2015 IL App (1st) 140846-U

FIRST DIVISION
November 30, 2015

No. 1-14-0846

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12889
	)	
ROBERT MORRIS,	)	Honorable
	)	Anna Helen Demacoploulos,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant's first degree murder conviction and sentence are affirmed. We find that: (1) testimony regarding a deceased eyewitness' exclusion of defendant from a lineup was properly excluded as hearsay; (2) police officer's testimony that he showed the victim defendant's picture in a photo array was properly admitted to establish the officer's course of conduct; (3) defendant invited any error in regard to the preclusion of his video expert's opinion; (4) evidence based on the ACE-V method of latent fingerprint analysis is admissible under *Frye*; (5) defendant was not entitled to an admonishment regarding his sentencing range; (6) and defendant forfeited plain error review of his sentencing claim.

¶ 2 Following a jury trial, defendant Robert Morris was found guilty of first degree murder and attempted armed robbery. At sentencing, the circuit court merged defendant's convictions and sentenced him to an aggregate term of 80 years' imprisonment: 50 years for first degree murder and an additional 30 years for personally discharging a firearm that caused the death of another.

¶ 3 On appeal, defendant contends that the circuit court erred by: (1) barring testimony regarding a deceased eyewitness' exclusion of him from a lineup; (2) allowing a police officer to testify that the deceased victim reviewed a photo array containing a photograph of defendant photograph and by admitting the photo array into evidence; (3) precluding a video forensic expert from opining that the individual observed in the surveillance footage may have been wearing a glove; (4) admitting expert fingerprint evidence based upon the ACE-V method of latent fingerprint analysis; (5) admonishing defendant as to the potential sentence he faced while a plea offer was pending; and (6) considering irrelevant factors when sentencing him to 80 years' imprisonment. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On April 3, 2009, Robert Sanders was shot during an attempted armed robbery outside a currency exchange in Calumet City, Illinois. An elderly man, Sanders suffered severe injuries and spent the next two years shifting between nursing homes before eventually succumbing to his wounds. Defendant became the prime suspect in the shooting after his fingerprints were discovered on Sanders' car. He was taken into custody, and an eyewitness who had been inside the currency exchange at the time of the shooting identified him as the perpetrator. He was eventually charged with multiple counts of first degree murder and attempted armed robbery.

¶ 6 A. Pretrial Motions

¶ 7 Prior to trial, defendant filed a motion to exclude expert testimony regarding latent fingerprint identification, claiming that such testimony did not meet the admissibility requirements of *Frye v. United States*, 293 F. 1013 (1923). After a five-day *Frye* hearing, the court denied defendant's motion and ruled that the State's fingerprint evidence was admissible. Defendant's motion to reconsider was denied.

¶ 8 Thereafter, defendant filed a motion *in limine* to bar the State's fingerprint examiner, Frank Senese, from testifying to "any matter that is not 'generally accepted' by the relevant scientific community." He sought to preclude Senese from testifying, *inter alia*, "that he can individualize [defendant's] known prints to the latent prints recovered from the crime scene to the exclusion of all others in the world." The circuit court determined that the issue involved a question of proper foundation for the fingerprint expert's testimony. It therefore denied defendant's motion to bar Senese from offering his expert opinion.

¶ 9 The State, in the meantime, filed a motion *in limine* to bar the defense's expert video witness, Robert Sanderson, from opining that a dark band on the wrist of an individual in surveillance video footage was consistent with that person wearing a glove. The State argued that Sanderson's opinion would be pure speculation where, in his report, he stated only that there was "a dark band on the left wrist or hand area" and did not reach any conclusion as to what the dark band represented. Defendant responded that Sanderson's opinion was based on the factual evidence of the video images and his experience drawing inferences from video footage. The court granted the State's motion. The court noted that Sanderson did not include any conclusion in his report as to whether the dark band in question was a glove and found that his opinion would be speculation and conjecture under the circumstances.

¶ 10 B. The Plea Offer

¶ 11 About a month before the start of trial, the State informed the circuit court that it had tendered defendant a plea offer. Defense counsel informed the court and the State that he had discussed the offer with defendant and that defendant was not interested in accepting it. The court then admonished defendant as follows:

> "[T]he First Degree Murder count has a sentence of six to thirty, but because you have what's called an enhancement, that being the firearm—that you used a firearm, and you discharged that firearm, and that discharge caused the death of James Saunders [*sic*], in addition to the six to thirty, you would be looking at and [*sic*] additional twenty-five to life."

Defendant stated that he had already discussed the offer with his counsel and acknowledged that he understood the procedure. Ultimately, he rejected the State's plea offer.

¶ 12 C. The State's Case-in-Chief

¶ 13 At trial, the State proceeded on three counts of first degree murder (Counts 1, 9, and 17) and one count of attempted armed robbery (Count 21). The remaining charges were *nol-prossed*.

¶ 14 *Sandra Jefferson*

¶ 15 Sandra Jefferson, the victim's granddaughter, was called as the first witness. She testified that, on April 2, 2009, Sanders called and asked her to come over to his trailer home in a senior citizens complex located in Calumet City. Jefferson went to his home that day and gave him some money for a few things that he needed done. She testified that Sanders was happy, and she was planning to see him again the next morning. On April 3, however, at around 1 p.m., Jefferson received a call from the Calumet City police. She went to Christ Hospital and found

Sanders at the hospital suffering from a gunshot wound.

¶ 16 Jefferson testified that Sanders never returned to his own home again to live independently. He went back and forth between the hospital and various nursing homes, and eventually passed away on April 30, 2011. On cross-examination, Jefferson stated that Sanders was 79 years old at the time of the shooting and in fairly good health.

¶ 17 *William Binns*

¶ 18 William Binns testified that he was cashing a check at the currency exchange on Sibley Boulevard on April 3, 2009. He had parked his car out front and noticed several other cars outside, including a tan Buick to the right of him with an older man sitting in the driver's seat. Binns testified that it was around 10:30 a.m. and the currency exchange was crowded. As he was looking out the window to check on his car, he saw a tall, dark-skinned man in a gray hooded top enter the front-passenger side of the tan Buick. According to Binns' recollection, the man in gray began struggling with the older man in the driver's seat. He testified that the struggle went on for a few minutes, and then he heard two or three gunshots. At that point, the offender exited the front-passenger side of the vehicle, closed the door, and walked quickly past the currency exchange with his hand in his pocket. Binns could not see whether he was wearing a glove, but identified defendant as the offender. Binns went out to check on his car and saw that the older man had been shot. He testified that the man was bleeding from both his stomach and his leg. Binns eventually spoke with the police after they arrived at the scene.

