FOURTH DIVISION
November 25, 2015

No. 1-13-2825



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 15317(02) |
| | ) | |
| CORTEZ LYONS, | ) | Honorable |
| | ) | Paula M. Daleo, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant was not denied right to be present for jury selection where he was present for questioning of prospective jurors and had opportunity to confer with his attorney about prospective jurors, but was not present when his attorney exercised challenges to jurors. Defendant's 120-year aggregate sentence for multiple convictions of armed robbery and aggravated criminal sexual assault was neither excessive nor unconstitutional.

¶ 2 Defendant Cortez Lyons was charged with numerous counts of armed robbery and aggravated criminal sexual assault. Defendant was tried jointly with codefendant Timothy Moore and convicted of all counts. During jury selection, defendant observed the questioning of the prospective jurors. But when the time came for his attorney and the State to exercise their challenges to certain prospective jurors, the court held conferences with the attorneys outside

defendant's presence. After defendant was convicted, the trial court sentenced defendant, who was 19 years old at the time of the offenses, to an aggregate 120-year sentence.

¶ 3 On appeal, defendant raises two issues: (1) that his right to be present during jury selection was violated when the prosecutor and his attorney struck jurors outside of his presence; and (2) that his aggregate, 120-year sentence violates the eighth amendment and proportionate penalties clause.

¶ 4 We affirm defendant's conviction and sentence. Defendant was present when the court, his attorney, and the prosecutor questioned the prospective jurors, and the court gave him an opportunity to confer with his attorney regarding the prospective jurors. The fact that defendant was not present when his counsel exercised for-cause and peremptory challenges did not, by itself, deprive defendant of his right to be present for jury selection. And defendant's sentence is not unconstitutional in light of the severity of defendant's crimes and his criminal history. The United States Supreme Court precedent defendant relies on in challenging his sentence does not apply to defendant because he was not a minor at the time of his offenses.

¶ 5 I. BACKGROUND

¶ 6 The State charged defendant and Moore with numerous counts of aggravated criminal sexual assault and armed robbery. Defendant was charged both for conduct he committed as a principal and as an accomplice to Moore's conduct.

¶ 7 A. Proceedings Relating to Jury Selection

¶ 8 During jury selection, the court questioned the potential jurors in open court, in defendant's presence. But when it came time for defense counsel and the State to exercise their challenges to the prospective jurors, the trial court held conferences in the jury deliberation room where defendant was not present. At the end of the first conference, the trial court asked defense

counsel, "By the way for purposes of the record, you waived the defendant['s] appearance when we were choosing the jurors, is that correct?" Defense counsel replied, "Yes, Judge." The court held two other conferences where challenges were used by both parties in selecting the jury, but for which defendant was not present.

¶ 9 The next day, before swearing the jury in, the trial court said, "For the record, I would just like to state that yesterday we had jury selection. During the course of jury selection, the defendants' appearances were waived as far as what picks were made except that the lawyers did consult with their clients."

¶ 10 During trial, after the State had rested its case-in-chief, the trial court inquired as to whether defendant or Moore wanted to exercise their rights to testify or to remain silent. Defendant said that he was aware that he had the right to testify but interjected:

> "[DEFENDANT]: I'm trying to get an understanding. I know when you off the first piece of jury instructions right here. I'm trying to get an understanding, were we supposed to be present when we added or deleted everything? I'm not sure, but were we supposed to go back with you all or not?
>
> MR. URBAN [Defense Counsel]: He is asking if he was supposed to be present when we picked the Jury.
>
> MS. O'BRIEN [Assistant State's Attorney]: Judge, he was present.
>
> [DEFENDANT]: No, you guys were talking about it when you—
>
> MR. URBAN: He means when we were in the Jury room.
>
> THE COURT: Your lawyer had waived your appearance, but it was my understanding that there was communication between you regarding—as the questioning of the Jury was going on. I will tell you what my observations were. That I saw your

lawyers talk to you. I can only assume that they were talking to you about the various candidates who were in the box.

[DEFENDANT]: You say, waived our appearance? We never agreed to waive our appearance.

* * *

We never agreed to waive our appearance, Judge. We were never informed on any of that. I just want you to put that on the record and everything; because we never—did we ever waive our appearance, [Mr. Urban]?"

The court then gave defense counsel an opportunity to talk to defendant outside the presence of the jury.

