2017 IL App (1st) 142951-U

No. 1-14-2951

Third Division
June 28, 2017



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS. Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Cook County. |
| v. | ) | No. 13 CR 19027 |
| ANDRE HILLIARD, Defendant- Appellant. | ) | Honorable Vincent M. Gaughan, Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

**O R D E R**

*Held*: The failure of the trial court to give the jury *Prim* instructions was not plain error. Defendant's disproportionality challenge to the firearm mandatory add-on provision is forfeited. Additionally, the trial court did not abuse its discretion when it sentenced defendant to 40-years in prison.

¶ 1 Following a jury trial, defendant, Andre Hilliard, was convicted of attempted first degree murder and sentenced to a term of 40 years, including a 25-year mandatory firearm sentence enhancement. On appeal, he contends that (1) the trial court coerced a guilty verdict by failing to issue a *Prim* instruction, (2) the addition of a 25-year firearm sentence is

unconstitutionally disproportionate, and (3) his 40-year sentence is excessive considering his youth and lack of prior criminal convictions. We affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with four counts of attempted first-degree murder, one count of aggravated battery and one count of aggravated discharge of a firearm following the shooting of Devaul Killingsworth. Defendant does not challenge the sufficiency of the evidence supporting his conviction, thus, we set forth those facts pertinent to disposition of the issues on appeal.

¶ 4 Trial commenced on June 2, 2014.[1] Killingsworth testified on behalf of the State as follows. On August 5, 2013, he visited his grandchildren and their mother, Tracy Chatman. At approximately 12:45 a.m., after talking to some neighbors outside of Chatman's apartment, Killingsworth proceeded to return to the apartment, when he heard a noise behind him. He turned around and saw defendant approaching him with a gun. To protect himself, Killingsworth lifted his arm and ran to a grassy area near the apartment. Defendant stood approximately one to two feet away from Killingsworth before firing two to five gunshots. Killingsworth was struck twice in the arm before defendant fled the scene.

¶ 5 Shortly thereafter, Killingsworth was taken to the hospital. While there, he spoke with two police officers and identified defendant as the shooter from a photo array. Killingsworth had known defendant for a few months because defendant and Chatman were dating. Killingsworth and defendant encountered each other on his many visits to Chatman's home, but they did not get along. After speaking with the police, Killingsworth had surgery to repair

[1] Defendant was not present in the courtroom for trial. In response to the trial court's repeated invitations and admonishments of his right to confront witnesses and to participate in the proceedings, defendant elected to listen to the proceedings via microphone in the "lock up" room outside of the courtroom.

his arm. Following surgery, he was informed that the surgeon did not remove one of the bullets and he would not have full use of the arm.

¶ 6 Dr. Tobbin Efferen, an emergency room physician treated Killingsworth's gunshot wound. His review of Killingsworth's x-rays revealed that Killingsworth sustained a gunshot wound to his left forearm, and both bones in the forearm were broken. He determined that Killingsworth needed surgery to repair the arm.

¶ 7 Officer Mark Davis testified that on August 6, 2013, he was working as an evidence technician when he was called to the scene of the shooting. He photographed, recovered, and inventoried a spent shell casing, an unfired bullet and a bloody t-shirt. He further testified that the bullets were from a small caliber weapon.

¶ 8 Detective Brian Cunningham testified that on August 6, 2013, he received an assignment to investigate the shooting with his partner, Detective Bryant Casey. The detectives went to the hospital to speak with Killingsworth, who told the detectives that defendant shot him and gave them a general description of defendant. Shortly thereafter, Detective Cunningham went to the scene of the shooting where he spoke to two witnesses. After gathering information from the witnesses, he prepared a photo array that included a picture of defendant. Detective Cunningham showed the photo array to Chatman and to Killingsworth, who identified defendant as the shooter. Detective Cunningham then issued an investigative alert for defendant. Once Detective Cunningham learned that defendant had been arrested, he prepared a line-up that included defendant. Killingsworth viewed the lineup and identified defendant as the person that shot him.

¶ 9 Officer Christopher Maraffino testified that he was part of the fugitive apprehension unit and was made aware of an investigative alert for defendant as the suspect in a shooting. On

September 19, 2013, he received information from defendant's mother that defendant would be returning to Chicago by bus that evening. Officer Maraffino waited for defendant at the bus station where he was then arrested.