¶ 19 On April 21, 2009, Binns went to the Calumet City Police Department to view a lineup. He identified the individual in position number three as "the gentleman that parked next to me." Subsequently, on June 3, 2011, Binns testified before a grand jury and identified defendant as the suspect who shot Sanders. On cross-examination, Binns acknowledged that the victim's car was a

blue Chevrolet, not a tan Buick, but explained that his memory of the car was not perfect after four years.

¶ 20 *Joseph Brazzale*

¶ 21 Calumet City paramedic Joseph Brazzale testified that he was dispatched to 1653 Sibley Boulevard to respond to a gunshot victim on the morning of April 3, 2009. When he arrived at the scene, he observed an elderly male sitting in the driver's seat of a car. The man had blood on his hands and shirt and was "excited and fearful." He told Brazzale that someone had tried to rob him and shot him.

¶ 22 *Officer George Jones*

¶ 23 Calumet City police officer George Jones testified that he is a patrol officer and an evidence technician. About 10:34 a.m. on the day of the shooting, he received a dispatch that someone had been shot at 1653 Sibley Boulevard. He arrived on the scene within a minute of the dispatch and discovered the victim sitting in his car. He stayed with the victim until the paramedics arrived, then secured the scene with crime tape. After the paramedics left, Officer Jones photographed the scene and dusted for fingerprints. He located prints on the passenger door of the victim's car, which he arranged to be towed to the police department. He testified that it was cool outside and that it is better to lift prints after the metal has warmed up. At the station, Officer Jones lifted prints from the interior and exterior front passenger window and the exterior front passenger door frame.

¶ 24 *Officer Momcilo Plavsa*

¶ 25 Calumet City police officer Momcilo Plavsa was the resource officer at Thornton Fractional North High School on April 20, 2009. He testified that a BOLO (be on the lookout) had been issued for defendant on that date with regard to an armed robbery on April 3, 2009.

Later in the day, after the students were dismissed for the day, Officer Plavsa observed defendant near the back of the school. He informed the dispatcher that defendant was walking eastbound on 155th Street and then proceeded to follow him. Police back-up eventually arrived, and the officers motioned defendant towards the car of Investigator Vizkovith. There, they patted him down and placed him into custody. The officers told defendant that the investigators needed to speak with him, but did not give any details about the investigation. Officer Goodwin transported defendant to the police station.

¶ 26 *Officer John Goodwin*

¶ 27 Calumet City police officer John Goodwin testified that he received a call for assistance from Officer Plavsa on April 20, 2009. About 3:45 p.m., he arrived in the area of 155th Street and Greenbay Avenue where he observed Officers Vizkovith and Wojcik along with defendant. He testified that he was asked to transport defendant to the police station and that he did so by himself. On the way to the station, Officer Goodwin did not discuss with defendant why he had been taken into custody or why he was being taken to the station.

¶ 28 *Officer Michael Serrano*

¶ 29 Calumet City police officer Michael Serrano, a trained evidence technician, testified that he was assigned to the tactical unit on April 20, 2009. That day, about 7:30 p.m., he took defendant's fingerprints at the Calumet City police department. He placed defendant's fingerprint cards in an envelope and put the envelope on the desk of Marco Glumac, the senior evidence technician, then locked the door to the evidence technicians' office.

¶ 30 *Officer Marco Glumac*

¶ 31 Calumet City police officer Marco Glumac testified that he came into the evidence technicians' office on the afternoon of April 21, 2009, and found the envelope containing

defendant's fingerprints on his desk. He marked the envelope with the case information, sealed and initialed it, and transported it to the Illinois State Police Crime Lab on May 1, 2009.

¶ 32 *Sergeant Kevin Rapacz*

¶ 33 Calumet City police sergeant Kevin Rapacz testified that he assisted in the investigation of the armed robbery incident involving Sanders on April 20, 2009, after defendant had been taken into custody. The State asked Sergeant Rapacz where he went in regard to the investigation on the morning of April 21, 2009. Defense counsel objected that, if the State was going to elicit Sanders' identification of defendant from a photo array, such testimony would be hearsay and would also violate *Crawford v. Washington*, 541 U.S. 36 (2004). The State responded that it would not be eliciting the victim's statements, but rather, establishing the course of the officer's investigation. Defense counsel responded that the mere discussion of a photo array would "put in the jury's mind the idea that [Sanders] made some kind of identification." The court found that "[t]he inference *** could go both ways" and that the probative value of the evidence outweighed the prejudicial effect, of which there was none. The object was thus overruled.

¶ 34 Sergeant Rapacz testified that about 11:45 a.m. on April 21, 2009, he and Commander Zorzi went to Christ Hospital to show Sanders a photo array containing six photographs, including one of defendant. Sergeant Rapacz testified that Sanders was "alert," but that he could not speak and communicated only by shaking his head and using his hands. Sanders was shown the photo array; the officers then returned to the police station. About 1 p.m., they prepared a physical lineup that included defendant. Sergeant Rapacz and his partner, Detective Erickson, were in the viewing room with Binns at the time he identified defendant.

¶ 35 On cross-examination, Sergeant Rapacz stated that Jack Spinks and Effie Sheppard also viewed the lineup in question. During a sidebar, the defense indicated that it might seek to

introduce evidence that Sheppard, now deceased, excluded defendant as the shooter in a lineup. The circuit court noted that "[a]ny identification that any deceased person made at this point is hearsay. And it doesn't meet any of the exceptions to the hearsay rule, especially an identification made at that time."

¶ 36 *Detective Casey Erickson*

¶ 37 Calumet City police detective Casey Erickson testified that he was assigned to the Criminal Investigations Division on April 3, 2009. About 10:30 a.m. that day, he was assigned to investigate the armed robbery of Sanders. Detective Erickson was aware that latent prints had been recovered from the Sanders' vehicle and submitted to the crime lab. He asked that those prints be compared with the prints of an individual named Jerrell Jackson based on a "hunch" of his boss. Sometime between April 14 and April 20, Detective Erickson learned that the prints recovered from the crime scene belonged to defendant. He issued a BOLO with defendant's photograph and began searching for defendant.