¶ 11 When defendant and defense counsel returned, the court asked defendant whether he had spoken to his attorney about whether or not he wanted to testify. Defendant said, "No. We were discussing what he told me he was going to come and tell you." The court again asked defendant whether he wanted to testify or not, adding, "You have made your record and the record is clear that you stated that you did not waive your right to come back and pick jurors." The court repeatedly asked defendant whether he wanted to testify, but defendant insisted on discussing the waiver of his appearance during jury selection. The trial court said it would revisit defendant's decision whether to testify after Moore testified.

¶ 12 After Moore testified on his own behalf, defense counsel said that he "never informed [defendant] or asked [defendant] if he wished to be present in the room *** when [the parties] selected [the] Jury," or "informed [defendant] *** that [he had] waived [defendant's] appearance." The court asked defendant if he wanted to testify, and he said that he did not. When

the court began to ask him further questions about whether his waiver of his right to testify was knowing and voluntary, defendant diverged into another discussion about jury selection:

"[DEFENDANT]: You told me that you never once advised us that they waived, like, in the back—he just told me. He remembers you saying it back there. Then he comes out here saying something different.

* * *

THE COURT: Here is what went on. You and Mr. Moore were present when we were putting jurors in the box and asking them questions, is that correct?

[DEFENDANT]: Y'all went in the back—

THE COURT: *** Do you recall being in the courtroom when witnesses were in the witness box or jurors were in the witness box being asked questions?

[DEFENDANT]: Yes.

THE COURT: Okay. Did you hear them give answers?

[DEFENDANT]: Yes.

THE COURT: Okay. So you were here during that part of Jury selection?

Your issue that you're having right now is the fact that you were not in the back when we were—

[DEFENDANT]: When you—when they were selected, I wasn't present, and he told me—

* * *

He told me that you wouldn't let us back there. Then you just came and told us that they waived us being back there. He never consulted with me. We wasn't waiving anything. That's what I was trying to stress to you the last two and a half hours, but you—

* * *

THE COURT: He said he was waiving your appearance.

[DEFENDANT]: Without consulting me. How could you waive—

THE COURT: That's fine, because you may or may not have a right to be in the back."

¶ 13 After trial, defendant filed a *pro se* motion for a new trial that included several complaints about his attorney, including that his attorney had waived his appearance at the conference where certain prospective jurors were struck without his consent. At the hearing on his motion, defendant said that, during jury selection, he saw the parties going into the jury conference room and asked his attorney where they were going. According to defendant, his attorney replied, "[T]he judge won't allow you to go back there." Defendant acknowledged that he was present when the judge and the parties asked the prospective jurors questions. The court asked defense counsel if he had anything to add, and defense counsel said that he had given defendant a note pad and a pen to make note of any reasons he had for striking any prospective jurors. Defendant denied having a pen and paper, and defense counsel said, "I remember a pad."

¶ 14 The court made lengthy findings regarding jury selection, ultimately concluding that defendant was not denied his right to be present:

"Both defendants were personally present during jury selection. They were introduced to the potential jurors.

They were present in the courtroom when the jurors were questioned by me and the—and any questions submitted by the attorneys, both the State and defense.

The defendants were present in the courtroom when their lawyers and the State's Attorneys asked questions of these jurors. The defendants and their lawyers had an

opportunity to assess the prospective jurors. And, upon request of the parties, only one juror was spoken to privately at a sidebar.

This questioning took place in the jury room during a sidebar where both defense attorneys and State's Attorneys were present. That juror was not seated on the jury.

The defendants didn't—also, the defense attorneys and the State's Attorneys participated in sidebars with the Court outside the presence of the jurors to exercise their respective challenges for cause and peremptory challenges.

During the questioning of the jurors I observed the defense attorneys talking to each other and to their respective clients. Prior to sidebars to discuss the challenges, I saw the defense attorneys talking to their respective clients.

Prior to my returning from the sidebars to the courtroom to excuse the jurors from jury service, the defense counsels asked for time to consult with their clients."

The court also noted that defendant had created a "security issue" because he "yelled and swore at the Court" during a February 24, 2013 court date.

¶ 15 B. Trial Evidence and Sentencing

¶ 16 The three victims in the case, Eric Gutknecht, M.G., and R.S., who were 17 years old at the time of the incident, testified that, around 11 p.m. on November 21, 2006, they went to a gas station in Maywood, Illinois to purchase cigarettes. M.G. drove, R.S. sat in the front passenger seat, and Gutknecht sat in the back. M.G. went into the gas station while R.S. and Gutknecht waited in the car. As M.G. went into the store, she saw a group of black men outside the store. She could not recall how many were in the group. As M.G. bought cigarettes in the store, the cashier told the group that he was going to call the police.