¶ 10 At the close of the State's case defendant presented a motion for directed verdict which the trial court denied. The defendant then rested and court was adjourned for the day.

¶ 11 On June 3, 2014, court reconvened. Following closing arguments, the jury was given instructions and retired to the jury room for deliberations. During deliberations, the jury sent several notes to the court, all dated June 3, 2014, and all bearing the signature of the jury foreperson.[2] The record reflects that, prior to responding, the court discussed each note and the proposed response with the parties, as well as sought defendant's position on the same. In each case, the parties agreed with the court's proposed response.

¶ 12 The jury's first note appearing in the record read: "Can we please see: Copy of transcripts from March hearing [,] Copy of transcripts from this trial [,] Video." The trial court responded in two separate writings. The first response read: "So we are all clear, Mr. Devaul Killingsworth did not testify on the March 9 hearing. He testified in Sept. That portion that was introduced at trial is for you (Jury) to determine if it can be used for impeachment evidence. Please use your collective [m]emory. Please continue to deliberate. Thank you!" The second response read: "The transcripts of the March 9 hearing are not evidence in this case. Trial transcripts are not available at this time. Concerning the video, you have received all the evidence on this case. Thank you!"

[2] Neither the common law record nor the report of the proceedings indicate the time at which any of the notes were presented to the court or the time of the court's responses. The written versions of the notes and the court's responses, which are contained in the common law record, are presented here in the order in which they were addressed on the record.

¶ 13 The jury's second note appearing in the record read: "We would like to get the quote that the defense attorney used during the trial that refferenced (sic) the victim's statement during the March 9 hearing. Pertaining to what Devaul saw when he was shot." The court responded, "You have heard all the evidence in this case. Please continue to deliberate. Thank you!"[3]

¶ 14 The jury's third note appearing in the record read: "Do we have to continue to deliberate until we reach a unanimous decision? The court responded: "You must continue to deliberate. Thank you."

¶ 15 Before offering the aforementioned response to the third note, the following colloquy occurred:

"STATE: Judge, the earlier note that was sent out, are we going to address that one where they said they were hung, at that point?

COURT: They're not hung.

STATE: They said 11 to 1. I don't know if I put it on the record that they were hung.

COURT: What did you just do?

STATE: I didn't know if she was taking it down.

COURT: There was another note sent out earlier just giving us the status of where they were. The status was, Dear Judge Guaghan, we're 11 to 1 and cannot get a unanimous decision. What would you like us to do next? So, this letter- or this note will incorporate that too. 'Continue to deliberate. Thank you.'"

[3] An additional note to the court appears in the common law record which is not referenced in the report of proceedings. The note reads: "We would like to make sure we understand this correctly; are we not allowed to use testimony that was given during the March hearing? Even the portion that was introduced during this trial? Specifically when the defense questioned the victim about who shot him." Based upon a review of the record it

The court then admonished the parties as follows: "I want everybody back- if you want to stay, that's great. If you don't, everybody back at 5:00." The record indicates that deliberations then continued.

¶ 16 The final note appearing in the record reads: "Is the transcript from the trial available yet? There is some confusion around various statements made during the trial that we will need clarity to in order to make a unanimous decision. Thank you." The court did not send a written response to the final note, but instead, had the jury brought into the courtroom. The court then advised the jury that the transcripts would not be available to them until the next morning. After further admonishing them concerning the need to avoid discussion of the case, court was adjourned until 9:00 a.m. the next morning.

¶ 17 On the next morning, the court tendered the transcript of the trial proceedings to the jury. The jury found defendant guilty of attempted first degree murder and that he had personally discharged a firearm that caused great bodily harm to the victim. The record is silent on the time at which the jury completed its deliberations. On defense counsel's request, the jury was polled and each juror confirmed their verdict as guilty.

¶ 18 Defendant subsequently filed a motion for judgment notwithstanding the verdict and a motion for new trial, both of which were denied by the court. At sentencing, the State argued that while defendant did not have a criminal history he should receive a sentence above the minimum statutory requirement based on the facts of the case. Defense counsel argued, *inter alia*, that defendant was only 19 at the time of sentencing and had no prior criminal history and thus should receive the minimum sentencing requirement.

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appears that the court's response to the prior note concerning Killingsworth's testimony in a related, but different proceeding, was also responsive to this note.

