2016 IL App (1st) 133876-U

SIXTH DIVISION
March 11, 2016

No. 1-13-3876

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	10 CR 1196
	)	
MIKEL PERNELL,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

HELD: The trial court did not misapprehend the law regarding defendant's burden of proof on his claim of self-defense and therefore defendant's claim of ineffective assistance of trial counsel premised on the same alleged error also fails. Defendant's 50-year sentence for first-degree murder while using a firearm in the commission of that murder does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 1 This case involves an apparent incident of road rage that resulted in the shooting death of the victim, George Cruz. Defendant Mikel Pernell appeals from a judgement of conviction entered by the circuit court of Cook County following a bench trial in which the court rejected defendant's claims of self-defense and found him guilty of first-degree murder. Defendant was sentenced to two concurrent 25-year sentences for counts 1 and 2 for first degree murder and a consecutive 25-year sentence for personally discharging a firearm. At the hearing on the defendant's motion to reconsider sentence, the trial court denied the motion but issued a revised sentencing order imposing a 50-year sentence on count 1 and merging all other counts.

¶ 2 On direct appeal defendant contends the following: (1) he was denied his right to a fair trial and the effective assistance of counsel when defense counsel and the trial court both misstated the law regarding his burden of proof as to self-defense; (2) he was denied the effective assistance of counsel by counsel's failure to argue he should be found guilty of second degree murder if it was determined that the shooting was unjustified; and (3) his 50-year sentence is excessive because it provides virtually no chance of restoring him to useful citizenship and therefore violates the proportionate penalties clause of the Illinois Constitution. Ill. Const.1970, art. I, § 11. We affirm.

¶ 3 BACKGROUND

¶ 4 The following facts were borne out by the testimony and evidence presented at trial. The victim's wife, Eileen Harper, testified that on September 18, 2009, at approximately 11:00 a.m., she and her husband George Cruz were driving a red pickup truck northbound in the right-hand lane on Torrence Avenue to meet their boss, a construction contractor, to bid on a job near 105th Street and Hoxie Avenue. As they neared 105th Street, Harper told Cruz to pull into the left lane

so he could make a left turn. According to Harper, when Cruz pulled over into the left lane he accidentally cut off defendant's car which was traveling in the left lane.

¶ 5 Harper testified that defendant drove up next to the passenger side of the pickup truck and started repeatedly screaming, "you are going to get shot." Both vehicles approached a stop sign where Cruz intended to turn left. Cruz apologized to defendant and explained that he changed lanes in order to turn left on 105th Street. Defendant made an abrupt left turn onto 105th Street cutting in front of the pickup truck. As Cruz turned onto 105th Street, defendant pulled over to the curb and held a gun out the window. Cruz stopped his pickup truck in the middle of the street and again apologized to defendant for cutting him off. Harper said there was no yelling between Cruz and defendant. Defendant fired a gunshot through the windshield of the pickup truck hitting Cruz in the eye. Defendant then drove away down 105th Street. Harper put the pickup truck in park and called 911. An ambulance arrived but Cruz was already deceased.

¶ 6 Laneise Fola, a supervisor for the United States Postal Service, testified that on September 18, 2009, at approximately 11:00 a.m., she was driving northbound on Torrence Avenue near 105th Street, headed to work, when a red pickup truck that was traveling directly in front of her changed from the right lane to the left lane and cut off a two-tone car that was traveling in the left lane. The two-tone car then moved to the right lane and the driver gestured with his middle finger towards the pickup truck. Fola testified that the driver of the two-tone car appeared to be angry and was yelling at the pickup truck, while the passengers in the truck appeared to be gesturing apologetically.

¶ 7 Fola testified that she never saw or heard the driver or passenger of the pickup truck yell at the car. Both vehicles came to a stop sign next to each other and the driver of the pickup truck activated the left turn signal. Fola's vehicle was directly behind the pickup truck. The car sped

up from the right lane and turned left in front of the pickup truck, forcing southbound traffic on Torrence Avenue to abruptly stop in order to avoid a collision. Fola saw the driver of the car pull over to the curb on 105th Street , park, and then pull out a gun, holding it out the window. As the pickup truck turned left onto 105th Street, the driver of the car fired a gunshot at the truck. Fola testified she "was in disbelief" and "just screamed," and then pulled over and called 911.

