

No. 1-09-0213

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 10737
	)	
SHAWN MILLER,	)	Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

*Held:* Defendant's convictions of heinous battery and second-degree murder were affirmed where: (1) defendant knowingly and understandingly waived his right to a jury trial; and (2) any error in the admission of hearsay evidence was harmless. Defendant's 40-year sentence for heinous battery was affirmed where the sentence did not constitute an abuse of discretion. The mittimus was corrected to reflect one additional day of pre-sentence credit.

Following a bench trial, the circuit court convicted defendant, Shawn Miller, of heinous battery and second-degree murder and sentenced him to consecutive terms of 40 years' imprisonment for the heinous battery conviction and 20 years' imprisonment for the second-degree murder conviction. On appeal, defendant contends the court erred by: (1) conducting a bench trial despite

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the absence of a jury waiver; (2) admitting hearsay evidence; and (3) imposing a 40-year sentence of imprisonment for heinous battery that was incommensurate with the severity of the offense. Defendant also contends he is entitled to an additional two days of pre-sentence credit. We affirm defendant's convictions and sentences and correct the mittimus to reflect one additional day of pre-sentence credit.

Defendant was charged with five counts of first-degree murder, one count of attempted first-degree murder, two counts of heinous battery, three counts of home invasion, two counts of aggravated domestic battery, and two counts of aggravated battery. On July 10, 2008, defendant appeared in court with defense counsel, who engaged in a discussion with the assistant state's attorney regarding an issue involving proof of other crimes. Defense counsel then engaged in the following colloquy with the court:

"MS. HERIGODT [defense counsel]: If you want, we can set a status for that and argue on the motion and set a trial date.

THE COURT: Bench or jury?

MS. HERIGODT: Bench.

THE COURT: There's a little problem and it goes to the probability of sending the case out because—

MS. HERIGODT: I'm not sure I would take a bench in another courtroom—

THE COURT: Okay.

MS. GONZALEZ [Assistant State's Attorney]: I'm doing a jury the week of the 16th, Judge.

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MS. HERIGODT: I am attending an out-of-state conference that week, and I have a double jury August 25.

THE COURT: How long is your out-of-state conference?

MS. HERIGODT: It's to the 21st, Judge. If we want to go that week after the 22nd, I just ask that we set it Tuesday and not Monday on account of traffic issues. Do you want to set an interim date for the motion?

THE COURT: You may.

MS. HERIGODT: I talked with counsel about August 18th or the 19th--August 18th, Judge, for the motions and September 23rd for the reserved trial date.

THE COURT: By agreement, 8-18, reserved trial date, September 23rd.

MS. GONZALEZ: I just want to be clear, is there a possibility of it being sent out?

THE COURT: Right now I'll make every effort."

On August 18, 2008, defendant was present in court when his defense counsel suggested a status date of September 3, 2008. Defense counsel further stated, "We are set for trial on this matter on September 23rd. That's a bench trial. I believe we'll be able to go on that date, but then the State will need a date to finish evidence." The circuit court granted a continuance until September 3rd, 2008.

On September 3rd, 2008, defendant again was present in court during a discussion of his upcoming bench trial. Defense counsel informed the court she had a jury trial on an unrelated case scheduled before Judge Alonso near the same time as the scheduled bench trial for defendant. The following discussion ensued:

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"THE COURT: Well, why did [you] stand there and let [yourself] get doublebooked?

MS. HERIGODT: [I] protested, Judge, vociferously protested, and Judge Alonso said that he would call you. Being as that's a jury trial, Judge, it's an '02 case, Judge Alonso thought that he took precedence over your Honor, and mine was a bench trial. Judge, we can reschedule the bench trial. Counsel and I have already—

THE COURT: Can we rearrange my entire calendar?

MS. HERIGODT: No, Judge.

THE COURT: That's what we're doing.

MS. HERIGODT: But we've endeavored to keep this bench trial as short as possible. We've already entered into some stipulations with regards to a great deal of the scientific evidence. So we are cognizant of your Honor's call."