¶ 38 On the afternoon of April 20, Detective Erickson learned that defendant had been taken into custody. About 6:37 p.m., he spoke with defendant in an interview room with Officer Serrano present. After advising defendant of his *Miranda* rights, they had a 20 minute conversation. The officers informed defendant of the armed robbery on the day in question and asked defendant if he was in that area. Defendant responded that "he may [have] been in that area on that day and time"; however, he denied knowing anything about an armed robbery. The officers then told defendant that they were going to place him in a lineup. Defendant asked "if the old man was okay." At that point, the officers had not mentioned an old man. They had merely informed defendant that there had been an attempted armed robbery, without mentioning the name of the victim or that he had been hurt.

¶ 39 About 2 p.m. on April 21, Detective Erickson spoke with defendant again with Detective Growe present. Detective Erickson advised defendant of his *Miranda* rights. He then told defendant the results of the lineup viewed by Binns. Defendant sat back in his chair, and Detective Erickson informed him that someone had been shot. Defendant hunched over and put his head down as if he were "a little upset," then said, "it wasn't cold-blooded." On cross, Detective Erickson stated that he had not accused defendant of shooting Sanders in cold blood.

¶ 40 *Dr. Ariel Goldschmidt*

¶ 41 Dr. Ariel Goldschmidt, an assistant medical examiner with the Cook County medical examiner's office, testified as a forensic pathology expert on behalf of the prosecution. Dr. Goldschmidt performed an autopsy on Sanders on May 3, 2011, and discovered gunshot injuries to the victim's right knee, stomach, pancreas, liver, small intestine, and right kidney. He also determined that Sanders had suffered respiratory failure after the shooting. In addition to the gunshot wounds, Sanders had suffered from a urinary tract infection, gastritis, colitis, a bowel obstruction, a MRSA skin infection, and bed sores prior to his death. Dr. Goldschmidt opined that the cause of death was aspiration pneumonia due to multiple gunshot wounds and that the manner of death was homicide.

¶ 42 *Frank Senese*

¶ 43 Frank Senese was presented as the State's expert in latent print analysis. Prior to his testimony, the defense renewed its objection to the admissibility of the fingerprint testimony under *Frye*, as well as its motion *in limine* to bar Senese from testifying that there was a fingerprint match in this case. The court again ruled that the State would be allowed to elicit expert opinion testimony regarding latent fingerprint analysis and comparison. It also ruled that Senese could give his opinion as to whether there was a match so long as there was an

appropriate foundation.

¶ 44 Senese testified that he is a latent print group supervisor for the Illinois State Police. On April 10, 2009, he received 12 latent print lifts pulled from the victim's car—specifically, from the exterior and interior of the passenger window and the top, middle, and bottom of the door frame. Senese determined that four of the prints were suitable for comparison and matched them against the prints of Jerrell Jackson. They did not match. He then entered a print recovered from the exterior of the front passenger window into AFIS (Automatic Fingerprint Identification System) and received a "perfect score" for defendant. He obtained defendant's fingerprint card, compared it to three of the prints from the victim's car, and made an identification. Senese notified the Calumet City police department in a report issued in mid-April 2009.

¶ 45 On May 5, 2009, Senese received a set of ink prints from defendant's fingers and palm. He re-compared the latent prints to defendant's inked prints and concluded that the three lifts from the exterior passenger window of Sanders' car matched the prints for defendant's left little finger, left ring finger, and left middle finger. On cross-examination, Senese admitted that he could not say whether a "dark smudge" at the bottom of one of the prints was left by defendant. He also admitted that he had no way of determining whether it was a glove print.

¶ 46 D. Motion for Directed Verdict

¶ 47 The State requested that its exhibits be admitted into evidence. Defense raised no objection to the admission of the photo array shown to Sander, and the court admitted the array into evidence. The State then rested. The defense's motion for a directed verdict was denied.

¶ 48 E. The Defense's Case

¶ 49 Before the defense called its first witness, the State renewed its motion *in limine* to bar Sanders from offering his conclusion that the individual in surveillance footage was wearing a

glove. Defense counsel responded, "Your Honor, we are not intending to elicit an opinion as to whether the man was wearing a glove from Mr. Sanderson." The court replied, "There you go, problem solved."

¶ 50 The State also renewed its objection to any evidence from the defense regarding what Effie Sheppard would have testified to or who she identified in the lineup. The defense indicated that it possessed Sheppard's affidavit in which she averred that she had excluded defendant as the offender and identified a different individual in the lineup. The defense claimed that if a police officer denied Sheppard's statements, it should be allowed to call her husband, Jack Spinks, to confirm what Sheppard said in her affidavit. The defense asserted that the affidavit was admissible under the residual exception to the hearsay rule. The trial court noted that the Illinois Rules of Evidence did not contain a residual hearsay exception and granted the State's objection.

¶ 51 Later at trial, the defense made an offer of proof as to how it would prove up Sheppard's identification. The defense claimed that: (1) Spinks would testify that on the car ride home from the police station he and Sheppard revealed that they had each identified someone other than defendant; (2) two police officers would testify that they interviewed Sheppard about her affidavit and that she confirmed to them that she picked someone other than defendant out of the lineup; and (3) Sergeant Rapacz and Detective Erickson would testify that Sheppard chose someone other than defendant. The defense argued that if Sergeant Rapacz and Detective Erickson testified differently, they should be subject to impeachment with Sheppard's affidavit. The defense claimed that it was also seeking the admission of Sheppard's affidavit to show the bias of the officers where Sheppard's purported identification was not contained in either Sergeant Rapacz's police report or Detective Erickson's lineup report. The trial court reaffirmed

its prior ruling and found that Sheppard's identification did not fall under the deceased witness exception to the hearsay rule and did not go to the bias of the officers' testimony.

¶ 52 *Jack Spinks*

¶ 53 The defense first called Jack Spinks. Spinks testified that he was getting a money order at the currency exchange on Sibley Boulevard at the time of the attempted armed robbery. He testified that he heard shots fired and saw some people moving around in a car, but could not see anything else. Spinks subsequently visited the police station and viewed a lineup. He identified someone other than defendant. On cross, Spinks stated that he saw the offender get out of the car, but he could not see the offender's face because the offender had a hoody over his head. Spinks saw the offender walk past the currency exchange and noticed a silver revolver in his right hand. He saw the offender put the revolver in his pants; he did not notice him wearing gloves. When Spinks went to the police station to view the lineup, he did not think he would be able to identify the offender. He stated that he was asked to look anyway.

