No. 1-09-1532

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 14759
	)	
TONY SERRANO,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

HELD: defendant was unable to establish he received ineffective assistance of counsel based on counsel's failure to file a motion to quash his arrest, failure to file a motion to suppress his confession, or failure to question the venire panel during jury selection regarding any potential gang violence. Defendant was unable to establish the trial court erred in

denying defense counsel's motion to withdraw from the case. The trial court did not err in finding defendant failed to establish a *prima facie* case that the State engaged purposeful racial discrimination during jury selection. Defendant failed to establish the trial court's violation of Rule 431(b) resulted in a biased jury. The trial court did not make hostile or disparaging remarks to defense counsel sufficient to prejudice his case. The trial court adequately inquired into defendant's *pro se* post-trial ineffective assistance of counsel claims. Defendant's 85-year sentence was properly based on the aggravating and mitigating factors presented, not the court's personal opinion of the crime. Defendant was entitled to 665-days of credit for time spent in pretrial custody.

Following a jury trial, defendant Tony Serrano was convicted of first-degree murder and sentenced to an 85-year prison term. On appeal, defendant contends: (1) he received ineffective assistance of trial counsel; (2) the trial court erred in denying defense counsel's motion to withdraw from the case; (3) the trial court erred in finding he failed to establish a *prima facie* case of purposeful racial discrimination based on the State's use of 4 out of 5 peremptory challenges against minorities, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986); (4) the trial court failed to comply with Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to afford each potential juror the opportunity to express their understanding of the *Zehr* principles; (5) he was denied his right to a fair trial when the trial court made hostile and disparaging remarks to defense counsel in front of the jury; (6) the trial court failed to adequately inquire into defendant's *pro se* claims of ineffective assistance of counsel,

as required under *People v. Krankel*, 102 Ill. 2d 181 (1984); (7) his 85-year prison sentence was excessive; and (8) he is entitled to 665 days, not 656 days, of pre-sentence custody credit. For the reasons that follow, we affirm defendant's conviction and sentence. We direct the trial court to correct defendant's mittimus to reflect 665-days credit for time spent in pre-sentence custody.

BACKGROUND

Both Serrano and his co-defendant, Mwenda Murithi, were tried in a bifurcated trial with separate juries. The evidence adduced at trial established that at around 6:30 p.m. on June 25, 2007, Katie Wilson and her 13-year-old cousin, Shanna Gayden, went to Funston Park, which is located at the corner of McLean and Central Park Avenue, to buy a watermelon from a vendor. Wilson testified she heard two groups of men arguing at each other from across the street. The group on Wilson's side of the street were yelling "Cobra killer." The argument got louder and then Wilson heard two gunshots. When Wilson turned around, she saw Gayden lying on the ground. Gayden subsequently died at the hospital of a gunshot wound.

Defendant did not file any pre-trial motions. However, Serrano's co-defendant, Murithi, filed motions to quash arrest, suppress evidence and suppress statements, all of which were

denied by the trial court.

At a hearing on Murithi's motion to quash arrest--a transcript of which has been made part of defendant's record on appeal in this case--Chicago police officer Edwin Pagan testified his investigation of the shooting scene indicated Murithi, a person Officer Pagan was already familiar with from the area, may have been present at the shooting. Officer Pagan found Murithi about a half block down from the park on McLean while canvassing the area. Officer Pagan said Murithi was standing outside drinking an alcoholic beverage. After Officer Pagan placed him under arrest for drinking on a public way, Murithi told the officer to "give [him] a break" because he had some information regarding the shooting. Before Officer Pagan could respond or read Murithi his *Miranda* rights, Murithi told Officer Pagan the 9mm handgun used in the shooting was being stored at 3503 West Dickens. After being advised of his *Miranda* rights, Murithi then told Officer Pagan he knew the shooter was an Imperial Gangster gang member named "Tony." Murithi also told Officer Pagan the shooter had fired six rounds, leaving one round in the handgun's clip. Officer Pagan said he was already aware before speaking with Murithi that six 9mm cartridge casings had been recovered from his investigation of the scene of the shooting.

Officer Pagan testified he then went to 3503 West Dickens

with Murithi to look for possible suspects. At the house, Officer Pagan saw several people on the back porch, including Serrano. After Serrano responded to the name Tony, Officer Pagan placed him under arrest. When Murithi identified Serrano as the shooter from the back of Officer Pagan's squad car, Officer Pagan brought both Murithi and Serrano to the Area 5 police station. Officer Pagan provided substantially similar--though much less detailed--testimony regarding the circumstances surrounding Serrano's and Murithi's arrest at defendant's trial.

Several witnesses testified at trial regarding Serrano's and Murithi's involvement in the shooting. Felix Jusino testified he was a member of the Imperial Gangsters street gang in June 2007. About 20 minutes before the shooting, Jusino ran into Murithi. Murithi told him there were some "Cobras" nearby and asked Jusino to come with him. When Jusino said he could not come because he was busy helping his mother, Murithi left. While at the phone store, Jusino heard people yelling "Cobra killer" outside. Jusino went to see what was happening and saw Murithi arguing with Cobras standing across the street. Murithi was yelling "Cobra killer" and hand signaling by "dropping the C" as a sign of disrespect. Jusino then noticed Murithi was with Serrano, who was also a member of the Imperial Gangsters. Murithi stood in front of Serrano yelling at the Cobras across the street while

Serrano went behind a car. When Serrano stepped out from behind the car, he started shooting towards the Cobras and then ran. Jusino said he saw a pistol in Serrano's hand as Serrano ran past.

Jacoby Jones testified he was walking with his sister near the park when he saw Murithi. Murithi was yelling "Cobra killer" and flashing gang signs at several Spanish Cobras gang members standing across the street in the park. When Jones saw Murithi raise his hand to his mouth and say "bring the thumper," which Jones said he knew to be a slang term for a gun, Jones picked up his sister and ran to his house. A few seconds after going upstairs, Jones heard six to eight gunshots. Jones identified Murithi in a photo array and a lineup as the person who said "bring the thumper."

Roquelin Bustamante testified that on June 25, 2007, he saw three black males, including Murithi, walking towards Central Park Avenue. All of the men were flashing gang signs and yelling at four Hispanic males standing on the other side of the street. Bustamante saw another Hispanic male come from behind a parked car, while hiding something in his shirt. Murithi was yelling at the men across the street to come closer. Bustamante said that when the Hispanic male who came from behind the car pulled a gun out from under his shirt, Murithi waved at the gunman and told

him to "wreck 'em." The gunman then started firing. Bustamante identified Murithi in a lineup as the person who told the gunman to "wreck 'em." Bustamante was unable to identify Serrano as the shooter in a lineup.