The cause eventually proceeded to a bench trial on September 23, 2008. At trial, Bernice Sipes testified she had dated defendant on and off for approximately 16 years, and that defendant was the father of one of her children. In April 2005, she was living in an apartment at 400 South Laramie Avenue with her four children; defendant was not living with her. On the morning of April 15, 2005, Sipes was in her apartment and in bed with another man, Kwan Edwards. At approximately 5 a.m., defendant came into the apartment, entered the bedroom, and asked Edwards to identify himself. Defendant then threw hot grease on Sipes and engaged in a fight with Edwards. After the fight, Sipes saw Edwards walk out of the bedroom and fall to the floor. He had blood on his shirt.

Detective Steven Desalvo testified that at approximately 5:30 a.m. on April 15, 2005, he received an assignment to go to 400 South Laramie Avenue. When he arrived, Detective Desalvo

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saw Edwards lying dead on the floor of the front room. He had multiple stab wounds and lacerations. Detective Desalvo walked through the apartment and observed blood in Sipes' bedroom and a metal pot on the bedroom floor that had a burn mark underneath. Detective Desalvo later was informed, at approximately 4 p.m. on April 17, 2005, that a bloody knife had been recovered approximately a half-block from Sipes' apartment. Officers placed defendant under arrest on April 17, 2005.

The parties stipulated that if called to testify, assistant Cook County Medical Examiner, Doctor Lawrence Cogan would testify he performed an autopsy on Edwards and determined that Edwards died as a result of multiple stab and incise wounds and the manner of death was homicide. The parties also stipulated that if called as a witness, Detective Fanning would testify he interviewed Sipes on April 15, 2005, and she told him defendant threw a pot of scalding oil on her and on Edwards.

Doctor Gary An testified he is currently a trauma critical care surgeon at Northwestern Memorial Hospital. On April 15, 2005, Doctor An was working in the burn unit at Stroger Hospital, where he treated Sipes for second-degree burns to the right side of her face, both of her hands and forearms, and her right thigh. Sipes reported to him that hot grease had been thrown on her. Doctor An testified that Sipes stayed in the hospital for 11 days, during which time she required: pain management; the removal of dead tissue from her arms, face, and legs; and the application of topical antibiotics to facilitate her wound healing. Doctor An also testified that Sipes' injuries were consistent with having hot grease thrown on her.

Defendant testified that, in April 2005, he was living with Sipes at 400 South Laramie

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Avenue. In the late evening hours, on April 14, 2005, defendant was out with a friend. In the morning of April 15, he returned to 400 South Laramie Avenue and entered the apartment. The bedroom door was locked, so defendant took a knife from the kitchen and used it to help open the bedroom door. Defendant became angry when he saw Sipes in bed with Edwards. Edwards got out of bed and hit defendant. Defendant testified he stabbed Edwards in self-defense. Defendant denied throwing hot grease on Sipes.

Following all the evidence, the circuit court convicted defendant of heinous battery, second-degree murder, aggravated battery and aggravated domestic battery. The circuit court merged the aggravated battery and aggravated domestic battery convictions into the heinous battery conviction and sentenced defendant to 40 years' imprisonment on the heinous battery conviction and a consecutive term of 20 years' imprisonment on the second-degree murder conviction. Defendant filed this timely appeal.

Defendant contends he was denied his right to a jury trial when the circuit court conducted a bench trial without first obtaining a valid jury waiver. The right to a trial by jury is a fundamental right guaranteed by our federal constitution (U.S. Const., amends. VI, XIV) and the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §8, §13). See *People v. Bannister*, 232 Ill.2d 52, 65 (2008). The legislature has codified this right: "Every person accused of an offense shall have the right to a trial by jury unless \*\*\* understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2008). The legislature also has provided: "[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in writing." 725 ILCS 5/115-1 (West 2008). However, our supreme court has held that the failure

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to file a written jury waiver does not require reversal as long as the waiver was knowingly and understandingly made in open court. *In re R.A.B.*, 197 Ill.2d 358, 364 (2001). The determination of whether a defendant made a knowing and understanding jury waiver does not rest on any precise formula but necessarily turns on the facts of the particular case. *R.A.B.*, 197 Ill.2d at 364. Where, as here, the relevant facts are not in dispute, we review *de novo* the issue of whether a defendant knowingly and understandingly waived his right to a jury trial. *People v. Bracey*, 213 Ill.2d 265, 270 (2004).