¶ 17 While M.G. was in the store, a man, whom both R.S. and Gutknecht identified as defendant, approached M.G.'s car. Defendant offered to sell R.S. and Gutknecht a variety of drugs, and when he said that he could sell them marijuana, Gutknecht said he was interested. Defendant got in the backseat of the car and said they would need to go to his house to pick up the marijuana. As M.G. left the store, she saw defendant getting into her car. Defendant gave M.G. directions to his house.

¶ 18 M.G. drove down a dead-end alley that led to a parking lot near an apartment complex. As defendant opened the car door, the dome light came on, and he pulled out a gun. Defendant pointed the gun at Gutknecht's face and demanded that the three victims hand over all of their possessions. They complied.

¶ 19 Defendant left the car, and two other men, armed with guns, ran up to the other side of the car. Defendant said that they were there "to back [him] up." Gutknecht, M.G., and R.S. all identified one of these other men as Christopher Pittmon, and Gutknecht identified the third man as Moore. Pittmon opened the back door to the car and pointed a gun at Gutknecht. Moore went to the front passenger side of the car and began to rummage through the glove compartment. After he finished, Moore walked to the driver's side of the car, and defendant walked to the passenger side. Moore looked around the driver's side of the car.

¶ 20 Defendant told M.G. to "get *** out of there," and that he would kill them if they told the police. As M.G. tried to put her keys into the ignition, Moore slapped the keys out of her hand, put his gun to her head, and said, "Where the fuck do you think you're going?" R.S. told Moore, Pittmon, and defendant that they could have "anything [they] want[ed]."

¶ 21 In response to R.S.'s comment, Moore pulled down his pants, put his gun to M.G.'s head, and forced her to perform oral sex on him. Defendant also pulled down his pants, put his gun to

R.S.'s head, and made her perform oral sex on him. Pittmon held his gun to Gutknecht in the backseat, punched Gutknecht several times, and told Gutknecht to watch defendant and Moore rape M.G. and R.S.

¶ 22 Defendant and Moore then switched places, so that Moore was next to R.S. and defendant was next to M.G. Defendant forced M.G. to perform oral sex on him. Then defendant and Moore ordered M.G. and R.S. to get out of the car and bend over onto the car seats. They then forced M.G. and R.S. to have vaginal intercourse with them. After raping M.G. for a while, defendant told her to lie on the ground, where defendant continued to rape her.

¶ 23 M.G., R.S., and Gutknecht heard police sirens. Moore yelled, "Cops," and pushed R.S. into the car and closed the door behind her. Moore and Pittmon ran away. Defendant got up, told M.G. to put her pants on, shoved her into the car, and ran away. M.G. started the car and began to back up, when she saw defendant standing in the alley next to the parking lot, pointing his gun at the car. Defendant threw Gutknecht's coat, which he had taken earlier, onto the windshield and ran away. Police cars then arrived on the scene.

¶ 24 Paramedics took M.G. and R.S. to the hospital, where nurses administered rape kits. Semen was found on M.G.'s underwear and pants. Vaginal swabs from M.G. and R.S. were eventually tested and compared with buccal swabs from defendant and Moore. M.G.'s vaginal swab had male DNA that matched defendant.

¶ 25 Evidence technician Terrance Powell testified that he recovered makeup kits, a black purse, a CD case, and CDs from a grassy area near the parking lot, in the direction that Moore and Pittmon had fled. M.G. identified the items as items they had taken from her.

¶ 26 Detective Randy Brown testified that, after speaking to Gutknecht at the police station, he went to the gas station where defendant had approached M.G., R.S., and Gutknecht. Brown

obtained security footage from November 21, 2006 and recognized defendant, Moore, and Pittmon in the video. On November 25, 2006, the victims met Brown at the gas station to view the surveillance footage. Brown testified that met with each of them individually, but Gutknecht testified that he watched the video with M.G. and R.S. R.S. was too upset to watch the footage. M.G. identified defendant, Moore, and Pittmon as her attackers. She also identified herself in the video. Brown testified that Gutknecht was only able to identify Moore as one of the attackers, but Gutknecht testified that he was only able to identify defendant. Gutknecht testified that it was "a bad video" and "hard to tell" who was in it. Brown described the video as "clear," but also pixilated and "kind of fuzzy a little bit."