Jonathan Lopez, a 21-year-old member of the Imperial Gangsters, testified he knew Serrano through his involvement with the gang. Lopez said that on June 22, 2007, he saw Serrano at Serrano's house, which was located at Dickens and St. Louis. Serrano brought Lopez down into the basement and showed him a black 9mm semiautomatic handgun. Lopez testified that at around 7 p.m. on June 25, 2007, he had a conversation with Serrano on Serrano's back porch. Serrano told Lopez that while shooting at some "Cobras," he shot a little kid. Lopez said that shortly after the conversation, the police arrived and arrested Serrano. Lopez admitted he had previously been convicted of unlawful use of a weapon and was currently on parole. Lopez also admitted he refused to speak with defense counsel prior to Serrano's trial.

Chicago police detective John Valkner testified he questioned defendant for the first time at around 1:30 a.m. on June 26, 2007. The interview was not videotaped. Detective Valkner said he read defendant his *Miranda* rights, however. During the 15 minute interview, defendant told Detective Valkner he was 19-years-old and had been a member of the Imperial

Gangsters for three months. Defendant said he had been living at 3503 West Dickens for the past eight months. After Detective Valkner told defendant that someone had identified him in the shooting, defendant admitted he had been "ordered" to shoot at the Cobras. Defendant said a fellow gang member came to his house and told him to take a gun over to Drake and McLean for Murithi, which he did. Defendant said Murithi then ordered him to shoot. When defendant hesitated, Murithi asked for the gun. Defendant then fired several shots at the Cobras. Defendant said he ran back to his house, changed out of his black, multi-colored crown t-shirt and returned the gun to a hiding place in the basement ceiling. At Detective Valkner's request, defendant signed a consent form for police to search his house. Although a black t-shirt with a crown on it was found at the house, the police did not recover a 9mm gun.

Assistant States Attorney (ASA) Aaron Bond testified that when he arrived at the Area 5 station to interview defendant at around 2:40 a.m., he did not know Gayden's condition. He asked the detectives to check and see if the victim was still alive; however, he did not wait to find out her current condition before speaking with defendant at 3:15 a.m. Detective Valkner testified the statement defendant made to ASA Bond regarding the shooting was consistent with defendant's initial statement.

Just before 4:00 a.m., Detective Valkner and ASA Bond learned the victim had died at around 12:10 a.m. that morning. Detective Valkner testified the video recording equipment was then turned on. At 4:11 a.m. Detective Valkner interviewed defendant for 10 minutes, during which defendant essentially repeated his earlier statement. All of the remaining interviews with defendant were also videotaped.

The jury found defendant guilty of first degree murder. The jury also found defendant discharged a firearm that proximately caused the death of the victim. Following a sentencing hearing, defendant was sentenced to a 60-year prison term for first degree murder and a 25-year mandatory consecutive sentence based on the discharging a firearm condition. Defendant appeals.

ANALYSIS

I. Ineffective Assistance of Counsel

Defendant contends he received ineffective assistance of trial counsel. Specifically, defendant contends where the sole basis for his arrest was co-defendant Murithi's self-benefitting accusations that defendant was the shooter, defense counsel was ineffective for failing to file a pre-trial motion challenging the lack of probable cause for defendant's arrest. Defendant suggests the pre-trial motion, which stood a reasonable chance of success, also would have resulted in the suppression of

defendant's statements to the police. Defendant also contends defense counsel was ineffective for failing to file a pre-trial motion to suppress defendant's statements based on the investigating officers' failure to videotape the interrogation, in violation of section 103-2.1(b) of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-2.1(b) (West 2006)). Lastly, defendant contends he was denied effective assistance of counsel based on defense counsel's failure to ensure the venire panel was questioned regarding possible gang bias. Each contention will be addressed in turn.

To establish a claim of ineffective assistance, a defendant must prove: (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006). "Prejudice is shown when there is 'a reasonable probability' that, but for counsel's ineffectiveness, the defendant's sentence or conviction would have been different." *Ford*, 368 Ill. App. 3d at 571, citing *People v. Mack*, 167 Ill. 2d 525, 532 (1995). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

A. Motion to Quash Arrest

Defense counsel's decision as to whether to file a motion to suppress evidence or quash an arrest is " 'generally a matter of trial strategy, which is entitled to great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008), quoting *People v. White*, 221 Ill. 2d 1, 21 (2006). Counsel's failure to file such a motion will be considered below prevailing professional norms if the motion "stood a reasonable chance of success in suppressing the evidence at the time of trial." *Bew*, 228 Ill. 2d at 128. The next step in the inquiry is to determine whether defendant was prejudiced by the alleged deficiency. " 'In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.' " *Bew*, 228 Ill. 2d at 128-29, quoting *People v. Patterson*, 217 Ill. 2d 407, 438 (2005); *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

A warrantless arrest is only valid if supported by probable cause. *People v. Jackson*, 232 Ill. 2d 246, 274-75; *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986). " 'Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to

believe that the arrestee had committed a crime.' " *Jackson*, 232 Ill. 2d at 275, quoting *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008). Our supreme court has held that in dealing with probable cause: " 'we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable prudent men, not legal technicians, act.' " *Wear*, 229 Ill. 2d at 564, quoting *People v. Love*, 199 Ill. 2d 269, 279 (2002).

To determine whether probable cause existed to effectuate an arrest, a court must look to the totality of the circumstances and make a practical, commonsense decision as to whether there was a reasonable probability that an offense was committed and that the defendant committed it. *People v. Redmond*, 341 Ill. App. 3d 498, 508 (2003). "Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more true than false." *Wear*, 229 Ill. 2d at 564. Although mere suspicion is inadequate to establish probable cause to arrest, the evidence relied upon by the arresting officer does not have to be sufficient to prove guilt beyond a reasonable doubt. *People v. Kidd*, 175 Ill. 2d 1, 22 (1996). "[E]ven information from a suspect which implicates another provides sufficient grounds for probable cause if buttressed by corroborating evidence or by the officer's knowledge and

experience." *People v. Hoover*, 250 Ill. App. 3d 338, 348 (1993), citing *People v. James*, 118 Ill. 2d 214 (1987).

Defendant contends that because co-defendant Murithi's self-serving statements to Officer Pagan formed the sole basis for defendant's arrest, an indicia of reliability sufficient to form the probable cause necessary for a legal arrest did not exist here. See *James*, 118 Ill. 2d at 222-23. Defendant suggests that because a motion to quash his arrest and suppress the fruits of that arrest would have had a reasonable chance of success in suppressing the evidence at trial, his counsel was ineffective for failing to file such a motion.