In the present case, the only mentions in the common law record of a purported jury waiver are the "JW" notations on the half-sheet on the final day of trial. When an entry in the common law record indicates a jury waiver has been made, a defendant seeking review of the question should include a transcript of the corresponding proceeding so that the court of review may determine whether the entry in the record reflects a valid jury waiver. *People v. Smith*, 106 Ill.2d 327, 335 (1985). Defendant here has provided us with transcripts which, he claims, belie the "JW" notations on the half-sheet and indicate no jury waiver ever was made.

The State initially claims defendant waived review by failing to object at trial or raise the issue in a post-trial motion. Defendant asks us to review the issue under the plain error doctrine. An issue may be reviewed for plain error under either of two prongs: (1) where the evidence is closely balanced; or (2) the error is of such magnitude to deprive defendant of a fair and impartial trial and remedying the error is necessary to preserve the integrity of the judicial process. *R.A.B.*, 197 Ill.2d at 363. Because of the fundamental nature of the right at stake, we review defendant's claim under the second prong. See *Bracey*, 213 Ill.2d at 270; *People v. Rankin*, 387 Ill. App. 3d 708,

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717 (2008).

A valid jury waiver exists if defense counsel expressly states in open court, in defendant's presence, without objection from him, that defendant opts to waive his jury trial in favor of a bench trial. *Rankin*, 387 Ill. App. 3d at 718. Such a valid jury waiver was made here. Specifically, on July 10, 2008, approximately two months prior to trial, the circuit court inquired of defense counsel in defendant's presence, "Bench or jury?" and defense counsel responded, "Bench." Thus, the circuit court afforded defendant notification of his right to a jury trial and of his choice to waive a jury and proceed to a bench trial. Acting through his attorney, defendant chose a bench trial. Following this decision to choose a bench trial, the circuit court immediately stated it might have to send the case to a different judge, at which point defense counsel expressed her reluctance to "take a bench in another courtroom" and the circuit court subsequently stated it would "make every effort" not to send the case out. This discussion provided further notification to defendant that the decision to waive a jury trial and take a bench trial was a strategic choice to have the case tried before a particular judge. Defendant offered no objections thereto. Further, on two subsequent occasions, August 18, 2008, and September 3, 2008, defendant again was present in court when his counsel reiterated to the circuit court the intent to take a bench trial in defendant's case. Also on September 3, 2008, defendant was present in court when his counsel related certain details of his upcoming bench trial, specifically, that the parties would stipulate to "a great deal of the scientific evidence." Defendant continued to voice no objections to the waiver of a jury trial in favor of a bench trial.

This case is similar to *People v. Frey*, 103 Ill.2d 327 (1984). In *Frey*, the defendant there, Brian J. Frey (Frey), was indicted on two counts of reckless homicide stemming from a car accident

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on March 6, 1981. *Frey*, 103 Ill.2d at 329. On October 8, 1981, the circuit court entered an order, approved by defense counsel, continuing the case for a bench trial and stating that defense counsel indicated Frey was waiving a jury trial. *Frey*, 103 Ill.2d at 329. On October 20, 1981, defense counsel filed a motion again stating that Frey had waived a jury trial and requested the judge, as "trier of the facts," to view the scene of the accident. *Frey*, 103 Ill.2d at 329. On January 27, 1982, the State filed an information charging Frey with one count of driving under the influence, based on the same accident. *Frey*, 103 Ill.2d at 330. The parties thereafter agreed to try the reckless homicide charges separate from the driving under the influence charge. *Frey*, 103 Ill.2d at 330. On the day of trial, Frey was present and did not object to the circuit court's statement that "these causes were set today for purposes of bench trial." *Frey*, 103 Ill.2d at 331. The circuit court acquitted Frey of the reckless homicide charges but convicted him the next day of driving under the influence. *Frey*, 103 Ill.2d at 331. At the hearing on the motion for a new trial, the prosecutor gave unrebutted testimony in Frey's presence that Frey had been "present on occasions when the matter of a bench trial was discussed, and at some point was advised of his right to trial by a jury or by the court." *Frey*, 103 Ill.2d at 330. The circuit court apparently denied the motion for a new trial, but the appellate court granted Frey a new trial, finding he had not validly waived a jury trial. *Frey*, 103 Ill.2d at 331-32.

