2017 IL App (1st) 143019-U

THIRD DIVISION
September 27, 2017

No. 1-14-3019

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. 83 CR 2300
	)	
JAMES HARRIS,	)	The Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

HELD: Trial court did not violate defendant's due process right to present evidence when it denied his request to call a police officer in his case-in-chief after defendant refused to provide an offer of proof; trial court did not err in admitting rebuttal testimony from a certain witness; trial court did not err in sentencing defendant pursuant to the presentence investigation report prepared in this cause; and trial court did not improperly consider mitigating factors in aggravation in determining defendant's sentence. Defendant's mittimus must be corrected to reflect the correct crimes for which he was convicted.

¶ 1 Following a jury trial, defendant James Harris (defendant) was convicted of murder,

attempted murder and two counts of attempted armed robbery. He was sentenced to concurrent terms of life in prison for murder and 30 years for attempted murder, and 15 years for each of the attempted armed robbery convictions, to run concurrent with each other but consecutive to his sentence for attempted murder. He appeals, asserting several errors on the part of the trial court, including that it violated his due process rights when it refused to allow him to call a certain witness, mistakenly allowed rebuttal testimony, inappropriately sentenced him without an adequate presentence investigation report (PSI), and improperly considered mitigating factors as aggravating when sentencing him. He also asserts error in his mittimus. He asks that we reverse and remand for a new trial or, alternatively, that we vacate his sentence and remand for resentencing, and/or that we correct his mittimus. For the following reasons, we affirm, with a minor correction to his mittimus.

¶ 2 BACKGROUND

¶ 3 Defendant's convictions stem from an incident that occurred in the early morning hours of February 10, 1983, outside a tavern at 69th Street and State Street in Chicago, during which 64-year-old bartender Jesse James, Sr. was murdered and pregnant employee Teresa Woods was shot in the back/shoulder. In 1984, defendant was tried for these crimes and a jury found him guilty; he was sentenced to death. Eventually, defendant was retried after *Batson* violations were found in the State's use of its peremptory challenges during his original trial. See *Batson v. Kentucky*, 476 U.S. 79 (1986). At his retrial, defendant proceeded *pro se*, and the following evidence was introduced.

¶ 4 Woods testified that she and James were closing the bar around 3:45 a.m. when a man,

whom she identified as defendant, approached them outside asking if the State Street bus was running. Defendant was wearing blue jeans, a blue jeans jacket and his hair natural, in an Afro. She responded affirmatively and then crossed the street with James to get to their cars. Defendant followed Woods, put a gun to her head and forced her out of her car and toward James' car. Defendant forced James into his driver's seat and her into his back seat, and defendant got into the front passenger's seat. Pointing the gun at them, defendant ordered James to drive around. Defendant then demanded $300. As neither Woods nor James had money on them, James suggested they go back to the bar where he could get the money for defendant. Defendant ordered James to drive back to the bar.

¶ 5 Woods averred that when they arrived, defendant ordered James to pull into a nearby alley and ordered her to go inside and get the money. As defendant was holding his gun on James, he warned her to return within three minutes or else he would kill James. Woods ran into the bar and cleared out its registers, collecting only $60. When she ran back outside, she noticed that the car had moved from the alley to the street. She went to the driver's side door to give the money to James so he could pass it to defendant, but defendant ordered her to get into the car. James interrupted defendant, telling him not to do so as Woods had just done exactly as he asked. Defendant ordered her back into the car again, and then grabbed James by the collar, pulled him close, shot him in the head and pushed him out of the car.

¶ 6 Woods further testified that she began to run, and that defendant ran after her. She then heard a gunshot and fell to the ground. She raised her hands up and rolled onto her stomach to protect her baby, begging defendant not to shoot her. Defendant, however, straddled her and

shot her, hitting her in the back/shoulder area. Woods played dead and defendant ran away. Eventually, Woods went back over to James; he was lying on the ground and his car had crashed into a nearby building's window. Woods ran into the bar and called 911; by this time, it was 4:17 a.m. Police soon arrived and Woods was taken to and treated at a hospital. While there, detectives showed her a photo array and she identified defendant as the shooter.

¶ 7 A transcript of Calvin Johnson's testimony from defendant's first trial was presented, as he was now deceased. Johnson testified that at around 4:10 a.m. on the day in question, he was driving to work near 63rd Street and State Street in Chicago. While stopped at a traffic light, he noticed defendant, who was wearing blue jeans, a blue jeans jacket and had bushy hair, running down State Street and under an underpass toward him. As a police car passed, he saw defendant move behind a traffic control box and then reemerge when it left the area. Johnson continued to watch defendant; as Johnson began to drive again, defendant crossed the street and approached his car, hitting its passenger side to get his attention. Johnson stopped and cracked open the window, whereupon defendant offered to pay him $5 to drive him to 51st Street. As defendant did so, Johnson saw him pull up on the waist of his pants; Johnson did not see anything in defendant's belt area and did not see him holding anything.