¶ 54 *Detective Casey Erickson*

¶ 55 Detective Erickson was recalled to the stand. He testified that he was present when Spinks viewed the lineup. He indicated that Spinks did not make an identification. When shown the lineup form to refresh his recollection, Detective Erickson stated that the form "basically states there was a negative ID by Mr. Spinks." He testified that this means that there was not an identification of defendant.

¶ 56 *ASA Grogan*

¶ 57 Assistant State's Attorney (ASA) Andrea Grogan testified that she met with Detective Erickson on the evening of April 21, 2009. She believes that Detective Erickson told her everything that defendant had said, including his question about the "old man" and his comment

that "it wasn't cold-blooded." She could not remember "exactly every word he used." ASA Grogan wrote a summary of the conversation and acknowledged that it did not include the statements "It wasn't cold blooded" or "How's the old man?"

¶ 58 *Robert Sanderson*

¶ 59 Robert Sanderson was qualified as an expert in the field of video forensics. Sanderson testified that he analyzed surveillance video footage of a person running down an alley[1] and focused on the individual's left arm, forearm, wrist and hand. He identified six "significant" frames, clarified them, and noticed a dark band around the left wrist area in each. He opined that this was an image element, *i.e.*, a real, tangible thing, as opposed to a shadow or an artifact. He considered the dark band to be some type of "covering." On cross, Sanderson acknowledged that neither a "flesh covered hand" nor a face could be seen in the selected frames.

¶ 60 *Ken Moses*

¶ 61 Ken Moses was qualified as an expert in the field of forensic crime scene analysis and latent print identification and comparison. Moses testified that he examined prints found on the door handle of a Ford that was at the crime scene and concluded that they were glove prints. He also examined the lifts taken from the exterior passenger window of Sanders' car. He opined that they were placed on the window "with a gentle touching or by a touching on the surface without moving the hand or without the surface moving." He reached this conclusion because the prints showed "virtually no distortion, movement or pressure." Moses testified that one of the prints from the window contained two "dark smudges" at the bottom. In his opinion, the smudges were glove prints because of the presence of parallel streaks. The streaks, he believed, were indicative

[1] During Sanderson's testimony, the parties stipulated that Monjet Shoman owned a shoe store at 1571 Sibley Boulevard and had a surveillance camera in back that overlooked the alley. On the morning of April 3, 2009, the camera recorded a man in a gray hoody running eastbound down the alley. Shoman had one of his employees copy the footage to DVD and then provide it to police. The parties stipulated that Officer Michell Growe received the DVD and placed it into evidence.

of fabric moving along the surface. Moses opined that the fingerprint was laid down before the glove print based on the fact that the fingerprint did not disrupt the glove print.

¶ 62 F. The State's Rebuttal Testimony

¶ 63 After the defense rested its case, the State recalled three witnesses, including Officer Plavsa, in rebuttal. As pertinent here, Officer Plavsa testified that Kelly Sellers, a student from Thornton Fractional North High School, was the first individual in the lineup viewed by the witnesses. On April 21, 2009, Officer Plavsa took Sellers from the high school to the police department to stand as a filler in a lineup.

¶ 64 G. Jury Verdict and Motion for J.N.O.V.

¶ 65 Following closing argument, the defense objected to the jury receiving the photo array with defendant's photograph. The court ruled that the photo array would be published to the jury. It found the photo array relevant in light of the defense argument "that there is a bias against [defendant] in that this was a rush to judgment in the investigation." The court denied defendant's renewed motion for a directed verdict.

¶ 66 The jury found defendant guilty of first degree murder and attempted armed robbery. The jury also found that, during the commission of first degree murder, defendant personally discharged a firearm which proximately caused the death of another.

¶ 67 Defendant filed a motion for judgment notwithstanding the verdict and for a new trial. He argued, *inter alia*, that the court erroneously admonished him as to the minimum prison sentence he was facing at the time he decided to reject the State's plea offer. At a hearing on the motion, the court questioned whether defense counsel admonished defendant of the correct sentencing range. The following colloquy occurred:

> "MR. VAN HORN [defense counsel]: Your Honor, that is privileged communication between us and our client and we do not at this time wish to disclose privilege[d] communication with [defendant].
>
> THE COURT: Nor are you alleging ineffective assistance?
>
> MR. VAN HORN: That's correct, your Honor, we are not.
>
> THE COURT: Okay. Thank you. Miss Morrissey?
>
> MS. MORRISSEY [ASA]: Judge, I can certainly put on the record that I had discussions with counsel that the minimum sentence was 45 to life and that my offer was under the minimum at 39. I know counsels were aware of the correct sentence."

The court acknowledged erroneously informing defendant of the sentencing range for murder. However, the court pointed out that it admonished defendant that he faced a possibility of 25 years to natural life based on his enhancements. The court stated that, under case law, it did not have any responsibility to admonish defendant of the applicable sentencing range where defendant had chosen to reject a plea offer. It stated that the obligation of properly informing defendant of the sentencing range fell upon defense counsel. The court thus rejected defendant's claim that his constitutional rights were violated by the improper admonishment.

¶ 68 H. Sentencing

¶ 69 At sentencing, the parties called several witnesses in aggravation and mitigation. The State requested a life sentence for defendant, arguing that he had three prior convictions for possession of a controlled substance, was on parole at the time of his arrest, and put the victim through a year of "torture" before his death. The defense requested the minimum sentence of 45

years' imprisonment, arguing, *inter alia*, that defendant had difficult upbringing and got "mixed up with the wrong crowd."

¶ 70 The trial court noted that it had considered the evidence in the case, the presentence investigation report, the testimony of the witnesses in mitigation, and the factors in aggravation and mitigation. The court found that defendant had the potential to be rehabilitated based on his prior history, but that there was no reason for him to have committed the crime in question given that he had been able to take advantage of several opportunities and had a loving family to support him. The court agreed that defendant's youth was a mitigating factor, but also took into account his prior criminal history. In aggravation, the court considered defendant's behavior in the Cook County department of corrections, primarily the fact that he set a fire and possessed a shank. Finally, the court noted that it would be considering the victim's old age in aggravation as well. The court then made the following comments:

> "Mr. Sanders was a 79-year-old man that had two things for him going on that day. He had his reputation and he had his dignity. You took that away from him, [defendant], and you took it away from his family. He served this country and took bullets and survived, but he couldn't survive your bullet, and I take that into aggravation factors [*sic*].
>
> I also take into aggravation that the injury that you caused Mr. Sanders, that the last years of his life, the last breath that he could take, he had no choice but to think about you, because you put him in that position to go from a healthy 79-year-old active man to a vegetable, where he could not take care of himself. For nothing. I am sure if you would have asked Mr. Sanders for money, he probably would've given it to you."