¶ 8 Charlotte Roseman, a teacher's assistant at Ada S. McKinley, testified that on September 18, 2009, at approximately 11:00 a.m., she was walking to work along 105th Street near Hoxie Avenue when she noticed a two-toned car parked on the side of 105th Street and a red pickup truck stopped next to an alley about 10-12 feet from the car. Roseman continued walking down 105th Street toward Torrence Avenue when she heard a gunshot. Roseman "ducked around the corner." When Roseman returned back around the corner, the two-tone car was gone. She saw a woman standing on the sidewalk screaming. Roseman tried to console the woman and then walked to a nearby fire station and screamed out for help.

¶ 9 Defense counsel attempted to impeach Roseman's trial testimony with a statement she gave to a defense investigator that stated the red pickup truck was inches away from the two-tone car and appeared to be blocking it, and that she could not hear what was being yelled between the occupants of the two vehicles. Roseman explained that when she stated she could not hear what was being yelled, she meant she never heard any yelling at all. Roseman also explained that the pickup truck never blocked the two-tone car because the car was parked along the curb and the truck was parked by an alley.

¶ 10 Mary Stella Rymus, testified that on September 18, 2009, at approximately 11:00 a.m., she was in her kitchen washing dishes when she looked out her kitchen window and saw a black

man driving a two-tone car pull up to the curb and park in a no-parking zone. The man kept looking back over his left shoulder. As Rymus walked away from the kitchen window toward her sliding glass door intending to tell the man that he was parked in a no-parking zone, she heard a "firecracker pop." She looked out her sliding glass door and saw the man in the car twist his body from the left, straighten up toward the steering wheel, and then just drive away. Rymus also saw a red pickup truck parked about 15-20 feet from where the two-tone car had been parked. Rymus then heard a woman screaming and realized that someone had been shot. She ran downstairs in her house and told her son "somebody got shot." Rymus and her son left their house and walked down the street to the nearby firehouse to get help. Rymus saw a man sitting in the pickup truck's driver seat, but when asked what condition he was in, she testified that she "didn't want to look." Rymus testified that when she and her son arrived at the firehouse, she noticed that the firemen were already preparing to go the scene.

¶ 11 Sergeant Jim Taylor testified that on September 18, 2009, at around 11:00 a.m., he was on patrol driving down Torrence Avenue and turned westbound on 105th Street where he saw a red pickup truck parked in the middle of the street. Before Sergeant Taylor could call in the license plate, the victim's wife, Eileen Harper, got out of the passenger side of the pickup truck screaming "my God, my God, he is shot, he is shot." There was a bullet hole through the windshield of the pickup truck and Harper had blood on her. After briefly speaking with Harper and some other individuals at the scene, Sergeant Taylor called for assistance and radioed a description of the offender as a bald heavy set male black. The sergeant added that the offender was driving a smallish two-colored car.

¶ 12 Chicago Police Forensic Investigator Victor L. Rivera processed the crime scene. He observed a bullet hole in the driver's side front windshield of the pickup truck. Investigator

Rivera provided chain of custody evidence relating to a blood card and a deformed bullet recovered by Dr. Hillary S. McElligott during the doctor's autopsy of the victim's body. The doctor determined that the victim died as a result of a gunshot wound to the right eye and that the manner of death was homicide.

¶ 13 Chicago Police Officer William R. Eaker responded to the shooting and obtained a description of the shooter's vehicle. Officer Eaker searched the vicinity and located a two-toned vehicle matching the description of the shooter's car. The vehicle was parked in a rear parking lot of the Trumbull Park housing projects. The officer ran the car's license plate and learned that the vehicle was owned by the defendant.

¶ 14 Tesha Hentz, defendant's second cousin, testified that on September 18, 2009, she and her children were living in an apartment at the Trumbull Park housing projects. Hentz testified that sometime between 11:00 a.m. and 12 noon, defendant unexpectedly visited her apartment. Defendant told Hentz he was passing through on his way to his mother's house. Hentz testified that defendant's mother lived about four or five blocks from her apartment.

¶ 15 Chicago Police Officer Candace Freeman testified that on September 18, 2009, at approximately 11:00 a.m., she was at her district office processing an arrest when she heard a police radio broadcast about a fatal shooting in her beat area which included the Trumbull Park housing projects. After finishing the arrest process, Officer Freeman proceeded to the housing projects. Officer Freeman testified she went there because it's a location where people frequently abandon their vehicles. Officer Freeman gave the assistant property manager of the housing projects a description of the shooter and the shooter's vehicle. Later that afternoon, the assistant property manager spoke with Officer Freeman. Based on this conversation, Officer Freeman contacted detectives working the case and gave them the address of Tesha Hentz.