¶ 27 Later that day, Brown had M.G., R.S., and Gutknecht go to the police station, where he showed them photo arrays containing pictures of defendant, Moore, and Pittmon. M.G. and R.S. both identified defendant and Pittmon. Gutknecht identified Moore and defendant. The police eventually arrested defendant, Moore, and Pittmon.

¶ 28 After defendant, Moore, and Pittmon were taken into custody, Brown arranged for each of them to appear in lineups in front of M.G., R.S., and Gutknecht. Both M.G. and R.S. identified defendant in separate lineups.

¶ 29 Pittmon, who had agreed to plead guilty to robbery and receive a sentence of 35 years in prison in exchange for his testimony against Moore and defendant, testified consistently with the victims' version of the incident. Pittmon testified that he was at the gas station with Moore and defendant around 11 p.m. on November 21, 2006. When shown photographs taken from security footage at the gas station, he identified himself, Moore, and defendant. Pittmon testified that Moore purchased a few items at the gas station and then they left. While they were outside the gas station, defendant told Pittmon and Moore that he had "a lick," which, Pittmon testified,

meant that defendant had found someone to rob. Defendant told Pittmon and defendant to meet him in the alley behind his house. Both Pittmon and Moore had guns.

¶ 30 When Pittmon and Moore arrived in the alley, Pittmon saw defendant halfway out of the backseat of M.G.'s car, holding a gun. Pittmon and Moore approached the car. Moore opened the rear car door and struck Gutknecht. Pittmon described the sexual assaults in nearly the same way that M.G., R.S., and Gutknecht had. During the sexual assaults, Pittmon kept his gun on Gutknecht, but he denied hitting Gutknecht.

¶ 31 Pittmon testified that he saw the police driving up the alley and told Moore and defendant. Pittmon and Moore fled to defendant's house, where they left their guns in the backyard. They went inside defendant's basement, until defendant's brother came down into the basement and asked where defendant was. After Moore and Pittmon told defendant's brother they did not know, they left and hid in an open garage they found. They did not see defendant for the rest of the night.

¶ 32 Assistant State's Attorney Brian Volkman testified that defendant confessed to him. Defendant told Volkman that he was at the gas station and that he spoke to a boy about selling him marijuana. Defendant said that, after he directed the boy and his two friends to the alley behind his house, he "raped th[e] girl, [and] th[e] other girl gave him a blow job while [Pittmon] held a gun to th[e] boy's head." Defendant refused to reduce his oral confession to writing.

¶ 33 Defendant did not testify or put on a case. The jury found defendant guilty of all counts.

¶ 34 At the sentencing hearing, defendant proceeded without the assistance of counsel. The State presented copies of defendant's 2005 convictions for solicitation of a sex act, robbery, and residential burglary. Defendant was sentenced to 11 days in Cook County jail for the solicitation

of a sex act, 30 months' felony probation for the robbery, and four years in prison for the residential burglary.

¶ 35 The State also presented the testimony of Sergeant Dennis Diaz, who testified regarding a 2007 incident that led to defendant being charged with possession of a stolen motor vehicle. But Diaz conceded that, at a preliminary hearing, the case had been thrown out for lack of probable cause.

¶ 36 M.G. and R.S. also read victim impact statements as aggravating evidence. M.G. described the "state of constant fear" she lived in as a result of the attack, her difficulty sleeping, and the emotional pain she experienced due to the attack. She also felt "violated, degraded, humiliated, [and] disgusting" after she had been raped. She also described, in detail, the humiliating experience of having the rape kit performed on her in the hospital, as well as the side effects of the drugs she was prescribed to avoid contracting a sexually transmitted disease.

¶ 37 R.S. said that she thought about the attack every day. She "excessively wash[ed]" herself because she always felt dirty. She experienced panic attacks that caused her to vomit. She also experienced constant fear, insomnia, and nightmares. She said that she felt "a little sense of relief and peace knowing that [defendant and Moore were] in prison and not free to do what they did again."

¶ 38 Defendant did not make any argument in mitigation. Instead, he demanded to see the trial judge's qualifications, including her "delegation of authority in written form." The trial judge denied this request.

