2017 IL App (1st) 142738-U

FIFTH DIVISION
March 31, 2017

No. 1-14-2738

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 9537
	)	
PAWEL BORS,	)	
	)	Honorable
Defendant-Appellant.	)	Kenneth J. Wadas,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed where the trial court (1) properly denied defendant's motion to suppress his videotaped statement to the police and (2) did not abuse its discretion in imposing a 14-year sentence.

¶ 2 Following a jury trial, defendant was convicted of leaving the scene of a motor vehicle accident involving death pursuant to section 11-401(b) of the Illinois Vehicle Code (Vehicle Code). 625 ILCS 5/11-401(b) (West 2010). The trial court sentenced defendant to serve 14

years in the Illinois Department of Corrections (IDOC). On appeal, defendant argues (1) the trial court should have suppressed the videotaped statement he provided to the police and (2) his sentence was excessive. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested and charged by indictment with one count of leaving the scene of a motor vehicle accident involving death. The indictment alleged that on April 24, 2011, defendant struck the victim Janusz Zajkowski with his vehicle while driving in reverse. The indictment also alleged defendant left the scene without leaving his information, did not seek medical assistance for the victim, and did not contact the police. The victim died nine days later from the skull fractures and internal bleeding he sustained during the incident. As the issues in this appeal are limited, we will recount only the relevant facts and testimonies.

¶ 5 A. Motion to Suppress Statement

¶ 6 Prior to trial, defendant filed a motion, seeking to suppress his statements to the police following his arrest. In the motion, defendant argued his statement to the police was not voluntary because (1) it was secured in violation of his right to prompt presentment after arrest, where the police interrogated him instead of presenting defendant to a judicial probable cause determination, (2) the police used coercive investigative techniques, including holding him "incommunicado" with respect to his pregnant girlfriend, and (3) the police denied him clothing to keep him warm and the opportunity to rest. Defendant further alleged he did not waive his *Miranda* rights because the police did not "make the final, crucial, required inquiry" as to whether defendant wished to waive his *Miranda* rights.

¶ 7 At the suppression hearing, Chicago police detective Juan Morales (Detective Morales) testified that on May 18, 2011, he interviewed defendant at the police station along with Chicago

police detective Arthur Tarasziewicz (Detective Tarasziewicz). A video recording of the interview was introduced during the hearing.

¶ 8 In the video recording, Detective Tarasziewicz commenced defendant's interview by reading him his *Miranda* rights. Specifically, Detective Tarasziewicz informed defendant he had the right to a lawyer and that he was entitled to an appointed lawyer if he could not afford or obtain counsel. Detective Tarasziewicz explained that if defendant requested an appointed attorney, the police would not ask him any questions until that lawyer was appointed. When asked if he understood these rights, defendant responded, "yes."

¶ 9 Defendant then proceeded to describe to Detectives Tarasziewicz and Morales what had occurred during the incident. He initially stated he did not know the victim very well and had met him on three prior occasions through a mutual friend, Sebastian Klewicki (Klewicki). The victim had been "aggressive" and "talking shit" each time they had met. On April 24, 2011, defendant was driving home with his pregnant girlfriend, when he received a call on his cell phone from the victim seeking to purchase cocaine from defendant. The defendant then drove to the victim's residence located at North Osceola Avenue in Chicago. His girlfriend was seated in the front right passenger seat.

¶ 10 When defendant and his girlfriend arrived in front of the victim's residence, the victim "jumped into" the rear passenger-side seat of defendant's vehicle and demanded $100 worth of cocaine on credit. The victim appeared "very drunk" and was upset when defendant refused his request. Defendant stayed seated in the driver's seat. Defendant then called Klewicki on his cell phone. Klewicki said he would speak with the victim and direct him to exit the vehicle. When defendant handed his cell phone to the victim, the victim hung up on Klewicki without speaking with him. The victim then exited defendant's vehicle from the passenger-side rear seat with

defendant's cell phone in his hand. The victim threatened defendant that he would "beat him up" if defendant did not provide him with the cocaine, walked around the back of the vehicle, and approached the driver's side window where defendant was sitting. The victim tried to open the driver's side door but defendant locked the doors to keep the victim from entering his vehicle again. When defendant began rolling up the driver's side window, the victim punched through the window with his "bare hand," broke the window, and hit defendant. Defendant was "severely afraid" and "felt pain." During the course of this interaction, defendant tried to give the victim "fifty [dollars worth of cocaine] just to go away" but the victim continued to demand a hundred dollars worth of cocaine. Defendant stated the victim was a "crazy cokehead."

