2012 IL App (1st) 100258

SECOND DIVISION
June 19, 2012

No. 1-10-0258

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. 04 CR 28085
	)	
DAVID WYNTER,	)	The Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

Held: Defendant was not deprived of his right to self-representation because he did not unequivocally invoke it. Defendant has not shown that an error occurred regarding his sixth amendment right to confront the witnesses against him, therefore, plain error review is not applicable in this case. The circuit court did not abuse its discretion in sentencing defendant.

¶ 1 Defendant, David Wynter, was convicted by a jury of home invasion and aggravated criminal sexual assault. He was sentenced to two consecutive 30 year prison terms, which were

to be served consecutively to a 15 year prison term from an unrelated case. Defendant raises the following issues on appeal: (1) whether he was deprived of his right to represent himself; (2) whether this court should review, under the plain error doctrine, whether his sixth amendment right to confront the witnesses against him was violated by the State's expert witness's testimony regarding deoxyribonucleic acid (DNA) extraction; and (3) whether his sentence is excessive. We hold defendant was not deprived of his right to represent himself because he did not unequivocally invoke the right. Defendant has also not shown that any error occurred regarding his right to confront the witnesses against him, thus plain error review is not applicable in this case. We further hold the circuit court did not abuse its discretion in sentencing defendant.

¶ 2 JURISDICTION

¶ 3 The circuit court sentenced defendant on January 8, 2010. Defendant timely filed his notice of appeal on the day of sentencing. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 4 BACKGROUND

¶ 5 Prior to trial, on September 21, 2007, defendant's private attorney asked the court to allow him leave to withdraw as defendant's attorney because defendant had opted to represent himself in an another matter (the elected case) then pending before a different judge. In response to the judge's inquiry regarding how he would like to proceed, defendant indicated that he would like to proceed *pro se*. The judge admonished defendant regarding his possible self-representation, and

defendant told the judge he would like to proceed with a court appointed attorney or *pro se* "due to strained relationship with counsel." Defendant agreed to the court's appointment of the Public Defender to represent him.

¶ 6 On March 20, 2009, the assistant Public Defender representing defendant indicated to the court that defendant had sent her a correspondence asking her to withdraw as his counsel. The court then admonished defendant at length in regard to the difficulties of self-representation. After the admonishments, the court asked defendant whether he would like to proceed *pro se*. Defendant responded that he had changed his mind and would keep the assistant Public Defender as his counsel.

¶ 7 On June 10, 2009, the court held a hearing on a motion *in limine*. The following exchange occurred between the court, defendant, and the assistant Public Defender:

> "THE COURT: Is the defense ready to proceed on the motion?
>
> DEFENDANT: No, your Honor.
>
> THE COURT: Hold on. I am asking your attorney. Are you ready to proceed?
>
> ASSISTANT PUBLIC DEFENDER: Judge, I would be ready to proceed. However, my client has indicated he wants to proceed *pro se*.
>
> THE COURT: What's going on, Mr. Wynter?
>
> DEFENDANT: I'm not satisfied with counsel's motion,

> your Honor, and the proceedings up to this point. I haven't seen a page of discovery. I'm prepared to proceed *pro se* from this moment on, your Honor, and accept the consequence of my choice.
>
> THE COURT: Mr. Wynter, you're not entitled to get the discovery from your attorney***."

The court then admonished defendant about representing himself. The court commented that "it's 2009. After five years with the attorney's services and on the eve of trial, we have a firm trial date, you're going to trial July 27th on this, I am loathe to let you come up at the last second with an idea of representing yourself." The following exchange then occurred between defendant and the court:

> "THE COURT: *** At this time I will not allow you to represent yourself. I will ask your attorney to go in the back and talk to you. And if you're not ready to proceed today, I will hold this matter over for a few weeks.
>
> But we are going to jury on July 27th.
>
> ***
>
> I will pass the case.
>
> THE DEFENDANT: Judge, one sticking point I have, your Honor, is if counsel wishes to proceed, I want a trial demand attached to this - -
>
> THE COURT: Go in the back and speak with her about how you will proceed - -
>
> THE DEFENDANT: We discussed this- -

THE COURT: I will let you go in the back some more. That's all the discussion I will have right now. I will call you out in a few minutes after counsel speaks with you again."

The case was then passed. When the case was recalled, the following exchange occurred:

"THE COURT: What is it that you wish to do?

THE DEFENDANT: I accept counsel's representation on one condition your Honor. That after the conclusion of this motion, a trial demand be attached to the trial date.

THE COURT: What's your response counsel?

ASSISTANT PUBLIC DEFENDER: Well, your Honor, at this point in time, *** [I] am not ready for trial. We have a trial date on July 27th. And at this time, there is no strategic reason or legal reason, and I cannot at this point in good faith file a trial demand when I am not ready for trial as I stand here today.

THE COURT: Mr. Wynter, even if you filed a demand, you could not get a date sooner than July 27th. That's the day your going to trial. That's the day we set. As I told you I allowed the whole week. Your trial is going that day whether you demand or not. The State is entitled to pick any day within 120 days.