¶ 39 The trial court found that defendant's actions "caused or threatened serious harm," adding, "Other than death itself I can't think of any more serious harm to a woman's body or her psyche than sexual assault." The court noted that defendant had a history of criminal activity,

adding that he had been on parole for his residential burglary conviction at the time of this offense. The court also noted that defendant had not satisfactorily completed his probation for his robbery conviction. The court discussed the impact of defendant's actions on the victims, the victims' families, and defendant's own family. The court concluded:

> "I believe there's sufficient factors in aggravation to extend your sentence. I believe the sentence I am about to impose is necessary to deter others from committing the same crime. I believe that your behavior and your conduct was brutal. Brutal. And that you acted in concert and as partners that night. You planned to do something when you went to that gas station. You brought weapons. *** You saw your targets, you got them to a secluded location. It was pre-arranged on your parts to meet."

¶ 40 The court sentenced defendant to 30 years' incarceration on each court of armed robbery, with the armed robbery sentences to be served concurrently with each other. The court sentenced defendant to 30 years' incarceration for his aggravated criminal sexual assault of M.G. in the car, 6 years' incarceration for his aggravated criminal sexual assault of M.G. on the ground outside the car, and 12 years' incarceration for his aggravated criminal sexual assault of R.S. The court sentenced defendant to 30 years' incarceration for Moore's aggravated criminal sexual assault of R.S. and 12 years' incarceration for Moore's aggravated criminal sexual assault of M.G. Based on the "nature and circumstances of the offense and the history and character of [defendant]," and the fact that consecutive sentences were necessary to protect the public from defendant, the court ordered that the sentences should run consecutively. In total, defendant was sentenced to 120 years' incarceration, with defendant being required to serve at least 85 percent of that sentence because the court found that his conduct "caused or threatened the serious bodily harm of the victims."

¶ 41 Defendant filed a motion to reconsider his sentence, arguing that the prosecution knowingly presented perjured testimony against him and that his attorney was ineffective. Defendant also noted that his sentence should be reduced because he had not completed ninth grade and had been diagnosed with attention deficit hyperactivity disorder (ADHD) at an early age. Defendant appeals.

¶ 42 II. ANALYSIS

¶ 43 A. Presence During Jury Selection

¶ 44 Defendant first argues that he was denied his right to be present during jury selection when he was excluded from the jury room while his attorney and the State exercised their peremptory challenges. He argues that jury selection is a critical stage of the proceedings, and that his attorney could not waive his right to be present on his behalf. The State counters that defendant was not deprived of his right to be present, because he had been given the opportunity to observe *voir dire* and consult with his attorney during jury selection, his attorney was entitled to waive defendant's appearance, and defendant's absence from the challenge process did not prejudice him.

¶ 45 A criminal defendant has a general right to be present at every critical stage of his trial, including jury selection. *People v. Bean*, 137 Ill. 2d 65, 80, 84 (1990); *People v. McLaurin*, 235 Ill. 2d 478, 490 (2009). But the right to presence is not a freestanding right under the Illinois Constitution. *Bean*, 137 Ill. 2d at 80-81. Rather, it is a "lesser right," a means by which to secure other constitutional rights, such as the rights to a fair trial and an impartial jury. *Bean*, 137 Ill. 2d at 81; see also *McLaurin*, 235 Ill. 2d at 490. Accordingly, a defendant's absence from a portion of trial—even at a critical stage—is not a *per se* constitutional violation, but instead warrants reversal only when the defendant's absence " 'results in a denial of an underlying substantial

right.' " *McLaurin*, 235 Ill. 2d at 491 (quoting *Bean*, 137 Ill. 2d at 81). The same is true under the U.S. Constitution; the right to presence at trial is "not an express constitutional right" but, rather, a right that arises from the due process clause. *Bean*, 137 Ill. 2d at 82; see *McLaurin*, 235 Ill. 2d at 492. Thus, a denial of the right of presence, again, is not *per se* error under the U.S. Constitution but, instead, results in reversal only if the defendant's absence "results in his being denied a fair and just trial." *Bean*, 137 Ill. 2d at 83.

¶ 46 Moreover, we have found that the exercise of juror challenges is not a critical stage of the proceedings. See *People v. Spears*, 169 Ill. App. 3d 470, 483 (1988) ("We find that the communication by defense counsel to the court of the defense's specific objections regarding prospective jurors is not a critical stage of trial requiring defendant's presence."); *People v. Gentry*, 351 Ill. App. 3d 872, 883-84 (2004). Accordingly, "peremptory challenges may be exercised outside the presence of the defendant so long as the defendant is given the opportunity to confer with counsel beforehand." *People v. Beacham*, 189 Ill. App. 3d 483, 492 (1989).