¶ 11 Meanwhile, defendant's girlfriend who was sitting in the front right passenger seat, started crying and screaming at defendant to leave the scene. When the victim began to walk away, defendant tried to drive away. Defendant stated he "tried to change the gears like three times, got mixed, mixed up." According to defendant, he could not drive straight forward because there was another vehicle in front of his automobile. He then drove in reverse veering to the left. When asked by Detective Tarasziewicz why he drove reverse to the left when there was no vehicle parked behind his automobile and he could have driven straight backwards, defendant explained he had "panicked." He stated he had "just tried to get away" and "that's what I did." Defendant then observed the victim on the top of the hood of his trunk. Thereafter, defendant exited his vehicle and retrieved his cell phone. He observed that the victim appeared to be drunk and passed out. He did not observe any blood on the victim. Defendant then drove away in his vehicle. He explained, "I panicked, I hit [the victim] by accident, I thought he was okay, I hoped he was okay, I didn't sleep for a couple of days." When asked by Detective Morales, "You know you hit [the victim]?" defendant replied, "yes."

¶ 12 After hearing defendant's account of the incident, the police provided defendant with a photograph of the accident scene. According to the police, the photograph demonstrated there was broken glass at least ten to fifteen feet behind an automobile in front of it, suggesting that there was plenty of room for defendant to have driven straight forward to leave the scene. In response, defendant suggested there may have been another vehicle behind the automobile depicted in the photograph. Detective Tarasziewicz informed defendant that no vehicles had been removed from the scene before the photograph was taken after the incident. Defendant then suggested the victim may have run into his vehicle because he still wanted cocaine from defendant. Detective Tarasziewicz stated, "No, no, no, don't start making stuff up." Then defendant dropped the photograph on the floor and the following exchange occurred:

"DEFENDANT: Alright, let me talk to my lawyer then, because there's nothing I can explain anymore because I didn't do it on purpose. I never wanted to kill nobody.

MORALES: So is that what you're saying then?

DEFENDANT: Yeah.

MORALES: You're saying you want to talk to a lawyer?

DEFENDANT: I just didn't do it. I didn't do it on purpose.

MORALES: What I'm asking you, is that you what you want?

DEFENDANT: Nah, I don't know what I want. I want for my girl to go home and get, for her to be safe.

MORALES: Well, at this point, at this point, she's a witness to this. And she's here voluntarily. She wants to be here, she wants to help you out. So again, I'm asking you, do you want a lawyer? You don't want to tell your side of the story? Do you want a

lawyer?

DEFENDANT: No, because I don't have any money. I don't want nothing.

MORALES: So, you gotta tell us. Do you want to continue talking?

DEFENDANT: Yes.

MORALES: Do you want to continue talking?

DEFENDANT: Yes.

MORALES: Do you want a lawyer?

DEFENDANT: Yeah, uh no, you want to talk to me, go ahead.

MORALES: You gotta say you don't want a lawyer here.

DEFENDANT: I don't want a lawyer here, no."

¶ 13 Following that exchange, defendant informed the two detectives that on April 24, 2011, he had been drinking prior to the incident because it was Easter. Defendant denied the detectives' suggestions that he hit the victim on purpose. He added that after he drove home, he called Klewicki and informed him about the incident. Defendant denied he had known the victim was hospitalized and had later died. Defendant stated, "I killed him by accident, and I feel bad about it, but I didn't want to do it, and I didn't want to hit him. I just panicked."

¶ 14 The next morning, Detective Morales continued to question defendant. Defendant stated he never called the police because he was in shock. He indicated he did not call an ambulance because he thought the victim was merely drunk.