In *Hoover*, the defendant contended the statement of Artie Davis, a suspect in the shooting, implicating defendant in the victim's shooting death was insufficient to provide probable cause for defendant's arrest. The appellate court noted police discovered the victim's body in a car parked across the street from defendant's home. Police also observed a fatal gunshot wound to the back of the victim's head. After failing a polygraph test, Davis admitted defendant had told him she shot the victim. Davis further admitted he took the gun from defendant and disposed of it in Lake Michigan. The police did not offer Davis any specific inducement for identifying defendant. Based upon those facts, the court determined the

police had sufficient probable cause to arrest the defendant. *Hoover*, 250 Ill. App. 3d at 349. See also *James*, 118 Ill. 2d at 225 (supreme court noted the requisite indicia of reliability of a suspect's statement implicating defendant as the strangler of the murder victim was established by the facts that: the information the suspect provided was corroborated by the officer's observations at the scene; the suspect specifically identified the defendant; the suspect had not been offered any specific inducement for identifying the defendant; and the police investigation provided independent verification of a substantial part of the statement.)

Likewise, in *Redmond,* the defendant contended there was not sufficient probable cause to support his arrest for murder. Specifically, the defendant contended the police lacked probable cause to arrest him after discovering a gun in his bedroom because the only person alleging the gun was used in the murder was a "lying, thrice-convicted felon and gang member with 23 arrests and a strong motive to save his own skin by placing full responsibility for the crime on [the defendant]." *Redmond*, 341 Ill. App. 3d at 508. The court recognized the officers had information that defendant participated in a murder where a .40-caliber semi-automatic handgun was used. The police found matching shell casings at the scene and, upon searching

defendant's bedroom, found a .40-caliber semi-automatic handgun under his mattress. Noting a court must look to the totality of the circumstances and make a "practical, common sense decision" regarding whether probable cause existed, this court held the officers had probable cause to arrest defendant under those circumstances. *Redmond*, 341 Ill. App. 3d at 508.

Here, similar to *Redmond, Hoover* and *James*, Officer Pagan received information from Murithi, a known gang member and co-defendant at defendant's trial, that he knew where the 9mm handgun used in the shooting was located. Murithi also told Officer Pagan that "Tony" was the shooter, and that "Tony" had fired six shots during the altercation. Murithi subsequently identified defendant as "Tony" from the back of Officer Pagan's squad car immediately after defendant was placed in custody.

Portions of Murithi's statement matched information Officer Pagan was already aware of based on his investigation of the scene, namely that a 9mm handgun had been used during the shooting and six spent 9mm shell casings had been recovered from the area. Although we recognize that, unlike *Redmond,* a 9mm handgun was not recovered from the house prior to defendant's arrest, we note the six 9mm shell casings Officer Pagan saw at the scene corroborated at least a portion of Murithi's information regarding the shooting. Such corroboration provided

Officer Pagan with an independent indicia of reliability regarding Murithi's statement implicating defendant as the shooter. We also note the limited record before us indicates that Murithi had already been read his *Miranda* rights when he volunteered information regarding defendant's role in the shooting, and that Officer Pagan had not promised Murithi anything in exchange for his cooperation or information. Looking at the totality of the circumstances present in this case, we cannot say as a "practical, common sense decision" that Officer Pagan necessarily lacked probable cause when he arrested defendant. See *Redmond*, 341 Ill. App. 3d at 508.

Because we find there was not a reasonable probability that a motion to quash defendant's arrest based on a lack of probable cause would have been granted by the trial court in this case, we cannot say defense counsel provided ineffective assistance by failing to file such a motion.

B. Motion to Suppress Evidence

Defendant also contends he received ineffective assistance of trial counsel based on counsel's failure to file a motion to suppress his statements to the police. Specifically, defendant contends a motion to suppress defendant's statements would have stood a reasonable chance of success because the interrogations conducted at 1:30 a.m. and 3:15 a.m. were not videotaped,

although the victim was pronounced dead at 12:10 a.m., which in turn violated section 103-2.1(b) of the Code (725 ILCS 5/103-2.1(b) (West 2006)).

Section 103-2.1(b) of the Code provides:

> "An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in any criminal proceeding brought under Section 9-1 *** unless:
>
> (1) an electronic recording is made of the custodial interrogation; and
>
> (2) the recording is substantially accurate and not intentionally altered."
>
> 725 ILCS 5/103-2.1(b) (West 2006).

Section 103-2.1(b) is subject to numerous exceptions set out in subsection (e) that preclude a finding of a violation. *People v. Armstrong*, 395 Ill. App. 3d 606, 621 (2009), citing 725 ILCS 5/103-2.1(e) (West 2006). The only pertinent exception at issue here provides: "Nothing in this Section precludes the admission *** of a statement given at a time when the interrogators are unaware that a death has in fact occurred." 725 ILCS 5/103-

2.1(e)(viii) (West 2006). Accordingly, "[t]he plain and clear language of exception (viii) requires two factual determinations before the exception is triggered: (1) a death has occurred; and (2) the interrogators are aware of the death." *Armstrong*, 395 Ill. App. 3d at 621.

Here, the victim was shot in the head at 6:30 p.m. on June 25, 2007. It is undisputed that defendant was interrogated at 1:30 a.m. and again at 3:15 a.m. on June 26, 2007, without those interrogations being electronically-recorded. During both of those interrogations, defendant made a statement implicating himself as the shooter. It is also undisputed that when Detective Valkner and ASA Bond conducted the interrogations at 1:30 a.m. and 3:15 a.m. respectively, they were not aware the victim had died. Although ASA Bond testified that after he arrived at the Area 5 police station at around 2:40 a.m. he asked the detectives to check if the victim was still alive, he said he did not wait to find out her current condition before speaking with defendant at 3:15 a.m. ASA Bond and defendant spoke for around 15 to 20 minutes. Detective Valkner testified that at 3:55 a.m., Area 5 was notified by an investigator in the Cook County Medical Examiner's office that the victim had died. The victim had been pronounced dead at 12:10 a.m on June 26. ASA Bond testified that after he learned at 4 a.m. that the victim

had died, defendant was moved into the station's video interrogation room. From that point forward defendant's remaining four interrogations were videotaped.

Although defendant recognizes neither ASA Bond nor Detective Valkner were aware the victim had already died when defendant was interrogated at 1:30 a.m. and 3:15 a.m., he contends the purpose of section 103-2.1 cannot be evaded by allowing law enforcement to purposely avoid such information. In support of his contention, defendant notes that even though over six hours had passed from the time the victim was shot in the head to the time defendant was initially interrogated, Detective Valkner made no attempt to determine the victim's condition before interrogating defendant. Defendant also notes that although ASA Bond asked if the victim was still alive when he arrived at the station, he proceeded to interrogate defendant without waiting for the information.