¶ 19 Defendant was sentenced to 15-years for attempted first degree murder, and an additional 25-years for personally discharging a firearm and causing great bodily harm. The trial court indicated that in determining defendant's sentence it considered both aggravating and mitigating factors. Defendant filed a motion to reconsider sentencing, which was denied. Defendant now appeals.

¶ 20 ANALYSIS

¶ 21 Jury Coercion

¶ 22 Defendant contends that the trial court erred by coercing the jury into returning a verdict. Specifically, he argues that the trial court erred in failing to give *Prim* instructions after the jury indicated that it was deadlocked. As the verdict was coerced, he asserts that his conviction should be reversed and the case remanded for a new trial. Defendant concedes that he did not preserve this claimed error for appeal but urges that we review the error for second prong plain error and in the alternative, as ineffective assistance of counsel.

¶ 23 In response, the State argues that the trial court did not err in failing to give a Prim instruction. Further, the second prong of plain error review does not apply because the trial court's statements to the jury were not coercive and did not interfere with deliberations.

¶ 24 Under the plain-error doctrine a reviewing court may consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) citing *Herron*, 215 Ill.2d at 186–87. Under both prongs of the doctrine, the

burden of persuasion remains with defendant. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The first step in a plain error analysis is to determine whether any error occurred at all. *Id*. Thus, we begin our analysis with examination of defendant's substantive claim.

¶ 25 "The integrity of the jury's verdict must be protected from coercion, duress or influence." *People v. Patton*, 105 Ill. App. 3d 892, 894 (1982). If a trial court's supplemental instructions, taken in context and considering all of the circumstances of the case, have the effect of coercing jurors into surrendering views conscientiously held, that court's judgment must be reversed and the cause remanded. *People v. Gregory*, 184 Ill. App. 3d 676, 680-81 (1989) citing *Jenkins v. United States*, 380 U.S. 445 (1965). The length of jury deliberations is a matter which rests within the sound discretion of the trial court and its judgment in this regard will not be disturbed unless it is clearly abused. *People v. Daily*, 41 Ill. 2d 116, 121 (1968).

¶ 26 Defendant argues that when the jury indicated that it was deadlocked and the court instructed them to continue to deliberate, the court's instruction was at odds with the supreme court's holding in *People v. Prim*, 53 Ill. 2d 62 (1972). Pursuant to *Prim*, a court is required to offer an instruction that allows the jury the option of returning no verdict if a consensus cannot be reached. Defendant asserts that here, the court's response coerced the jury into reaching a decision, without the benefit of a *Prim* instruction. Thus, defendant maintains, reversal is required.

¶ 27 The supreme court's intended result in *Prim* was to eliminate supplemental instruction to jurors to "heed the majority" as a means of securing a verdict. *People v. Palmer*, 125 Ill. App. 3d 703, 712 (1984). A "heed the majority" instruction, commonly recognized as an "Allen" charge (see *Allen v. United States*, 164 U.S. 492(1896)) has the effect of urging those

members of the jury who are in the minority to reevaluate their position. *Gregory*, 184 Ill. App. 3d at 681. The decision to give the supplemental Prim instruction to a deadlocked jury rests within the sound discretion of the trial court. *People v. Cowan*, 105 Ill. 2d 324, 328 (1985); *People v. Thompson*, 93 Ill. App. 3d 995, 1008 (1981). In exercising that discretion, the trial court should primarily consider the length of time the jury had deliberated and the complexity of the issues the jury must decide. *Cowan*, 105 Ill. 2d at 328; *Thompson*, 93 Ill. App. 3d at 1008.

¶ 28 Incidentally, the jury's own view of its ability to reach a verdict is only one factor to be considered by the trial court in the exercise of that discretion. *Thompson*, 93 Ill. App. 3d at 1008; *People v. Allen*, 47 Ill. App. 3d 900, 905-906 (1977). Further, the trial court has discretion to have the jury continue its deliberations even if the jury reported that it is deadlocked and will be unable to reach a verdict. *Cowan*, 105 Ill. 2d at 328. The mere failure to give a *Prim* instruction is not reversible error (*Gregory*, 184 Ill. App. 3d at 681), and absent some showing that the court abused its discretion in requiring continued deliberations, we will not find that the jury was coerced. *Daily*, 41 Ill. 2d at 121.