¶ 15 After watching the video, Detective Morales testified it was his impression that during the interview defendant had wished to continue speaking with Detective Tarasziewicz and himself without counsel. Thereafter, the trial court denied defendant's motion to suppress and admitted his videotaped statement into evidence. In denying defendant's motion, the trial court

found Detective Morales testified credibly and that his testimony matched what the court observed in the video. The trial court further found that defendant's interview with the two detectives was not conducted in a coercive environment. The trial court explained defendant was provided his *Miranda* warnings and he voluntarily waived his right to remain silent when he started speaking with the two detectives. Specifically, the trial court noted it was evident that defendant understood the concept of waiving or not waiving his *Miranda* rights as he had asked to speak with a lawyer during the videotaped interview. The trial court added it was reasonable for Detective Morales to ask defendant to clarify his request for counsel, as defendant was clearly "frustrate[ed]" when he dropped the photograph on the floor and requested a lawyer. The trial court also noted defendant then indicated he did not know whether he wanted a lawyer and continued speaking with the detectives. The trial court ruled that accordingly, defendant's videotaped statement was not coerced and the statement was given freely and voluntarily.

¶ 16 B. Trial Proceedings

¶ 17 The matter proceeded to a jury trial where the State presented the testimony of the following six witnesses. Solongo Erdenebat testified that, on April 24, 2011, defendant drove to the victim's residence after he received a phone call from the victim. Erdenebat was also in the vehicle and seated in the front right passenger seat. When defendant and Erdenebat arrived, defendant parked the vehicle on the street "right behind" a white van. The victim then entered the vehicle through the right rear passenger door right behind the front passenger seat. His face was red and he smelled of alcohol. He was screaming and "really mad." Then the victim exited the vehicle with defendant's cell phone, walked to the driver's side window, and broke the window with his hand. The victim continued screaming, struck defendant's head with his hand, and tried to pull defendant out of the vehicle. Erdenebat was scared and instructed defendant to

leave. The victim then walked to the backside of the vehicle. Defendant drove in reverse. At that moment, Erdenebat heard a "bump, something hitting metal" and observed the victim on the ground. Defendant exited the vehicle to check on the victim, re-entered the vehicle approximately five to ten seconds later, and immediately drove away with Erdenebat. They did not leave any contact information at the scene. Erdenebat did not hear defendant call the police to report the incident. They did not call 911.

¶ 18 The victim's neighbor, Michelle Bruek testified that shortly after 10:30 p.m. on April 24, 2011, she was awakened by a loud "thud" sound from the street. She looked out of her bedroom window and observed a dark colored vehicle quickly drive away. When she observed the victim lying on the apron of his driveway, she ran outside. The victim was nonresponsive and there was blood on the back of his head. Bruek knew he needed help and ran back inside her house and dialed 911. Bruek noticed a "really bad bruise" on the victim's back underneath his shirt when his cousin Edward Targonski tried to lift him. She also observed broken glass on the ground.

¶ 19 Targonski testified that on April 24, 2011, he had been drinking all day with the victim in the victim's residence located at North Osceola Avenue. Later that day, the victim made several phone calls in Targonski's bedroom and then left the house. Shortly thereafter, Targonski heard a voice coming from outside and observed his neighbors standing around the victim who was laying in the driveway. He ran outside and tried to pick up the victim. He observed blood where the victim was laying.

¶ 20 Beata Ostrowska, the victim's wife, testified that she was married to the victim for six years. They had two sons who were nine and seven years of age at the time of the trial. On April 25, 2011, Ostrowska learned that the victim was in a coma in a hospital. When she arrived at the hospital, she was provided with the victim's cell phone. While looking through the cell

phone, Ostrowska noticed that from 10:30 p.m. to 11 p.m. on April 24, 2011, the same phone number appeared "on the ID" on three occasions. She provided the police with the victim's phone records and information on a vehicle that may have been involved in the incident.