¶ 16 Detective Robert McVicker responded to the scene of the shooting and after speaking with Officer Freeman proceeded to the Trumbull Park housing projects to speak with Tesha Hentz. When the detective arrived at the housing complex, he noticed a four-door, two-tone vehicle. Detective McVicker parked next to the two-tone car and saw an individual he later learned was defendant get into the car. The detective wrote down the car's license plate number and learned that the vehicle was owned by the defendant. Detective McVicker then spoke with Tesha Hentz.

¶ 17 The next day, on September 19th, Detective McVicker went to Eileen Harper's parents' home and showed her a photo array. Harper identified defendant in the photo array as the man who shot her husband. In late September, early October 2009, Detective McVicker put out an investigative alert for the defendant.

¶ 18 Defendant was arrested on October 19, 2009, and questioned at Area 2 police headquarters. The defendant told investigating officers that at the time of the shooting, he was in Waukegan, Illinois. Defendant claimed that either his brother or a man named Brian Hardy was driving his Oldsmobile, which he described as being completely green, and not red and green. Defendant denied visiting Tesha Hentz at her apartment. Defendant was released.

¶ 19 Brian Hardy testified that sometime between September 23rd and 25th, 2009, he told his friend Clayvon Reeves that he was looking to buy a car. Reeves suggested that Hardy purchase a two-tone green Oldsmobile he had seen for sale at a gas station located on 70th Street and Damen Avenue. Hardy called the telephone number displayed on the Oldsmobile and met with defendant a few times and eventually paid him $1000 for the vehicle.

¶ 20 On December 2, 2009, Janet Bonds, the mother of defendant's son, called Detective McVicker and told him where he could find defendant's two-tone Oldsmobile. The detective obtained a search warrant for the vehicle.

¶ 21 On December 3, 2009, Hardy was served with a search warrant for the vehicle and the vehicle was towed by the Chicago Police Department. Hardy went to the police station where he identified defendant in a photo array as the man who sold him the two-toned Oldsmobile.

¶ 22 Janet Bonds testified that she was formerly in a relationship with defendant and that a child was born during their relationship. She claimed the relationship ended long before defendant's trial. On December 2, 2009, prior to defendant's trial, Bonds provided a written statement to detectives and a prosecutor, and she also testified before a grand jury the next day. On December 29, 2009, Bonds attempted to recant her written statement. She informed Detective McVicker and the prosecutor by telephone that her statement was untrue. Bonds denied being threatened and explained that she had been angry with defendant when she gave her statement. At trial, however, Bonds explained that she attempted to recant her written statement because defendant had threatened her and their son.

¶ 23 At trial, Bonds testified that in October 2009, after defendant was arrested and released from custody, she had a conversation with him at her home and that during the conversation defendant told her he had "shot a Mexican guy in the face with his wife in the car in a road rage incident on Torrence Avenue." Defendant was driving a green Oldsmobile with a red hood. Bonds testified that defendant told her the victim "cut him off" and that the victim had tried to apologize but he "just shot him." After the shooting, defendant went to his cousin Tesha's house in the housing projects at 105th Street and Torrence Avenue. Defendant said that police officers were at Tesha's house looking for him. Defendant gave his gun to someone and tried to sell it.

Defendant eventually drove his car over to his friend Clayvon's house and left the car parked in the back of the house. Clayvon lived on Damen Street.

¶ 24 After speaking with Bonds and Hardy, Detective McVicker obtained an arrest warrant for defendant which was executed on December 15, 2009.

¶ 25 At trial defendant testified on his own behalf. Defendant admitted shooting the victim, but claimed he acted in self-defense. In this regard, defendant testified that on September 18, 2009, at approximately 11:00 a.m., he was driving his two-tone Oldsmobile northbound in the right lane of Torrence Avenue when he looked in his rearview mirror and noticed a red pickup truck tailgating his car. As the vehicles proceeded northbound, the truck's driver honked the horn and flashed its headlights at defendant. Defendant testified he was driving the speed limit, but it appeared that the driver of the pickup truck wanted him to drive faster than the speed limit.