THE DEFENDANT: I understand that, your Honor, so I don't see what the hesitation is about attaching a trial demand to

July 27th.

THE COURT: Because maybe your lawyer doesn't want to lose credibility with the court. If she is not ready to go today, she doesn't want to make a representation that is false. Maybe she knows that the State has 120 days and can't go to trial any faster than that. Maybe she wants to be prepared for you. *** She knows and you know and the state's attorney knows, and I know you're going to trial July 27th. Period. That's your time.

Let's proceed with the first motion *in limine*."

¶ 8 Later, during the same hearing, as the assistant State's Attorney was stating defendant's prior convictions to the court, defendant interrupted the proceedings in the following colloquy:

"ASSISTANT STATES ATTORNEY: [Defendant] has an '04 conviction, an '03 conviction. He also has a '96 conviction. The '96 conviction the People are seeking to admit under Montgomery because his date of parole or discharge was 2003.

DEFENDANT: 2003. 2

THE COURT: Mr. Wynter, it's not your chance to just pipe up whenever you want, so don't do it. Just don't.

The 1996 conviction, what was that for?

ASSISTANT STATES ATTORNEY: The 1996 is for ***.

THE COURT: Excuse me, Mr. Wynter, I told you before, I

wanted all the shackles and the cuffs taken off of you provided that you would behave properly in court and you assured me that you would.

DEFENDANT: I'm not doing anything, your Honor.

THE COURT: Don't start moving around and make me order them. I don't want to see you cuffed and shackled. I would much rather not. But if you're moving around, I will be forced to do that.

DEFENDANT: Your Honor, I want- -

THE COURT: Stop talking now.

DEFENDANT: I want to proceed *pro se*, your Honor.

THE COURT: No.

What is that 1996 conviction?"

The parties continued to argue the motions. At the end of the hearing, defense counsel requested that defendant, who was in the custody of the Illinois Department of Corrections, be remanded to the Cook County jail. Defendant interrupted saying he did not want to be remanded to the Cook County jail. The court offered to schedule another status date before trial to allow defendant to meet with his lawyer. Defendant refused, stating that he was "fine" with only coming back to court on July 27, 2009, stating that "I can telephone counsel." The court then agreed not to set another status date. The following exchange then occurred:

"THE COURT: *** If something changes and you want to

> come up, if your lawyer brings it to my attention, I will bring you up. You don't have to be remanded here. But if something develops, you need to meet in person, don't hesitate to let me know and I will do that for whatever date you want.
>
> THE DEFENDANT: So I will have a trial July 27th?
>
> THE COURT: Your day is set. You have about two months, a little shy of two months now to get ready. Use your time to work with your lawyer.
>
> If you need to come up to meet with your lawyer, let me know, not a problem as many times as you want."

The parties then agreed to start defendant's trial on July 27, 2009.

¶ 9 On July 27, 2009, immediately prior to selecting a jury, defendant stated to the court that his counsel was ineffective. After being extensively admonished by the court regarding the perils of self-representation, his background, and his possible sentence, defendant indicated to the court that he would like to represent himself at trial. The court allowed defendant's motion to proceed *pro se* and allowed the Public Defender's office to withdraw.

¶ 10 At trial, the State first called the victim, C.L[1]., to the stand. C.L. testified that at the time of trial she was 40 years old and had lived in Las Vegas, Nevada for the past six years. In 2002, C.L. lived in Chicago with an ex sister-in-law and some of her family. At the time, she worked

[1] We will use the victim's initials to protect the victim's privacy. The use of initials does not detract from our decision in any way.

the night shift from midnight to eight in the morning. On the morning of the incident, C.L. dropped her son off at school prior to nine a.m. and then went back to her apartment. Back at the apartment, she first went to the kitchen and got something to eat. After eating, she went to bed. She testified she locked the outer door to her apartment before going to sleep. She was wearing a black blouse and jeans, but took her jeans off when she went to sleep. Both her door to her room and the curtains were closed. The curtains were white, so some light did come through.

¶ 11 C.L. testified that as she was sleeping, she woke up to some noises. Because other people lived in the apartment, C.L. believed that someone else who lived in the apartment had come in to the apartment. She then went back to sleep. She testified "seconds went by" when a man she had never seen before entered her bedroom. At this point in her testimony, she identified defendant as the man who entered her bedroom. C.L. testified defendant asked her to give him money; she told him she did not have any. Defendant then showed her an ice pick, which she described as a "metal, long thing with a point." She had never seen the ice pick in her apartment before. Defendant threatened her with the ice pick. C.L. attempted to turn towards the window to open it, but defendant pulled her by her hair and hit her in her jaw with his fist. Defendant then threw C.L. on the bed, and pulled his pants down. Defendant pulled C.L.'s underwear down, put his hand over C.L.'s mouth, and raped her vaginally with his penis. Defendant then left the apartment. C.L. testified that after defendant left the apartment, she went to a nearby beauty salon. She was crying and in shock. Someone at the beauty salon called the police. She spoke to the police at the beauty salon and then an ambulance took her to the hospital. At the hospital, C.L. was given a full examination. The hospital kept all of the clothing she was wearing that

day.