¶ 21 Detective Tarasziewicz testified that during his investigation, he went to defendant's residence. Defendant answered the door and stated he knew why the police were there. The police searched defendant's vehicle and found a box of plastic ziplock bags and broken glass near the driver's seat. Detective Tarasziewicz further testified that he looked through defendant's cell phone and noticed that no call was ever made to 911. Thereafter, defendant was arrested and he participated in a videotaped interview with Detectives Tarasziewicz and Morales. The videotaped statement, having been admitted into evidence, was published to the jury by the State.

¶ 22 Dr. Ponni Arkunkumar, a licensed physician, testified she was employed as a forensic pathologist at the Cook County Medical Examiner's Office. Upon performing an autopsy on the victim's body after his death, she found a large fracture in the victim's skull and a subdural hematoma and a subarachnoid hemorrhaging around his brain. According to Dr. Arkunkumar, the victim's cause of death was his cranial cerebral injuries that were caused by an automobile striking him. The victim's lower back injuries were also consistent with "being pushed by a vehicle or falling and being scrapped on the ground." The victim's medical records indicated he was intoxicated when he arrived at the hospital. On cross-examination, Dr. Arkunkuma testified that while chronic alcohol use could affect the way blood clots in the body, intoxication itself does not affect the bleeding. On redirect examination, Dr. Arkunkuma testified there was no evidence that the victim suffered any blood clotting problems.

¶ 23 The State rested. Defendant moved for a directed verdict, which was denied. Defendant

rested his case without offering any evidence at trial.

¶ 24 C. The Verdict and Sentencing

¶ 25 After hearing closing arguments and considering the evidence, the jury found defendant guilty of leaving the scene of an accident involving death. Defendant filed a motion for a new trial, which was denied by the trial court. The matter then proceeded to a sentencing hearing.

¶ 26 At sentencing, the trial court informed defendant that he was found guilty of a Class 1 offense and that he could be sentenced up to 15 years in the IDOC. The State then published a victim impact statement from Ostrowska. In her statement, Ostrowska stated her nine year old son could no longer sleep at night and cried because he was scared he would be left alone. She also stated her seven year old son missed his father and had stated he wanted to hurt the man who killed his father. Ostrowska further stated defendant never showed any remorse. She asked the trial court to sentence defendant to jail for "as long as possible."

¶ 27 During argument in aggravation, the State contended defendant had not demonstrated remorse regarding the incident as observed in his videotaped statement. The State also pointed out that defendant had two prior felony convictions for theft and burglary, and requested the trial court impose a sentence "in the maximum range."

¶ 28 In mitigation, defense counsel asserted defendant expressed remorse in his videotaped statement when he indicated he did not intend to kill the victim. Defense counsel further contended defendant's actions were not intentional and that the sentence should not be enhanced based on such speculation. Defense counsel requested that accordingly, the trial court should impose a sentence of up to seven years as punishment and deterrence for defendant's crime.

¶ 29 In allocution, defendant stated, "I am very sorry for everything that happened. I didn't intend to do anything for, like this. It was just an accident. Nothing else, your honor."

¶ 30 Prior to announcing its sentencing decision, the trial court stated it had considered the mitigation and aggravation factors, including defendant's criminal history. The trial court noted that defendant's conduct of leaving the scene and not rendering aid to an individual who is seriously injured as a result of your actions is "the type of conduct that is almost premeditated at the time." The trial court also stated that defendant's attitude and character indicated he was likely to commit another crime. While the trial court noted that a lengthy sentence might cause hardship to defendant's wife and newborn daughter, it further found that defendant did not have a medical condition, he was not physically disabled, and that his incarceration would not create an excessive hardship to his dependents. Accordingly, the trial court sentenced defendant to 14 years' imprisonment in the IDOC.

¶ 31 D. Postsentencing Proceedings

¶ 32 Following sentencing, defendant filed a motion to reconsider sentence. Before that motion was heard, however, defendant hired new counsel and filed (1) a motion to reconsider the ruling on motion for new trial, in which he alleged ineffective assistance of trial counsel and (2) a motion to reconsider sentence, which were denied. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant argues the trial court should have suppressed defendant's videotaped interrogation because he invoked his constitutional right to have counsel during the questioning. Defendant further contends his 14-year sentence was excessive where (1) the trial court discounted certain mitigation factors and (2) there is no evidence to support the trial court's finding that his crime caused harm, that he may have acted intentionally, and that his sentence will deter others. We address each issue in turn.