¶ 26 Defendant testified that the pickup truck eventually bumped his car and the driver made gestures he interpreted as threats. Defendant claimed he was traveling about 40 miles per hour and that the flowing traffic prevented him from changing lanes and he feared the pickup truck would rear end him if he slowed to change lanes or make a turn. Defendant testified he was eventually able to change lanes but that the pickup truck continued to follow him. Defendant accelerated, but the pickup truck kept pace with him, bumping his vehicle a second time. Defendant testified he felt "threatened and scared."

¶ 27 Defendant testified that when he reached 105th Street, he ran a stop sign and turned left cutting off southbound traffic, in an attempt to get away from the pickup truck. Defendant claimed he pulled over to the curb to get some air and calm down. According to defendant, the pickup truck followed him and stopped in the middle of the street behind his car. Defendant feared the truck's driver intended to harm him. Defendant testified that when he saw the truck's

driver reach down in the cab, he feared the driver was reaching for a weapon and would get out of the truck to attack him. Defendant retrieved a gun from his car's glove compartment, aimed the gun at the truck and fired. Defendant claimed he did not intend to hurt or kill anybody, but instead shot his gun to warn the truck's driver to leave him alone. After firing his gun, defendant drove away and went to his cousin Tesha Hentz's apartment. Defendant admitted that on October 19, 2009, when the police initially questioned him about shooting, he gave them a false alibi because he feared they would not believe his account of the shooting.

¶ 28 On cross-examination, defendant acknowledged he never attempted to turn his vehicle off Torrence Avenue before reaching 105th Street and he never reduced his speed to allow the pickup truck to pass him. He also acknowledged that he never stopped his vehicle to report that the pickup truck had bumped his car. Defendant admitted having a conversation with Janet Bonds about the shooting incident, but denied making the statements she attributed to him.

¶ 29 The defense presented the testimonies of David Petrik, Wendy Cruz Hajdas, and Edward Morfin, as evidence that the victim, George Cruz, had a propensity for violence. David Petrik, who had a 2009 conviction for theft and a 2013 conviction for felony domestic battery, testified that in November 1994 he was at a party when he got into a verbal altercation with some people who accused him of insulting a woman. Petrik testified that after he left the party and was walking home alone, Cruz and another man followed him from the party and proceeded to hit him with brass knuckles, knocked him unconscious, and then urinated on him. Petrik claimed a good Samaritan came along and fought off Cruz and the other assailant, allowing him to run to a nearby police station. Cruz was arrested at the scene. The police did not recover any brass knuckles. Petrik went to a hospital where he received stitches. Petrik never went to court to testify against Cruz and battery charges against Cruz were dropped.

¶ 30 Wendy Cruz Hajdas testified that she was previously married to George Cruz and they had a child together. Their seven-year marriage had been dissolved at least 20 years at the time of trial. Hajdas testified that during her marriage to Cruz, she was using heroin, which "he didn't like at all." Hajdas claimed her drug use led to arguments between her and Cruz. Hajdas testified that she used drugs before and after her pregnancy, but not during the pregnancy. She filed several complaints against Cruz for domestic violence. On August 16, 1992, she signed a complaint against him alleging aggravated battery. Hajdas alleged Cruz pushed her while she was pregnant causing her to bump her head.

¶ 31 At the time of his testimony, Edward Morfin was serving a 35-year prison sentence for first-degree murder. Morfin testified he was formerly a member of the Latin Count street gang and knew George Cruz from a rival street gang, the Two Six. Morfin testified that in May 1994, he and another man were flashing gang signs at a rival group of gang members that included Cruz. Morfin's friend ran away when the rival gang approached. Cruz and the others beat Morfin, resulting in a one-day stay at Cook County Hospital. Morfin claimed the last time he saw Cruz was in 1994, and he had no other contact with him since that time.

¶ 32 The trial court ultimately rejected defendant's claims of self-defense and found him guilty of first-degree murder. Defendant was sentenced as heretofore indicated and this appeal followed.

¶ 33 ANALYSIS

¶ 34 Defendant first contends he was denied his right to a fair trial and the effective assistance of counsel when his counsel and the trial court both misstated the law regarding his burden of proof as to self-defense. Defendant claims that defense counsel misstated the law regarding his burden of proof as to self-defense when she argued during closing argument that the defense was

required to prove the shooting was justified by a preponderance of the evidence, when it was the prosecution who had the burden of proving beyond a reasonable doubt that his actions in shooting the victim were unjustified. Defendant contends the trial court repeated defense counsel's mistake in this regard, when in finding him guilty of the shooting death of the victim, the court stated that the defense had failed to show by a preponderance of the evidence that the defendant acted in self-defense.

