speak for itself. Dr. Kraushaar testified she would make $8000 for her work in preparing the report and in testifying.

¶ 22 During cross-examination of Dr. Kraushaar, the State asked Dr. Kraushaar about an evaluation titled "Mental Health Evaluation for Brett Wilson, Inmate Number M35918, dated April 4, 2013," which notes defendant admitted penetration on all three victims. Defense counsel objected as to foundation. The trial court asked if the evaluation was an official record of the

DOC. The State confirmed it was an official record of the DOC and responded it was "one of the documents received from the court subpoena." The court found the document to be a business record. The State then asked it be admitted as such. The court ruled: "[T]here is an indication that the document was prepared by Charles Woods[,] MS. And so for a variety of reasons, the first whether it will be admitted under an exception to the hearsay rule; however, hearsay so long as it's deemed reliable is also admissible at a sentencing hearing."

¶ 23 The State then asked the trial court to consider the document in the cross-examination of Dr. Kraushaar and as evidence. Defense counsel objected, arguing it could not test the veracity of the person who wrote the report. Defense counsel asked for additional foundation from the State.

¶ 24 The trial court concluded an exception to the hearsay rule applied. The court also found it admissible hearsay at sentencing, so long as it was deemed reliable. The court admitted the evaluation. Dr. Kraushaar testified defendant "consistently denied" the offenses when he spoke to her.

¶ 25 The trial court admitted Dr. Kraushaar's report into evidence. In addition to matters to which Dr. Kraushaar testified, the report indicates the Department of Children and Family Services (DCFS) went to defendant's home multiple times after his mother married Tom H. Many allegations of abuse had been made against Tom H. Allegations were also made against defendant's parents. As a result, defendant was moved into foster care for some time. Tom H. filed approximately eight orders of protection against Belinda and one against defendant. Tom H. also made multiple reports to the police, which were deemed unfounded. Defendant had no additional legal problems, although he fought once or twice in middle school, stole candy or

money from his mother or grandmother, and was truant five to six times during his senior year of high school. Defendant tried alcohol initially at age 16 and marijuana at age 14. While in prison, defendant broke two bones in his hand while fighting an inmate.

¶ 26 The State argued the trial court "should proceed with strong hesitation to give any credibility to the good doctor's testimony." The State maintained the expert charged the county $8000 to give an opinion parroting the defense theory at trial. The State emphasized defendant fell within the majority of where sex offenders fall—in the middle of the bell curve. Defendant was at a moderate risk to reoffend. The State argued "[c]ommon sense doesn't dictate that a 17-year-old doesn't know it's wrong to put [his] penis in a five-year-old's mouth." The State asked for 12 years on each offense consecutively, noting the consecutive nature of the sentences was mandated by statute. At the close of the State's argument, the court asked "just to confirm, 60 is the total that you are requesting?"

¶ 27 Defendant argued he should be sentenced under section 5-4.5-105 of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016)), which codifies *Miller*. Defendant noted five counts multiplied by the minimum of six years equaled 30 years' imprisonment. Defendant suggested under the current case law, *People v. Harris*, 2016 IL. App (1st) 141744, 70 N.E.3d 718, the trial court had the option of sentencing him to a lesser amount if the sentences were found to violate the proportionate penalties clause of the Illinois constitution. In mitigation, defendant argued he did not cause or threaten serious harm. Defendant pointed to the absence of a criminal or juvenile record. Regarding the *Miller* factors, defendant emphasized his young age and the tumultuous household he resided in during his early teens. He pointed to the fact he escaped this background by moving in with his grandmother and finishing school. Defendant

argued he was very intelligent and the tests on sexual recidivism indicated "he is really not a risk" and he fell within the "low to moderate" range. Defendant asked for the minimum sentence.

