2015 IL App (1st) 130861-U

No. 13-0861

Fourth Division
May 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	No. 10 CR 8037
	)	
v.	)	Honorable
	)	Kenneth J. Wadas,
EDDIE FENTON,	)	Judge, presiding.
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1

¶ 2 *Held*: The trial court's finding that defendant failed to establish a *prima facie* case of racial discrimination under *Batson* was not against the manifest weight of the evidence; the trial court properly sentenced defendant to 110 years' imprisonment; and the 25 year firearm sentencing enhancement is not unconstitutionally vague.

¶ 3 Following a jury trial, defendant Eddie Fenton was convicted of first degree murder pursuant to sections 9-1(a)(1) and 9-1(a)(2) of the Criminal Code of 1961 (Code). (720 ILCS

5/9-1(a)(1), 9-1(a)(2)(West 2006). The jury found that defendant personally discharged a firearm that proximately caused death during the commission of the offense, and defendant was sentenced to 110 years' imprisonment. On appeal, defendant contends that the trial court erred in holding that he failed to establish a *prima facie* case of racial discrimination in jury selection where the State used two-thirds of its peremptory challenges to excuse African-American venire members, and that the trial court abused its discretion when it sentenced defendant to 110 years in prison because it did not adequately consider mitigating factors and gave undue consideration to aggravating factors. Defendant further claims that the 25 years-to-life firearm enhancement is unconstitutionally vague. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant does not challenge the sufficiency of the evidence underlying the conviction. Therefore, the facts set forth below are limited to those relevant to the issues on appeal. The charges against defendant arose from the fatal shooting of Willie Williams (Williams) during a mob fight in front of the Ford City Mall movie theater in the early morning of April 1, 2006. The evidence presented at trial established that defendant went to the movie theater with a group of friends on March 28, 2006. Williams also went to the theater that night with a group of friends to see the late night showing of "ATL." After the movie, Williams walked with Yolanda Metayer as he and his friends left the theater. As they were leaving, Williams' friend Donta Mitchell got into an argument with defendant's friend Donnie Moore. Moore and Mitchell began to fight and a brawl ensued. At some point, Metayer and Williams turned around and saw the group fighting. Williams realized that his friend, Mitchell, was involved and ran towards the fight. Metayer saw Williams stopped in the middle of the melee, "ducking and dodging." Metayer also ran towards the fight, but when she saw someone with a gun, she ran the other way. A gun was fired and

everyone scattered. Metayer "blanked" for a few minutes and then she looked over to Williams, who was convulsing on the ground. Williams had suffered a gunshot wound to the head and later died from his injuries.

¶ 6 Several witnesses, including Metayer, Moore, and defendant's friend Devon Pearson, variously testified that they saw defendant with a gun either before, during, or after the fight. Defendant's friend Levi Ford testified that he saw defendant pull a gun out of his waistband and shoot Williams once in the head. Mitchell testified that he heard a gunshot and saw the shooter from the side, whom he described as a tall African-American man with a "caramel" complexion. Two other witnesses, Robert Rodwell and Jerry Williams, provided statements to the police and testified before the grand jury that they had seen defendant with a gun either right before or right after the shooting, but later recanted their statements at trial. Rodwell stated that he was suffering from a mental illness and had not actually been present at the theater that night. Williams stated that he had been coerced by police to testify against defendant. He also testified that he and his family had received threats of intimidation from an unknown source before trial.

¶ 7 The court conducted jury selection by calling four venirepersons at a time to be questioned as a panel. The court then began by questioning jurors. The court *sua sponte* excused "numerous" people for cause when it was apparent that they could not sit on the jury based on their answers to the court's questions. When a venireperson was excused, another was called up for questioning to replace that person on the panel, in order to maintain a panel of four. When a four person panel was fully questioned by the court, the panel was presented to the parties for questioning. At that time, the parties were permitted to question jurors and make for cause or peremptory challenges. Neither party made any for cause challenges; however, both parties exercised peremptory challenges.

¶ 8 The State used three of its five peremptory challenges during jury selection. The first peremptory challenge was used against Bruce T. Holmes, a Caucasian man. Holmes was from the northern suburbs of Chicago. He was a singer/songwriter and also worked in mail-order sales. During *voir dire*, Holmes stated that the battery was stolen out of his car 20 years earlier and his wife's house was burglarized in the middle of the night a number of years ago. The other two challenges were used against Monique Tisdel and Laurie Martin, two women who are African-American, as is defendant. Tisdel, who was from the northern suburbs of Chicago, stated that she had two children, worked in administration at Lurie Children's Hospital, and she knew a law clerk. She also stated that her brother was in prison for a murder conviction. After two panels of four had already been sworn in and the third panel was being questioned, the State excused Martin. Martin lived on the northwest side of Chicago and was a librarian for a Chicago public school. She taught children from first through sixth grade. Five years before trial in this case, her purse was stolen. She knew some police officers who worked at her school. At the conclusion of the court's questioning before the panel was turned over to the State for questioning, Martin volunteered the following: "I have a comment to make because I know you say you're not excusing somebody, I just got off strike. So I know that's not an excuse, but I just want to put that in for the Court[.] *** I know you're not excusing anybody for school or weddings, but I just wanted to add that I just came off seven days of strike. Just for a thought."