¶ 12 In 2004, C.L. was contacted by the Chicago police. She had by that time moved to Las Vegas, Nevada. She agreed to come back to Chicago. In Chicago, she viewed a line-up and identified defendant as the man who had sexually assaulted her.

¶ 13 Dr. Andrew Costello, who the court found to be an expert in emergency room medicine, testified on behalf of the State. On the day of the incident, Dr. Costello treated C.L. at the hospital. He performed a complete history and a physical on C.L. in addition to collecting evidence for a sexual assault evidence kit. Dr. Costello described the sexual assault evidence kit as "a kit that collects evidence. It collects hair samples, pubic hair combings, samples if there are fluid, clothes, nail clippings." A blood standard is also taken from a sexual assault victim. Dr. Costello testified the evidence he collected for the sexual assault kit in C.L.'s case included a vaginal swab. After collecting the evidence for the kit, the box was sealed and an evidence technician from the police department collected the box.

¶ 14 The State next called Officer Nancy DeCook, a forensic investigator for the Chicago police department. Officer DeCook testified that a forensic investigator "is a crime scene processor of homicides and police involved shootings." Officer DeCook testified she processed the crime scene in this case. This included photographing the crime scene and collecting evidence. Officer DeCook testified that she observed and photographed the door to the apartment, which she believed was pried open by a slim metal object. She found some "ridge impressions" on the doorknob to the apartment, which she described as the "swirls and arches that make up an individual person's fingerprints." Although she lifted the fingerprints, the

fingerprints were not suitable for comparison. Additionally, Officer DeCook collected a sheet, a blanket, and three pillow cases from the scene. All were inventoried as evidence. After processing the scene, she collected the sexual assault evidence kit and a bag of clothing from the hospital. The kit was given to her by a nurse named Roxanne Reschke in a sealed condition. She inventoried both the kit and the bag of clothing. The evidence was then transferred to the Illinois State Police Crime Lab where it was stored in a secure vault.

¶ 15 Manuel Sanchez, a technician who collects biological samples for the States Attorney's office, testified on behalf of the State. On February 2, 2005, Sanchez collected buccal swabs from defendant's mouth pursuant to a court order. After collecting the samples, he gave them to Investigator Shepard who then inventoried the samples.

¶ 16 Greg Didomenic, a forensic scientist employed by the Illinois State Police's Forensic Science Center in Chicago, testified on the State's behalf. The court found Didomenic to be an expert in the area of forensic biology. On February 11, 2003, Didomenic received the sexual assault evidence kit collected from the hospital in a sealed condition and performed tests on C.L.'s vaginal swabs, C.L.'s underwear, and C.L.'s sanitary napkin to determine whether semen was present. Semen was indicated on the vaginal swabs, the underwear, and the sanitary napkin. Didomenic then preserved and sealed samples from the vaginal swabs, underwear, sanitary napkin, and C.L.'s blood standard separately for future DNA analysis. On October 23, 2003, the preserved samples were sent to Orchard Cellmark (Cellmark)[2], an outsourcing laboratory, to have

[2] Cellmark is referred to in the record as both Orchard Cellmark and Cellmark Diagnostics. We will refer to the laboratory simply as Cellmark.

DNA analysis performed. Cellmark was under contract with the Illinois State Police to assist in analyzing sexual assault kits due to a backlog of cases. Didomenic recalled that a sample from C.L.'s underwear and from her blood standard were shipped to Cellmark. Didomenic testified that the proper chain of custody was maintained at all times. Didomenic conducted the testing and sealed the samples, but other individuals from his office "took care of the shipping and packaging to Cellmark." Didomenic stressed he only performed biological testing on the samples, he did not do any DNA analysis.

¶ 17 Dr. Charlotte Word testified on behalf of the State as an expert in forensic biology and forensic DNA analysis. Dr. Word was a laboratory director at Cellmark at the time of defendant's arrest. Cellmark was asked to perform forensic DNA testing on the biological samples in this case. She explained that forensic DNA testing is when a biological sample from a crime scene is tested to determine who the source of the biological sample is. In doing so, they generate a DNA profile which can be compared to samples from a known individual. She testified that the methods Cellmark used in its DNA analysis were generally accepted in the scientific community. Cellmark was accredited at the time in question and as part of that accreditation, as well as standard procedure in the laboratory, all the instrumentation used were calibrated and functioning properly. Dr. Word testified in this case, that on October 24, 2003, Cellmark received two items from the Illinois State Police Crime Laboratory in sealed envelopes; a blood card or blood standard labeled C.L. and a stained fabric cutting removed from underwear. Cellmark was able to generate a female DNA profile and a male DNA profile from the fabric cutting from the underwear. The female DNA profile matched C.L. based on C.L.'s blood

standard. The male DNA profile was from an unknown male but was suitable for comparison purposes. Cellmark then wrote a report detailing the results of their testing. Dr. Word testified that through her review of the file, a proper chain of custody was maintained at all times. She also testified that proper protocol was also followed at all times. Cellmark sent the results and evidence back to the Illinois State Police Crime Laboratory. Dr. Word testified that she did not personally conduct any of the DNA testing in this case.