The supreme court reversed the appellate court, finding from the orders in the common law record and from the prosecutor's unrebutted testimony at the hearing on the post-trial motion that Frey "was aware of his right to a jury trial and was present at some point prior to trial when the jury waiver was discussed." *Frey*, 103 Ill.2d at 333. Factored with Frey's "silent acquiescence in the

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judge's statement in his presence on the day of trial that all counts were set for bench trial," the supreme court held that he had knowingly and understandingly waived his jury right. *Frey*, 103 Ill.2d at 333.

Similar to *Frey*, defendant here was present in court prior to trial when the judge specifically referenced his right to a jury trial and when defense counsel indicated defendant was waiving that right in favor of a bench trial. Defendant voiced no objections to the jury waiver, nor did he object on the two subsequent occasions when his counsel reiterated the decision to take a bench trial. As in *Frey*, defendant's silent acquiescence to his counsel's statement in open court waiving a jury trial in favor of a bench trial leads us to conclude that the jury waiver was made with defendant's knowing and understanding consent.

This case also is similar to *People v. Asselborn*, 278 Ill. App. 3d 960 (1996), and *People v. Tucker*, 183 Ill. App. 3d 333 (1989). In *Asselborn*, defense counsel engaged in the following colloquy with the circuit court on the day of trial and in defendant's, Daniel Asselborn's (Asselborn's), presence:

"THE COURT: Have a seat. Jury waiver. Bench or jury?"

MR. LEVIN [Defense Counsel]: It will be a bench your Honor." *Asselborn*, 278 Ill. App. 3d at 962.

The appellate court held that this colloquy sufficiently apprised Asselborn of his right to a jury trial and the waiver thereof and that Asselborn's failure to object constituted a knowing and understanding waiver of his right to a jury trial. *Asselborn*, 278 Ill. App. 3d at 962-63.

In *Tucker*, the circuit court inquired of defense counsel on the day of trial and in defendant's,

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Dale Ray Tucker's (Tucker's), presence, "Jury trial?" and defense counsel responded, "No. Bench." *Tucker*, 183 Ill. App. 3d at 334. As in *Asselborn*, the appellate court held that this brief colloquy was sufficient to apprise Tucker of his right to a jury trial and his waiver thereof and that Tucker's failure to object constituted a knowing and understanding waiver of his right to a jury trial. *Tucker*, 183 Ill. App. 3d at 334-35.

In *R.A.B.*, the supreme court cited *Tucker* as an example of a valid waiver, noting the circuit court's mention there in Tucker's presence of his right to a jury trial, as opposed to *R.A.B.*'s case, in which the purported jury waiver was invalid because no mention was made in open court of *R.A.B.*'s right to a jury trial. *R.A.B.*, 197 Ill.2d at 368.

The instant case presents an even stronger argument than in *Asselborn* and *Tucker* that the jury waiver was valid, because here in defendant's presence the circuit court not only mentioned defendant's right to a jury but also engaged in a discussion in which defense counsel specifically indicated the strategic reasoning behind choosing a bench trial instead of a jury trial. Defendant thus was made aware of his right to a jury trial and to the waiver thereof, and he made no objection when his counsel stated defendant was choosing a bench trial and when his counsel expressly reiterated that decision at two subsequent court appearances. Defendant's failure to object to the court hearing the case constituted a knowing and understanding waiver of his right to a jury trial.