¶ 35 1. Motion to Suppress

¶ 36 Defendant contends the trial court erred when it denied the motion to suppress his videotaped statement to the police. According to defendant, he had unambiguously invoked his right to counsel when he stated, "let me talk to my lawyer then." Defendant maintains that thereafter, Detectives Morale and Tarasziewicz "stalled with a series of obfuscating questions designed to convince defendant to reconsider" and eventually "coach[ed]" him to state "I don't want a lawyer." Defendant asserts it was only after this exchange that he admitted he was driving drunk at the time of the incident and that he did not call the police or an ambulance. In addition, defendant concedes he failed to raise the issue in a posttrial motion and properly preserve the issue for our review. *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 14. However, he asks this court to overlook the forfeiture and review the issue under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In the alternative, defendant contends he was denied effective assistance of counsel because his trial counsel failed to raise this claim in a posttrial motion.

¶ 37 The State responds defendant did not effectively invoke his right to counsel because he immediately reinitiated the interview with the two detectives. The State also asserts defendant's inculpatory statements were obtained before he requested an attorney. The State, accordingly argues, suppression of defendant's statements that followed thereafter would not affect the outcome of this case. In addition, the State contends defendant failed to preserve this issue for our review. The State further maintains this forfeited issue is not reviewable as plain error because the trial court did not err in denying defendant's motion to suppress.

¶ 38 Initially, we agree defendant failed to properly preserve this issue for our review. To preserve an issue for review, defendant must object both at trial and in a posttrial motion. *People*

v. Enoch, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006). Under the plain-error doctrine, however, a court of review can consider unpreserved error when (1) the evidence is closely balanced or (2) the error was so serious it affected the fairness of the defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Nevertheless, the plain-error doctrine is not a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court. *Herron*, 215 Ill. 2d at 177. Rather, the plain-error doctrine provides a narrow and limited exception to the general waiver rule. *Id.* The burden of persuasion remains with the defendant under both prongs of the plain-error test. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 39 The first step of plain-error review is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). The burden of establishing a clear or obvious error rests with defendant. *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 73. Accordingly, we turn to consider whether the trial court erred when it denied defendant's motion to suppress.

¶ 40 In reviewing a trial court's ruling on a motion to suppress, we apply a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Under this standard, we accord great deference to the trial court's findings of fact and reverse those findings only if they are against the manifest weight of the evidence; however, we review *de novo* the trial court's ruling as to whether suppression is warranted. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). When reviewing a trial court's ruling on a motion to suppress, we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 41 Defendant asserts his confession should have been suppressed because he invoked his right to counsel during his videotaped interview. Under the United Sates and Illinois

Constitutions, a criminal defendant has a constitutional right to counsel at all custodial interrogations. U.S. Constitution, amends. V, XIV; Ill. Constitution 1970, art. I, § 10; *People v. McCauley*, 163 Ill. 2d 414, 206 (1994). When the defendant invokes that right after being advised of his *Miranda* rights, interrogation by law enforcement authorities must cease unless the defendant initiates further communications with the police. *People v. Woolley*, 178 Ill. 2d 175, 197 (1997) (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981)). This rule is designed to prevent the police from badgering a defendant into waiving his previous assertion of his right to counsel. *Id.* at 198 (citing *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