¶ 18 Eugene Shepard, an investigator for the Cook County State's Attorney's office testified for the State. On February 2, 2005, he was assigned to transport defendant's buccal swab from Cermak Hospital to the Chicago police department. He received the buccal swab from technician Manny Sanchez.

¶ 19 Nicholas Richert, a forensic scientist in the biology DNA section of the Illinois State police's Forensic Science Center in Chicago, testified as an expert in forensic DNA analysis on the State's behalf. Richert was assigned to review the data generated in this case by Cellmark. He received the DNA profile of the unknown male and its accompanying report. After reviewing the DNA profile, he entered it into a DNA database for a search. The search resulted in an "association." The Chicago police were notified of the association and the name corresponding to the DNA profile. Richert issued a report and requested a confirmatory standard from the named individual. He explained that a confirmatory standard is a buccal swab, which is then used to confirm the information obtained from the DNA database. Richert then received defendant's buccal swab from the Chicago police in a sealed condition. Using tests commonly accepted in the scientific community, Richert was able to generate defendant's DNA profile from

his buccal swab. He then compared the DNA profile he generated from the buccal swab with the DNA profile Cellmark generated from the underwear stain. Richert concluded that defendant's DNA profile matched the DNA profile from the underwear stain. Richert testified that the DNA profile from the underwear stain in this case would be expected to occur in approximately one in 6.9 quintillion black, one in 48 quintillion white, or one in 400 quintillion Hispanic unrelated individuals. Richert testified that a proper chain of custody was maintained at all times. He opined that "the male DNA profile identified from the semen stain in the underwear in this case is consistent with having originated from [defendant]."

¶ 20 Roxanne Reschke Fitzgerald testified on behalf of the State. Fitzgerald testified that on November 15, 2002, she worked at Swedish Covenant Hospital in the emergency room. At about 1:30 in the afternoon, Fitzgerald was present during C.L.'s treatment and the collection of evidence for the sexual assault evidence kit. Fitzgerald testified C.L. consented to the collection of evidence for the sexual assault evidence kit. The evidence collected included Vaginal swabs and other specimens, C.L.'s sanitary napkin, C.L.'s underwear, C.L.'s blood standard, and C.L.'s clothing. Fitzgerald testified she maintained custody and control of the evidence collected until she turned them over to Officer DeCook. The State then rested. Defendant motioned for a directed verdict, which the court denied.

¶ 21 Defendant called Officer Rita O'Leary, a detective for the Chicago police department, to testify on his behalf. Officer O'Leary interviewed C.L. and conducted the line-up she viewed. Officer O'Leary also testified before the grand jury.

¶ 22 Defendant testified on his own behalf. He testified that he recalled an incident that

occurred "sometime in the fall of [20]02, around November." While driving around the north side of Chicago; he picked up a woman who was a stranger to him, who he originally thought was Indian, but turned out to be Hispanic. The woman spoke English. They drove the car to a nursing home on Clark Street where the two had consensual sex. After having consensual sex, defendant got out of the car when he discovered his underwear was covered in blood. He became angry that the woman was menstruating and he "started creating a fuss." The woman got out of the car and left and defendant never saw her again. Defendant testified that two years later, he was approached by the Chicago police. He testified he has never been to C.L.'s residence. Defendant acknowledged that he has used alias names in the past and had previously been convicted of felony offenses. Defendant then rested.

¶ 23 On rebuttal, the State presented certified copies of two convictions defendant received for prior residential home burglaries. After closing arguments were made by both parties and after being instructed by the court, the jury deliberated. The jury found defendant guilty of aggravated criminal sexual assault and home invasion.

¶ 24 On September 23, 2009, the court appointed the Public Defender to represent defendant for posttrial motions and sentencing. On October 7, 2009, defendant indicated to the court that he wanted a different Public Defender to represent him because the appointed Public Defender was the same one that had previously worked on his case. Defendant later agreed to the Public Defender's representation for posttrial motions and sentencing.

¶ 25 On January 8, 2009, defendant filed a motion for a new trial. Relevant to this appeal, defendant alleged the circuit court erred in failing to allow him to proceed *pro se* after the June

10, 2009, hearing. The court denied defendant's motion. In making its decision, the court noted that it repeatedly warned defendant about the dangers of self-representation. The court further stated on the record that:

> "The defendant was admonished each and every time he was in front of me and he wanted to go *pro se*. He chose not to. Once all the witnesses were here, after he was strenuously admonished when we set it, given one last time to make up his mind, when all the witnesses were here, then he decided again to say now he wants to go *pro se* for sure and he wants a continuance; playing games with the court."

¶ 26 Also on January 8, 2009, the parties proceeded to sentencing. In aggravation, the State presented a victim impact statement from C.L., and defendant's multiple past felony convictions. Based on his multiple convictions and history of reoffending, the State argued defendant had no rehabilitative potential and posed a danger to the community. The State urged the court to give defendant the maximum possible sentence. In mitigation, defense counsel argued that at the time of sentencing defendant was 54 years old, he had a long history of drug abuse, mental illness, and that he suffered from a severe head trauma while in the military. Defense counsel also argued defendant had suffered from seizures and had been on suicide watch as recently as two weeks prior to the sentencing hearing. Defense counsel requested a sentence closer to the minimum.