The cases cited by defendant in support of his argument that he did not validly waive his jury right are distinguishable. In *People v. Scott*, 186 Ill.2d 283 (1999), and *R.A.B.*, 197 Ill.2d at 362-68, the supreme court found the purported, respective jury waivers invalid where the defendants were not present in court during any discussions of the jury waivers. In contrast to *Scott* and *R.A.B.*,

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defendant here was present in court and voiced no objection when the court specifically notified him of his right to a jury trial and his counsel stated defendant was waiving his jury right in favor of a bench trial. In *People v. Owens*, 336 Ill. App. 3d 807, 809-12 (2002), the appellate court held that the purported jury waiver was invalid where the record was unclear as to whether the defendant there was admonished of his right to a jury trial. In contrast to *Owens*, the record here clearly indicates that the court notified defendant of his jury right.

We further note that defendant has had previous experience waiving jury trials. Defendant's prior criminal record includes a domestic battery charge (of which he was acquitted) in which he opted for a bench trial in March 2005, approximately one month prior to his arrest here. Defendant also entered guilty pleas to several different cases from 1992 through 2004. Our supreme court has held that a defendant's prior criminal convictions give rise to a presumption he was familiar with his right to a trial by jury and the ramifications attendant to waiving this right. See *People v. Tooles*, 177 Ill.2d 462, 471 (1997).

Defendant argues that *Bracey* counsels against considering his criminal record in determining the validity of his jury waiver. In *Bracey*, the supreme court considered whether Ernest Bracey's (Bracey's) right to a jury trial was violated when the circuit court, relying on a jury waiver executed by Bracey in conjunction with his first trial, retried Bracey in a bench trial without ascertaining whether he again knowingly and understandingly waived his right to a jury trial. *Bracey*, 213 Ill.2d at 266-67. The supreme court held that the original written waiver and admonishments regarding Bracey's right to a jury trial were no longer of any effect once his first trial terminated (*Bracey*, 213 Ill.2d at 271), and the supreme court noted Bracey never was advised that upon retrial he again

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would have the choice to be tried by a jury. *Bracey*, 213 Ill.2d at 272. Rather, the record indicated Bracey was led to believe that the jury waiver he executed prior to his first trial obligated him to a bench trial once again. *Bracey*, 213 Ill.2d at 272. Accordingly, the supreme court held that Bracey did not knowingly and understandingly waive his right to a jury trial on retrial. *Bracey*, 213 Ill.2d at 273.

*Bracey* is inapposite, as the present case does not involve a retrial in which defendant mistakenly believed he was obligated to again take a bench trial. Further, nothing in *Bracey* calls into question, or even discusses, the supreme court's prior holding in *Tooles* that a defendant's criminal background indicates his presumptive familiarity with his constitutional right to trial by jury and the ramifications for waiving this right. Moreover, subsequent to *Bracey*, the supreme court again has held that a defendant's criminal record properly may be considered in determining the validity of his jury waiver. See *Bannister*, 232 Ill.2d at 71.

Accordingly, defendant's criminal background supports our conclusion that he was aware of his right to a jury trial and knowingly and understandingly waived his right thereto.

Next, defendant contends the circuit court erred during Sipes' redirect-examination by the State, when the court permitted her to testify that she told a doctor at Stroger Hospital that her ex-boyfriend had thrown hot grease on her while she was sleeping, and that her current boyfriend had been stabbed and killed. Defendant objected to Sipes' testimony on the basis that it constituted an inadmissible prior consistent statement. The State responded that Sipes' prior consistent statement was made to a treating physician and therefore fell within a hearsay exception for statements made by a patient to medical personnel for the purpose of medical diagnosis and treatment. The circuit

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court overruled the objection and allowed the testimony.

Generally, proof of a prior consistent statement is inadmissible hearsay that may not be used to bolster a witness's testimony. *People v. House*, 377 Ill. App. 3d 9, 19 (2007). Two exceptions exist to this rule: (1) when the prior consistent statement rebuts a charge that a witness is motivated to testify falsely; and (2) when the prior consistent statement rebuts an allegation of recent fabrication. *House*, 377 Ill. App. 3d at 19. Under the first exception, the prior consistent statement is admissible if it was made before the witness's motive to testify falsely came into existence. *House*, 377 Ill. App. 3d at 19. Under the second exception, the prior consistent statement is admissible if it was made before the alleged fabrication. *House*, 377 Ill. App. 3d at 19.