¶ 9 After Martin was excused, defendant alleged a claim of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Specifically, defendant objected to the State's peremptory challenges excluding Tisdel and Martin as jurors. Defense counsel asserted that because of the State's peremptory challenges, defendant was not likely to have a jury that represented an adequate cross-section of the community. Defendant argued that two out of three,

or 66 percent, of peremptory challenges used against African-American venirepersons indicates racial discrimination. He further argued that the State's use of peremptory challenges against African-American venirepersons demonstrates a pattern of excluding jurors on the basis of their race. Specifically, defense counsel stated:

> "I know that a lot of African Americans on this jury have been excused for cause because of their inability to be fair, but it's getting to the point where [defendant] is not getting a cross-section of the community to sit and hear his case[.]
>
> * * *
>
> [W]e believe that when 66 percent of their peremptory challenges are towards African Americans, that we've shown a pattern. *** I don't believe there's any African Americans that have been seated on this jury. And, you know, at this point I suppose we have essentially eleven, but that last juror, you know is obviously at this point not going to be African American[.]"

¶ 10 The State maintained that its use of peremptory challenges did not amount to a pattern of excluding African-Americans because two out of three challenges are not enough to establish a pattern. After hearing defendant's arguments and the State's response, the court determined that defendant did not establish a *prima facie* case of racial discrimination under *Batson* and stated that:

> "the record should reflect that numerous African-Americans have been called into the jury box for questioning during the course of the questioning of prospective jurors. Almost everyone has taken themselves out for one reason or another, but I don't find that with all three challenges used, one of which was a male white, that

a pattern is established, and accordingly the Defense has failed to meet their burden at this stage of the proceedings."

¶ 11 The case proceeded to trial and defendant was convicted of first degree murder. Additionally, the jury found that defendant had personally discharged a firearm that proximately caused the death of Williams.

¶ 12 Defendant's presentence investigation report (PSI) indicated that he was 27 years old at the time of sentencing. It further indicated that he had been diagnosed with bipolar disorder and was prescribed Wellbutrin for the symptoms. While incarcerated, he saw a psychiatrist once a month. Additionally, the PSI stated that defendant has a good relationship with his family and has two children. Defendant's highest level of education is tenth grade. During the summers of 2000 and 2001, defendant worked with children at Gage Park. While incarcerated he was studying for the GED test and he was interested in culinary arts and becoming an electrician.

¶ 13 The PSI also outlined defendant's extensive criminal history. As a juvenile, defendant was convicted of theft. As an adult, defendant had been convicted of cruelty to animals, manufacture/delivery of cannabis, and possession of cocaine and also had been convicted twice for unlawful use of a weapon by a felon.

¶ 14 At the sentencing hearing, the court heard from three witnesses. Investigator McGough, an investigator for the Cook County Sheriff's Office assigned to the Correctional Information and Intelligence Commission, was qualified as an expert in gang intelligence and investigation. Previously, McGough was employed in the Criminal Investigations Unit (CIU). McGough testified that while he was working in the CIU in the Cook County jail, defendant came to him and admitted to being a member of the Black P-Stone Nation street gang. Defendant told McGough that prior to his incarceration, he held the rank of general in the Black P-Stones, which

is a section leader for a particular set of the gang. Defendant also told McGough that he turned down a leadership position within the jail. Defendant agreed to be an informant on other gang members and to help the CIU establish the hierarchy and membership in the gang. The State introduced as evidence a chart of the Black P-Stone hierarchy that defendant helped the CIU prepare and defendant's name was not on the chart. However, defendant's name was listed on a document created by the Cook County Sheriff's Office with influential Black P-Stone members in Division 10 of Cook County jail, which was also submitted as evidence.

¶ 15 Officer McGough testified that while defendant was in jail awaiting trial on this matter, his cell was searched. Black P-Stone literature, including the gang prayer and an unsigned recantation letter relating to defendant's case, were found in his cell. The recantation letter stated that police intimidated the writer into saying that he or she saw defendant shoot Williams, "but the truth is I really didn't."

¶ 16 McGough further testified that defendant's left forearm bears a tattoo of a five-pointed star, which is associated with the Black P-Stone Nation gang. That tattoo has the name of his son's mother in the center. Defendant did not have the tattoo before he entered Cook County jail. McGough also testified that defendant has a tattoo on his right forearm of the "grim reaper" holding a smoking gun. McGough reviewed the PSI before testifying. In the report, defendant denied being a member of a gang. McGough testified that it is not unusual for members of the Black P-Stones to deny being members of a gang to law enforcement.

¶ 17 Williams' father and mother testified and gave victim impact statements. Both described their son as a caring person who had a lot of potential. In honor of Williams, Williams' father started the "Willie Williams, III, Youth Foundation" to mentor inner city youth so that they stay in school and do not turn to drugs and gangs.