¶ 27 In making its decision, the court noted the great effect the crime had on C.L.'s life. The court also reviewed defendant's criminal history, which it read into the record. The court

considered the information contained in defendant's pre-sentence investigation report, which contained defendant's family background, education, marriage status, military service, and employment history. The court also reviewed defendant's health, which showed drug and alcohol abuse, a head trauma, that he suffered from seizures, and had numerous suicide attempts. The court also noted that defendant's criminal history showed he was not truthful when arrested and had used numerous alias names, false dates of birth, and different social security numbers. The court stressed that defendant had repeatedly reoffended upon his past releases from incarceration and that his crimes had become progressively worse. The court also considered statutory factors in aggravation and mitigation. The court found none of the statutory factors in mitigation, but found it mitigating that at some point in defendant's life there were short periods where he was able to hold a job. In determining which statutory factors in aggravation applied, the court found that defendant caused substantial serious harm to C.L., that he has an extensive criminal history, and that the sentence is necessary to deter others. The court found further that there was a need to protect society from further harm from defendant. The court then sentenced defendant to two consecutive 30-year prison terms. The court stated that defendant's sentence shall be consecutive to a fifteen year sentence in an unrelated case because it found "it is necessary to protect the public from harm." Defendant's counsel immediately filed a motion to reconsider his sentence in which she argued defendant's sentence was excessive, which the court denied.

¶ 28 Defendant timely appealed.

¶ 29 ANALYSIS

¶ 30 Defendant raises the following issues on appeal: (1) whether he was deprived of his right

to represent himself; (2) whether this court should review, under the plain error doctrine, whether his sixth amendment right to confront the witnesses against him was violated by the State's expert witness's testimony regarding DNA extraction; and (3) whether his sentence is excessive. We will address each argument in turn.

¶ 31 Defendant's Right To Self Representation

¶ 32 Before this court, defendant argues the circuit court deprived him of his right to represent himself. Defendant contends that on June 10, 2009, five weeks prior to trial, he unequivocally expressed to the circuit court his desire to proceed *pro se*. Defendant does not dispute that the circuit court properly admonished him, rather, he argues that the circuit court's refusal to let him proceed *pro se* after the June 10, 2009, hearing violated his right to represent himself. Defendant characterizes the circuit court's decision denying his request to represent himself at the June 10, 2009, hearing as arbitrary and argues that it hindered his ability to prepare for his trial. Defendant later represented himself at his trial. He urges this court to reverse his conviction and remand the cause for a new trial.

¶ 33 In response, the State argues that at the June 10, 2009, hearing, defendant initially sought to represent himself, but later agreed to be represented by counsel. Accordingly, the State argues that defendant's right to self representation was not violated. The State also disputes that defendant made an unequivocal demand to represent himself, as shown by his subsequent conduct.

¶ 34 A criminal defendant has a constitutional right under the sixth amendment to self-representation. *People v. Burton*, 184 Ill. 2d 1, 21 (1998) (citing *Faretta v. California*, 422 U.S.

806 (1975)). Before proceeding *pro se*, a criminal defendant must intelligently and knowingly relinquish the right to representation. *Id.* "It is well settled that waiver of counsel must be clear and unequivocal, not ambiguous." *Id*. at 21. In deciding whether to allow self-representation, "a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right to self-representation." *People v. Beaz*, 241 Ill. 2d 44, 116 (2011). A defendant's right to self-representation is waived "unless he 'articulately and unmistakably demands to proceed *pro se*.' " *Burton*, 184 Ill. 2d at 22 (quoting *United States v. Weisz*, 718 F. 2d 413426 (D.C. Cir. 1983)). An unequivocal demand to waive counsel is required "to: (1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*." *People v. Mayo*, 198 Ill. 2d 530, 538 (2002).

¶ 35 If a defendant's decision to proceed *pro se* is made knowingly and intelligently, defendant's decision must be accepted even though a court may believe the decision to be unwise. *Baez*, 214 Ill. 2d at 117. Courts look at the overall context of the proceedings to determine whether a defendant unequivocally desires to proceed *pro se*. *Burton*, 184 Ill. 2d at 22, see also *Baez*, 214 Ill. 2d at 116 ("The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused."). Additionally, a defendant can later acquiesce in representation by counsel even after indicating a desire to proceed *pro se*. *Burton*, 184 Ill. 2d at 23. Our supreme court has explained that:

> "Even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel. Under certain circumstances, defendant may acquiesce by vacillating or abandoning an earlier request to proceed *pro se*. [Citations.] In determining whether a defendant seeks to relinquish counsel, courts may look at the defendant's conduct following the defendant's request to represent himself. [Citations.] A defendant may forfeit self-representation by remaining silent at critical junctions of the proceedings." *Id.* at 23-24.

"Courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Baez*, 214 Ill. 2d at 116 (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). The circuit court's decision regarding a defendant's relinquishment of the right to counsel will not be overturned absent an abuse of discretion. *Baez*, 241 Ill. 2d at 116.