¶ 47 Here, it is undisputed that defendant was present when the prospective jurors were questioned by the court, his attorney, and the State. He had an opportunity to hear their answers and view their demeanor. And as the trial court made clear at the hearing on defendant's posttrial motion, defendant had an opportunity to consult with his attorney prior to his attorney using any peremptory challenges. In fact, the trial judge said that she saw "the defense attorneys talking to their respective clients" before the attorneys left the courtroom to exercise their peremptory challenges. Because defendant had an opportunity to participate in the selection of the jury, he was not denied his right to be present at jury selection.

¶ 48 Three cases support our conclusion. First, in *Spears*, the defendant argued that he was denied his right to be present for jury selection when "the trial court retired to chambers with

counsel, outside the presence of [the] defendant, to allow for the exercise of peremptory challenges." *Spears*, 169 Ill. App. 3d at 482. At the hearing on the defendant's posttrial motion, his attorney said that, before going into the judge's chambers, "she and counsel for the prosecution, in the presence of [the] defendant, discussed prospective jurors." *Id.* at 482-83. And she recalled the defendant expressing his opinion about at least one juror. *Id.* at 483. We held that defendant was not denied his right to be present because the record did not show "that defendant was precluded from making suggestions to defense counsel during the court's questioning of the prospective jurors, or later during the discussion among defense counsel, the prosecutor, and defendant regarding specific objections to prospective jurors." *Id.*

¶ 49 Second, in *Beacham*, we rejected a similar argument "because the record indicate[d] *** that [the defendant] was present during the *voir dire* and was able to consult with his attorney before the exercise of challenges in chambers." *Beacham*, 189 Ill. App. 3d at 491-92. In fact, the defendant in *Beacham* even "was allowed to reverse his counsel's acceptance of a panel of jurors." *Id.* at 492.

¶ 50 Third, in *Gentry*, 351 Ill. App. 3d at 884, we held that the defendant was not deprived of his right to be present for jury selection where the prospective jurors were all questioned in his presence, even though challenges were made in the defendant's absence, as "[n]othing prevented [the defendant] from conferring with his counsel on the composition of the jury ***." We concluded that defendant was not denied his right to be present "[j]ust because he was not present when the choices and arguments were actually communicated to the trial court." *Id.*

¶ 51 In this case, like *Spears*, *Beacham*, and *Gentry*, defendant claims that his absence from the conference where the attorneys exercised their challenges deprived him of his right to be

present. But, like those cases, the record in this case shows that defendant was present during the questioning of the prospective jurors and had an opportunity to confer with his attorney.

¶ 52 Acknowledging that "peremptory challenges can be held outside a defendant's presence as long as the defendant is given the chance to confer with counsel beforehand," defendant maintains that he was deprived of his right to be present because "the record does not indicate that [his] counsel actually consulted with him regarding the challenges for cause and peremptory challenges." We reject this argument for two reasons. First, the trial court stated that it observed defense counsel conferring with their clients during *voir dire* and before retiring for the challenge conference. Second and more fundamentally, whether defendant and his attorney *actually* discussed prospective jurors does not mean that defendant was deprived of the *opportunity* to do so. The record demonstrates that defendant had an opportunity to speak with his attorney during *voir dire* and before counsel exercised any challenges. He was not deprived of his right to be present and participate in jury selection.

¶ 53 Moreover, even if defendant could somehow make out a claim that his right to presence was violated—and he has not—we agree with the State that the record does not demonstrate, nor has defendant even claimed, prejudice resulting from his absence at the challenge conference. Defendant does not claim that his trial was unfair as a result of his absence from the juror challenges. He does not claim that the jury was anything but impartial. See *Bean*, 137 Ill. 2d at 85 (though defendant was absent from portion of *voir dire* of jurors, defendant did not show resulting prejudice; he did not demonstrate or even claim that jury was biased against him); *McLaurin*, 235 Ill. 2d at 491 (though defendant was absent from court's discussion of how to answer jury notes, "defendant has pointed to no substantive right that was impaired by the trial court's decision to proceed in his absence, and we find no such right was impaired."). The only

prejudice that defendant articulates is that, had he been present during the challenge conference, "he could have influenced the makeup of his jury." That claim is far cry from a denial of a fair trial or denial of an impartial jury. Our state and federal constitutions "guarantee a defendant an impartial jury, not a jury of his choice." *Bean*, 137 Ill. 2d at 85.