¶ 35 At the outset, we note this case was tried as a bench trial. Therefore, there was no concern that a jury might be confused or misled by the remarks made by defense counsel or the trial court. Moreover, upon our review of a trial court's judgment following a criminal bench trial we are guided by the presumption that the trial court considered only competent evidence in reaching its decision and that it applied the proper standard to that evidence in determining the defendant's guilt or innocence. See *People v. Lester*, 102 Ill. App. 3d 761, 768 (1981); *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 28. This presumption may be rebutted only "when the record contains strong affirmative evidence to the contrary." *People v. Howery*, 178 Ill. 2d 1, 32 (1997).

¶ 36 In arguing that the trial court misapprehended the law regarding his burden of proof as to self-defense, defendant relies on the following statement made by the trial court: "the defense has failed to show by a preponderance of the evidence that the defendant acted in self-defense." We do not believe this isolated statement, when viewed in the context of the trial court's entire discussion of the evidence and credibility of the witnesses, constitutes strong affirmative evidence that the court improperly shifted the burden of proof to defendant on his claim of self-defense.

¶ 37 Whether the trial court applied an incorrect legal standard is an issue of law subject to *de novo* review. *People v. Campos*, 349 Ill. App. 3d 172, 176 (2004). In order to raise a claim of self-defense, a defendant must present evidence supporting each of the following elements: (1) force had been threatened against defendant; (2) defendant was not the aggressor; (3) the danger of harm was imminent; (4) the force threatened against defendant was unlawful; (5) defendant actually believed that a danger existed, that the use of force was necessary to avert the danger, and that the kind and amount of force actually used was necessary; and (6) that defendant's beliefs were reasonable. *People v. Morgan*, 187 Ill. 2d 500, 533 (1999). Once the defendant introduces some evidence as to each of these elements, the burden then shifts to the State to prove that the defendant did not act in self-defense. *People v. Myles*, 257 Ill. App. 3d 872, 882 (1994). The State meets this burden by affirmatively disproving at least one of the elements beyond a reasonable doubt. *Id.*

¶ 38 In this case, immediately after the trial court made the complained-of statement, the court found that the burden had not shifted back to the State. This finding inherently included a determination that the defendant failed to introduce evidence establishing the existence of at least one of the elements of self-defense so as to shift the burden to the State to disprove that he acted in self-defense. Self-defense is an affirmative defense. 720 ILCS 5/714 (West 2002). As such, the State does not have the burden of disproving the defense until the defendant presents sufficient evidence to raise the defense. *People v. Daniel*, 191 Ill. App. 3d 837, 842 (1989); *People v. Everette*, 141 Ill. 2d 147, 157 (1990) ("Self-defense is an affirmative defense, meaning that unless the State's evidence raises the issue involving the alleged defense, the defendant bears the burden of presenting evidence sufficient to raise the issue"). Here, the trial court obviously

determined that the defendant failed to present sufficient evidence to raise the affirmative defense of self-defense.

¶ 39 Defendant's reliance on the decisions in *People v. Virella*, 256 Ill. App. 3d 635 (1993), and *People v. Kluxdal*, 225 Ill. App. 3d 217 (1991) is misplaced, as both of these cases present facts easily distinguishable from the facts present in our case. In *Virella*, the trial court repeatedly referred to the clear and convincing standard of proof at least three times in adjudging defendants guilty, instead of the correct standard of proof beyond a reasonable doubt. *Virella*, 256 Ill. App. 3d at 638. Similarly, in *Kluxdale*, the trial court repeated the clear and convincing standard of proof at least four times in assessing the defendant's sanity when the preponderance of the evidence standard should have been applied. *Kluxdale*, 225 Ill. App. 3d at 223. The reviewing courts in both of these cases determined that the respective trial courts' repeated references to the incorrect standards of proof constituted strong affirmative evidence that the courts applied the wrong standards of proof and rebutted the presumption that they properly applied the law. *Virella*, 256 Ill. App. 3d at 639; *Kluxdale*, 225 Ill. App. 3d at 223.