¶ 36 Our review of the record, particularly, the overall context of the proceedings shows that defendant did not unequivocally invoke his right to proceed *pro se* at the June 10, 2009, hearing. See *Burton*, 184 Ill. 2d at 22 ("In determining whether a defendant's statement is clear and unequivocal, courts have looked at the overall context of the proceedings."). Defendant points to two instances during the June 10, 2009, hearing in which he alleges he invoked his right to self-representation. In the first instance, at the beginning of the hearing, defendant and defense counsel informed the court that defendant wanted to represent himself. After admonishing him, the court passed the case to allow defendant to speak with his attorney. When the case was

recalled, the court asked defendant how he would like to proceed. Defendant answered, "I accept counsel's representation on one condition your Honor. That after the conclusion of this motion, a trial demand be attached to the trial date." The court and defendant's counsel then explained to defendant that the date of trial, July 27, 2009, was the first available day for the trial, with or without a jury demand. Defendant did not object and the hearing continued on the originally scheduled motion. Defendant's conditional acceptance of representation and then his silence after he was informed of the futility of his condition, *i.e.* the jury demand, shows defendant acquiesced in his counsel's continued representation. See *Burton*, 184 Ill. 2d at 23-24 ("In determining whether a defendant seeks to relinquish counsel, courts may look at the defendant's conduct following the defendant's request to represent himself. [Citations.] A defendant may forfeit self-representation by remaining silent at critical junctions of the proceedings."). We cannot say that defendant unequivocally invoked his right to self-representation based on his actions.

¶ 37 In the second instance on June 10, 2009, defendant interrupted the assistant State's Attorney. The court informed the defendant it was not his turn to speak and told him to stop speaking. The assistant State's Attorney began to speak again when the court interrupted and told defendant, "I told you before, I wanted all the shackles and the cuffs taken off of you provided that you would behave properly in court and you assured me you would." Defendant responded that he was "not doing anything." The court then warned defendant to stop moving around and told him to "[s]top talking now" when defendant attempted to address the court. Defendant ignored the court's order, and stated "I want to proceed *pro se*, your Honor." The court stated

"No" and allowed the Assistant State's Attorney to resume the proceedings. At the end of the hearing, defendant informed the court that he did not want an extra status date before trial to speak with his attorney and stated that he could "telephone counsel." The court then told defendant to inform the court "if something develops." We hold that defendant also did not clearly and unequivocally invoke his right to self-representation in this second instance. The record shows that defendant was acting disruptive in court and then after being warned by the court not to speak, directly disobeyed the court order and stated he wanted to proceed *pro se.* This was not a definitive request for self-representation, rather it was a response to being warned about being disruptive in court. In addition to the two instances at the June 10, 2009, hearing, defendant had already requested to represent himself, only to later accept representation, at the March 20, 2009, hearing. Based on defendant's history of denying and then accepting representation, it appears that defendant was disingenuously attempting to manipulate or abuse the system by interrupting the proceedings with his request to proceed *pro se*. *Mayo*, 198 Ill. 2d at 538 (An unequivocal demand to waive counsel is required "to*** prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se.*") Further, defendant was again silent after this second instance. After interrupting the proceedings, defendant did not inform either his counsel or the court that he would like to represent himself. At the end of the hearing, he even told the court he could telephone his attorney if he needed to.

¶ 38 We hold defendant did not unequivocally invoke his right to represent himself at the June 10, 2009, hearing. The circuit court did not abuse its discretion in its actions concerning

defendant's requests. In the first instance, defendant asked to proceed *pro se*, but later acquiesced in having counsel as shown by his actions after his request. In the second instance, defendant attempted to interrupt the proceedings in defiance of the court's order not to speak at that time. The nature of his request, by interrupting the State after being disruptive in court, matched with his history of vacillating between having representation or proceeding *pro se*, shows defendant was attempting to abuse the system. Additionally, defendant did not attempt to inform the court or his counsel in a proper manner that he wanted to represent himself, which again showed his acquiescence in having counsel represent him at that time.

¶ 39 Defendant's Right to Confront the Witnesses Against Him

¶ 40 Defendant next argues that his Sixth Amendment right to confront the witnesses against him was violated because the State did not present any testimony from the scientists at Cellmark who actually calibrated the DNA testing equipment, extracted biological material, or extrapolated the DNA evidence that was later used against him at trial. Instead, the State presented the testimony of Dr. Word, the former laboratory director of Cellmark. Defendant contends Dr. Word's testimony is impermissible testimonial hearsay. Defendant argues that our supreme court's recent decision to the contrary in *People v. Williams* (238 Ill. 2d 125 (2010)) is wrongly decided and urges this court to follow the United State's Supreme Court decision in *Melendez-Diaz v. Massachusetts* (129 S. Ct. 2527, 2532 (2009)). Defendant also admits that he did not properly preserve this issue for appeal, but argues that we should review the alleged error under either of the two prongs of the plain error doctrine. We note that defendant did not argue in his briefs that the State failed to lay a proper foundation for Dr. Word's testimony.