¶ 18 The court then heard arguments from both sides regarding the proper sentence for defendant. The State argued, among other things, that the court should give defendant a significant sentence because defendant killed an innocent victim. The State further argued that defendant is dangerous and violent and has several prior convictions. Additionally, defendant is a high-school dropout who is in a gang and abuses drugs. Defense counsel maintained, among other things, that the court should give defendant a lower sentence because defendant has a bipolar diagnosis. Defense counsel urged the court to consider the inadequacies of the criminal justice system for addressing mental health issues. Additionally, defense counsel stressed to the court that defendant will have to serve the entire sentence that is imposed and that, even with the minimum sentence of 45 years, defendant would be in prison until he is 70 years of age.

¶ 19 After hearing counsels' arguments, the trial court discussed aggravating and mitigating factors. The court went through each of the statutory mitigating factors and found that none applied. The court observed that defendant killed an innocent victim and stated that "as people are engaged in a fistfight, you walk up to someone who is not involved in the fight and put a bullet in his head." The court went on, stating that defendant "wasn't threatened, and the individual, Willie Williams, Jr., was not threatening the defendant. In fact, he was walking away from him. His back was towards him. Gunned down from behind." The court also considered defendant's extensive criminal history and pointed out that defendant "has shown a propensity over the years to be armed with a handgun and ultimately be convicted of offenses with a handgun, someone who over time got a couple of breaks in the system, but nevertheless continued to be armed and dangerous." After addressing all of the statutory mitigating factors, the court explained that "there are no factors in mitigation that inure to the benefit of defendant, and his rehabilitative potential is on a scale of one to ten probably a zero." The court explained

its reasons for defendant's sentence and stated that Williams was " "[a] young man who really had nothing but potential tattooed on his soul, if you will, as opposed to a smoking gun tattoo on [defendant], the ultimate irony you might say. I guess when you put a smoking gun on your body as a tattoo, then it's not that surprising when you pull the trigger and kill someone with a smoking gun." The court sentenced defendant to 50 years' imprisonment for the first degree murder conviction, plus a consecutive mandatory firearm enhancement of 60 years for personally discharging a firearm that caused death.

¶ 20 On December 28, 2012, defendant filed a motion to reconsider the sentence. Defense counsel asked the court to reduce the 60 year firearm enhancement so that defendant would have the possibility of leaving the penitentiary in his lifetime. The court denied the motion stating:

> "I think [defendant] belongs to a small group of individuals that represent extreme threats to society and pose a significant threat to society. That was one of the factors that I considered in the sentence I imposed. The sentence is within the statutory guidelines. It's not cruel and unusual, and I think it's totally appropriate considering all of the facts and circumstances of this case, the defendant's track record, and all of the other factors in aggravation and mitigation that I considered."

¶ 21 II. ANALYSIS

¶ 22 Batson Challenge

¶ 23 Defendant first contends that the trial court erred in rejecting his claim of racial discrimination pursuant to *Batson v.* Kentucky, 476 U.S. 79 (1986). Under *Batson*, the court conducts a three-step analysis to determine whether there has been purposeful racial discrimination during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 96-99 (1986). First, the

defendant must establish a *prima facie* case that the prosecutor used a peremptory challenge on the basis of race. *Id.*; *People v. Davis*, 345 Ill. App. 3d 901, 906 (2004). If a *prima facie* case is shown, the burden shifts to the prosecutor to show that there is a race neutral reason for excusing that juror. *Id.* If the prosecutor makes such a showing, then the court must make a determination regarding whether the defendant met his or her burden of proving purposeful discrimination. *Id.*

¶ 24 Defendant argues that the court erred when it found that a *prima facie* case of racial discrimination was not established where two out of three peremptory challenges used by the State were against African-Americans. The State responds that the record is not sufficiently developed to substantiate defendant's claims because the racial composition of the venire and of the jury is unknown. The State further argues that the trial court correctly found that defendant did not establish a *prima facie* case of discrimination.

¶ 25 We review a trial court's finding that a party has failed to establish a *prima facie* case of purposeful discrimination for whether it was against the manifest weight of the evidence. *People v. Furdge*, 332 Ill. App. 3d 1019, 1029 (2002). " 'A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. ' " *People ex rel. Ryan v. Bishop*, 315 Ill. App. 3d 976, 978 (2000) (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995)). Additionally, "the party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party." *People v. Rivera*, 221 Ill. 2d 481, 512 (2006) (citing *People v. Evans*, 186 Ill. 2d 83, 92 (1999)).

¶ 26 To establish a *prima facie* case of purposeful racial discrimination, the defendant must demonstrate that " 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the peremptory strike" raise an inference that the prosecutor used the peremptory challenge on

the basis of race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008) (quoting *Batson*, 476 U.S. at 93-94, 97)); See also *People v. Heard*, 187 Ill. 2d 36, 54 (1999). The supreme court has explained that the court should consider the following relevant factors when determining whether a *prima facie* case exits:

> "(1) 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 witnesses." *Davis*, 231 Ill. 2d at 362.

¶ 27 The first factor to consider is whether the excluded venirepersons and the defendant share the same race. Here, defendant and venirepersons Martin and Tisdel are all African-American. Thus, this factor weighs in favor a *prima facie* case. However, "although this circumstance is relevant, it is not dispositive in determining whether a *prima facie* case exists." *People v. Williams*, 173 Ill. 2d 48, 72 (1996) (citing *People v. Peeples*, 155 Ill. 2d 422, 470 (1993)).