¶ 28 The trial court ruled as follows, in part:

> "The Court having considered for purposes of the resentencing hearing the evidence at trial, the gravity of the offenses, the presentence report as amended, Court further having considered the financial impact of incarceration, all evidence, information and testimony in aggravation and mitigation, including the exhibits which were admitted, the Court having further considered the history, character and attitude of the defendant, along with his potential for rehabilitation, which I will qualify more here in just a few minutes, as well as all sentencing options, and all hearsay that was presented and deemed relevant and reliable.
>
> The Court further will find that it has considered that youth are constitutionally different than adults, that they lack a certain level of maturity, that they have an underdeveloped sense of responsibility, vulnerability, negative influences and outside pressures and a limited control over their environment and capacity for change. The Court will also indicate that I have further considered the defendant's chronological age, including his maturity, impetuosity and failure to appreciate risks and

consequences, his family and home environment, the circumstances of the offenses, including the susceptibility of the defendant to familial and peer pressures, the incompetencies of youth, including the ability to deal with—or perhaps inability to deal with police officers, prosecutors or defense counsel. [The] Court *** further considered the reduced culpability due to the defendant's age and capacity for change as well as the defendant's relevant life history as well. The Court has already considered again the arguments of counsel and would find and order as follows: The defendant is being resentenced for five Class X felonies[.]

* * *

[T]he maximum penalty that could be imposed up to 240 years notwithstanding basically why we are back here, which is to acknowledge that although 240 years is not technically a mandatory life sentence, in reality it would be.

The Court further having considered—I think I said already before—the factors in aggravation and mitigation and then in assessing and weighing the recommendations of counsel, giving weight to the U.S. Supreme Court decisions, in particular in *Graham v. Florida*, but that is not to the exclusion of the other cases, *Miller, et cetera*, and would note that under *Graham v.*

Florida, that the State must give the defendant or defendants some meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation, and, further, that the Eighth Amendment prohibits the states from making the judgment at the outset that juvenile offenders of nonhomicidal crimes would never be fit to reenter society.

* * *

Interestingly enough, there wasn't much comment about People's Exhibit B, and I have to be careful in what I say then as well, but I did indicate that I would relate to [c]ounsel the weight that the [c]ourt is giving to that particular exhibit which has been admitted, and I think that I must do that for purposes of the record. It is hearsay. And so it's reliable, though, because it is an official record and document. And what the Court is finding is that People's Exhibit B constitutes both a mitigating and aggravating factor. It's an aggravating factor because, as testified to by the doctor, the defendant has consistently denied to her or his involvement as the perpetrator of these crimes. It's a mitigating factor if it is substantive in nature in that the defendant has, in fact, admitted his culpability and responsibility as a perpetrator of these offenses, because then that would indicate a sense of remorse and constitute the defendant's first step toward rehabilitation that

would be required as is necessary for an individual who is required to successfully complete sex[-]offender treatment to acknowledge that they perpetrated the offense upon their victim or victims and that continual denial of those offenses delays rehabilitation.

So what am I to believe? I'm to believe at this point in time that there are mixed signals with respect to the defendant's recognition of his culpability and responsibility because the document, People's Exhibit B, would predate the statements that he made to Dr. Kraushaar. And I don't have enough information, however, to state that that is definitively the defendant's statement, or for that matter that he has then retracted his statement in order to put a better foot forward before the Court at the time of the sentencing hearing. So I'm indicating what reliability I'm giving to the exhibit is that it's reliable, but it serves as both an aggravating and mitigating circumstance to the [c]ourt.

I don't want [c]ounsel to feel—and I guess when I ultimately indicate what my decision is—that I have split the baby in half. In reality, before I even heard what your recommendations were going to be, the [c]ourt had come to the conclusion that the defendant was going to be sentenced to consecutive [9]-year terms for a total of 45 years in the [DOC]. And the reason why I'm doing that is taking into consideration the factors which the [c]ourt has

> demonstrated and indicated, for purposes of the record I have, but also then having calculated that the defendant is currently 24 years of age at the time he is being resentenced. He is being given credit for 1,924 days. That means that he has served about five-and-a-quarter years in the [DOC]. Since these are 85[%] sentences, a 45-year sentence means that he will have to serve an additional 38.25 years. However—excuse me, but he will actually serve 38.25 years. Given the 5.25 years credit against that *** he is going to serve another 33 years. And that means that he is going to be getting out when he is 57 years of age. The defendant getting out at 57 years of age from the [c]ourt's perspective does allow enough of an incentive, not only to the defendant *** to continue with rehabilitation, but also to recognize that in today's day and age and the life span of individuals, that there is a considerable period of time following the date of his release for which he could still enjoy a meaningful and satisfying life outside of the [DOC], but which, nonetheless, would have him pay his debt to society as a result of having committed these offenses. And so that will be the [c]ourt's sentence."