Notwithstanding defendant's contentions, we cannot escape the plain language of section 103-2.1(e)(viii), which specifically provides nothing in the section is intended to preclude admission of a statement "given at a time when the interrogators are unaware that a death has in fact occurred." 725 ILCS 5/103-2.1(e)(viii) (West 2006). "Where the language of the statute is clear and unambiguous, it must be read and given

effect without exception, limitation, or other condition." *People v. Carter*, 213 Ill. 2d 295, 299 (2004).

Moreover, we note that although defendant attempts to paint a picture of the investigating detectives maintaining "purposeful ignorance" of the victim's condition for over a six hour period, the record clearly reflects the victim was not pronounced dead by the medical examiner's office until 12:10 a.m. on June 26--slightly over an hour prior to when defendant's first interrogation with Detective Valkner began at 1:30 a.m. Nothing in the record suggests either Detective Valkner or ASA Bond intended to maintain "purposeful ignorance" of the victim's condition in order to ensure they did not have to comply with section 103-2.1. We also find unpersuasive defendant's contention that in order to ensure proper compliance with section 103-2.1, the police detective who eventually reported the victim's death from the medical examiner's office at 3:55 a.m. "should have been stationed at the hospital the entire evening." Nothing in the plain language of section 103-2.1 suggests the legislature intended such a burden.

Because we cannot say a motion to suppress defendant's statements based on an alleged violation of section 103-2.1(b) would have had a reasonable probability of success in this case, we find defendant's ineffective assistance of counsel claim based

on counsel failure to file such a motion is without merit. See *Armstrong*, 395 Ill. App. 3d at 623 ("Because it is uncontested that the interrogating detectives were not informed of the medical diagnosis of brain death until after the second interrogation had concluded, we can reach no other legal conclusion than exception (viii) of section 103-2.1(e) applies.")

C. *Voir Dire*

Defendant contends his trial counsel's failure to request the trial court to specifically question the individual prospective jurors during *voir dire* regarding any possible gang bias they might have had amounted to ineffective assistance of counsel. Specifically, defendant contends that given the fact that the evidence at trial would show defendant was an admitted gang member and the victim was shot during a dispute between two rival street gangs, defense counsel's inexplicable decision to not request the potential jurors be questioned regarding gang bias fell below an objective standard of reasonableness and prejudiced defendant's case. We disagree.

Generally, counsel's decision as to whether to question potential jurors on a particular subject is considered to be a matter of trial strategy, which has no bearing on the competency of counsel. *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002), citing *People v. Palmer*, 188 Ill. App. 3d 414, 428

(1989). Moreover, a strong presumption exists that counsel's performance involved sound trial strategy. *People v. Macias*, 371 Ill. App. 3d 632, 641 (2007).

Prior to jury selection in this case, the trial judge informed the State and defense counsel that if either party had any questions they wanted asked of the venire panel, to submit them in writing to the court. Defense counsel submitted several questions to the trial court, but did not submit a question regarding potential gang bias. The trial judge admonished both panels of prospective jurors that:

> "It is possible that during the course of the trial, there will be evidence -- alleged evidence of gang membership. One thing I want to bring home to you right now is that that association, to the extent that it exists or doesn't exist in, and of itself could not be considered by you as evidence of guilt in this charge. Do you understand that? Everybody is indicating yes."

In light of the trial court's admonishment to the prospective jurors here, we find defense counsel's apparent decision to not have the jurors questioned further regarding gang bias cannot be classified as objectively unreasonable under

Strickland. It is entirely reasonable to suggest defense counsel could have determined as a matter of trial strategy that the court's admonishment to the jurors regarding the impact of gang evidence was sufficient to ensure defendant received an impartial jury and a fair trial, rendering any further questioning of the potential jurors regarding gang bias unnecessary and even potentially harmful to defendant's case by highlighting the unfavorable evidence. See *Macias*, 371 Ill. App. 3d at 641 ("On the record before us, defense counsel likely could have determined that the questioning of the prospective jurors by the trial court regarding whether they could be fair and impartial was sufficient to ensure that defendant would receive a fair trial and that he did not want to highlight the gang evidence further. Accordingly, defendant's conduct during *voir dire* was not objectively unreasonable.")

Because defendant has not rebutted the presumption that counsel's decision not to have the jurors questioned regarding gang bias constituted sound trial strategy, we find defendant's ineffective assistance of counsel claim based on counsel's conduct during *voir dire* is without merit.

II. Defense Counsel's Motion to Withdraw

Defendant contends the trial counsel abused its discretion by refusing to allow defense counsel to withdraw after counsel

informed the court that he allegedly could not provide effective assistance based on defendant's failure to pay counsel's fee.

Prior to defendant's trial, defense counsel filed a written motion to withdraw from defendant's case. Counsel indicated in the motion that although defendant's family had paid a portion of the agreed upon fee, they had not paid the majority of the legal fees. Accordingly, counsel argued he could not continue to represent defendant and provide him with effective assistance at trial, citing Illinois Supreme Court Rule of Professional Conduct 1.16(b)(1)(F) (134 Ill. 2d R. 1.16(b)(1)(F)).

Initially, the State contends defendant forfeited the issue on appeal by failing to raise it in his post-trial motion below. See *People v. Enoch*, 122 Ill. 2d 176 (1988). Waiver aside, we find the trial court did not abuse its discretion in denying defense counsel's motion to withdraw.

During a hearing on counsel's motion to withdraw, defense counsel noted in support of his motion that:

> "The family and [defendant] have been on notice for quite a while now that if trial comes up and they don't fulfill their obligation regarding fees, and there are some expenses. As you know, this is a murder

> trial. I have an investigator that was lined up to go out and interview some possible witnesses. Nothing has been paid towards the legal fees for quite sometime, and [defendant] and his family have been on notice for that for quite sometime as well."

The State noted in response that the case had been scheduled to start in February to accommodate defense counsel's schedule, and that the State had witnesses flying in from the Netherlands and other parts of the United States. The State argued that due to judicial economy and the fact that defendant had been in custody the whole time, counsel should not be allowed to withdraw two weeks before jury selection was scheduled to begin.

When the trial court asked defendant whether he wanted to be represented by defense counsel, defendant responded yes. After defense counsel told the court defendant had already paid around $20,000 in fees, the following colloquy occurred:

> "THE COURT: You are going to be on trial February 19th, counsel. All right.
>
> With all due respect, I understand having been married for 16 years to a woman

that was in private practice, I understand this an [*sic*] onerous task. The remuneration is not nonexistent. It may not have been consistent with your fee schedule with the client's family, but it is -- this court has tried to be patient as we set this matter for trial on many, many occasions. There has been payment made of some sort, not an insubstantial sum in my humble view. And there is no indication that there is any problem with the relationship with defendant in this circumstance.