Defendant contends neither exception applies here because Sipes' prior consistent statement did not rebut a charge that she was motivated to testify falsely, nor did it rebut an allegation of recent fabrication.

Further, defendant also contends Sipes' prior consistent statement does not fall within the common law exception to the hearsay rule for statements made by a patient to medical personnel for purposes of medical diagnosis and treatment. This exception encompasses statements made to a physician concerning the cause or external source of the condition to be treated. *People v. Oehrke*, 369 Ill. App. 3d 63, 68 (2006). Defendant here argues that a portion of Sipes' statement identified defendant as the offender, and that such a statement falls outside the exception. See *Oehrke*, 369 Ill. App. 3d at 68 (holding that "[s]tatements identifying the offender \*\*\* are beyond the scope of the exception.") Defendant also argues that the other portion of Sipes' statement describes Edwards' death by stabbing, which was not relevant to Sipes' treatment and diagnosis and thus falls outside

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the exception.

The State does not disagree with defendant's arguments. Rather, the State argues only that defendant "opened the door" to Sipes' testimony by: (1) questioning her during cross-examination as to whether she was accidentally burned (as opposed to defendant intentionally burning her) on April 15, 2005; and (2) questioning her during cross-examination as to statements she made to police and medical personnel suggesting she had feelings of guilt regarding the incident.

In support, the State cites *People v. Dent*, 266 Ill. App. 3d 680 (1994), in which the defendant there, Christopher Dent (Dent), was convicted of first-degree murder and sentenced to 45 years' imprisonment. *Dent*, 266 Ill. App. 3d at 681. On appeal, Dent argued, in pertinent part, that the State improperly bolstered the credibility of its main witness, Sidney Crooks (Crooks), by eliciting testimony that Crooks made prior statements consistent with his trial testimony. *Dent*, 266 Ill. App. 3d at 686. The appellate court held that Dent had opened the door to Crooks' testimony by attempting to implicate Crooks as the murderer, and by attempting to show Crooks initially was under suspicion by police and, that Crooks omitted pertinent information when he gave his statements to police after the shooting. *Dent*, 266 Ill. App. 3d at 686-87. The appellate court held that once Dent opened the door to the issue of Crooks' culpability in the murder, the State properly was allowed to rehabilitate Crooks by eliciting prior statements consistent with his trial testimony implicating Dent. *Dent*, 266 Ill. App. 3d at 687.

The State here argues that, as in *Dent*, defendant opened the door to the challenged redirect testimony by attempting to blame Sipes for her injuries, calling into question what she told police after the incident, and questioning Sipes about other statements she made at the hospital regarding

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her feelings of guilt about the incident. Defendant counters that, even assuming he opened the door to these issues, any such redirect-examination still was required to comply with the rules against hearsay. In other words, defendant contends the State still could not elicit Sipes' prior consistent statement in the absence of a showing that it fell within one of the hearsay exceptions cited above. In support, defendant cites *People v. Howell*, 53 Ill. App. 3d 465 (1977), in which the appellate court held that even where defendant opened the door to re-examination of a particular topic, the testimony on re-examination still must be analyzed to determine whether it was hearsay or admissible nonhearsay. *Howell*, 53 Ill. App. 3d at 469-71.

We need not resolve whether the admission of Sipes' prior consistent statement was error in the absence of a showing that it fell within a hearsay exception. Even if we were to hold that the circuit court erred in admitting Sipes' prior consistent statement that defendant had burned her and that Edwards had been stabbed and killed, any error was harmless where it was cumulative to the following evidence properly admitted at trial: (1) Sipes' testimony on direct examination that defendant had thrown hot grease on her; (2) Doctor An's testimony that Sipes told him hot grease had been thrown on her; (3) the stipulation that Detective Fanning would testify Sipes told him defendant threw a pot of scalding oil on her and on Edwards; (4) defendant's testimony that he stabbed Edwards; and (5) the stipulation that Dr. Cogan would testify Edwards died as a result of multiple stab and incise wounds and the manner of death was homicide. In light of the overwhelming evidence of defendant's guilt, any error in the admission of Sipes' prior consistent statement was harmless beyond a reasonable doubt. See *Dent*, 266 Ill. App. 3d at 687 (any error in the admission of Crooks' prior consistent statement was harmless beyond a reasonable doubt where

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it was cumulative to the other overwhelming evidence of Dent's guilt.)