¶ 41 In response, the State argues that the plain error doctrine is not applicable in this case because no error occurred. The State contends that our supreme court's decision in *Williams* is proper, but acknowledges that the United State's Supreme Court recently granted *certiorari* in *Williams*.[3] In the alternative, the State argues that defendant has not met his burden under either prong of the plain error doctrine. Accordingly, his procedural default should be honored.

¶ 42 Under the plain-error doctrine, we may review alleged errors that are not properly preserved for appellate review. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, before determining whether we may review the alleged error under either prong of the plain-error doctrine, "defendant must first show that a clear or obvious error occurred." *Id*., see also *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) ("Clearly, there can be no plain error if there is no error.")

¶ 43 Both our supreme court and two panels of this court have recently addressed the issue at bar. In *People v. Williams*, samples from a sexual assault evidence kit were sent by the Illinois State Police to a Cellmark laboratory in Maryland. *Williams*, 238 Ill. 2d at 130. Based on semen found on one of the samples, Cellmark derived a DNA profile and sent the profile back to the Illinois State Police. *Id.* This DNA profile was then used by the Illinois State Police to link the defendant to the crime. *Id.* At trial, an Illinois State Police forensic biologist testified as an expert regarding DNA analysis and how the DNA analysis in that case linked defendant to the crime. *Id.* at 130-33. In linking defendant to the crime through DNA analysis, the expert relied upon the DNA profile derived by Cellmark. *Id.* On appeal, the defendant argued that his sixth

[3]According to Plaintiff's brief, the United States Supreme Court heard oral argument in *Williams v. Illinois*, No. 10-8505, on December 6, 2011.

amendment confrontation rights were violated by the expert's testimony regarding the Cellmark DNA profile. *Id.* at 141.[4] Specifically, the defendant contended that the State's introduction of the Cellmark report was hearsay as it sought to establish the truth of the matter asserted. *Id.* at 143. Our supreme court disagreed, holding:

> "[The expert's] testimony about Cellmark's report was not admitted for the truth of the matter asserted. The State introduced this testimony, rather, to show the underlying facts and data [the expert] used before rendering an expert opinion in this case. [Citation.] The evidence against the defendant was [the expert's] opinion, not Cellmark's report, and the testimony was introduced live on the witness stand. Indeed, the report was not admitted into evidence at all. Rather, [the expert] testified to her conclusion based upon her own subjective judgment about the comparison of the Cellmark report with the existing [Illinois State Police] profile." *Id.* at 145.

The DNA profile from Cellmark was therefore not hearsay, as it was not used for the truth of the matter asserted. *Id.* 147.

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[4] The defendant in *Williams* also argued that the expert's testimony which relied upon the DNA profile derived by Cellmark lacked a proper foundation. *Id.* at 136-42. Defendant in the case at bar does not make any foundational challenges.

¶ 44 The defendant in *Williams*, like defendant in the case at bar, also argued that we should follow the United States Supreme Court holding in *Melendez-Diaz. Id.*, citing *Melendez-Diaz,* 129 S. Ct. 2527 (2009). Our supreme court disagreed, and distinguished *Melendez-Diaz,* stating:

> "In *Melendez-Diaz*, the disputed evidence was a 'bare bones statement' that the substance was cocaine, and the defendant 'did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.' *Melendez-Diaz,* *** 129 S. Ct. at 2537. Here, [the expert] testified about her own expertise, judgment, and skill at interpretation of the specific alleles at the 13 loci, and confirmed her general knowledge of the protocols and procedures of Cellmark. [The expert] also conducted her own statistical analysis of the DNA match. She did not simply read to the judge, sitting as a fact finder, from Cellmark's report. This in contrast to Cellmark's report, which did not include any comparative analysis of the electropherograms or DNA profiles and was not introduced into evidence. Cellmark's electropherogram, rather, was part of the process used by [the expert] in rendering her

> opinion concluding that the profiles matched. Thus, [the expert's] opinion is categorically different from the certificate in *Melendez-Diaz*." *Id.* at 149-50.

¶ 45 In *People v. Johnson*, 406 Ill. App. 3d 114 (2010) (*Johnson I*), from the sixth division of this court, the State presented the expert testimony of a DNA analyst from Cellmark in addition to the expert testimony from a Illinois State Police forensic scientist in a factually similar case *Id*. at 116-17. The Cellmark expert, like the expert in the case at bar, testified that she did not participate in the testing of the sample sent to Cellmark by the Illinois State Police. *Id.* at 116.[5] She did testify to the procedures and protocols at Cellmark and that the results and the DNA profile were correct. *Id.* As in the case at bar, the State then presented the testimony of an Illinois State Police forensic scientist who matched the DNA profile from Cellmark with the defendant's DNA profile. *Id.* at 117. This court then denied that the defendant's confrontation clause rights were violated, holding:

> "We reach the same conclusion as the supreme court in *Williams*. [The Cellmark analyst] testified about the laboratory's procedures and practices regarding DNA testing, though she did not participate in the testing. She used the report that was prepared as the basis of her expert opinion that the proper procedures were followed in the

[5] It appears the expert from Cellmark in *Johnson I* is the same expert from Cellmark in the case at bar, Dr. Charlotte Word.