Say this with deep apologies to you, Mr. Pissetzky. At this juncture it's just too late for me to grant you leave to withdraw.

MR. PISSETZKY: Just for the record, I don't think I could be effective without the assistance --

THE COURT: Counsel, don't pull that card with me. I am telling you right now. Don't do it. You have been on this case for two years, sir. Two years.

> And now two weeks from trial you walk in and tell me you need to get off the case. That is unacceptable. You have been ably representing him the entire time. He has given you $22,000, sir. $22,000. That is not nothing. It may be nothing to you, sir; but it is a large sum of money. More than enough to adequately represent this individual. You haven't had investigators talk to his witnesses yet, I suggest do you [*sic*] it between now and two weeks from now.
>
> I will hear nothing from you further on this case, sir. I was patient with you. I listened to what you had to say. I took what you said with a great deal of consideration, but it is impossible for me to imagine allowing you to withdraw on a case you have already been paid this large sum of money just because there isn't more."

Defendant contends the trial court abused its discretion by not considering several relevant factors prior to denying the motion to withdraw. Defendant also contends the court erred by failing to properly advise defendant regarding the potential

conflict of interest defense counsel's continued representation could present.

Under the version of Rule 1.16 that applied at the time counsel sought to withdraw, an attorney may seek permission to withdraw from a pending case when a client "substantially fails to fulfill an agreement or obligation to the lawyer as to expenses or fees." 134 Ill. 2d R. 1.16(b)(1)(F). However, Illinois Supreme Court Rule 13 provides a motion to withdraw "may be denied by the court if the granting of it would delay the trial of the case, or would otherwise be inequitable." 134 Ill. 2d R. 13(c)(1)(3). A trial court's decision regarding an attorney's request to withdraw as counsel will not be disturbed absent an abuse of discretion. *People v. Franklin*, 415 Ill. 514, 516 (1953).

After reviewing the record in this case, we cannot say the trial court abused its discretion in denying defense counsel's motion to withdraw.

Here, the trial court clearly determined the granting of the motion to withdraw a mere two weeks before defendant's murder trial was set to begin would impermissibly delay the trial. The court also noted it would be inequitable to allow defense counsel to withdraw based on defendant's failure to pay more in fees after counsel had already received $20,000 from defendant's

family in order to represent him. Although defendant contends the trial court's decision saddled him with an attorney who admitted he felt he could not render effective assistance during the trial, we note we have addressed all of defendant's specific ineffective assistance contentions above and found they lack merit. Accordingly, we see no reason to disturb the trial court's findings in this case.

III. *Batson* Challenge

During jury selection, defense counsel made a *Batson* motion challenging the State's use of four out of its five peremptory challenges to improperly excuse Hispanic and African-American minorities from the jury. Defendant contends that because the trial court erroneously denied the motion, this court should remand the issue for a proper *Batson* determination. See *Batson v. Kentucky*, 476 U.S. 79 (1986)

A three-step process exists for evaluating whether the State's use of a peremptory challenge resulted in the removal of venirepersons on the basis of race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008); *People v. Hogan*, 389 Ill. App. 3d 91, 99 (2009). First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. *Davis*, 231 Ill. 2d at 360, citing *Batson*, 476 U.S. at 96.

To determine whether racial bias motivated a prosecutor's decision to remove a potential juror, "a court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the peremptory strike to see if they give rise to a discriminatory purpose." *Davis*, 231 Ill. 2d at 360, quoting *Batson*, 476 U.S. at 93-94. The threshold for establishing a *prima facie* claim under *Batson* is not high. *Davis*, 231 Ill. 2d at 360. " '[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' " *Davis*, 231 Ill. 2d at 360, quoting *Johnson v. California*, 545 U.S. 162, 170 (2005).

Although striking even a single prospective juror for a discriminatory purpose is forbidden, the "mere fact of a peremptory challenge of a [minority] venireperson who is the same race as defendant or the mere number of [minority] venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis*, 231 Ill. 2d at 360-61.

An important tool in assessing whether a *prima facie* case has been established is the " 'comparative juror analysis,' " which examines " 'a prosecutor's questions to prospective jurors and the juror's responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership

in a particular group.' " *Davis*, 231 Ill. 2d at 361, quoting *Boyd v. Newland*, 467 F. 3d 1139, 1145 (9th Cir. 2006). The following factors also assist a court in evaluating whether a *prima facie* case exists:

> " '(1) the racial identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against African-Americans on the venire; (3) a disproportionate use of peremptory challenges against African-Americans; (4) the level of African-American representation in the venire compared to the jury; (5) the prosecutor's questions and statements of the challenging party during voir dire examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witness.' " *Hogan*, 389 Ill. App. 3d at 99-100, quoting *Davis*, 231 Ill. 2d at 362.

Second, if the moving party establishes a *prima facie* case,

the burden shifts to the nonmoving party to provide a race-neutral explanation for excusing the venireperson. *Hogan*, 389 Ill. App. 3d at 100, citing *Mack v. Anderson*, 371 Ill. App. 3d 36, 44 (2006). Once the nonmoving party provides a race-neutral reason, the court must then determine whether the moving party has carried his burden of establishing purposeful discrimination. *Hogan*, 389 Ill. App. 3d at 100. Finally, the trial court must evaluate the race-neutral reason provided by the nonmoving party against the moving party's claim that the proffered reason is pretextual. *Hogan*, 389 Ill. App. 3d at 100, citing *Rice v. Collins*, 546 U.S. 333, 338 (2006).

A trial court's finding as to whether a *prima facie* case has been established will not be overturned on review unless it is against the manifest weight of the evidence. *People v. Gutierrez*, 402 Ill. App. 3d 866, 892 (2010).

Defendant contends here that at no point did the trial court determine whether defendant made a *prima facie* case under *Batson*. Defendant contends that, instead, the trial court incorrectly applied an outdated standard by finding no "systematic preclusion" of Hispanics had been shown. Defendant notes the "pattern of systematic exclusion" standard previously used by courts was specifically rejected by the Supreme Court in *Batson*, and replaced with a *prima facie* showing of purposeful racial

discrimination in selection of the jury. See *Batson*, 476 U.S. at 95.

Defense counsel argued below that four out of the State's five peremptory challenges were used against minority venire persons: Caro and Reyes, both Hispanic women; Rojas, a Hispanic man; and Smith, an African-American woman. The trial court responded that counsel had to pick a minority group, finding that it was "not enough that they be minorities" and that counsel must present a *prima facie* case of "systematic preclusion of a given minority, not just any minority." Counsel then argued his motion pertained to "Hispanic minorities."