¶ 29 Although no time stamp appears on any of the jury's notes or on the court's responses, we may infer from the substance of the jury's notes that the assertion concerning unanimity occurred sometime after their initial request for the transcripts of the proceedings. It appears from the final note that the jury believed a review of the transcripts would aid in reaching a verdict. Given the jury's request for the transcripts, coupled with their interest in Killingsworth's pre-trial and trial testimony, it appears their deliberations centered on identification evidence, which clearly they believed would be available in the transcripts. Moreover, even a conservative reading of the record reveals that deliberations likely began

mid-morning, following closing statements and jury instructions, and concluded for the day shortly after 5:00 p.m. On the following day, the transcripts were made available and, significantly, no additional questions from the jury were tendered. Further, this was not a complex proceeding. Other than testimony from Killingsworth, the remainder of the testimony involved the police officers' investigative steps and the health care providers' assessment of the victim's injuries. Thus, we believe it was reasonable for the trial court to instruct the jury to continue its deliberations, especially in light of the then unavailable transcripts.

¶ 30 Defendant posits, however, that proof that the jury felt they had no choice but to reach a unanimous decision can be found in their final note requesting the transcripts because they needed clarity in order to make a unanimous decision. We believe just the opposite is a more natural conclusion to be drawn from the request. That the jury believed the then unavailable transcripts were necessary to resolve their impasse supports the court's decision to urge continued deliberation. If anything the final note served as the basis for the trial judge to adjourn court for the evening in anticipation of being able to give to the jury the guidance they sought by honoring the first of their requests, the delivery of the trial transcripts.

¶ 31 Defendant invites our review of *People v. Wilcox*, 407 Ill. App. 3d 151 (2010), as similar to the case at bar. In *Wilcox*, jury deliberations began at 12:40 p.m. on May 9, 2008. *Id* at 163. On that same day, at 3:25 p.m., the trial court received a note from the jury relating that it was "11 to 1" on all propositions. *Id.* at 163. In response, the trial judge sent a note to the jury which stated that "'[w]hen you were sworn in as jurors and placed under oath you pledged to obtain a verdict. Please continue to deliberate and obtain a verdict.'" *Id.* At 4:10 p.m., the jury reached a verdict. *Id.* On appeal, this court found the judge's note to be

coercive because it "indicated that being deadlocked was not an option, that the jurors were required by their oath to obtain a verdict, and that they would be required to deliberate until a verdict was reached." *Id.* at 164. Further, the reviewing court reasoned that although the trial court did not explicitly state that a deadlock was impossible, it gave the impression that the jurors had to reach a verdict in order to satisfy their obligations as juror. *Id*.

¶ 32 We find the judge's supplemental instructions in *Wilcox* to have been far different from those offered by the trial judge in this case. Here, in response to the jury's questions that asked "do we have to continue to deliberate until we reach a unanimous decision," and "we're 11 to 1 and cannot get a unanimous decision. What would you like us to do next?," the court responded, "continue to deliberate." Unlike in *Wilcox,* where the trial court's comments gave the impression that being deadlocked was not permissible, the court in this case did not preclude that as a possibility. The judge's responses here neither heeded the majority nor did they assert that a verdict must be reached. Rather the instructions were simple, neutral and allowed for each juror to reach his or her own verdict. See *People v. McLaurin,* 235 Ill. 2d 478, 491 (2009) (a "trial court has broad discretion when responding to a jury that claims to be deadlocked, although any response should be clear, simple, and not coercive"), *cf., People v. Ferro,* 195 Ill. App. 3d 282, 292-293 (1990) (trial court's supplemental instructions held to be coercive where jury was instructed that if they were not going to be able to reach a verdict, they would be housed in a local motel until they did so); *People v. Robertson*, 92 Ill. App. 3d 806, 809 (1981) (trial court's supplemental instructions held to be coercive where after giving Prim, the court commented to the jury that it did not see any reason why the jury could not arrive at verdicts and further, directed that the jury could not be deadlocked).

¶ 33 Additionally, taking into consideration the length of time the jurors deliberated, we cannot conclude that the court's instructions were coercive. Although the length of the deliberations following a trial court's comments is alone insufficient to determine whether the comments were the primary factor in procuring a verdict, brief deliberations invite an inference of coercion. *Mclaurin*, 235 Ill. 2d at 491. Here deliberations began on the second day of trial and were continued to the following day after the court determined that it could not provide the jury with the trial transcripts. The effort to accommodate the jury does not demonstrate an attempt by the court to hastily reach a verdict.