¶ 29 Defendant filed a motion to reconsider sentence, which the trial court denied. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Proportionate Penalties Clause

¶ 32 Defendant begins his proportionate-penalties argument by asserting "[t]he mandatory consecutive nature of [his] sentences for Counts I-III violates the proportionate penalties clause of the Illinois Constitution." Counts I through III allege offenses committed when defendant was 17 years old. Defendant clarifies his challenge on appeal is not to the statute mandating consecutive sentencing but to the application of the statute to him, a minor when the crimes were committed. Defendant argues his sentence violates the proportionate penalties clause as it fails to take into account his age and its attendant circumstances at the time of the offenses and his low risk of recidivism.

¶ 33 The proportionate penalties clause of the Illinois Constitution requires Illinois courts, when fashioning a criminal sentence, to do so "according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The limitation on penalties set forth in the proportionate penalties clause "focuses on the objective of rehabilitation ***." *People v. Clemons*, 2012 IL 107821, ¶ 40, 968 N.E.2d 1046. "[T]he proportionate penalties clause is violated only where a legislative punishment for a particular offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Davis*, 177 Ill. 2d 495, 502, 687 N.E.2d 24, 27 (1997), *overruled on other grounds by People v. Sharpe*, 216 Ill. 2d 481, 506-07, 533, 839 N.E.2d 492, 508-09, 523 (2005).

¶ 34 Defendant was convicted of five counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2010)). The sentence for each of these counts, Class X felonies, is a term of imprisonment of 6 to 60 years. *Id.* § 11-1.40(b)(1). Section 5-8-4(d)(2) of the Unified

Code of Corrections (730 ILCS 5/5-8-4(d)(2) (West 2010)) mandates these sentences be served consecutively. Defendant's convictions for five offenses of predatory criminal sexual assault thus exposed him to a term of 30 to 300 years' imprisonment. For his convictions for counts I-III, committed when defendant was 17 years old, defendant was eligible for a consecutive sentence of 18 to 180 years.

¶ 35 Defendant argues that the application of section 5-8-4(d)(2) to the offenses committed when he was 17 years old is unconstitutional. This is an as-applied challenge to the statute. When a defendant raises an as-applied challenge to a statute, that party must show the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party. *People v. Harris*, 2018 IL 121932, ¶ 38. When a defendant asserts an as-applied challenge under the proportionate penalties clause, this court will overturn a sentence if "the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 338, 781 N.E.2d 300, 307 (2002). It is presumed the statute is constitutional. *Id.* at 335. Due to this presumption, the challenging party bears the burden of proof. *Id.*

¶ 36 At first, defendant's opening brief seems to suggest the mandatory consecutive nature of the applicable sentencing provisions, without consideration of the specific circumstances of defendant's case, is unconstitutional as applied to youth offenders. Defendant highlights the recent trio of United States Supreme Court decisions that plainly establish "youth matters in sentencing" (*People v. Holman*, 2017 IL 120655, ¶ 33, 91 N.E.3d 849 (citing *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012)). *Roper* establishes the eighth amendment bars capital sentences for

juveniles who commit murder. *Roper*, 543 U.S. at 578-79. The *Graham* court concluded the eighth amendment bars mandatory life sentences for juveniles who committed non-homicidal offenses. *Graham*, 560 U.S. at 82. *Miller* prohibits mandatory life sentences for juveniles who have committed murder. *Miller*, 567 U.S. at 489. Defendant relies on these cases as showing children lack the neurological and psychological development of adults, resulting in "children hav[ing] a lack of maturity and underdeveloped sense of responsibility, leading to recklessness, impulsivity and heedless risk-taking." (Internal quotation marks omitted.) *Id.* at 471. Defendant points to juveniles' vulnerability to outside influence and pressure, as well as their inability to remove themselves from crime-producing settings. *Id.*. Defendant emphasizes society has evolved when it comes to harsh sentences for juveniles.