¶ 28 The second relevant factor addresses whether the prosecutor's peremptory challenges demonstrate a pattern of strikes against African-American venirepersons. A pattern is present "where the strikes affect members of a certain race to such a degree or with such a lack of apparent nonracial motivation that it suggests the possibility of racial motivation." *Williams*, 173

Ill. 2d at 72. Defendant asserts that the exclusion of two African-American venirepersons in a row demonstrates a pattern of strikes.

¶ 29 In considering defendant's *Batson* challenge during jury selection, the trial court explicitly found that there was not a pattern of strikes against African-American venirepersons. The court heard both parties' arguments, observed *voir dire*, and determined that two out of three peremptory strikes against African-Americans did not suggest a pattern. In so finding, the court noted that the State's first peremptory challenge was used against a Caucasian man and that its second and third challenges were against African-American women. The court stated:

> "[t]he record should reflect that numerous African Americans have been called into the jury box for questioning during the course of the questioning of prospective jurors. Almost everyone has taken themselves out for one reason or another, but I don't find that with all three challenges used, one of which was male white, that a pattern is established."

¶ 30 In *Rivera*, 221 Ill. 2d at 513-14, the supreme court refused to find a pattern when two peremptory challenges were used against African-American women because that conclusion would set a precedent that "a pattern develops anytime a party strikes more than one juror of any race or gender." *Id.* We agree with the supreme court and the trial court that, two out of three strikes against African-Americans is not sufficient to establish a pattern.

¶ 31 Defendant further argues that the timing of the State's peremptory strike against Martin suggests a pattern because at the time she was excluded there were 11 non African-American venirepersons who would likely be on the jury. According to defendant, because Martin was questioned for the potential 12th seat, she was the only possible African-American juror. Defendant's argument must fail because, taken to its logical conclusion, it would require an

inference of discriminatory conduct every time a challenge is used against an African-American venireperson and the other 11 potential jurors are non African-American. Accordingly, we find that this factor favors the finding that there was not a *prima facie* case.

¶ 32 We next consider whether there was a disproportionate use of the State's peremptory challenges against African-American venirepersons. Initially, we note that, although the racial proportion of those excluded is a relevant circumstance, it is unconstitutional to exclude even one person on the basis of race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008)(citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) [citations.]). Defendant argues that the racial breakdown of excluded venirepersons—66% African-American and 34% Caucasian—is so disproportionate that it indicates purposeful discrimination.

¶ 33 In support, defendant cites to *People v. Champs*, 273 Ill App. 3d 502 (1995), in which the court found an inference of purposeful racial discrimination where 60 percent of the excluded jurors where African-American. In *Champs*, the court reasoned that 60 percent of the excluded jurors being African-American suggested an inference of racial discrimination when the State used peremptory challenges to exclude three out of only four potential African-American jurors. *Id.* at 505-07.

¶ 34 We find *Champs*, distinguishable from this case. Here, it is uncertain from the record how many potential African-American jurors were questioned. As in *Champs*, several African-American jurors were excused for cause. However, unlike in *Champs*, we do not know how many venirepersons were African-American, how many of them were excused for cause, or how many African-American venirepersons were left to be questioned when Tisdel and Martin were excused. The only record that we have of the racial makeup of the venire is the defense attorney's on the record statements that when Martin was excused "a lot of African Americans" had been

questioned and "excused for cause[,]" the prosecutor's comment that the venire was "probably more than 50 percent African American," and the court's statement that "numerous" African-Americans had been questioned. Based on this record, we are unable to complete the precise analysis that the court in *Champs* engaged in when it determined that the state excluded three out of four possible African-American jurors, which amounted to three out of five of its peremptory challenges. We point out that the party asserting a *Batson* challenge has the burden of preserving a sufficient record. *Rivera*, 221 Ill. 2d at 512.

¶ 35 Moreover, we find the other cases defendant cites regarding disproportionate use of peremptory challenges where there are significantly larger sample sizes to be unavailing. See *People v. Harris*, 129 Ill 2d 123, 173 (1989)(finding 15 out of 20 peremptory challenges (75%) excluding African-American venirepersons was a pattern); *People v. McDonald*, 125 Ill. 2d 182, 196 (1998) (finding that 16 out of 18 peremptory challenges (88%) excluding African-American venirepersons was a pattern.). We believe it prudent to point out that, here, with such a small number of peremptory challenges used, one challenge would greatly affect the group's racial proportion. Nonetheless, we find that the use of two out of three peremptory challenges to exclude African-American venirepersons, or 66%, slightly weighs in favor of finding a *prima facie* case.

¶ 36 The next factor we consider is the number of African-American venirepersons as compared to the number of African-American jurors. As discussed above, the record does not reflect the racial makeup of the venire and of the jury. We reiterate that it is defendant's burden to provide a sufficient record. *Rivera*, 221 Ill. 2d at 512. Additionally, apparently many African-American venirepersons were excused for cause by the court *sua sponte*. Consequently, the court significantly limited jury pool before either party had an opportunity to excuse jurors. Therefore,

the racial makeup of the jury and of the potential jurors who remained, is a consequence, in large part, of actions taken by the court and not by the State. Thus, this factor cannot suggest an inference of racial discrimination by the State.