The court ultimately merged defendant's convictions and sentenced him to 50 years' imprisonment for first degree murder, with an additional 30 years for personally discharging a firearm that proximately caused the death of another. The court denied defendant's motion to reconsider sentence.

¶ 71 We have jurisdiction pursuant to Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Feb. 6, 2013).

¶ 72 II. ANALYSIS

¶ 73 On appeal, defendant contends that the court: (1) erroneously barred him from eliciting testimony regarding Sheppard's exclusion of him from a lineup; (2) erroneously allowed Sergeant Rapacz to testify that Sanders reviewed a photo array containing his photograph and also improperly allowed the admission of the photo array into evidence; (3) abused its discretion in precluding Sanderson from opining that the individual in the surveillance footage may have been wearing a glove; (4) abused its discretion in admitting expert fingerprint evidence based upon the ACE-V method of latent fingerprint analysis; (5) incorrectly admonished him regarding the potential sentence he faced at the time the State's plea offer was pending; and (6) improperly considered irrelevant factors in sentencing him to 80 years' imprisonment. We address each argument in turn.

¶ 74 A. Alleged Evidentiary Errors

¶ 75 Defendant contends that the trial court erroneously admitted certain evidence at trial. A trial court's ruling on the admissibility of evidence will not be disturbed absent a clear showing of an abuse of discretion. *People v. Thomas*, 171 Ill. 2d 207, 218 (1996). An abuse of discretion will be found only when the court's decision is arbitrary, fanciful, or unreasonable, or no reasonable person would agree with it. *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 16.

¶ 76 1. Admissibility of Testimony Regarding Sheppard's Identification

¶ 77 Defendant claims that the court erred in precluding him from admitting Sheppard's statement in which she stated that she identified an individual other than defendant in a lineup. He argues that Sheppard's statement was admissible under the United States Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), that the court abused its discretion in refusing to allow him to cross-examine Detective Erickson with the statement, and that the statement was admissible under the residual exception to the hearsay rule.

¶ 78 The State argues that the court properly declined to admit Sheppard's statement since it did not fall within any recognized exception to the hearsay rule. The State argues that none of the *Chambers* factors are present and that Illinois does not recognize the residual exception to the hearsay rule. The State argues that the court also did not abuse its discretion in precluding defendant from cross-examining Detective Erickson with Sheppard's statement when it would not have shown his bias or impeached his testimony.

¶ 79 We initially find that Sheppard's statements were, indeed, hearsay. In her affidavit, Sheppard stated that she identified an individual other than defendant in a lineup at the Calumet City police station. She also stated that, on the car ride home, she and her husband, Jack Spinks, revealed that they had each identified the same person. Sheppard then stated that she met with the Calumet City police and an ASA later that evening at her home. At that time, she told the police and the ASA that she had identified the shooter in a lineup earlier in the day.

¶ 80 The definition of hearsay is an out of court statement offered to prove the truth of the matter asserted. *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). In this case, each one of Sheppard's statements was made out-of-court and was offered to prove the truth of the matter

asserted: namely, that Sheppard did not identify defendant as the shooter in question. Notably, Sheppard's statements were also double hearsay in that they were related by way of an affidavit.

¶ 81 Defendant does not identify any hearsay exceptions in the Illinois Rules of Evidence that would allow the admission of Sheppard's statement. He also does not make the argument that Sheppard's statements were admissible under section 115-10.4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.4 (West 2012)), which sets forth the circumstances in which a statement of a deceased witness may be admitted when no other hearsay exception applies. Under section 115-10.4, a prior statement is only admissible if it has been "made by the declarant under oath at a trial, hearing, or other proceeding and been subject to cross-examination by the adverse party." 725 ILCS 5/115-10.4(d) (West 2012). Because Sheppard never made her statements under oath at one of these proceedings nor was subject to cross-examination by the State, it is clear that section 115-10.4 does not apply.

¶ 82 Defendant claims that, even though Sheppard's statements were otherwise inadmissible under Illinois law, he should have been allowed to elicit testimony about Sheppard's lineup identification under *Chambers v. Mississippi*. There, the Supreme Court identified four factors for determining the reliability of a hearsay statement, including: "(1) the statement was spontaneously made to a close acquaintance shortly after the crime occurred; (2) the statement is corroborated by some other evidence; (3) the statement is self-incriminating and against the declarant's interests; and (4) there was adequate opportunity for cross-examination of the declarant." *People v. Tenney*, 205 Ill. 2d 411, 435 (2002). These factors are merely guidelines; they do not each need to be satisfied as a condition of admissibility. *Id.* In determining the admissibility of an extrajudicial statement, the ultimate question is whether the statement was

"made under circumstances which provide 'considerable assurance' of its reliability by objective indicia of trustworthiness." *Id.* (quoting *People v. Thomas*, 171 Ill. 2d 207, 216 (1996)).

¶ 83 In this case, we find the first *Chambers* factor to be satisfied. Sheppard, in her affidavit, stated that, on the ride home from the police station, she and Spinks "revealed to each other that [they] had each identified the same man in the lineup as the shooter. He was the tallest man in the lineup." Sheppard's statement was spontaneous in that it was not made in response to coercion or force, but instead, during natural conversation with her husband. See *Tenney*, 205 Ill. 2d at 438-39. It was also made "shortly after the crime occurred." The attempted armed robbery occurred on April 3, 2009; Sheppard made her statement on April 21, 2009, a mere three weeks after the incident. Under the circumstances, we have no doubt the first *Chambers* factor is present.

¶ 84 Regarding the second *Chambers* factor, we choose to give defendant the benefit of the doubt and find that Sheppard's statement could be corroborated. At trial, defendant made an offer of proof that Sheppard's statement would be corroborated by her husband, the unnamed police officers who visited her after the lineup, and the officers who conducted the lineup. We will consider this offer of proof sufficient to satisfy the second *Chambers* factor.