¶ 34 Further, prior to receiving the note on the jury's status, the jury had requested evidence necessary to assist them in reaching verdict. We agree with the trial court's assessment that the jury was not deadlocked when it provided the status of its deliberations. When the transcripts were not available the judge did not pressure the jury into relying only on the evidence available to them at the time, but instead adjourned the court until they could have what was requested and needed to reach a verdict. The court did not need to issue a *Prim* instruction to a jury that was still deliberating.

¶ 35 A trial court's comments to the jury are improper where, under the totality of the circumstances, the language used interfered with the jury's deliberations and coerced a guilty verdict. *Wilcox*, 407 Ill. App. 3d at163. We find no impropriety either in the trial court's supplemental instructions or in its failure to *sua sponte* give a *Prim* instruction. Considering the totality of the circumstances in this case, we disagree with defendant's assessment that the jury was coerced to render a unanimous decision.

¶ 36 Having determined that no error occurred in the trial court's supplemental instructions to the jury's questions, we conclude that plain error is not available to excuse defendant's forfeiture.

¶ 37 Ineffective Assistance

¶ 38 In his brief, defendant offers as an alternative to plain error review, a review for ineffective assistance of counsel. A court may review an error that has been forfeited when trial counsel's failure to preserve the error results in ineffective assistance of counsel. See *People v. Enoch*, 122 Ill. 2d 176, 201 (1998). Claims of ineffective assistance of counsel are analyzed under a two-pronged test. *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, a defendant must show both, that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that the substandard performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687. Because we have determined that no error occurred in the trial court's supplemental instructions to the jury, we need not engage in a *Strickland* analysis. Even were we to do so, given our determination that the jury's verdict was not coerced, defendant could not satisfy either prong of the test.

¶ 39 Constitutionality of Sentence

¶ 40 Defendant next contends that the 25 year mandatory firearm add-on is unconstitutionally disproportionate where the mandatory nature of the add-on deprived the judge of the ability to consider the fact that he was 18 years of age at the time of the offense and had no prior criminal convictions. He argues that, in his case, the 25 year firearm add-on is particularly harsh and should not apply. The State responds that defendant has forfeited review of this issue for failing to first raise it in the trial court. In support of its argument that review is

foreclosed, the State cites to *People v. Thompson*, 2015 IL 118151 (2015). In his reply brief, defendant acknowledges that he did not raise the issue in the trial court, but maintains that review here is proper. Noting that *Thompson* addressed forfeiture of the defendant's as-applied claim in the context of dismissal of a section 2-1401 petition, he maintains that *Thompson* is inapposite. Defendant reads *Thompson* too narrowly.

¶ 41 Defendant correctly notes the procedural posture of the *Thompson* defendant's as-applied challenge. However, the *Thompson* court's reasoning in rejecting the claim for review had little to do with the fact that defendant was appealing dismissal of his 2-1401 petition. In its analysis, the court first distinguished between as-applied and on its face constitutional challenges to statutes. *Id.* at ¶ 36. With respect to as-applied challenges, the court noted that such claims typically require some showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. *Id.* Such matters, the court concluded, require that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review. *Id.* at ¶ 37. The type of factual development necessary to adequately address a defendant's as-applied challenge, the court concluded, is a task best suited for the trial court. See *Id.* at ¶ 38. Because the defendant had failed to present the issue in the trial court, the issue was deemed to have been forfeited. *Id.* at ¶ 39.

¶ 42 As a court of review, we are no better suited here to decide defendant's as-applied challenge than was our supreme court in *Thompson*. Although defendant sets forth, in great detail, information concerning the relevant studies on brain development and offers case law in support of his as-applied claim, as a reviewing court, we have no means by which to weigh this evidence in the context of the facts and circumstances of this case. As in *Thompson*, the factual development necessary for review of defendant's claim is best suited for the trial

court, procedural posture of *Thompson* notwithstanding. We note, as did the court in *Thompson*, however that defendant is not forever foreclosed from presenting his as-applied claims in the trial court. See *Id.* at ¶ 44. That said, we take no position on the merits of such claims. Suffice it to say that here, the matter is forfeited.

¶ 43 Excessive Sentence

¶ 44 Defendant next argues that the 40 year sentence imposed by the trial court was excessive in light of his age and the absence of any prior criminal activity. Accordingly, he requests that this court either reduce his sentence or remand the case for resentencing. The State responds that defendant's sentence, which is within the statutory limits, is proper.