Next, defendant contends the circuit court abused its discretion in sentencing him to 40 years' imprisonment for heinous battery. The circuit court's sentence may not be disturbed absent an abuse of discretion. *People v. Perruquet*, 68 Ill.2d 149, 154 (1977). The sentence must be determined according to the seriousness of the offense and with the objective of restoring defendant to useful citizenship. Ill. Const. 1970, art. 1, §11. The circuit court must base its sentencing determination on the particular circumstances of each case, considering such factors as defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Fern*, 189 Ill.2d 48, 53 (1999). The circuit court's sentence is entitled to great deference and weight because it is in a superior position, having observed defendant and the proceedings, to consider these factors. *Fern*, 189 Ill.2d at 53. A sentence within the statutory limits will not be considered excessive unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill.2d 203, 210 (2000).

Defendant contends his 40-year sentence for heinous battery was incommensurate with the seriousness of the offense, where it was only five years less than the maximum sentence, and where "the instant offense was not severe given the scope of the heinous battery statute." The heinous battery statute states:

"A person who, in committing a battery, knowingly causes severe and permanent disability, great bodily harm or disfigurement by means of a caustic or flammable substance, a poisonous gas, a deadly biological or chemical contaminant or agent, a radioactive substance, or a bomb or explosive compound commits heinous battery." 720 ILCS 5/12-4.1(a) (West

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2008).

Defendant argues that permanent disability or disfigurement represents the more severe end of the heinous battery spectrum, yet, in this case, the State offered only evidence of great bodily harm and no evidence showing permanent disability or disfigurement. Accordingly, defendant contends we should reduce his sentence.

Defendant's argument is unavailing. The sentencing range for heinous battery is 6 to 45 years' imprisonment (720 ILCS 5/12-4.1(b) (West 2008)), and the sentencing range makes no distinction for the type of heinous battery committed. In other words; a sentence at or near the 45-year maximum may be imposed, where supported by the facts, for any such heinous battery, regardless of whether it caused severe and permanent disability, great bodily harm, or disfigurement. In the present case, the evidence at trial indicated defendant committed heinous battery when he threw hot grease on Sipes, knowingly causing her great bodily harm. As a result, Sipes suffered second-degree burns on the right side of her face, both of her hands and forearms and her right thigh, and she required an 11-day hospital stay in which she underwent pain management, the removal of dead tissue from her arms, face and legs, and the application of topical antibiotics to facilitate her wound healing. These facts, coupled with defendant's criminal history including robbery, manufacturing/delivery of a controlled substance, and possession of a controlled substance, support the circuit court's imposition of a 40-year sentence. The circuit court committed no abuse of discretion here.

Defendant contends the circuit court failed to thoughtfully consider the reasonableness of his sentence or his rehabilitative potential, and improperly relied primarily on the facts relating to his

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second-degree murder conviction to justify the sentence for heinous battery. Review of the record at sentencing reveals that the court expressly stated it had reviewed the pre-sentence investigation, listened to defendant's elocution, considered all the evidence and testimony, and determined that defendant deserved a 20-year sentence for second-degree murder and a consecutive 40-year sentence for heinous battery. In denying defendant's motion for reconsideration of the sentence, the circuit court discussed the injury defendant caused Sipes by throwing hot grease on her, and referenced defendant's criminal background and potential for rehabilitation. Thus, contrary to defendant's argument, the record indicates that the circuit court expressly considered the evidence relating to the heinous battery conviction, as well as defendant's rehabilitative potential, when imposing sentence. As discussed, the circuit court committed no abuse of discretion here.