The court found:

> "All right. I've asked the clerk to bring back the cards, and I've watched the State closely. The second juror the State chose was Melecio Melendez (sic), he was Hispanic. Michelle Forrest is an African-American. Robert Williams is an African-American. Irene Garcia, also on the jury was a Hispanic.
>
> Maybe this was like a -- and I'm not dismissing what you are saying, Mr.

Pissetzky, but this was a highly diverse panel that we're talking about out there. I want the record to be clear on this. I would say I've seen more non-Anglo people than I've seen Anglo.

At some point you start wondering what the case law means in these circumstances when we're living in this wonderful multicultural society and we've got all these people showing up to serve as jurors -- Mr. Rice is an African-American -- it's actually a minority jury right now as comprised, at least in some capacity.

I deprecated [*sic*] the notion that any minority recusal could result in a *Batson* challenge. But I certainly couldn't find one -- we've got a diverse group like we've got seated right now -- that there's been any systematic preclusion that would require them presenting me with any reason for the challenges they've made, because they've, you know -- contrary to the composition of the venire as well as the composition of the

> individuals I've questioned. So your *Batson* motion is denied."

After reviewing the record, we find the trial court's decision was not against the manifest weight of the evidence.

While defendant now attempts to address several of the relevant *Batson* factors to support his *prima facie* case on appeal, defendant's argument below relied solely on the fact that the State used three peremptory challenges to exclude Hispanic venirepersons. Moreover, none of the State's questions or statements during the *voir dire* were cited by defendant as implying purposeful discrimination, and our review of the record reveals nothing that can reasonably be said to have raised such an inference. Although striking even a single prospective juror for a discriminatory purpose is forbidden, the "mere fact of a peremptory challenge of a [minority] venireperson who is the same race as defendant or the mere number of [minority] venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis*, 231 Ill. 2d at 360-61; *People v. Heard*, 187 Ill. 2d 36, 55-56 (1999); *People v. Garrett*, 139 Ill. 2d 189, 204-05 (1990).

Defendant also contends the trial court used an incorrect standard in ruling on his *Batson* motion. Although defendant

makes much out of the trial court's use of the phrase "systematic preclusion" when denying the motion, it is clear the court also recognized defendant was required to "present a *prima facie* case" of discrimination before the State would be required to provide race-neutral reasons for the peremptory challenges. We note the trial court is presumed to know and follow the law, unless the record indicates otherwise. See *People v. Jordan*, 218 Ill. 2d 255, 269 (2006).

The record reflects that in determining no "systematic preclusion" was present, the trial court was merely reviewing the racial characteristics of the stricken jurors to the racial characteristics of the jury and the venire panel as a whole in order to determine whether a pattern of discrimination was present. Such a consideration has been specifically identified as one of the factors a court may consider in order to determine whether *a prima facie* case exists. See *Hogan*, 389 Ill. App. 3d at 99-100 ("following factors assist a court in evaluating whether a *prima facie* case exists: *** (4) the level of African-American representation in the venire compared to the jury ***").

IV. *Zehr* Principles

Defendant contends his sixth amendment right to a trial by a fair and impartial jury was denied when the trial court violated Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to

admonish the prospective jurors that defendant's failure to testify could not be held against him, and by failing to question the prospective jurors as to whether they accepted any of the four principles set forth in *People v. Zehr*, 103 Ill. 2d 472, 483 (1984), and codified in Rule 431(b).

During *voir dire*, the trial court admonished the entire panel of prospective jurors that: every defendant is presumed innocent and this presumption remains throughout trial; the State has the burden of proving defendant guilty beyond a reasonable doubt; a defendant is not required to testify or provide any evidence on his own behalf. The court also told the jury panel that defendant's presumption of innocence was not overcome unless the jury was convinced beyond a reasonable doubt of defendant's guilt. Following each admonishment, the trial court asked the prospective jurors whether they "understood" the principles. Defendant notes, however, that the trial court neither informed the prospective jurors that defendant's failure to testify could not be used against him, nor asked any of the prospective jurors whether they "accepted" the *Zehr* principles.

Defendant neither objected to the trial court's Rule 431(b) admonishments at trial nor raised the issue in his post-trial motion, however. Accordingly, the State contends defendant waived the issue. *People v. Cloutier*, 156 Ill. 2d 483, 507

(1993). Defendant counters that the trial court's failure to adhere to the *Zehr* principles is reviewable here under the "second prong" of the plain error doctrine. Specifically, defendant contends the trial court's failure to comply with Rule 431(b) is of such a magnitude that it denied defendant a fair and impartial trial, irregardless of whether he is able to establish prejudice. Defendant does not contend the evidence presented at trial was "closely balanced."

Under the plain error doctrine, a reviewing court may consider unreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs 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. Herron*, 215 Ill. 2d 167, 187-88 (2005). In order to find plain error, we must first find the trial court committed some error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008). Naturally, if the trial court failed to follow Rule 431(b) in this case, an error would have occurred pursuant to *Rodriguez*, opening the door to a plain error analysis.

Defendant notes that after he filed his initial brief,

however, our supreme court addressed the issue defendant raises here in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, our supreme court held it could not presume a jury was biased simply because the trial court erred in conducting Rule 431(b) questioning. *Thompson*, 238 Ill. 2d at 615. Although the supreme court recognized a trial before a biased jury is structural error subject to automatic reversal, the supreme court noted failure to comply with the amended version of Rule 431(b) alone does not necessarily result in a biased jury, and, therefore, does not require automatic reversal as structural error. *Thompson*, 238 Ill. 2d at 614-15.

Here, similar to *Thompson*, the prospective jurors received some, but not all, of the required Rule 431(b) admonishments. Defendant has failed to establish that the trial court's violation of Rule 431(b) resulted in a biased jury. Because defendant has failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process, we find the second prong of plain-error review does not provide a basis for excusing defendant's procedural default. Accordingly, we find defendant has forfeited the issue.

V. Judicial Misconduct

Defendant contends he was denied his right to a fair trial

by several allegedly hostile and disparaging comments the trial court made to defense counsel while in the presence of the jury.

During defense counsel's cross-examination of Jusino, counsel asked: "So now you're so curious you don't have to go back to help mommy, right?" The court responded, "Counsel, those weren't ever his words. The word mommy was never said by anyone other than you. That may be your wish, but I'm going to ask you to conduct yourself with a degree of respect."

During defense counsel's cross-examination of ASA Bond, the court sustained the State's objection to a question. When defense counsel said he wanted to know why, the court said:

> "Because you are quizzing him on things that happened when he wasn't there. The only way he could have received that information is if somebody told it to him. That would admit hearsay in a trial that I am trying to have that not occur in. That's why I did it. Do you understand now?"

During defense counsel's cross-examination of Detective Valkner, the following colloquy also took place:

> "[Defense counsel] Q. So when you were sitting with ASA Bond in Room D where the

video camera was, ASA Bond took notes?