¶ 42 In determining whether statements defendant provided after the right to counsel has been invoked are admissible as substantive evidence, a two-part inquiry must be made. *Id.* (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983)). The first question is whether the accused, after invoking his right to counsel, initiated further conversation evincing a willingness and desire for a generalized discussion about the investigation. *Id.* (citing *Bradshaw*, 462 U.S. at 1044-45). Communications that relate to the routine matters of the custodial relationship, such as requests for water or to use a restroom or a telephone, will not generally constitute initiation *Id.* at 198-99 (citing *Bradshaw*, 462 U.S. at 1045). If the police initiated further communication, defendant's statements are inadmissible. *Id.* at 199. If, however, defendant initiated the conversation with the police, the court moves to the second question of whether, under the totality of the circumstances, the defendant knowingly and intelligently waived his right to counsel. *Id*. In addition, even where the defendant has reinitiated contact, the burden remains upon the prosecution to establish that subsequently, defendant knowingly and intelligently waived his right to counsel, which he had previously invoked. *People v. Crotty*, 394 Ill. App. 3d 651, 655-56 (2009) (citing *Bradshaw*, 462 U.S. at 1044).

¶ 43 We find *Woolley* to be instructive. In that case, the defendant was informed by an interrogating police officer that a witness had identified him as a shooter in a murder case. *Woolley*, 178 Ill. 2d at 195. During trial, the defendant and one of the two interrogating officers gave different accounts of how the defendant responded thereafter. According to the defendant, he then requested an attorney and added, "I didn't do it, I didn't do it." *Id.* at 196. The interrogating police officer, however, testified the defendant asked for an attorney and in " '[j]ust a matter of seconds' " stated, " 'I killed them. Yeah. I killed them.' " *Id.* The officer subsequently informed the defendant that in order for them to continue to communicate, the defendant would have to recant his request for an attorney. *Id.* at 195. Defendant responded he would speak without an attorney and gave the police a statement. *Id.* Later, the defendant filed a motion to suppress his statement, which the trial court denied. *Id.* at 182.

¶ 44 In its determination, the *Woolley* court found that the defendant initiated further communication with the police after invoking his right to counsel. *Id.* at 200. Specifically, the *Woolley* court determined that, regardless of whether defendant had stated, "I killed them" or exculpated himself by stating, "I didn't do it," either statement could be found to evince a willingness to continue a generalized discussion about the investigation. *Id.* at 201. Importantly, the *Woolley* court noted that even a suspect's exculpatory statement following his request for counsel may constitute an initiation of further conversation about the case. *Id*.

¶ 45 Further, the *Woolley* court rejected the defendant's argument that the timing of the second statement precluded a finding that it constituted initiation of further conversation. *Id.* at 202. The *Woolley* court reasoned the interrogating officers did not interpret the defendant's second statement to be a part of his request for counsel, but rather, they believed the defendant was demonstrating his willingness to continue the discussion of the investigation. *Id.* The *Woolley*

court also noted that while the defendant testified at the suppression hearing, he did not claim that the second statement was a part of his request for an attorney. *Id.* In addition, the *Woolley* court noted that the trial court determined that the defendant's subsequent waiver of his right to counsel was knowing and intelligent and the defendant had not challenged that finding on appeal. *Id.* at 202-203. Accordingly, the *Woolley* court affirmed the trial court's denial of the defendant's motion to suppress. *Id.* at 203.

¶ 46 Similarly, after defendant here stated, "let me talk to my lawyer then" he immediately exculpated himself by adding, "I didn't do it on purpose. I never wanted to kill nobody." In fact, when Detective Morales subsequently attempted to clarify whether defendant wanted an attorney, defendant exculpated himself again by responding, "I didn't do it on purpose." Like the defendant's subsequent statement in *Woolley*, defendant's statements following his request to speak with a lawyer evinces a willingness and a desire for a generalized discussion about the investigation. *Id.* at 201. We further note that like the defendant in *Woolley*, defendant has not claimed that his exculpatory statements were a part of his request for an attorney. *Id.* at 202. Thus, as our supreme court found in *Woolley*, we likewise find here that defendant's exculpatory statements constitute an initiation of further conversation about the case. *Id.* at 200; see *People v. Hicks*, 132 Ill. 2d 488, 493 (1989) (a suspect initiated further conversation by "gratuitously offering exculpatory statements" to police).