¶ 45 Under Illinois Supreme Court Rule 615(b)(4) a reviewing court may reduce the punishment imposed by the trial court. Ill. S. Ct. R 615(b)(4). However, where a trial court's sentencing determination is within the statutory range for a criminal offense, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence it imposed. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). A sentence will be deemed an abuse of discretion where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010), citing *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 46 The Illinois Constitution mandates the balancing of both retributive and rehabilitative purposes of punishment. Ill. Const. 1970, art. I, § 11; see also *People v. Evans*, 373 Ill. App. 3d 948, 967 (2007). Thus, in sentencing, "the trial court is [] required to consider both the seriousness of the offense and the likelihood of rehabilitating the offender. *Evans*, 373 Ill. App. 3d at 967. However, a defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *Alexander*, 239 Ill. 2d at 214.

¶ 47 A trial court has the opportunity to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Alexander*, 239 Ill. 2d at 213; see also 730 ILCS 5/5-5-3.1 (eff. Aug 22, 2016). We accord the trial court's sentencing decision great deference because the trial judge, having observed the defendant and the proceedings, is better suited to consider these factors than the reviewing court, which must rely on the cold record. *Alexander*, 239 Ill. 2d at 212–213, citing *People v. Fern*, 189 Ill, 2d 48, 53 (1999). Therefore, we will not substitute our judgment for that of the trial court merely because we might have weighed these factors differently. *Id* at 214.

¶ 48 Defendant argues that the trial court did not sufficiently consider mitigating factors in deciding on his sentence. He contends that the 40-year sentence is excessive in light of his youth and lack of criminal history, both of which evidence his rehabilitative potential. He invites our attention to *People v. Anderson*, 142 Ill. App. 3d 240 (1985), *People v. Maldonado*, 240 Ill. App. 3d 470 (1992), *People v. Brown*, 243 Ill. App. 3d 170 (1993), and *People v. Clark*, 374 Ill. App. 3d 50 (2007)), as an exemplary of cases in which this court reduced the sentences of youthful offenders for the same reasons as he asserts are present here. Thus, we review each in turn.

¶ 49 We begin first with *Anderson.* Notably, the defendants there were both 17 years of age, below the age of majority, at the time the offense was committed. 142 Ill. App. 3d at 241. Further, the offense committed, residential burglary, though serious, pales in comparison to the offenses for which defendant here was convicted. Here, defendant, 18 years of age at the time of the offense, approached his victim, pointed a loaded gun at him, fired three to five shots at him, and caused him great bodily harm. The distinction between the defendants in

*Anderson* and defendant in this case, we think, is clear. Thus, we need not consider the case further.

¶ 50 *Maldonado*, is equally unavailing. There the 20 year old defendant, who was a father of two children, had completed three years of high school, with no prior felony convictions, was convicted of first-degree murder. 240 Ill. App. 3d 470, 473 (1992). The defendant shot and killed Elizabeth Cooley, who was asleep in the backseat of a car. *Id*. at 474. Outside of the car, defendant and another of the car's passengers had become engaged in a verbal confrontation. *Id*. When the confrontation ended, and as the car was being driven away, the defendant fired between three to seven gunshots at the vehicle, striking Cooley, who later died. *Id.* Defendant was sentenced to the maximum 40 year prison term. *Id.*

¶ 51 On appeal, the defendant argued that given the nature of the offense, the evidence presented at the sentencing hearing, his youth and rehabilitative potential, the 40 year maximum sentence constituted an abuse of discretion. *Id*. at 484. The court reduced the defendant's sentence to 20 years. *Id.* at 486. In so doing, the court cited to cases, for the sake of comparison, in which murders had been either planned executions or were committed for money. *Id.* In such cases, the court noted, the 40 year maximum sentences were justified. *Id.* The court concluded, however, that the circumstances in Maldonado's case did not justify the same outcome. *Id.*

¶ 52 Here, defendant's claim that his action was "impulsive" is clearly refuted by the record. Unlike in *Maldonado*, defendant targeted his victim, took aim and shot him. Further, unlike in *Maldonado*, defendant was not sentenced to the maximum available statutory term of imprisonment. Rather, he was sentenced to 15 years for attempted murder, 15 years below the statutory maximum.