¶ 37 The next factor is whether the prosecutor's questions and statements during *voir dire* and in making peremptory challenges suggest that the prosecutor was purposefully discriminating against African-Americans during jury selection. The record reveals that after the court questioned the potential jurors, the prosecutor asked each potential juror similar questions regarding their background. None of the prosecutor's questions suggest that he was making peremptory challenge determinations based on race and defendant does not make a specific argument in his brief regarding the prosecutor's questions and statements. Accordingly, we find that this factor does not support finding a *prima facie* case.

¶ 38 We next consider whether the excluded venirepersons were a heterogeneous group with race as their only shared characteristic. The excluded venirepersons by the State consisted of Holmes, Tisdel, and Martin. Holmes was a Caucasian man, and Tisdel and Martin were African-American women. Thus, they did not all share the same race or gender. The two excluded jurors who were African-American, Tisdel and Martin, also shared the same gender. The only characteristic that the entire group shared is that they are from the same general geographic area, as they were all from the northern suburbs or the north side of Chicago.

¶ 39 However, also relevant to this consideration is whether the excluded venirepersons share any characteristics with the venirepersons who were chosen to be on the jury. *Williams*, 173 Ill. 2d at 74. This court has explained that, where the excluded vernireperson shares characteristics with seated jurors, "[a]bsent some reasonable ground, apparent on the record, for exercising a

peremptory challenge, the record raises an inference that the challenge was exercised for a racially discriminatory purpose." *Davis,* 345 Ill. App. 3d at 908.

¶ 40 Defendant maintains that both Tisdel and Martin share common characteristics with the seated jurors. He draws out a number of similarities and asserts that they raise an inference of racial discrimination. However, defendant overlooks an important qualification. When there is a reasonable ground, apparent from the record, for that venireperson's exclusion, then common characteristics between that venireperson and the seated jurors do not require an inference of racial discrimination. See *Davis,* 345 Ill. App. 3d at 908; See also *Williams*, 173 Ill. 2d 48, 72 (1996). Here, both Tisdel and Martin had distinguishing characteristics that are apparent from the record. Significantly, Tisdel's brother was convicted of murder, the same crime for which defendant was charged, and Martin was a teacher who expressed concern to the court that she had just gotten off seven days of strike. Accordingly, because the excluded venirepersons did not all share the same race and because there are nonracial reasons apparent from the record for excluding Tisdel and Martin, we conclude that this factor does not suggest finding a *prima facie* case of racial discrimination.

¶ 41 The last factor we consider is whether the excluded venirepersons share the same race as the defendant, the victim, and the witnesses. The racial characteristics of a crime are important factors to be considered by the trial court in determining whether a *prima facie* case has been established. *People v. Andrews*, 146 Ill. 2d 413, 433 (1992). Notably, the court has found that where the crime is interracial, there is greater potential for racial discrimination. *Id.* Here, although defendant and two of the excluded venirepersons were African-American, many of the witnesses and the victim were also African-American. Therefore, this factor is neutral.

¶ 42 Defendant contends that the trial court erred when it based its decision that there was not a *prima facie* case on the sole reason that it did not find a pattern of strikes. We agree with defendant that a pattern of strikes is but one factor that the court should consider in determining whether there is a *prima facie* case of racial discrimination. However, after review of the record, we do not believe that the absence of a pattern of strikes was the sole basis for the court's ruling. When defendant made his *Batson* challenge, he presented several arguments which related to the test factors discussed above for the court to consider. Additionally, the court stated that "numerous" African-American venirepresons had been questioned, reflecting that the court considered the racial makeup of the venire and of the jury.

¶ 43 Our supreme court emphasized in *Davis*, 231 Ill. 2d 349, 362, that the court must consider the totality of the circumstances to determine whether they give rise to an inference of racial discrimination and thus a *prima facie* case. Here, only two of the factors discussed above suggest an inference of racial discrimination: that defendant and two of the excluded jurors shared the same race and that there was a disparate proportion of African-American venirepersons excluded which—given that the proportion was two out of three—only slightly tends to suggest an inference of racial discrimination.

¶ 44 By contrast, there were several factors that weigh against finding a *prima facie* case. There was not a pattern of excluding jurors based on race, the prosecutor's questions did not suggest racial discrimination, the excluded venirepersons did not all share the same race, and there were reasonable, nonracial grounds apparent from the record, for excluding Tisdel and Martin. Additionally, as noted above, the court removed numerous African-Americans for cause, which affected the racial makeup of the jury and the venire prior to either party having the opportunity to use their peremptory challenges. Reviewing the totality of these circumstances

and the evidence in the record, we find that the record supports the trial court's ruling that defendant failed to establish a *prima facie* case of purposeful racial discrimination and we cannot conclude that the ruling was against the manifest weight of the evidence.