A. No.

MR Holmes: Objection. That's not his testimony.

THE COURT: Sustained. Counsel, I am going to warn you now.

MR. PISSETZKY: That's what I understood.

THE COURT: No, that's not --

MR. HOLMES: Objection.

THE COURT: Listen to me for a second.

MR. PISSETZKY: I apologize.

THE COURT: Are you listening to me? It has happened on several occasions. When the witness answers the question, listen carefully to the answer --

MR. PISSETZKY: I Will

THE WITNESS: [*sic*] -- because that wasn't the answer that you repeated in the next question, and it is important that you be carefully listening to what he says.

MR. PISSETZKY: Your Honor, I would appreciate it if you don't yell me in front

of the jury.

THE COURT: I am not yelling at you in front of the jury. I am urging you to listen closely to what they say because it has happened several times.

Certainly they know already -- I have warned you folks that a sustained or overruled objection means nothing as it relates to the evidence. The evidence is what comes from this witness stand. You all understand that, right? I am only trying to ensure that you only here appropriate and proper evidence in this case.

My discourse with him has nothing to do with it. I am just urging him to listen more carefully."

Defendant contends that although taken alone the comments may not constitute error, the comments taken together evidence the trial court's improper personal disapproval of defense counsel's conduct and defendant's case.

Although we recognize a trial court has a duty to avoid both improper conduct and the appearance of impropriety (*People v.*

Bradshaw, 171 Ill. App. 3d 971, 975 (1988)), we note a court also has the power to ensure that the proceedings before it are conducted in an orderly fashion (*People v. Thigpen*, 306 Ill. App. 3d 29, 40 (1999)). While defense counsel may have felt the trial court's comments were overly harsh in this case, we cannot say they rose to the level of displaying bias against defendant.

Moreover, even if we were to find the trial court's comments were improper, we note a defendant must show the court's comments caused prejudice to defendant's case in order for the comments to warrant a reversal. See *Thigpen*, 306 Ill. App. 3d at 40. In order to establish prejudice, a defendant must show the comments were a material factor in his conviction. *Thigpen*, 306 Ill. App. 3d at 40, citing *People v. Thompson*, 234 Ill. App. 3d 770, 773 (1991). Based on the record before us, we cannot say any prejudice resulted from the trial court's allegedly hostile and disparaging comments to defense counsel.

VI. *Krankel*

Defendant contends the trial court erred by failing to conduct a sufficient inquiry into his post-trial claims of ineffective assistance of counsel, as required under *People v. Krankel*, 102 Ill. 2d 181, 189 (1984).

In interpreting *Krankel*, our supreme court has held new

counsel is "not automatically required in every case in which a defendant presents a *pro se* post-trial motion alleging ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, when a defendant presents a *pro se* post-trial claim of ineffective assistance, the trial court should:

> "first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77.

The operative concern for us is "whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 77.

During an inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the alleged ineffective representation is permissible and usually necessary in assessing what further action, if any,

is warranted on a defendant's claim." *Moore*, 207 Ill. 2d at 78. A trial court may also base its evaluation of a defendant's claims on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78.

Here, defendant filed a *pro se* motion for a new trial on March 20, 2009, arguing defense counsel provided ineffective assistance of counsel by failing to notify the court and the State that he was on psychotrophic medications throughout the trial, and by failing to request a fitness examination pursuant to 725 ILCS 5/104-13(a) (West 2006). After admitting that he "didn't read [the motion] in its entirety," the trial court ordered a psychological examination of defendant.

Defendant filed a second *pro se* motion with the court, again alleging counsel had provided ineffective assistance by failing to raise the fitness issues during his trial. The trial court noted that based on the last *pro se* motion, it had requested that the forensic clinic services conduct an examination of defendant. The court noted such an examination was not required under the law, but "it would be the best practice" for the court to have someone take a look at defendant. A report filed with the court by Dr. Cooper from the forensic clinical services indicated he was unable to perform or proffer any opinion because defendant

had refused to participate in the examination.

The trial court then went on to discuss and address defendant's ineffective assistance allegation in detail. After the court noted its own observations and recollections of defense counsel's and defendant's conduct during the trial, the trial court questioned defense counsel regarding the claims. Defense counsel told the court that after numerous conversations with defendant before and during the trial, counsel had no reason to suspect defendant was unfit to stand trial. The court also specifically noted "[defendant] never, ever gave me any reason to believe that he's anything other than totally fit to stand trial during the course of the pendency of this case which was a substantial period of time." Based on the court's own observations during the trial and defense counsel's comments during the hearing on the motion, the trial court found defendant's ineffective assistance claim lacked merit.

Contrary to defendant's contention, we find the record reflects the trial court conducted an adequate inquiry into defendant's *pro se* ineffective assistance allegations prior to denying the motion. It is well settled that a trial court may base its evaluation of a defendant's claims on its questioning of defense counsel during the hearing, and on its knowledge and observation of defense counsel's performance at trial and the

insufficiency of the defendant's allegations on their face. See *Moore*, 207 Ill. 2d at 78. That is exactly what the trial court did here.

Moreover, while defendant points to defense counsel's disclosure during the sentencing hearing that defendant was on Prozac and Trazodone throughout the trial in support of his ineffective assistance claims, we note "[a] defendant who has received psychotrophic medication is not presumed unfit to stand trial solely by virtue of having received those medications." See *People v. Woodard*, 367 Ill. App. 3d 304, 320 (2006).

Accordingly, we see no reason to disturb the trial court's findings.

VII. Sentencing

Defendant contends the trial court abused its discretion in sentencing him to a 85-year prison term. Specifically, defendant contends the trial court failed to adequately consider defendant's lack of a criminal record, history of employment, limited gang evolvement, high school diploma and remorse as mitigating factors; instead improperly relying on its own personal feelings regarding gang violence and the nature of the crime when determining defendant's 85-year sentence.

The standard of review with regard to sentencing issues is

whether the trial court abused its discretion in determining the sentence. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1039 (2008); *People v. Shaw*, 278 Ill. App. 3d 939, 953 (1996). When reviewing a sentence, we afford great deference to the sentencing court's judgment as the court is in the best position to " 'analyze the facts constituting the crime and a defendant's credibility, demeanor, general moral character, mentality, social environments, habits, age, and potential for rehabilitation.' " *Tijerina*, 381 Ill. App. 3d at 1039, quoting *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). Although it is clearly within the trial court's discretion to determine what significance is given to each aggravating and mitigating factor (*People v. Saldivar*, 113 Ill. 2d 256, 270-71 (1986)), the court's discretion in making sentencing decisions is not totally unbridled, which is reflected by this court's ability to reduce a sentence where the trial court has abused its discretion (*People v. Henry*, 254 Ill. App. 3d 899, 904 (1993)). However, we must not substitute our judgment for that of the sentencing court merely because we would have weighed the relevant mitigating and aggravating factors differently. *Henry*, 254 Ill. App. 3d at 904. "Unless the sentence is grossly disproportionate to the nature of the offense committed, the sentence should be affirmed." *Tijerina*, 381 Ill. App. 3d at 1039.