¶ 37 Defendant recognizes, however, the *nature* of the applicable mandatory-consecutive-sentence statute does not alone render defendant's sentence unconstitutional. Indeed, defendant points to *People v. Patterson*, 2014 IL 115102, ¶¶ 107-08, 25 N.E.3d 526, where our supreme court rejected a similar argument regarding the automatic-transfer statute (705 ILCS 405/5-130 (West 2008)) and the consecutive-sentence statute (730 ILCS 5/5-8-4(a)(ii) (West 2008)). In *Patterson*, 2014 IL 115102, the court held the considerations of *Graham*, *Roper*, and *Miller* did not apply to the 15-year-old offender's 36-year term following three counts of aggravated criminal sexual assault, as the 36-year term did not compare to the death penalty or life in prison without parole. *Id.* ¶ 110.

¶ 38 Defendant argues, however, the specific circumstances of his case, in addition to his age and youth's attendant circumstances, show his 27-year sentence is "wholly disproportionate to the offense as to shock the moral sense of the community." *Miller*, 202 Ill. 2d

at 338. Defendant points to his lack of criminal history, the absence of the potential to repeat the offenses, his chaotic home life, and Dr. Kraushaar's opinion defendant's crimes were the result of his being a teenager.

¶ 39 We find defendant has not met his burden of establishing his sentence for counts I-III is cruel, degrading, or so wholly disproportionate as to "shock the moral sense of the community." As the evidence at sentencing establishes, defendant's intelligence was high. The testing by Dr. Kraushaar indicates defendant's intellectual capacities exceeded 94% of the population. When defendant was 17½ years old, he sexually assaulted his half-siblings, who were 5, 6, and 7 years old. He threatened the young children with removal from their family should they tell anyone of his offenses. Despite his youth and its attendant circumstances—factors the trial court considered—a combined 27-year term for these offenses would have permitted defendant's release from imprisonment around age 41. The sentence for the offenses defendant committed when he was 17 does not violate the proportionate penalties clause.

¶ 40 B. Pre-Sentencing Discovery Order

¶ 41 Defendant next contends the trial court erroneously permitted the State to obtain the defense expert's notes before sentencing. According to defendant, this error allowed the State to undermine the expert's credibility. Defendant argues discovery is permitted only for *trials* in criminal proceedings as the rules for discovery in criminal cases refer to the "accused." See, *e.g.*, Ill. S. Ct. R. 411 (eff. Dec. 9, 2011); Ill. S. Ct. R. 412 (eff. Mar. 1, 2001). Defendant further emphasizes while older versions of Rule 411 extended discovery to *sentencing hearings* for any accused charged with a death-penalty-eligible offense (Ill. S. Ct. R. 411 (eff. Mar. 1, 2001)), the more recent versions of that rule excluded that language and did not expand discovery for all

sentencing hearings (see Ill. S. Ct. R. 411 (eff. Dec. 9, 2011)).

¶ 42 In further support of his argument, defendant heavily relies on the Illinois Supreme Court's decision in *People v. Lee*, 196 Ill. 2d 368, 752 N.E.2d 1017 (2001). In *Lee*, the defendant was convicted after a bench trial of first degree murder of a police officer. *Id.* at 369. The State sought the death penalty. *Id.* at 371. After the conclusion of the bench trial, the State renewed its motion for disclosure of expert opinions and for a psychiatric examination of defendant. *Id.* at 375. The State argued "it was entitled to a fair opportunity to rebut any information defendant might present at the death[-]penalty hearing regarding his mental health." *Id.* Ultimately, after opening arguments were made to the jury on the eligibility phase of the death-penalty hearing, the State renewed its request to perform a psychiatric examination of defendant. *Id.* The circuit court granted the State's renewed motion, finding "it was a lesser evil to allow the State's expert to examine defendant than to allow the State's expert to testify without benefit of an examination, and, possibly persuade the jury that defendant should be sentenced to death." *Id.* at 376. At the hearing, three experts testified on defendant's behalf regarding defendant's mental health. *Id.* at 376-78. The State countered with one witness who performed a psychiatric examination on defendant pursuant to the court order. *Id.* at 379. Defendant was sentenced to death. *Id.* at 372.