¶ 85 Defendant concedes, however, that the third and fourth *Chambers* factors are not present here. Thus, only two out of the four *Chambers* factors are present. While we recognize that *Chambers* does not require each of the four factors to be satisfied, we are troubled by the fact that Sheppard's statement was neither against her interests nor subject to cross-examination. To give an example of why we believe cross-examination would have been so important in this case, we note that Sheppard's husband, Jack Spinks, also allegedly identified someone other than defendant in the lineup. On cross, the State elicited that Spinks could not see the offender's face

at the time of the crime and that when he went to the police station to view the lineup, he did not think he would be able to identify the offender. Had the State had an opportunity to cross-examine Sheppard, it is possible that it would have been able to similarly undermine her lineup identification. Ultimately, we have no "considerable assurance" that Sheppard's statement was reliable. We therefore find that the trial court did not err in declining to admit it.

¶ 86 In reaching our conclusion, we have considered the unreported federal decision of *Lugo v. Miller*, No. CV 03-2004-CAS CW, 2014 WL 1956659 (C.D. Cal. Feb. 25, 2014), *adopted*, 2014 WL 1957019, cited by defendant. *Lugo*, unlike here, addressed *Chambers* within the context of an ineffective assistance of counsel claim, which is an entirely different standard than the one applicable here. We are not bound by federal district court decisions (*People v. Neese*, 2015 IL App (2d) 140368, ¶ 21), and, in any event, we find *Lugo* inapposite.

¶ 87 2. Cross-Examination of Detective Erickson

¶ 88 Defendant next claims that the court abused its discretion in refusing to allow him to cross-examine Detective Erickson about Sheppard's lineup identification. He claims that if Detective Erickson had testified that Sheppard excluded defendant from the lineup, it would have "supported the defense" and shown that the detective did not include exculpatory information in his police report. Alternatively, he claims that if Detective Erickson had testified that Sheppard did not make a lineup identification, he could have been impeached by testimony from Spinks that Sheppard told him of her lineup identification.

¶ 89 The State argues that the trial court properly limited Detective Erickson's cross-examination because Sheppard's statement was inadmissible hearsay. The State argues that the impeachment exception to the hearsay rule does not apply because "the fact that Sheppard

identified a filler in the line-up and not defendant would not have impeached [Detective] Erickson in any way."

¶ 90 The scope of cross-examination is generally limited to the subject matter of the direct examination and the credibility of the witness. *People v. Velez*, 2012 IL App (1st) 101325, ¶ 62. Impeachment on collateral matters is not permitted; a witness' answer must be accepted. *People v. Sandoval*, 135 Ill. 2d 159, 194 (1990). " 'A matter is collateral if it is not relevant to a material issue of the case.' " *People v. Santos*, 211 Ill. 2d 395, 405 (2004) (quoting *Esser v. McIntyre*, 169 Ill. 2d 292, 304-05 (1996)). The test for determining whether a matter is collateral is whether it could be introduced for any purpose other than to contradict. *Id.* The trial court has discretion to set boundaries on cross-examination; its ruling will not be disturbed absent a clear abuse of discretion resulting in manifest prejudice to defendant. *Velez*, 2012 IL App (1st) 101325, ¶ 62.

¶ 91 In the case at bar, we do not believe that the court abused its discretion in barring defendant from cross-examining Detective Erickson about Sheppard's lineup identification. On direct examination of Detective Erickson, the State did not elicit any testimony concerning Sheppard viewing a lineup, and, thus, Sheppard's statements were outside the scope of direct. Moreover, we reject defendant's claim that Sheppard's statements were the proper subject of impeachment. Notably, defendant has not identified a single piece of *actual* testimony on which Detective Erickson could be impeached by the admission of Sheppard's statement. He merely hypothesizes as to the various ways that Detective Erickson might have testified about Sheppard's identification and asserts that he could have "complete[d]" any impeachment by calling Spinks. By framing his argument this way, defendant has revealed that he has no real basis for impeaching Detective Erickson; indeed, he does not even know what the detective's testimony would be. Under the circumstances, we find that the trial court properly barred

defendant from cross-examining Detective Erickson on matters outside the scope of direct, which did not affect his credibility.

¶ 92 3. Residual Hearsay Exception

¶ 93 Defendant alternatively claims that Sheppard's affidavit should have been admitted under the residual exception to the hearsay rule. He acknowledges that Illinois has not adopted the rule, but claims this "does not mean that Illinois has rejected the common law residual exception to hearsay."

¶ 94 In *People v. Olinger*, our supreme court expressly declined to adopt the residual exception to the hearsay rule. *People v. Olinger*, 176 Ill. 2d 326, 359 (1997). Subsequently, in 2011, the Illinois Rules of Evidence took effect. The committee commentary to the rules states that the committee codified "the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years. Ill. R. Evid. Committee Commentary (adopted Sept. 27, 2010). Notably, the residual exception to the hearsay rule was not included in the newly codified Rules of Evidence. Under the circumstances, we find that Illinois does not recognize the residual exception to the hearsay rule and decline to address the admissibility of Sheppard's affidavit thereunder.

¶ 95 4. The Admissibility of the Photo Array

¶ 96 Defendant next contends that the court erred by allowing Sergeant Rapacz to testify that he showed the victim a photo array containing defendant's picture. He claims that the court further erred by allowing the photo array to be admitted into evidence. According to defendant, the photo array evidence was "testimonial" and violated his right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36 (2004).

¶ 97 In *Crawford*, the United States Supreme Court held that, under the confrontation clause, "the testimonial hearsay statements of a witness who is unavailable at trial may not be admitted against a criminal defendant unless the defendant had a prior opportunity for cross-examination." *People v. Patterson*, 217 Ill. 2d 407, 423 (2005) (citing *Crawford*, 541 U.S. at 68). "The confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " *People v. Banks*, 237 Ill. 2d 154, 182 (2010) (quoting *Crawford*, 541 U.S. at 59 n.9). "Thus, if defendant cannot establish that challenged testimony is hearsay, he likewise cannot prevail on a claim under the confrontation clause." *People v. Risper*, 2015 IL App (1st) 130993, ¶ 36.

¶ 98 The State asserts that Sergeant Rapacz's testimony was not hearsay, but rather, evidence of his course of conduct. A police officer's course of conduct may be established through testimony that he spoke with an individual and that he subsequently acted on the information received. *People v. Johnson*, 199 Ill. App. 3d 577, 582 (1990). The officer is prohibited from testifying to the substance of the conversation because it would amount to inadmissible hearsay. *Id.* However, " '[t]estimony describing the progress of an investigation is admissible even if it suggests that a nontestifying witness implicated the defendant.' " *People v. Peoples*, 377 Ill. App. 3d 978, 986 (2007) (quoting *People v. Simms*, 143 Ill. 2d 154, 174 (1991)).