¶ 47 Having found that defendant initiated further discussion with the police about the investigation, we turn to consider whether defendant's subsequent waiver of his right to counsel was knowing and intelligent. *Woolley*, 178 Ill. 2d at 199. We note that after defendant exculpated himself and initiated further communication with the police, the two detectives asked him to clarify whether he wanted to speak with a lawyer. In response, defendant indicated he

would "continue talking" without an attorney present and further stated the detectives could "go ahead" with the interview. Given that defendant gave the exculpatory statement right after stating he wanted a lawyer, it was good police practice for the detectives to ask these "clarifying questions." *Davis v. United States*, 512 U.S. 452, 461 (1994) (when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney); *In re Christopher K.*, 217 Ill. 2d 348, 379 (2005) (it is good police practice to clarify whether the suspect actually wants counsel); *People v. Schuning*, 399 Ill. App. 3d 1073, 1089 (2010) (interrogating officer was certainly allowed to ask clarifying questions if he was confused whether the defendant wanted an attorney). In addition, the trial court found it was evident that defendant understood the concept of waiving his *Miranda* rights and that his statement was given freely and voluntarily. Accordingly, we find that the trial court did not err in denying defendant's motion to suppress. *Woolley*, 178 Ill. 2d at 202-03.

¶ 48 Further, we find defendant's reliance on *Smith v. Illinois*, 469 U.S. 91 (1984) to be misplaced. In that case, the defendant was arrested and given his *Miranda* warnings by a police officer who informed him, " '[y]ou have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?' " *Id.* at 93. The defendant answered, " 'Uh, yeah. I'd like to do that." (Emphases omitted.) *Id.* Instead of terminating the questioning at this point, the interrogating officer proceeded to finish reading the defendant his *Miranda* rights and then asked, " 'Do you wish to talk to me at this time without a lawyer being present?' " *Id.* The defendant responded, " 'Yeah and no, uh, I don't know what's what, really.' " (Emphases omitted.) *Id.* The defendant thereafter agreed to speak with the officers in the absence of counsel. *Id.* The *Smith* court found that the defendant's initial

response was an unequivocal request for counsel and that under the " 'bright-line rule' " set forth in *Edwards*, all questioning must cease after an accused requests counsel. *Id.* at 98.

¶ 49 Unlike in *Smith*, however, after defendant requested counsel he immediately added, "I didn't do it on purpose. I never wanted to kill nobody" before the police could step in to cease the questioning. As previously noted, a defendant's exculpatory statement following his request for counsel may constitute an initiation of further conversation regarding the investigation. *Woolley*, 178 Ill. 2d at 201. We therefore find no reason to extend *Smith* to the facts of this case.

¶ 50 Based on the entire record, we conclude the trial court did not err in denying defendant's motion to suppress. *Id.* at 203. Accordingly, we find no error. Having found no error, there can be no plain error, and thus we hold defendant forfeited this issue on review. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 51 In addition, because there was no error, defendant cannot demonstrate that he was prejudiced by his trial counsel's failure to raise this claim in a posttrial motion. To establish ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was fundamentally deficient and, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Further, the failure to file a futile motion does not constitute ineffective assistance of counsel. See *People v. Givens*, 237 Ill. 2d 311, 331 (2010) ("the failure to file a motion to suppress or the withdrawal of such a motion prior to trial does not establish incompetent representation when it turns out that the motion would have been futile"). Accordingly, defendant's claim of ineffective assistance of counsel must also fail. *See People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 52 2. Excessive Sentence

¶ 53 Lastly, defendant argues his sentence of 14 years was excessive where the trial court discounted the hardship on his family, the unlikelihood that he would recidivate, and the improbable recurrence of this crime. Defendant further asserts that there is no evidence to support the trial court's finding that defendant's crime caused harm, that he may have acted intentionally, and that his sentence will deter others. The State responds the trial court entered a sentence within the statutory range after considering the relevant sentencing factors in aggravation and mitigation.

¶ 54 It is well-settled that a trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 201, 212 (2010). A trial court's sentencing decisions will not be altered by a reviewing court absent an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36. The trial court's sentencing decision is entitled to great deference because it is generally in a better position to determine the sentencing factors than the reviewing court which must rely on the " 'cold' record." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The reviewing court may not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Alexander*, 239 Ill. 2d at 213. "[I]t is not our duty to reweigh the factors involved in [the trial court's] sentencing decision." *Id.* at 214. Further, a sentence which falls within the statutory range is not an abuse of discretion unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* at 212.