> analysis. Defendant's attorney was able to cross-examine [Cellmark's expert] about the basis of her opinion and called attention to the fact that she did not participate in the testing and that she assumed that the analysts properly documented each part of the testing, as required by Cellmark. The same reasoning holds true for [the Illinois State Police forensic scientist]. He used the Cellmark report as the basis for part if his opinion that the male DNA profiled obtained from the crime scene matched defendant's DNA. The Cellmark report was not offered to prove the truth of its contents, but was used as part of the bases for two expert's opinions." *Id.* at 120.

Accordingly, this court in *Johnson I* held that the defendant's confrontation clause rights were not violated. *Id.* Additionally, this court in *Johnson I*, relied on *Williams* to distinguish the United States Supreme Court's decision in *Melendez-Diaz*. *Id.* at 121-22.

¶ 46 Ten days after the *Johnson I* opinion was filed, the first division of this court addressed the same issue with the same fact pattern in another case named *People v. Johnson*, 406 Ill. App. 3d 805 (2010) (*Johnson II*). As in the case at bar, the defendant sought review under the plain error doctrine. *Id.* at 814-15. The first division of this court, relying on *Williams*, held that the Cellmark "report was not offered to prove the truth of Cellmark's findings; instead, [the Cellmark expert] testified regarding the report to provide the basis for her own opinion." *Id.* at 818. This

court also noted that unlike in *Williams*, a actual Cellmark representative testified and was subject to cross-examination. *Id.* Accordingly, the first division of this court held that there was no confrontation clause violation and, thus, no error. *Id.*

¶ 47 We see no reason to depart from the holdings in *Williams*, *Johnson I*, or *Johnson II*. The facts at issue in this case are similar to *Williams* and nearly identical to the facts in *Johnson I* and *Johnson II*. Dr. Word, an expert formerly employed by Cellmark, testified to her own expert opinions based on her independent review of the DNA profile generated by Cellmark. She was subject to cross-examination by the defendant. No Cellmark report was admitted into evidence. Accordingly, defendant's right to confront the witnesses against him was not violated in this case. As defendant has not shown that an error occurred, plain error review is not appropriate in this case. *Hillier*, 237 Ill. 2d at 545.

¶ 48 Defendant's Sentence

¶ 49 Defendant's final argument is that his sentence is excessive because the circuit court did not give proper consideration to his age, mental illness, and addiction issues in crafting a sentence. Defendant argues further that the circuit court erred by ordering his sentence to run consecutively to a 15 year sentence imposed in an unrelated case. He contends that the circuit court's stated reason for sentencing him as it did, to protect the public, is "illusory"and "invalid" because his 60 year sentence is effectively a life sentence.

¶ 50 In response, the State argues the circuit court did not abuse its discretion in sentencing defendant. The State maintains that defendant was sentenced within the applicable statutory guidelines, and that the circuit court considered defendant's age, mental health, and reported

substance abuse issues in determining his sentence.

¶ 51 The Illinois Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Under Supreme Court Rule 615, a court of review does have the power to reduce a defendant's sentence if the circuit court abused its discretion or if the sentence was unlawful. Ill. S. Ct. Rs. 615(b)(1), (b)(4); *People v. Jones*, 168 Ill. 2d 367, 378 (1995). If a sentence is within the statutory limits, a court of review will not alter that sentence unless the trial court abused its discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). Our supreme court has warned that "the power to reduce a sentence should be exercised 'cautiously and sparingly.' " *Jones*, 168 Ill. 2d at 378 (quoting *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988)).

¶ 52 The sentencing court does not have to expressly find that a defendant lacked rehabilitative potential. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The defendant's potential for rehabilitation is not given greater weight than the seriousness of the crime. *Coleman*, 166 Ill. 2d at 261. Further, "[t]here is a strong presumption that a trial court has considered any evidence of mitigation brought before it." *People v. Trimble*, 220 Ill. App. 3d 338, 355-56 (1991).

¶ 53 A circuit court's sentencing decision is given "substantial deference" because the circuit court, "having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. A reviewing court "must proceed with great caution and must not substitute its judgment for that of the trial court

merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Further, "[a] sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Id.* at 54.

¶ 54 Initially, we note that defendant does not argue that his sentence is unlawful or outside the sentencing range permissible by statute. Rather, defendant's argument is that his sentence is excessive based on his age, mental illness, and drug addiction. Defendant also presented this argument before the circuit court. Defendant is essentially asking this court to reweigh the factors in aggravation and mitigation, which we are not prepared to do. See *Fern*, 189 Ill. 2d at 53 (A reviewing court "must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently.") Our review of the record shows, contrary to defendant's assertions, that the circuit court did consider defendant's age, mental health, and reported substance abuse in determining defendant's sentence. The circuit court, on the record, reviewed defendant's PSI report, which addressed his age, drug and substance abuse, and mental health. Accordingly, the circuit court did not abuse its discretion in sentencing defendant.

¶ 55 CONCLUSION

¶ 56 The judgment of the circuit court is affirmed.

¶ 57 Affirmed.