¶ 45 Sentencing Hearing

¶ 46 Next, defendant contends that the court abused its discretion in failing to adequately consider mitigating factors at defendant's sentencing hearing. Specifically, defendant argues that the court did not give sufficient weight to defendant's youth, potential for rehabilitation, and mental health and also placed too much emphasis on defendant's alleged gang involvement. A sentence within the statutory range will not be modified absent an abuse of discretion. *People v. Jones*, 2014 IL App (1st) 120927, ¶¶ 56-58; *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 47 Moreover, "[a] reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The reviewing court may not reverse the sentencing court just because it could have weighed the factors differently. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 25 (citing *People v. Streit*, 142 Ill. 2d 13, 19 (1991)). However, even where the sentence imposed is within the statutory range, we will find an abuse of discretion and reduce the sentence when it is "greatly at variance with the purpose and spirit of the law." *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 134 (citing *People v. Center*, 198 Ill. App. 3d 1025, 1032 (1990)).

¶ 48 The seriousness of the offense is the most important factor in determining a sentence, and the presence of mitigating factors does not require the minimum sentence be imposed. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). Moreover, "[i]t is presumed the trial court properly considered all mitigating factors and rehabilitative potential presented, and the burden is on the

defendant to affirmatively prove otherwise." *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010).

¶ 49 Under section 5-4.5-20 of the Code, (730 ILCS 5/5-4.5-20(a) (West 2012), the sentencing range for first degree murder is 20 to 60 years' imprisonment. A sentencing enhancement of 25 years-to-life applies in cases where the defendant personally discharged a firearm that proximately caused the death of another during the commission of the offense. 730 ILCS 5/5-8-1(a)(1)(d)(iii)(West 2012). When a jury makes such a finding, the court must impose the sentencing enhancement, which runs consecutively to the sentence for the underlying offense.

¶ 50 Here, for the first degree murder conviction, defendant was sentenced to 50 years in prison, well within the statutory guidelines. Additionally, the court was required to impose a firearm sentence enhancement because the jury found that defendant personally discharged a firearm that resulted in death. Accordingly, the court sentenced defendant to an additional 60 years in prison for the firearm enhancement in compliance with the statutory mandate.

¶ 51 Our review of the record reveals that the court carefully considered the mitigating and aggravating factors. Initially, we observe that the court was very thorough as it discussed all of the statutory mitigating and aggravating factors listed in the Code pursuant to section 5-3.1. See 730 ILCS 5/5-3.1. The court examined each statutory factor and found that "there are no factors in mitigation that inure to the benefit of defendant." Additionally, the court discussed the circumstances of the crime and noted that defendant "wasn't threatened, and the individual, William Williams, Jr., was not threatening defendant. In fact, he was walking away from him. His back was to him. Gunned down from behind." The court further noted that "as people are engaged in a fistfight, you walk up to someone who is not involved in the fight and put a bullet in his head." The court reviewed defendant's criminal history and observed that "defendant has

shown a propensity over the years to be armed with a handgun and ultimately be convicted of offenses with a handgun, someone who over time got a couple of breaks in the system, but nevertheless continued to be armed and dangerous."

¶ 52 Defendant argues that the court should have given greater weight to his young age, mental illness, and rehabilitative potential. Defendant points to the court's comment that there "were no mitigating factors that inure to defendant's benefit" to argue that the court ignored these mitigating factors. We disagree with defendant and find that, with this comment, the court was referring to the absence of statutory mitigating factors, as the court was discussing the statutory factors at the time the comment was made.

¶ 53 Rather, the record demonstrates that the court properly considered the relevant mitigating factors. According to defendant's PSI, he was 27 years old at the time of sentencing and he had a bipolar diagnosis. Counsel for both parties directed the court's attention to the PSI numerous times throughout the sentencing hearing and the court referred to information contained in the PSI in explaining its sentencing decision. Thus, the record indicates that the PSI was before the court and that the court considered the mitigating and aggravating factors contained therein, including defendant's age and bipolar diagnosis. Additionally, on defendant's motion to reconsider his sentence, the court explicitly stated that it considered both aggravating and mitigating factors.

> "I believe [defendant] belongs to a small group of individuals that represent extreme threats to society and pose a significant threat to society. *** I think [the sentence] is totally appropriate considering all of the other factors in aggravation and mitigation that I considered."

¶ 54 Clear from the court's statement is that its sentencing decision was given considerable thought. Moreover, the trial court is not required to articulate its consideration of mitigating factors, (*People v. Velez*, 388 Ill. App. 3d 493, 514-15 (2009)), and we will not reweigh the factors considered by the trial court, which is in a better position to hear the evidence and observe the proceedings than the reviewing court. *Fern*, 189 Ill. 2d at 53.