¶ 53 In *Brown*, following a conviction for first-degree murder, the defendant was sentenced to 45 years in prison. 243 Ill. App. 3d. 170, 171 (1993). At the time of the offense the defendant was 20 years old and had no prior criminal history. The reviewing court reduced the defendant's sentence to 30 years. *Id.* at 176. In so doing, the court commented, without more, that "[g]iven that at the time of the offense defendant was 20 years old and lacked any prior criminal history we believe that his rehabilitative potential was not adequately considered." *Id*. at 176.

¶ 54 Unlike in *Brown*, on this record we cannot conclude that the trial court failed to consider any factors in sentencing. In fact, the court is on record as stating that it had taken into consideration "the provisions in aggravation, the statutory provisions in mitigation and the non-stature (sic) provisions in mitigation and also he (sic) evidence presented at the aggravation and met (sic) mitigation phase of the sentencing and pre-sentencing investigation." Given the court's comments, we find defendant's reliance on *Brown* misplaced.

¶ 55 Finally, we consider the facts in *Clark*, 374 Ill. App. 3d 50 (2007). There, the 18 year old defendant was convicted of first degree murder and sentenced to a 44 year sentence. *Id.* at 75. In reducing his sentence, this court expressly noted the following substantial evidence in mitigation, which it believed had been overlooked by the trial court. The court noted that the defendant had "received a GED, and had no prior felony convictions. Defendant presented extensive evidence in both live testimony and affidavits from family members, friends, and experts discussing his rehabilitative potential. Defendant was described as a respectful and polite young man who made a bad decision in joining a gang. Several people disclosed defendant's desire to leave the gang, but his fear of retribution from the gang against himself

and his family kept him from leaving. Defendant offered [] expert testimony [] to illustrate both defendant's atypical behavior for a gang member and the structure and circumstances of Chicago gangs. Dr. Gur testified about generally accepted studies involving the brain development in adolescents. Defendant also offered his own apologies to the victim's family. The trial court dismissed the testimony of Dr. Gur and found [the other expert's testimony] did not offer anything helpful." *Id.* at 75

¶ 56 Here, defendant offered as factors in mitigation, his age**,** activities, familial involvement, his lack of a criminal history and his rehabilitation potential. Unlike in *Clark*, defendant provided no additional evidence, such as testimony or affidavits in further support of his character or rehabilitative potential. And in fact, when invited by the trial court to offer a statement at sentencing, defendant declined. We note in passing defendant's invitation to this court to consider in mitigation "scientific" evidence concerning the development of the adolescent brain. Unlike in *Clark*, however, there is nothing in the record to indicate this same evidence was ever presented to the trial court. Thus, as it was not part of the record below, we may not properly review it here. See *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994).

¶ 57 Having determined that the cases cited to us provide no basis upon which might properly modify defendant's sentence, we proceed with consideration of his final contention on appeal. Defendant argues that during sentencing the trial court failed to mention his lack of criminal history, youth or his rehabilitative potential as mitigating factors. First of all, a trial court need not expressly outline its reasoning for sentencing or explicitly find that the defendant lacks rehabilitative potential. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). Even in the absence of a trial judge's oral comments, we presume that the judge considered

all relevant factors in determining an appropriate sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). Further, the burden rests on defendant to show that the court failed to properly consider factors in mitigation. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). However, as we have previously noted, in this case, the trial court explained the factors it considered in determining defendant's sentence.

¶ 58 It bears noting that the existence of mitigating factors neither mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006)) nor do they preclude imposition of the maximum sentence (*People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001)). Defendant was convicted of attempted murder, a Class X felony subject to a sentencing range of 6 to 30 years, and a mandatory firearm enhancement of 25 years or up to natural life. 720 ILCS 5/8-4(c)(1)(B), (D). He was sentenced to a total of 40 years - 15 years on the attempted murder conviction charge, 9 years above the minimum, and 25 years on the mandatory firearm enhancement, a term less than natural life. On this record, we find no abuse of discretion. In our view, defendant's sentence comports with the purpose and spirit of the law and is by no means disproportionate to the nature of the offense. Thus, we decline any modification.

¶ 59 CONCLUSION

¶ 60 Based upon our review, we find that the trial court did not coerce the jury into reaching a unanimous verdict of guilty. Defendant's "as-applied" challenge to the constitutionality of the mandatory firearm provision, raised here on appeal for first time, is forfeited. Finally, the trial court did not abuse its discretion in sentencing defendant to 40 years imprisonment. For all of the foregoing reasons, we affirm the judgment and sentence of the trial court.

¶ 61 Affirmed.