Defendant argues "it is incongruous that [he] received a sentence twice as long for heinous battery than the sentence he received for second-degree murder." The sentencing ranges for second-degree murder and heinous battery are different. At the time of defendant's sentencing in December 2008, the sentencing range for second-degree murder was 4 to 20 years imprisonment (730 ILCS 5/5-8-1(a)(1.5) (West 2008)), whereas the sentencing range for heinous battery was 6 to 45 years' imprisonment. 720 ILCS 5/12-4.1(b) (West 2008). The circuit court imposed the maximum 20-year sentence for second-degree murder and a near-maximum 40-year sentence for heinous battery. As discussed above, the record indicates the circuit court adequately considered all the evidence and testimony, as well as the factors in aggravation and mitigation, when imposing sentence. There was no abuse of discretion here.

Defendant contends *People v. Cooper*, 283 Ill. App. 3d 86 (1996), compels a different result.

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In *Cooper*, the defendant there, Kevin Cooper (Cooper), was convicted of heinous battery and sentenced to 30 years' imprisonment, which was the maximum term at that time (730 ILCS 5/5-8-1 (West 1992)). *Cooper*, 283 Ill. App. 3d at 87. The evidence at trial established that Cooper dunked the two-year-old victim in hot bathwater, causing painful second-degree burns covering approximately 10% of his body. *Cooper*, 283 Ill. App. 3d at 89. The appellate court reduced Cooper's sentence to 15 years' imprisonment, holding that the circuit court had failed to adequately balance both the retributive and rehabilitative purposes of incarceration. *Cooper*, 283 Ill. App. 3d at 95. In contrast to *Cooper*, the circuit court here adequately balanced both the retributive and rehabilitative purposes of incarceration. See our discussion above. Further, our supreme court has held that the "propriety of the sentence imposed in a particular case cannot properly be judged by the sentence imposed in another, unrelated case." *Fern*, 189 Ill.2d at 56. Accordingly, *Cooper* does not compel a reduction in defendant's sentence here.

Defendant also contends we should reduce his sentence because his conduct would not have fallen within the scope of the earlier version of the heinous battery statute, which stated:

"A person who, in committing a battery, knowingly causes severe and permanent disability or disfigurement by means of a caustic or flammable substance commits heinous battery."  
720 ILCS 5/12-4.1(a) (West 1998).

Defendant's discussion of the previous version of the heinous battery statute (which was not in effect at the time of the instant offense) is not relevant to review of his sentence in this case. The version of the heinous battery statute in effect at the time of defendant's conviction and sentence expressly defines a heinous battery as including a battery in which defendant knowingly causes great

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bodily harm. As discussed, defendant's conduct fell within the heinous battery statute in effect at the time of his offense and sentencing, as defendant committed a battery in which he knowingly caused great bodily harm by throwing hot grease on Sipes. We affirm defendant's 40-year sentence.

Next, defendant contends he spent 1,335 days in custody prior to sentencing, but the circuit court credited him with only 1,333 days. Defendant contends he is entitled to two additional days of pre-sentence credit, which includes one day of credit for the date he was sentenced. The State agrees that defendant is entitled to one additional day of pre-sentence credit, but that he is not entitled to credit for the date he was sentenced. Our supreme court recently has held that the date a defendant is sentenced and committed to the department of corrections is to be counted as a day of sentence and *not* as a day of pre-sentence credit. See *People v. Williams*, No. 109361 (Ill. Jan. 21, 2011). Accordingly, defendant here is entitled to only one additional day of pre-sentence credit, for a total of 1,334 days, and is not entitled to a day of credit for the date he was sentenced. We correct the mittimus to reflect that defendant is entitled to 1,334 days of pre-sentence credit. See *People v. Douglas*, 381 Ill. App. 3d 1067, 1069 (2008) (appellate court may correct the mittimus without remanding the cause to the circuit court).

For the foregoing reasons, we affirm defendant's convictions and sentences and correct the mittimus.

Affirmed and mittimus corrected.