¶ 99 Here, Sergeant Rapacz's testimony was certainly admissible to establish his course of conduct with respect to the murder investigation. Sergeant Rapacz testified that he met Sanders at the hospital after the crime in question and showed him a photo array containing defendant's photograph. He testified that Sanders communicated with him by shaking his head and using his hands. He returned to the police station after showing Sanders the photo array and conducted a physical lineup that included defendant. Importantly, Sergeant Rapacz never testified to the

substance of his conversation with Sanders; he merely testified that he spoke with Sanders and acted on the information he received. Under the circumstances, we find no hearsay issue, and thus no confrontation clause violation, because Sergeant Rapacz's testimony "was not offered for its truth, but rather to show the course of the police investigation" that led to defendant's murder charge. *Id.*

¶ 100 Defendant claims that this case is analogous to *In re Jovan A.*, 2014 IL App (1st) 103835, ¶¶ 32-35. We disagree. That case involved a completely different situation where an officer testified to the contents of a craigslist advertisement. Here, the State did not introduce any such hearsay statement. We thus find *Jovan A.* to be distinguishable.

¶ 101 Defendant also cites to *People v. Armstead*, 322 Ill. App. 3d 1 (2001). In that case, the State repeatedly tried to elicit a nontestifying witnesses' prior identification from a police officer. *Id.* at 7-8. Each time the court sustained the defense attorney's objection. *Id.* At the end of the exchange, the State elicited from the officer that he began looking for defendant after speaking with the witness. *Id.* at 8. There, we found that the State's "questioning clearly revealed the substance of the conversation between *** a nontestifying witness *** and [the officer] and implicated defendant as the shooter." *Id.* at 12-13. Here, no such exchange occurred. We agree with the trial court that the inference as to whether Sanders identified defendant could have gone either way. We thus find defendant's reliance on *Armstead* misplaced.

¶ 102 Defendant claims that, even if there was no constitutional violation, the photo array evidence was more prejudicial than probative and should have been barred under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011). Rule 403 states that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403. We review the trial court's ruling for an abuse of discretion. *Thomas*, 171 Ill. 2d at 218.

¶ 103 Here, the court found that defendant would not be prejudiced by Sergeant Rapacz's testimony regarding the photo array because there was no evidence of his conversation with Sanders. The court found that, without such evidence, no clear inference could be drawn as to whether Sanders identified defendant out of the photo array. We agree with the court's reasoning. Defendant was already in custody at the time Sanders was shown the photo array. There was thus no evidence that the conversation with Sanders led to defendant's arrest. Although defendant was subsequently placed in a lineup, this could have resulted whether there was a non-identification *or* an identification. Defendant had been picked up as a suspect in the crime and made a very incriminating statement while in custody. Under the circumstances, it is nearly unfathomable that he would not have been placed in a lineup even if Sanders had not been able to identify him in the photo array.

¶ 104 Defendant claims that the prejudicial effect of Sergeant Rapacz's testimony is revealed in the State's closing remark: "[The victim] has spoken to you through the evidence." According to defendant, the State was implying that Sanders identified him in the photo array. Having reviewed the context of this remark, we find that it had absolutely nothing to do with the photo array. The State was simply arguing that *all of the evidence* presented in its case in chief clearly established defendant's guilt. Defendant has taken this remark entirely out of context. We do not believe the court abused its discretion in admitting Sergeant Rapacz's course of conduct testimony.

¶ 105 Defendant finally claims that the court erred in admitting the photo array into evidence and allowing the jury to view it during deliberations. We are not entirely clear as to what he is arguing with respect to the actual photo array. At times, he seems to argue that the photo array constituted hearsay and that its admission violated *Crawford*. However, a photograph is not a

"statement" and therefore cannot violate *Crawford*. Ill. R. Evid. 801(a), (c) (eff. Oct. 15, 2015); see *Peoples*, 377 Ill. App. 3d at 983, 986. As for allowing the jury to view the photo array during deliberations, we note that defendant has not cited any caselaw in support of his argument that this was improper. We therefore decline to consider his argument further (*Bank of Ravenswood v. Maiorella*, 104 Ill. App. 3d 1072, 1074 (1982)) and find no abuse of discretion.

¶ 106 5. Exclusion of Video Expert's Opinion Regarding Glove

¶ 107 Defendant next contends that the court erred in precluding Sanderson, his video expert, from testifying that the individual in the surveillance video footage was wearing a glove. The State initially responds that defendant consented to the exclusion of Sanderson's opinion regarding the glove when defense counsel informed the court: "Your Honor, we are not intending to elicit an opinion as to whether the man was wearing a glove from Mr. Sanderson." Defendant claims that he was not seeking an opinion as to whether the individual was "definitively" wearing a glove, but rather, whether the surveillance images were "consistent with a glove." This distinction is untenable. If defense counsel, in fact, intended to draw such a distinction, counsel should have expressly done so; no reasonable person would have inferred from counsel's comment that the defense was still seeking to establish that the surveillance images were consistent with a glove. Under the circumstances, the record clearly shows that defendant acquiesced in the decision to bar Sanderson from testifying that the individual in the surveillance video footage was wearing a glove.

¶ 108 It is axiomatic that a party who acquiesces in proceeding in a given manner is not in a position to claim he was prejudiced thereby. *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). Our supreme court has held that, under the doctrine of invited error, defendant may not request to proceed in one manner, then later argue that the course of action was erroneous. *People v.*

Carter, 208 Ill. 2d 309, 319 (2003). Here, we find defendant's acquiescence in the claimed error to be fatal to his claim.[2]

¶ 109 B. Admissibility of Fingerprint Evidence

¶ 110 Defendant next contends that the court erred in allowing the State's fingerprint examiner to offer expert testimony at trial. He claims that the State failed to show that the ACE-V method of latent print examination is generally accepted by research scientists in the community and also failed to rebut the consensus among that group that the method is flawed. The State responds that a *Frye* hearing was not necessary given this court's previous ruling that the ACE-V methodology is generally accepted within the relevant scientific community.

¶ 111 The admissibility of expert testimony is governed by the "general acceptance" test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004). Under the *Frye* standard, scientific evidence will be admitted at trial "only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *Id.* at 529-30 (quoting *Frye*, 293 F. at 1014). "General acceptance" is not synonymous with universal acceptance; the methodology in question need not be accepted by unanimity, consensus, or even a majority of experts. *Id.* at 530. Rather, "it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field." *Id. Frye* applies only to "new" or "novel" scientific methodologies. *Id.* "Generally speaking, a scientific methodology is considered 'new' or 'novel' if it is 'original or striking' or 'does not resembl[e] something formerly known or used.' " (Internal quotation marks omitted.) *Id.* (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 79 (2002)).