¶ 43 On appeal in *Lee*, the critical question for the court was whether the trial court could mandate defendant submit to the examination by the State's expert witness. *Id.* at 380. The court found neither a statute nor supreme court rule permitted the trial court to order the examination. We note, at that time, the supreme court rules governing discovery did not apply to death-penalty hearings. *Id.* at 381. The court found because "[t]he trial court's order was not

authorized either by statute or by rule" it was improper. *Id.* at 382. Having concluded the order was erroneous, the court asked whether the error prejudiced defendant. *Id.* at 382-83. The court found that it did. *Id.* at 383. The court concluded the testimony by the State's expert who performed the psychological examination of defendant contradicted defense theories and related to the jury information defendant provided regarding his state of mind on the day of the shooting. *Id.* at 383-84.

¶ *44* *Lee* raises questions regarding the propriety of the trial court's order. As in *Lee*, there does not appear to be a rule or statute applicable to criminal proceedings that authorizes the trial court's disclosure order. Here, the court cited none, relying instead on Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007), a rule within Article II, entitled "Rules on Civil Proceedings in the Trial Court," and on "a policy of fairness and due process." We note the *Lee* court denied any argument the discovery order in that case could be based on fairness grounds. See *Lee*, 196 Ill. 2d at 382 (rejecting the State's request to impose a rule grounded in equity to allow the psychiatric examination). In rejecting that argument, the court observed "the actions of the trial court and the actions of this court must be guided by the supreme court rules as presently written." *Id.*

¶ 45 However, we need not decide whether or not the order was proper under the civil rule, as defendant suffered no prejudice as a result of the order. As stated above, *Lee* establishes reversible error on an improper discovery order during sentencing requires trial-court error as well as prejudice resulting from that error. See *id.* at 382-83. As to the issue of prejudice, this case is not like *Lee*. The disclosure of the notes of the defense expert does not equate to an order to mandate the defendant to submit to a psychological examination. The former did not implicate

the protections of the fifth amendment, while the latter did. See *id.* at 388 ("Certain procedural safeguards embodied in our constitution serve to limit discovery by the defendant to the State to the end that a defendant will not be sentenced to death by the use of evidence he unwittingly provides.").

¶ 46 Defendant's sole argument regarding prejudice is that the State was able to use Dr. Kraushaar's notes—the handwritten question regarding whether to weave the vindictive, litigious nature of Tom H. into the report—to undermine her credibility. All of the information disclosed to the State contained matters about which the State could have questioned Dr. Kraushaar during sentencing. The State properly could have questioned Dr. Kraushaar regarding the bases of her opinions, the tests she performed on defendant, the results of those tests, the perceptions during the tests, and any notes she took while reviewing the evidence or preparing her report. The effect of the order was simply to provide the State the materials before sentencing, providing for a more efficient sentencing hearing. In addition, Dr. Kraushaar's credibility was sufficiently challenged by the fact she was hired to be a defense witness, she was paid $8000 to perform the tests and testify on defendant's behalf, and her report, which highlights multiple cases, including orders of protection, initiated by Tom H. A note questioning how to best advocate for a witness on whose behalf she was hired to advocate provides no more prejudice than the fact she was testifying on defendant's behalf and was paid to do so.

¶ 47 We therefore find the trial court's discovery order, whether erroneous or not, is harmless beyond a reasonable doubt. See *People v. McLaurin*, 235 Ill. 2d 478, 495, 922 N.E.2d 344, 355 (2009) (the burden of proving an error harmless, *i.e.*, lack of prejudice, is on the State when a party makes a timely objection and preserves an error for review).

¶ 48 C. Weight Afforded to the DOC Report

¶ 49 Defendant next argues the trial court improperly gave weight to the mental-health evaluation from the DOC. Defendant concedes the evaluation was admissible but argued no weight should have been given "due to its uncorroborated nature."