¶ 54 Having reviewed the record in its entirety, we see no impairment whatsoever to any constitutional right guaranteed to defendant by his absence from the juror-challenge process. Thus, though we find that defendant's right to presence was not violated in this case, we would find any such violation harmless beyond a reasonable doubt, in any event, because it did not impact his right to a fair trial, to an impartial jury, or to any other substantive right guaranteed by the constitution.

¶ 55 Defendant cites *People v. Bennett*, 282 Ill. App. 3d 975 (1996), and *People v. Oliver*, 2012 IL App (1st) 102531, but neither case is persuasive. In *Bennett*, we held that the defendant was denied his right to be present at jury selection because he was excluded from 17 *voir dire* sessions involving 16 of the 29 potential jurors examined. *Bennett*, 282 Ill. App. 3d at 979. Unlike the defendant in *Bennett*, defendant was not excluded from any of the *voir dire*. He was able to observe the court, the State, and the defense attorneys question the prospective jurors. Only one prospective juror was partially questioned outside defendant's presence, and that individual did not wind up on the jury. Thus, *Bennett* is distinguishable.

¶ 56 In *Oliver*, defense counsel said he had waived the defendant's appearance during an *in camera* conference where the parties exercised their peremptory challenges. *Oliver*, 2012 IL App (1st) 102531, ¶ 5. The defendant filed a postconviction petition alleging that his attorney was ineffective because he never gave his attorney permission to waive his appearance. *Id.* ¶ 12. On appeal from the dismissal of his postconviction petition, this court found that the defendant "had

adequately stated a claim that his trial counsel violated his constitutional right by waiving his presence for part of jury selection, when he had not authorized his counsel to waive his presence." *Id.* ¶ 22. While *Oliver* would appear to support defendant's argument, the court in *Oliver* did not appear to consider the issue of whether defendant had a right to be present at the conferences in the first place. Instead, it assumed that defendant had a right to be present for the conferences and examined whether defendant had to additionally show that some underlying constitutional right was violated. *Id.* ¶¶ 17-22. Notably, *Oliver* did not discuss *Spears*, *Beacham*, or *Gentry*, each of which held that the right to be present is not violated when a defendant has an opportunity to observe *voir dire* and consult with his attorney before his attorney challenges prospective jurors. Whether the State did not raise this issue in *Oliver* or it went overlooked, we do not find *Oliver*'s analysis informative on the question of whether defendant's right to presence was violated in this case.

¶ 57 We therefore reject defendant's first claim of error.

¶ 58 B. Eighth Amendment and Proportionate Penalties

¶ 59 Defendant next contends that the trial court's imposition of a *de facto* life sentence runs afoul of the United States Supreme Court's eighth-amendment jurisprudence on juvenile offenders.

¶ 60 The eighth amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The proportionate penalties clause of the Illinois Constitution states 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. The proportionate penalties clause places two limits on the legislature's ability to prescribe criminal sentences: (1) it prohibits

criminal penalties that are "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community"; and (2) it prevents offenses with the same elements from having different sentences. (Internal quotation marks omitted.) *People v. Sharpe*, 216 Ill. 2d 481, 487, 521 (2005). When interpreting the first of these restrictions, our supreme court has held that the proportionate penalties clause is coextensive with the eighth amendment's proportionality requirement. *People v. Patterson*, 2014 IL 115102, ¶ 106. Because defendant's proportionate-penalties challenge in this case is based on the first restriction in the proportionate penalties clause, we analyze his eighth-amendment and proportionate-penalties arguments by the same standards.

¶ 61 At the outset, we note that the parties have shown some confusion over the minimum sentence applicable to defendant's crimes. In his opening brief, defendant argued that the applicable sentencing statutes required that he be sentenced to a minimum of 100 years in prison, *i.e.*, a *de facto* life sentence. In its brief, the State noted that the 15-year firearm enhancement did not apply to defendant because, at the time that defendant committed his crimes, the 15-year firearm enhancement was held unconstitutional by *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2005). In his reply brief, defendant concedes that the 15-year firearm enhancement did not apply to him, and that the minimum possible sentence for him was 36 years.