¶ 55 Finally, contrary to defendant's assertion that the court did not consider his rehabilitative potential, the court clearly considered this factor and stated that "his rehabilitative potential is on a scale of one to ten probably a zero." Although defendant disagrees with the court's determination and argues that it should have given greater weight to the fact that he was studying for the GED and was interested in the culinary arts or becoming an electrician, the court is not required to give greater weight to these facts. See *People v. Coleman*, 166 Ill. 2d 247, 261 (1995). In this case, there were also several aggravating factors, such as defendant's criminal history and gang involvement, which the court considered regarding defendant's rehabilitative potential. At the hearing on defendant's motion to reconsider, the court explained that it believed defendant is "a significant threat to society." "[T]he trial court is generally in a better position than the reviewing court to determine the appropriate sentence and to balance the need to protect society with the rehabilitation potential of the defendant." *Sharp*, 2015 IL App (1st) 130438, ¶ 133 (citing *People v. Stacey*, 193 Ill. App. 3d 1025, 1032 (1990)). The court observed defendant's demeanor during trial and the sentencing hearing, considered his criminal history and gang involvement, and determined that defendant did not have rehabilitative potential. We decline to reweigh these factors. *Fern*, 189 Ill. 2d at 53.

¶ 56 Defendant also argues that the court gave undue consideration to his alleged gang involvement. However, a defendant's gang involvement is not an improper consideration during

sentencing if it relates to aggravating factors, behavior during prison, or to rebut mitigating factors. *People v. Jackson*, 182 Ill. 2d 30, 72 (1998). The court has great discretion in sentencing within the statutory range as long as it does not consider incompetent evidence or improper aggravating factors. *People v. Jones*, 2014 IL App (1st) 120927, ¶¶ 56-58. Testimony was presented at the sentencing hearing regarding defendant's alleged gang involvement, including evidence that defendant had admitted that on the street he was a general in the Black P-Stones, that he received a gang tattoo while he was in prison, and that he had a copy of the Black P-Stone gang prayer in his cell.

¶ 57 Defendant also challenges Investigator McGough's qualification as an expert in gang intelligence and investigation. A trial court's decision to accept expert testimony is reviewed for an abuse of discretion. *People v. Cardamone*, 381 Ill. App. 3d 462, 500 (2008). "Generally, an individual may testify as an expert if his or her qualifications display knowledge that is not common to laypersons and if the testimony will aid the trier of fact in reaching its conclusion." [Citation.] *Id.* Here, Investigator McGough was employed in the Cook County Sheriff Department's Criminal Intelligence Unit, had attended a three-day training on gang identification, and had taught a class on gang identification to law enforcement. Given the evidence presented, we do not find that admitting Investigator McGough's testimony as an expert was an abuse of discretion.

¶ 58 Finally, defendant argues that the trial court improperly imputed a literal meaning to defendant's "grim reaper" with a smoking gun tattoo. In the course of explaining, at length, the reasons for defendant's sentence, the court compared the victim with defendant, stating that Williams was "[a] young man who really had nothing but potential tattooed on his soul, if you will, as opposed to a smoking gun tattoo on [defendant], the ultimate irony you might say. I

guess when you put a smoking gun on your body as a tattoo, then it's not that surprising when you pull the trigger and kill someone with a smoking gun." We reject defendant's argument as it is clear from a review of the record that the court made this comment in passing and did not base its sentencing decision on the existence of that tattoo. " 'An isolated remark made in passing, even through improper, does not necessarily require that defendant be resentenced.' " *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007) (quoting *People v. Fort*, 229 Ill. App. 3d 336, 340 (1992)).

¶ 59 We conclude that defendant did not meet his burden of proving that the court did not consider mitigating factors and find that defendant's sentence was within the purpose and spirit of the law, thus it was not an abuse of discretion.

¶ 60 Firearm Enhancement

¶ 61 Finally, defendant asserts that the 25 years-to-life firearm enhancement is unconstitutionally vague because it encourages arbitrary and discriminatory imposition of sentences and offers no criteria to guide judges in imposing sentences within the range. Defendant alleges that because the firearm enhancement is vague, it violates his constitutional right to due process. See U.S. Const. amends. V, XIV; Ill. Const. art. I, § 2. Specifically, defendant contends that the broad range of the 25 years-to-life sentencing enhancement impermissibly encourages discriminatory sentencing based on the "opinions and whims of judges." The State argues that this court has already determined in *People v. Butler*, 2013 IL App (1st) 120923, that the firearm enhancement is not unconstitutionally vague and that defendant has not given the court reasons to depart from *Butler*. We agree.

¶ 62 We review the constitutionality of a statute *de novo*. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 12. "All statutes are presumed to be constitutional, and the burden of rebutting

that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Greco*, 204 Ill. 2d 400, 406 (2003). If reasonably possible, the court must construe a statute to affirm its constitutionality. *Id.*

¶ 63 The vagueness doctrine requires that a criminal statute give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited and it must adequately define the offense by explicit standards in order to prevent arbitrary and discriminatory enforcement. *People v. Maness*, 191 Ill. 2d 478, 483-84 (2000). Furthermore, "[t]o pass muster under the due process clause, a penalty must be reasonably designed to remedy the particular evil that the legislature was targeting." *People v. Sharpe*, 216 Ill. 2d 481, 531 (2005) (citing *People v. Steppan*, 105 Ill. 2d 310, 319 (1985)).

¶ 64 Section 5-8-1 of the Code provides:

"a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first degree murder,

* * *

(d)(iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1 (d)(iii)(West 2012).