¶ 40 Contrastingly, in the present case, the record does not contain such strong affirmative evidence that the trial court applied the wrong standard of proof in rejecting defendant’s claim of self-defense. The trial court did not make multiple misstatements of law or incorrect legal standards. Rather, in conjunction with the defense counsel’s own misstatement, the trial court made a single misstatement. As this court has stated before: "The decision of the circuit court will not be reversed based on an isolated statement.” *People v. Weston*, 271 Ill. App. 3d 604, 616 (1995). In sum, the trial court's complained-of statement does not constitute affirmative evidence that it improperly shifted the burden of proof to defendant on his claim of self-defense.

¶ 41 For similar reasons, we reject defendant's claim that his trial counsel was ineffective for arguing during closing argument that the defense was required to prove the shooting was justified by a preponderance of the evidence. The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is composed of two prongs: deficiency and prejudice.

¶ 42 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001).

"The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 43 A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not decide whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). Applying these principles to the instant case, we find defendant has failed to show he was prejudiced by counsel's closing argument because he cannot show there is a

reasonable probability that the outcome of his trial would have been any different had counsel not made the argument.

¶ 44 First, as stated previously, this was a bench trial and the trial court is presumed to know the law and apply it accurately. *Kluxdal*, 225 Ill. App. 3d at 223. And second, the State presented overwhelming evidence at trial that disproves at least one of the elements, if not all of them, for a claim of self-defense. Consider that Harper testified that defendant threatened her husband and shot him, even after he repeatedly apologized for cutting him off. Further, three witnesses corroborated her testimony and the only testimony suggesting that the victim actually started the altercation and that defendant feared for his life came from the defendant himself.

¶ 45 We also reject defendant's contention that his trial counsel was deficient for failing to argue in the alternative that the trial court should find him guilty of second rather than first-degree murder if the court determined the shooting was unjustified. A trier of fact may find a defendant, who is charged with first-degree murder and pleads self-defense, guilty of the lesser mitigated offense of second-degree murder if it finds the defendant believed circumstances existed that justified the use of deadly force, but that belief was unreasonable. *People v. Garcia*, 407 Ill. App. 3d 195, 203 (2011). Defendant contends that in light of the evidence presented at trial, there was no sound strategic reason for his counsel's failure to argue for an alternative finding of second-degree murder if the court determined the shooting was unjustified.

¶ 46 As noted, this was a bench trial. "[A] judge presiding over a bench trial may convict a criminal defendant of an uncharged lesser-included offense *sua sponte*." *People v. Walton*, 378 Ill. App. 3d 580, 588 (2007). In a bench trial, even though second-degree murder is a lesser mitigated offense of first-degree murder rather than a lesser included offense, a trial court may *sua sponte* convict a defendant of second-degree murder. *Id*. at 588. In the context of this bench

trial, the trial judge, sitting as the trier of fact, is presumed to know the law which would have permitted her to *sua sponte* find the defendant guilty of second-degree murder rather than first-degree murder if she found the evidence supported defendant's belief that the use of deadly force was necessary to defend himself, but his subjective belief was unreasonable. See *People v. Rogers*, 286 Ill. App. 3d 825, 829-30 (1997).

¶ 47 A review of the trial court's ruling shows the court determined there was no evidence supporting defendant's belief that the use of deadly force was necessary to protect himself from the victim. In delivering its ruling, the trial court stated in part as follows:

> "This court believes that even taking everything that the defendant said was true or assuming for the sake of argument that everything that the defendant said was true, that he was being followed by George Cruz in the red truck northbound on Torrence Avenue for several miles or from at least 142nd Street until 105th Street. And assuming that George Cruz was riding on his bumper and may have even tapped his car on two occasions and that he was made nervous by George Cruz's activity and he turned left on 105th Street to get away from George Cruz, that does not justify what happened after George Cruz also turned left.
>
> This is not a situation where because he was afraid he pulled his gun and said get back, don't come any closer, I have a gun or fired the shot in the air, he actually fired the shot that ended up hitting George Cruz in the face, in his eye, and killing him.
>
> This court does not find, cannot find, based on my review of the evidence, that that action was justified."