¶ 50 The flaw with defendant's argument is it is unsupported by legal authority. Defendant's statements of law establish both the applicability of the abuse-of-discretion standard and the rules of evidence typically do not apply at sentencing. See *People v. Williams*, 149 Ill. 2d 467, 490, 599 N.E.2d 913, 924 (1992). Defendant then states "evidence at sentencing is admissible so long as it is 'relevant and reliable.' " See *id.* Defendant's legal authority concludes with "[b]ecause hearsay is generally admissible at sentencing, 'a hearsay objection affects the weight rather than the admissibility of the evidence[.]' " See *People v. Spears*, 221 Ill. App. 3d 430, 437, 582 N.E.2d 227, 231 (1991). Defendant states the evaluation was admissible, thus conceding it was "relevant and reliable." See *Williams*, 149 Ill. 2d at 490 ("Evidence is admissible in a sentencing hearing provided the proffered evidence is relevant and reliable."). Defendant then argues the trial court gave the report improper weight as it was "unsupported by anything else in the record" or was "uncorroborated." Defendant, however, provides no legal authority or support that admissible hearsay during sentencing must not be given weight due to being uncorroborated. The only authority provided by defendant on appeal shows the trial court committed no error. Absent legal authority supporting his claim, defendant has forfeited this argument. See *People v. Jacobs*, 405 Ill. App. 3d 210, 218, 939 N.E.2d 64, 72 (2010) (finding an argument not properly supported by legal argument forfeited upon noting a court of review is entitled to have issues defined clearly with relevant authority cited and not act as a repository

into which an appellant may dump the burden of research and argument).

¶ 51 D. Parties' Sentencing Recommendations

¶ 52 After counsel's arguments at sentencing, the trial court made the following statement when rendering defendant's sentence:

> "I don't want [c]ounsel to feel—and I guess when I ultimately indicate what my decision is—that I have split the baby in half. In reality, before I even heard what your recommendations were going to be, the [c]ourt had come to the conclusion that the defendant was going to be sentenced to consecutive [9]-year terms for a total of 45 years in the [DOC]."

¶ 53 Defendant argues this last sentence establishes he was denied his right to the assistance of counsel when the trial court decided his sentence before hearing counsel's recommendations. Defendant relies primarily on *Herring v. New York*, 422 U.S. 853, 853-54, 863 (1975), in which the United States Supreme Court concluded New York violated this right by enacting a statute that permitted trial judges presiding over a bench trial to deny closing argument. While defendant acknowledges *Herring* explicitly limits its holding to "the conclusion of the evidence in a criminal trial" (*id.* at 863 n.13) and Illinois courts have refused to extend *Herring* to other proceedings, such as the right to oral argument on a motion to reconsider sentence (see *People v. Burnett*, 237 Ill. 2d 381, 390, 930 N.E.2d 953, 958 (2010)), he maintains a defendant is entitled to the assistance of counsel at sentencing, and the premature decision regarding his sentence violated that right. Moreover, defendant acknowledges he forfeited this argument by not raising it in the trial court but maintains we should consider the argument as

plain error.

¶ 54 As defendant acknowledges, he failed to raise this argument before the trial court. *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675. Arguments not made at trial and in a posttrial motion are forfeited. *Id.* Otherwise forfeited errors may, however, be considered for the first time on appeal "if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." (Internal quotation marks omitted.) *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 26, 25 N.E.3d 1. Our initial task in plain-error analysis is consideration of whether a clear or obvious error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Defendant bears the burden of establishing clear error. *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 479-80 (2005).

¶ 55 We are not convinced defendant has been denied his fundamental right to the assistance of counsel. While our constitution guarantees the accused in state criminal prosecutions the fundamental right to the assistance of counsel (*Herring*, 422 U.S. at 856-57) and *Herring* holds the constitution requires a criminal defendant be provided closing summation at trial (*id.* at 863), defendant has not cited any authority or developed a legal argument to establish such a right should extend to sentencing. Indeed, the Illinois Supreme Court in *Burnett* decided "given the circumstances of this case and the arguments presented herein," not "to extend the absolute right to oral argument beyond its current circumscribed parameters." *Burnett*, 237 Ill. 2d at 390. The *Burnett* court ultimately found the right to counsel did not extend to oral argument on a motion to reconsider sentence. *Id.* Defendant's reliance on *Lafler v. Cooper*, 566 U.S. 156 (2012), and *People v. Stevens*, 338 Ill. App. 3d 806, 790 N.E.2d 52 (2003), is also unconvincing. *Lafler* establishes the accused are entitled to the assistance of counsel at sentencing but not that

the accused are denied that right if closing argument does not occur before a sentencing decision is reached. See *Lafler*, 566 U.S. at 165. *Stevens* involves a case in which the trial court repeatedly interrupted defense counsel during closing argument with questions undermining the argument and, before counsel completed argument, interrupted counsel mid-sentence by stating, "I'm as clear as can be and convinced as can be that the State has proven your client made those statements and by those statements specifically intended to keep someone from *** testifying in a criminal case." *Stevens*, 338 Ill. App. 3d at 807-09.