¶ 55 Moreover, the trial court is presumed to consider all relevant factors and any aggravation and mitigation evidence presented, absent some contrary indication other than the sentence imposed. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. While the sentencing court may not ignore evidence in mitigation, it may determine the weight to attribute to it. *People v.*

Markiewicz, 246 Ill. App. 3d 31, 55 (1993). The seriousness of the crime is the most important factor in determining a sentence, and a defendant's rehabilitation potential need not be given greater weight. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). In addition, the trial court has no obligation to recite and assign a value to each mitigation factor. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Rather, a defendant must affirmatively establish that the sentencing court did not consider the relevant factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 56 We initially observe that defendant was convicted for leaving the scene of a motor vehicle accident involving death, which is a Class 1 felony with a sentencing range of 4 to 15 years. 730 ILCS 5/5-4.5-30(a) (West 2010). As a result, defendant's sentence of 14 years' imprisonment falls within the Class 1 offender sentencing range, and therefore, is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 57 Furthermore, defendant cannot establish that the trial court failed to consider the mitigating factors presented. Prior to sentencing, the trial court heard arguments from both parties and considered the defendant's statement, the State's evidence, and the aggravating and mitigating factors presented by the parties. Indeed, the trial court referenced specific mitigating evidence, including the hardship that a lengthy sentence may cause defendant's wife and newborn daughter and his potential for rehabilitation. We note that although the trial court may not have specifically mentioned all of the mitigating factors upon which defendant now relies, the trial court is not required to specify on the record the reasons for its sentence (*People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24), nor recite and assign a value to each fact presented at the sentencing hearing (*People v. Partin*, 156 Ill. App. 3d 365, 373 (1987)). Rather, the trial court is presumed to have considered all relevant factors absent contrary evidence in the record. *People v. Franks*, 292 Ill. App. 3d 776, 779 (1997).

¶ 58 In addition, a defendant's rehabilitative potential or other mitigating factors are not entitled to greater weight than the seriousness of the offense. *Alexander*, 239 Ill. 2d at 214 (citing *People v. Coleman*, 166 Ill. 2d 247, 261 (1995)); *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55 ("Since the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, and the presence of mitigating factors neither requires a minimum sentence nor precludes a maximum sentence."). Here, the trial court specifically stated it had considered all aggravation and mitigation factors, including defendant's potential for rehabilitation. It is not our prerogative to reweigh these same factors and independently conclude that defendant's sentence was excessive. *Alexander*, 239 Ill. 2d at 214. Accordingly, we reject defendant's argument that the trial court did not properly consider the aggravating and mitigating factors, including her rehabilitative potential. *Brazziel*, 406 Ill. App. 3d at 434 (it is presumed the trial court properly considered all mitigating and rehabilitative potential presented and the burden is on the defendant to affirmatively prove otherwise).

¶ 59 Moreover, we are not persuaded by defendant's reliance on *People v. Stacey*, 193 Ill. 2d 203 (2000), where the defendant's sentence was reduced on a finding that it was disproportionate to the crime committed. *Stacey* is factually distinguishable from defendant's case. Furthermore, our supreme court has held that if a sentence is appropriate given the particular facts of that case, it may not be attacked by a sentence imposed in a similar, but unrelated case (*Fern*, 189 Ill. 2d at 62), and we decline to do so in the instant case.

¶ 60 In light of the severity of the crime charged, defendant's background, and factors in aggravation and mitigation, we cannot say that defendant's sentence was manifestly disproportionate to the nature of the offense. Under these circumstances, we find that

defendant's sentence was not excessive and the trial court did not abuse its discretion in imposing such a sentence. See *People v. Almo*, 108 Ill. 2d 54, 69-70 (the trial court did not abuse its discretion in sentencing the defendant after considering the facts and the circumstances of the case and the defendant's prior history).

¶ 61 III. CONCLUSION

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

¶ 63 Affirmed.