¶ 48 In light of the trial court's above statements and findings, and the evidence presented at trial, it is exceedingly unlikely that defense counsel's arguments would have persuaded the trial

court to find the defendant guilty of the lesser mitigated offense of second-degree murder rather than first-degree murder. Although defendant now emphasizes the weakness of a self-defense theory, at trial he adamantly testified that the victim was the aggressor and that he only fired his handgun to save his life. Under these circumstances, we cannot say trial counsel was ineffective for pursuing an affirmative defense of self-defense as opposed to a second-degree murder defense. A trial counsel's decision to rely on one theory of defense to the exclusion of other theories is generally considered a matter of trial strategy that will not support a claim of ineffective assistance. *People v. Labosette*, 236 Ill. App. 3d 846, 856 (1992).

¶ 49 Defendant finally contends his 50-year sentence is excessive because it provides virtually no chance of restoring him to useful citizenship and therefore violates the proportionate penalties clause of the Illinois Constitution. Ill. Const.1970, art. I, § 11. We disagree.

¶ 50 The proportionate penalties clause of the Illinois Constitution provides in part 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. 1, § 11. The eighth amendment to the United States Constitution provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. Our supreme court has recognized that our state constitution's proportionate penalties clause is coextensive with the eight amendment's cruel and unusual punishment clause. See *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) (citing *People v. Sharpe*, 216 Ill. 2d 481, 517 (2005)). Both constitutional provisions incorporate the concept of "proportionality" in criminal sentencing. See *People v. Brown*, 2012 IL App (1st) 091940, ¶ 56 (citing *Graham v. Florida*, 560 U.S. 48, ____, 130 S. Ct. 2011, 2021 (2010)).

¶ 51 In evaluating an alleged proportionate penalties violation, we must determine whether the penalty at issue has been set by the legislature according to the seriousness of the offense. *People v. Harvey*, 366 Ill. App. 3d 119, 122-23 (2006); *People v. Cummings*, 375 Ill. App. 3d 513, 516 (2007). The legislature has the power to declare and define conduct constituting a crime and to determine the nature and extent of punishment for it. *People v. Powell*, 299 Ill. App. 3d 92, 96 (1998). Currently, there are two ways to determine whether a penalty violates the proportionate penalties clause: (1) whether the penalty is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community; and (2) whether offenses with identical elements are given different sentences. *Harvey*, 366 Ill. App. 3d at 123; *Cummings*, 375 Ill. App. 3d at 516.

¶ 52 Imposition of a prison sentence is a matter of judicial discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). The trial court is granted such deference because it is generally in a better position than the reviewing court to determine an appropriate sentence. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 53 Where a defendant's sentence is within statutory limits, a reviewing court will not alter the sentence absent an abuse of that discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). The statutory sentencing range for the underlying offense of first-degree murder is 20 to 60 years (730 ILCS 5/5-4.5-20(a)(1) (West 2008)), while the mandatory enhancement range for personally causing death with a firearm is 25 years to natural life (730 ILCS 5/5-8-1(a)(d)(iii) (West 2008)). "The sentence enhancements were put into place because of the legislature's recognition of the significant danger posed when a firearm is involved in a felony." *People v.*

Sharpe, 216 Ill. 2d 481, 524 (2005). Our supreme court in *Sharpe*, concluded that "it would not shock the conscience of the community to learn that the legislature has determined that an additional penalty ought to be imposed when murder is committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Sharpe*, 216 Ill. 2d at 525. Defendant's 50-year sentence falls within the statutory sentencing range.

¶ 54 When an imposed sentence is within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The spirit and purpose of the law are promoted when a sentence reflects the seriousness of the crime and gives adequate consideration to the defendant's rehabilitative potential. *People v. BoClair*, 225 Ill. App. 3d 331, 335 (1992).

¶ 55 A defendant's potential for rehabilitation is but one factor a sentencing court should consider and it must be weighed against other countervailing factors, including the seriousness of the crime. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). The most important factor is the seriousness of the crime. *Id*. In the present case, there is nothing in the record which indicates the trial court ignored defendant's rehabilitative potential or any other mitigating factors before she imposed sentence. The record reveals that at defendant's sentencing hearing, the trial court reviewed the defendant's presentence investigation report, which raises the presumption that the court took into account defendant's potential for rehabilitation. See *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994).

¶ 56 Our review of the record shows the trial court considered both mitigating and aggravating factors and arrived at a balance between society's need for protection and defendant's

rehabilitative potential. Defendant's enhanced sentence for first-degree murder, using a firearm in the commission of the murder, does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 57 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 58 Affirmed.