¶ 56 As the First District Court of Appeals recently made clear, there is a distinction between the act of a trial court's denying argument in its entirety, as in *Herring*, and the act of reaching a decision before argument is made. *People v. Little*, 2018 IL App (1st) 151954, ¶ 75. The First District, in *Little*, considered an argument based on *Herring* after the trial court in a bench trial mistakenly entered judgment before hearing closing argument. *Id.* ¶¶ 27-31. After defense rested, the trial court continued the case to review notes and the trial transcripts. *Id.* ¶ 27. When the case was recalled nearly three months later, the court announced its findings without holding argument. *Id.* ¶ 28. Defense counsel informed the court closing arguments had not been made. *Id.* ¶ 30. The court, promising to keep an open mind, offered defense counsel the opportunity to present closing argument. *Id.* After summation, the court apologized to counsel for not holding argument first but stated, " '[N]othing that you said, [counsel], would have changed my mind.' " *Id.* ¶ 31. The First District concluded "[r]eopening a case for closing argument is an adequate remedy for a premature judgment at a bench trial when the record shows that the judge was willing to hear the defense's argument with an open mind." *Id.* ¶ 94. In reaching that decision, the *Little* court held the following:

> "We need not—because *Herring* does not—indulge the fantasy that a trier of fact will suspend all judgment until the last word is uttered in rebuttal argument. Instead, the fair and open-minded trier of fact to which every defendant is entitled is one that—while striving to suspend judgment, as best it can—is open to revising the views it does reach along the way. It is a trier of fact that remains open, at all times, to the possibility that its impressions and beliefs thus far may ultimately be wrong, upon further evidence, argument, or reflection. It is a trier of fact that listens attentively and patiently, until the very end, for any evidence or argument that might sway its verdict." *Id.* ¶ 85.

¶ 57 Aside from the fact we are considering argument after *sentencing* as opposed to argument at *trial*, this case is more like *Little* than *Herring*. Here, closing argument was not denied. The trial court heard oral argument at sentencing. As in *Little*, the court's statements here, viewed in their entirety, do not indicate the court had a closed mind. The comments show the court heard and considered counsel's recommendations. After the State's closing argument, the trial court asked the State a clarifying question: "[J]ust to confirm, 60 is the total that you are requesting?" The court, in anticipation of a split-the-baby argument, was aware defendant requested the minimum, a total of 30 years. There is no language indicating the court was not open to change its mind upon further argument or reflection.

¶ 58 Defendant has not met his burden of proving clear error. See *Herron*, 215 Ill. 2d at 187 (holding "the defendant must show *** that there was plain error ***"). Defendant has

not established the holding in *Herring* should be extended to sentencing hearings in which the trial court heard oral argument and sentencing recommendations but indicated it reached a conclusion before hearing those recommendations.

¶ 59 E. Cumulative Error

¶ 60 Defendant last argues the trial court's errors in ordering discovery, giving weight to the DOC report, and making the sentencing determination before hearing argument cumulatively denied him a fair sentencing hearing.

¶ 61 While errors individually may not necessitate a reversal, such errors considered together may have the cumulative effect of denying a defendant a fair trial or sentencing hearing. See *People v. Emerson*, 189 Ill. 2d 436, 513-14, 727 N.E.2d 302, 344 (2000) (considering a cumulative-effect argument as to alleged errors at a capital-sentence hearing); *People v. Speight*, 153 Ill. 2d 365, 376, 606 N.E.2d 1174, 1178 (1992) (considering a cumulative-effect argument as to alleged trial errors). Here, however, we find defendant has not established cumulative error. As to defendant's alleged errors, we found the first, even if error, was harmless and could not have prejudiced defendant. The last two alleged errors were not proven. In these circumstances, no cumulative error exists.

¶ 62 III. CONCLUSION

¶ 63 We affirm the trial court's judgment. As part of our judgment, we grant the State its $50 assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 64 Affirmed.