Section 5-4.5-20 of the Unified Code of Corrections (730 ILCS 5/5-4.5-20) (West 2008)) provides the prison term for first degree murder "shall be not less than 20 years and not more than 60 years." The jury also found defendant personally discharged the firearm that caused the death of the victim, which subjected him to an additional consecutive sentence ranging from 25 years' to life. 730 ILCS 5/5-8-1 (West 2008). Because defendant's sentence was within the permissible sentencing range, we must begin with the presumption that his sentence was proper. See *Ramos*, 353 Ill. App. 3d at 137.

Notwithstanding, defendant contends the trial court's comments that, "I seethe as I sit here now trying with every part of my being not to allow how strongly I am reviled by their conduct that day and to try to render what I believe to be a dispassionate sentence, one that is predicated on the background and criteria that I have cited," indicate the court improperly relied on its own personal opinion of the crime in handing down defendant's sentence.

In *Henry*, the defendant was convicted of armed robbery and aggravated battery for snatching a woman's purse and cutting her husband with a knife. The trial court sentenced defendant to a 25-year prison term for armed robbery and a consecutive 5-year prison term for aggravated battery. In doing so, the court noted

it took into account the relevant aggravating and mitigating factors presented during the sentencing hearing. The trial court also noted, however, that it found the crime "disgusting" and "that's why you are given this amount of time." *Henry*, 254 Ill. App. 3d at 904. Based on the "clarity of the trial court's statement," this court held it could not "say that the court did not rely upon its own opinion of the crime when it sentenced defendant." *Henry*, 254 Ill. App. 3d at 904. The court remanded the matter for re-sentencing to ensure the defendant's sentence was based only upon proper factors and not the trial court's subjective feelings. *Henry*, 254 Ill. App. 3d at 904.

In *Tijerina*, by contrast, the defendant was sentenced to a 60-year prison term for first degree murder and a consecutive 40-year prison term for intentional homicide of an unborn child. When handing down the sentence, the trial court said "But this crime itself, there is no mitigation to the crime whatsoever, the defendant committing a crime like this." The court continued by saying defendant should never get out of prison. In determining the sentence was not excessive, this court held we "may not take the trial court's findings lightly and cherry-pick from the record to support a reduction of sentence." *Tijerina*, 381 Ill. App. 3d at 1040. The court noted that unlike in *Henry*, where there was no serious injury and the stolen money was recovered,

the heinousness of the defendant's crime in murdering a 14-year-old pregnant girl who was pregnant with an 8-month-old fetus could not be ignored. *Tijerina*, 381 Ill. App. 3d at 1041. The court held the defendant's lack of remorse and the utmost seriousness of the crime supported the sentence imposed. *Tijerina*, 381 Ill. App. 3d at 1041. Moreover, the court noted there was "ample record to support application of the presumption that the trial court had considered all factors in mitigation and aggravation" in determining the defendant's sentence. *Tijerina*, 381 Ill. App. 3d at 1040-41.

Following bifurcated trials in this case, the trial court held a joint sentencing hearing for defendant and Murithi, the other perpetrator charged in the shooting. During the joint sentencing hearing, the trial court noted:

> "It is my job in this case to make a sentence in this case, a sentence that is fair in light of what occurred in this particular crime. And in light of the information that I've heard here today during the course of the evidentiary hearing for sentencing. In making my sentence today, I will consider the evidence presented at trial, the presentence investigator's report which I've reviewed

> both individuals' presentence investigation here on at least two prior dates now. I'm fairly familiar with the facts, completely familiar with the facts within as well as the letters supplied by Mr. Serrano's family as well as prior people that educated him or been part of his life, the evidence offered in aggravation and mitigation during the course of the hearing here today, the statutory factors in aggravation and mitigation some of which have been cited by both parties, the arguments of the attorneys as to the sentencing the alternative that exists within this case, the victim impact statement that was done by [the victim's mother] in this case and obviously the thing that I heard most recently the statements of both Mr. Serrano and Mr. Murithi."

The court continued:

> "[Defense counsel] correctly points out that this job is a difficult one. How could I possibly answer by a sentence the magnitude of the offense which these two men have

> committed, that would be impossible. I seethe as I sit here now trying with every part of my being not to allow how strongly I am reviled by their conduct that day and to try to render what I believe to be a dispassionate sentence, one that is predicated on the background and criteria that I have cited."

The court then went on to discuss several of the various aggravating and mitigating circumstances presented, including the nature and circumstances of the offense, the fact that defendant was a member of a gang, that defendant went to high school, and that defendant did not have a criminal background. In light of the mitigating factors, the court determined an 85-year sentence, rather than life imprisonment as the victim's family and the State had requested, was the more appropriate sentence.

Here, similar to *Tijerina*, there is ample evidence in the record to support application of the presumption that the trial court considered all of the factors presented in mitigation and aggravation during the sentencing hearing prior to handing down defendant's sentence. See *Tijerina*, 381 Ill. App. 3d at 1041. Although we do not seek to encourage trial court's to add their own personal observations before imposing a sentence, we will not

take the totality of the trial court's findings lightly and cherry-pick from the record in order to support a reduction of defendant's sentence. See *People v. Steppan*, 105 Ill. 2d 310, 323 (1985)("The fact that the sentencing judge added some personal observation before imposing sentence, while not to be encouraged, is of no consequence"); *Tijerina*, 381 Ill. App. 3d at 1040. We find the fact that the record clearly indicates the trial court considered both the aggravating and mitigating factors presented before handing down defendant's sentence, mixed with the utmost seriousness of this crime, support the sentence imposed by the trial court. See *Tijerina*, 381 Ill. App. 3d at 1041.

VIII. Mittimus

Defendant contends, and the State agrees, his mittimus should be corrected to reflect 665 days of time in pre-sentencing custody, not 656 days. A defendant has a right to one day of credit for each day that he spends in custody prior to sentencing. See 730 ILCS 5/5-8-7(b) (West 2006); *People v. Whitmore*, 313 Ill. App. 3d 117, 120 (2000). Accordingly, we order the trial court to issue a corrected mittimus reflecting 665 days of credit. See *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002).

CONCLUSION

We affirm defendant's conviction and sentence. We direct the trial court to issue a corrected mittimus reflecting 665 days of credit for defendant's pre-sentence custody.

Affirmed.