¶ 65 Contrary to defendant's assertion that this statute is not clear as to when the enhancement should be imposed, the standards for application of the enhancement are clearly defined. The court must impose the enhancement whenever a defendant is convicted of first degree murder and the jury finds that he or she used a firearm to proximately cause death. This court in *Butler*

explained that "[a]lthough the sentence enhancement allows for a wide range of sentences, the scope of the sentencing range is clear and definite. When the enhancement is triggered, it must be applied for no less than 25 years and up to a term of natural life. The trial court has no discretion to decide whether or not to impose the sentence enhancement." *Butler*, 2013 IL App (1st) 120923, ¶ 41.

¶ 66 Defendant further contends that the enhancement fails to satisfy the due process requirement because it does not guide a court in deciding the propriety of a particular sentence within that range. This contention is without merit.

¶ 67 For all criminal offenses for which a prison sentence applies, the permissible range for a particular offense is defined by statute. *People v. Fern*, 189 Ill. 2d 48, 55 (2000). The trial court has discretion within that range to impose a sentence based on the particular facts of the case before it. *Id.* Determining a sentence within the firearm-enhancement range is no different. The firearm enhancement for first degree murder imposes an additional sentence with the range of 25 years to natural life. 730 ILCS 5/5-8-1(a)(1)(d)(iii)(West 2012). Recognizing that the trial court is in the best position to observe the demeanor of the defendant, evaluate the particular facts of the case, and impose a sentence, the legislature gave the court discretion to determine what enhancement is appropriate within the range. See *Butler*, 2013 IL App (1st) 120923, ¶ 41.

¶ 68 In fact, defendant acknowledges that the law is well settled regarding the aggravating factors that the court generally considers in imposing a sentence within a particular range. See 730 ILCS 5/5-5-3.2. However, he argues that it would be improper for these aggravating factors to first influence the sentence for the underlying offense and then again influence the additional sentence for the firearm enhancement. Although generally double-enhancement based on the same aggravating factors is prohibited because it is presumed that the legislature considered

factors inherent in the offense in setting the initial penalty, "where the legislature has made clear an intention to enhance the penalty for a crime, even in a way that might constitute double-enhancement, this court will not overrule the legislature." *Sharpe*, 216 Ill. 2d at 430. Here, the legislature's very purpose in enacting the firearm enhancement was to increase the initial penalty of first degree murder when a firearm is used. See 730 ILCS 5/5-8-1(a)(1)(d)(iii)(West 2012). Accordingly, the possibility of double-enhancement does not invalidate the statute.

¶ 69 Defendant points out that every defendant who is found guilty of murder and who personally discharges a firearm that causes death now faces a term of natural life in prison. We note that the legislature believed firearms to be uniquely dangerous[1], and the possibility of natural life in prison is exactly what the legislature intended when it enacted the firearm enhancement. See 720 ILCS 5/33A-1(a)(2) (West 2012). In fact, the legislature's specific intention was to "impose particularly severe penalties in order to deter the use of firearms in the commission of felonies." See *Sharpe*, 216 Ill. 2d 481 (2005); 720 ILCS 5/33A-1(a) (West 2012). Because the firearm enhancement is automatically triggered when a firearm is used to commit first degree murder, it is clearly designed to remedy the evil of firearms targeted by the legislature.

¶ 70 Thus, the legislature deliberately empowered the court to impose significant sentences to deter the use of firearms. However, not all cases involving a firearm are the same, and the legislature set a sentence range to allow the court to determine which cases pose a greater threat to society than others. *Butler*, 2013 IL App (1st) 120923, ¶ 41. The sentencing range for the

[1] The legislature's codified statement of intent for the firearm enhancement states, "[t]he use of a firearm greatly facilitates the commission of a criminal offense because of the more lethal nature of a firearm and the greater perceived threat produced in those confronted by a person wielding a firearm. Unlike other dangerous weapons such as knives and clubs, the use of a firearm in the commission of a criminal felony offense significantly escalates the threat and the potential for bodily harm, and the greater range of the firearm increase the potential for harm to more persons. Not only are the victims and bystanders at greater risk when a firearm is used, but also the law enforcement officers whose duty is to confront and apprehend the armed suspect." 720 ILCS 5/33A-1(a)(2) (West 2012).

firearm enhancement "allows the trial court to engage in fact-based determinations based on the unique circumstances of each case. The wide range of the sentence enhancement is appropriate because it is impossible to predict every type of situation that may fall under the purview of the statute." *Id.* Thus, sentences for the enhancement are not imposed on the "opinions and whims" of judges. Rather, it is clear that an enhancement between 25 years and natural life must be imposed when certain defined circumstances are present and the sentence that is imposed within the range is based on the particular facts of that case.

¶ 71 Additionally, as the State notes, this court has previously come to the same conclusion and rejected the argument that the sentencing enhancement statute is unconstitutionally vague in *People v. Butler*, 2013 IL App (1st) 120923. We hasten to point out that subsequent appellate court cases have followed suit. See *People v. Sharp*, 2015 IL App (1st) 130438; *People v. Thompson*, 2013 IL App (1st) 113105. We believe these cases to have been correctly decided. Accordingly, we conclude that the 25 years-to-life sentencing enhancement is not unconstitutionally vague.

¶ 72 III. CONCLUSION

¶ 73 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 74 Affirmed.