[2] We also reject defendant's claim of cumulative error given that we have found no errors. *People v. Dresher*, 364 Ill. App. 3d 847, 863 (2006).

¶ 112 To determine the general acceptance of a scientific principle or methodology, a court may: (1) rely on the results of a *Frye* hearing; or (2) take judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on a subject. *People v. Luna*, 2013 IL App (1st) 072253, ¶ 52. Our review of the trial court's *Frye* ruling is *de novo*. *Commitment of Simons*, 213 Ill. 2d at 531.

¶ 113 Here, we agree with the State that a *Frye* hearing was unnecessary based on prior judicial decisions. In *Luna*, this court noted that "wholesale objections to the ACE-V methodology have been uniformly rejected by state appellate courts (under *Frye*, *Daubert*, or some hybrid standard of admissibility) and by federal appellate courts (under *Daubert*)." *Id.* ¶ 68 (citing cases). The defendant in *Luna*, like the defendant here, failed to cite a single published opinion of any court "suggesting that ACE-V methodology is not generally accepted within the relevant scientific community." *Id.* ¶ 69. Instead, he argued that "recent criticisms of the ACE-V method in the scientific literature preclude[d] this court from taking judicial notice of its general acceptance." *Id.* We found that these criticisms went to the weight of the evidence, rather than its admissibility under *Frye*. *Id.* ¶ 70. We emphasized that "the 'general acceptance' standard tolerates criticism of a methodology from experts within the scientific community." *Id.* ¶ 80. Ultimately, because " 'general acceptance' does not require unanimity, consensus, or even a majority of experts, and those courts considering latent print analysis have considered the range of views within the relevant scientific community, we conclude[d] that the trial court did not err in taking judicial notice of the general acceptance of the ACE-V methodology." *Id.* ¶ 81.

¶ 114 Defendant now claims that *Luna* is inapposite because it did not consider the report of his expert witness, Dr. Ralph Haber, and the one Baltimore County circuit court case that the doctor cited in his report. However, one witness' report and one circuit court decision do not affect our

conclusion in *Luna* that the ACE-V method is generally accepted in the relevant scientific community. See *id.* ¶ 81. Accordingly, we find that the expert testimony of the State's fingerprint examiner was properly admitted at trial under *Frye*.

¶ 115 C. Admonishment Regarding Sentencing Range

¶ 116 Defendant next contends that the court erroneously admonished him regarding his sentencing range at the time the State's plea deal was pending. He claims that, as a result of this error, he should be returned to the position that he was in prior to the incorrect admonishment; that is, he should be granted a new trial and offered the same plea deal again.[3]

¶ 117 The State responds that there is no requirement that a trial court inform a defendant of the applicable sentencing range before he rejects a plea deal. The State also points out that defendant discussed the plea offer with counsel before rejecting it and was thus aware of the applicable sentencing range.

¶ 118 "A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." (Emphasis in original.) *People v. Curry*, 178 Ill. 2d 509, 528 (1997), *abrogated on other grounds*, 2013 IL 113140. A defense attorney is therefore obligated to advise his or her client as to the sentencing range for the offense with which the client is charged. *Id.* Illinois Supreme Court Rule 402 requires the trial court to admonish defendant as to "the minimum and maximum sentence prescribed by law" before he accepts a plea of guilty. Ill. S. Ct. R. 402(a)(2) (eff. Jul. 1, 2012). The trial court, however, has no obligation to admonish defendant as to his sentencing range if he has *not* pleaded guilty. *People v. Harvey*, 366 Ill. App. 3d 910, 918 (2006). We review *de novo* the legal

[3] The record shows that defendant did not object to the incorrect admonishment. The State has not argued, however, that defendant has forfeited this issue. We therefore find that the State has forfeited any forfeiture argument. See *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003) (noting that "the State may waive waiver").

issue of whether defendant failed to receive correct admonishments. *People v. Green*, 332 Ill. App. 3d 481, 483 (2002).

¶ 119 Here, there is no dispute that the trial court incorrectly admonished defendant as to the proper sentencing range for first degree felony murder. Notwithstanding, we find no reversible error. Prior to the court's incorrect admonishment, defense counsel stated that defendant did not wish to take the offer. The trial court was not required to admonish defendant as to the sentencing range for first degree felony murder *after* he had decided to reject the State's plea offer. *Harvey*, 366 Ill. App. 3d at 919.

¶ 120 Defendant cites *Lafler v. Cooper*, 132 S. Ct. 1376, ___ U.S. ___ (2012), in support of his claim that he has rights at the plea stage. We do not disagree with the general proposition that a criminal defendant has rights during plea proceedings. However, we do not believe that defendant has any right to be admonished regarding the sentencing range for an offense *after deciding to reject a plea deal*, especially when the circumstances suggest that he relied on the proper advice of counsel in reaching his decision. We therefore reject defendant's claim.

¶ 121 D. 80-Year Sentence

¶ 122 Defendant lastly contends that the court abused its discretion in sentencing him to an aggregate term of 80 years' imprisonment. He maintains that the court considered several improper factors in fashioning his sentence, including: (1) his use of a firearm; (2) the victim's age and personality traits; and (3) evidence that the victim had become a "vegetable" as a result of the shooting. The State responds that defendant has forfeited his objections to these alleged sentencing errors by failing to object to them at trial.

¶ 123 We agree that defendant has forfeited his claim. "A defendant wishing to raise errors that occurred at sentencing must *** object at the sentencing hearing and include the issues in a

written motion to reconsider sentence, or risk forfeiture on appeal." *People v. Ramirez*, 2015 IL App (1st) 130022, ¶ 19. Here, because defendant did not object to the court's alleged errors during the sentencing hearing, we may review his claim only if he can establish plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 124 Defendant, in replying to the State's forfeiture argument, insists that there has been no forfeiture and makes no attempt to argue for plain error review of his forfeited sentencing claim. It is ultimately his burden to establish plain error; and, if he fails to argue for it, he obviously cannot meet his burden of persuasion. *Id.* Defendant has thus forfeited plain error review of his sentencing claim by failing to argue for it. *Id.* at 545-46.

¶ 125 III. CONCLUSION

¶ 126 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 127 Affirmed.