¶ 62 In any event, the trial judge did not sentence defendant to the minimum, or indicate in any way that she would have given defendant a sentence of less than 100 years had she been able to do so. To the contrary, the trial court sentenced defendant to the maximum aggregate sentence available: 120 years' incarceration. See 720 ILCS 5/11-1.30(d) (West 2006) (aggravated criminal sexual assault is Class X felony); 720 ILCS 5/18-2(b) (West 2006) (armed robbery is Class X felony); 730 ILCS 5/5-8-2(a)(2) (West 2006) (maximum extended-term sentence for Class X

felony is 60 years' incarceration); 730 ILCS 5/5-8-4(c)(2) (West 2006) (when sentenced to consecutive prison terms, aggregate sentence may not exceed sum of maximum extended terms of two most serious felonies involved). Thus, the minimum sentence did not come into play.

¶ 63 Defendant argues that his sentence failed to take into account the rehabilitative potential inherent in his youth. Defendant cites *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), which, respectively, struck down the use of the death penalty against juveniles, prohibited life without parole sentences for juveniles convicted of non-homicide offenses, and invalidated mandatory life-without-parole sentences for juveniles convicted of murder. Defendant argues that these cases show that juvenile offenders must be treated differently from adult offenders.

¶ 64 The fundamental flaw with defendant's argument is that he is not a juvenile. *Roper*, *Graham*, and *Miller* apply only to juveniles under 18. *Roper*, 543 U.S. at 574; *Graham*, 560 U.S. at 74-75; *Miller*, 567 U.S. at ___,132 S. Ct. at 2460. In both *Roper* and *Graham*, the Court acknowledged that drawing the line at 18 was not perfect, but described why such a categorical approach was preferable to taking a case-by-case approach. *Roper*, 543 U.S. at 574; *Graham*, 560 U.S. at 75-79. By asking us to include him within the holding of *Graham*, defendant asks us to take the very case-by-case approach that the Court rejected in that case. We cannot simply set aside that line.

¶ 65 Nor does defendant suggest an alternative categorical rule. He cites no case from Illinois or any other jurisdiction that has extended *Graham* to 19-year-olds. He does not argue that we expand *Graham*'s bar on life sentences for non-homicide juvenile offenders to include all 19-year-olds. And, although we recognize that, in certain cases, it may be difficult to distinguish a 17-year-old defendant from a 19-year-old one, we see nothing in the record to indicate that

defendant was particularly immature or underdeveloped. See *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. *** [H]owever, a line must be drawn.").

¶ 66 While defendant does cite some research suggesting that the portions of the brain responsible for impulse control continue to develop into an individual's mid-20s, we are not persuaded that this limited evidence necessitates an expansion of *Graham* to encompass 19-year-olds. While the Court cited scientific evidence in *Graham* in support of its holding (*Graham*, 560 U.S. at 68-69), it also relied on statistical evidence showing a national consensus against life sentences for juveniles convicted of crimes other than homicide. *Id.* at 62-67. Defendant cites no evidence to suggest that there is a national consensus against life sentences for sexual assaults and armed robberies committed by 19-year-olds. To the contrary, as the Supreme Court has noted, most states consider 18 to be the age of majority. See *Roper*, 543 U.S. at 569 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."); see also *United States v. Montenegro-Recinos*, 424 F.3d 715, 717 (8th Cir. 2005) (age of majority is 18 in most states).

¶ 67 Moreover, the trial judge had an opportunity to, and did, in fact, consider defendant's age at sentencing. She simply determined that any mitigation due to defendant's age was outweighed by the horrific nature of defendant's crimes and his criminal history. The crimes committed by defendant—premeditated armed robbery, followed by multiple acts of sexual assault on two different victims, all while forcing a third victim to witness the sexual assaults on his two female friends—were unspeakably cruel. Defendant's sentence was certainly not grossly

disproportionate under the eighth amendment, as the United States Supreme Court has held that life sentences for far less serious offenses do not violate the eighth amendment. See, *e.g.*, *Ewing v. California*, 538 U.S. 11, 28-31 (2003) (25 years to life for stealing golf clubs); *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991) (life without parole for possessing 650 grams of cocaine); *Rummel v. Estelle*, 445 U.S. 263, 275-85 (1980) (life sentence for stealing $120 under false pretenses). Defendant's sentence is constitutional.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, we affirm defendant's conviction and sentence. Defendant was not deprived of his right to be present for jury selection, and his sentence is constitutional.

¶ 70 Affirmed.