¶ 8 Johnson further testified that, as he refused defendant's offer, two police officers pulled up in front of his car. They exited with their guns drawn and told defendant to put his hands on the hood of the car. Defendant did so, and Johnson watched as one of the officers recovered a gun from his waistline, which had been tucked under his jacket.

¶ 9 Conrail police officers Michael Grady and Theodore Kurzweil, retired, testified that at

around 4:30 a.m. that day, they were patrolling the area around the rail yard at 63rd Street and State Street. They corroborated much of each other's testimony. They recounted that as they patrolled, Chicago police officers passed by and informed them that they were looking for someone in connection with an armed robbery, describing him as wearing blue jeans, a blue jeans jacket and having a bushy Afro, and armed with a gun. Officers Grady and Kurzweil continued their patrol and when they arrived at a traffic light on 63rd and State, they saw defendant, who matched the description they had just received, running alongside Johnson's car; defendant was holding the passenger side doorhandle in one hand and a gun down at the side of his body in the other. They pulled their car in front of Johnson's and told defendant to "freeze" and drop his weapon, whereupon defendant put his gun in his waistband and kept his hand on it. The officers again told defendant to drop his weapon; this time, defendant said, "I give up," and put his hands in the air. Officers Grady and Kurzweil took defendant into custody, with officer Grady taking the gun from defendant's waistband and placing it in his own. They then turned defendant over to Chicago police.

¶ 10 The transcript of Chicago police officer Abe Wilson, who was deceased at the time of defendant's second trial, indicated that he was on patrol with his partner, officer Renee Daniels, when, at approximately 4:18 a.m., they heard a radio call about a man shot on nearby State Street. They went to the tavern, where a bus driver told them that a car had been in an accident. As officer Wilson went to the accident site about a half-block away, he saw that a car had crashed into the window of a building; he also saw James lying on the ground nearby, shot.

¶ 11 Chicago police officer Joseph Mitchell, retired, testified that he, too, was on patrol with

his partner, officer Phyllis Ham, in the area that early morning. At approximately 3:45 a.m., he saw defendant standing alone at a bus stop on State Street about 15-20 feet from the entrance to the tavern. Officer Mitchell noticed defendant in particular because a bus had passed at the stop and he did not get on it. At approximately 4:17 a.m., officer Mitchell received a radio call about a man who was shot. Officer Mitchell drove to the tavern and saw the doors open, but no one there. He then noticed a vehicular accident down the street, along with police cars handling that scene, so officer Mitchell and his partner continued on patrol. They then received a radio call to go retrieve someone being held by railroad police. When they did, officer Mitchell met Conrail officers Grady and Kurzweil, who had defendant in custody. Officer Grady gave officer Mitchell the gun he recovered from defendant with his bare hand, and officer Mitchell took it with his bare hand and removed the ammunition inside it. Officer Mitchell stated that, at the time he took the gun, he did not know there was an ongoing murder and attempted murder investigation. Officer Mitchell transported defendant to the police station as directed.

¶ 12 Chicago Detective Dennis Dwyer testified that at 4:17 a.m. that morning, he and his partner, Detective Geraldine Perry, were assigned to go to the hospital to speak with the victims. They could not speak to James due to his serious condition, but Detective Dwyer did speak to Woods, who again provided the same description of the assailant. After spending some time at the scene, Detective Dwyer learned that defendant, who matched Woods' description was in custody. He took a photo of defendant, composed an array of eight photographs and presented them to Woods, who immediately identified defendant as the shooter. Detective Dwyer was informed that James had, by now, died.

¶ 13 Lengthy and detailed forensic evidence presented at both defendant's original trial, and then independently retested at this, his second, trial, indicated that the gun recovered from defendant on the morning in question had been shot at least three times since it was last cleaned. Additionally, testing and retesting made clear that the bullet recovered from the right side of James' head came from this same gun.[1]

¶ 14 Allan Davis testified that he was arrested and in jail in July 1984 when he met defendant there. Davis averred that, while together in jail, defendant told him he was there because he had held a gun on an older man at an incident at a bar on 69th and State, while he waited for a barmaid to come out with money. Defendant also told him that he shot the man when he tried to drive off, and that he chased the barmaid and shot her as well. He recounted that he tried to run, but was caught by railroad police.

¶ 15 After the State rested its case-in-chief, the court reviewed with defendant his witness list. The court asked what he had done to secure the witnesses he sought to call, which included three public defenders and several police officers. Defendant responded that he had done nothing but provide his list to the court. Accordingly, the court asked him to make an offer of proof as to each witness, so it could determine whether the testimony was relevant to the trial. Defendant refused to do so, telling the court that he was "not going to give you no outline for you to help the State design their outline for what I have got to say." Following further exchange between defendant and the trial court about his witnesses, the topic turned to the police officers on his list,

[1]The bullet lodged in Woods' back/shoulder area was not removed since she was pregnant.

which included officer Wilson and his partner, officer Daniels, and officer Mitchell and his partner, officer Ham. The State notified the court that officers Wilson and Ham were both dead, and officer Wilson's transcript from defendant's first trial had already been read into evidence; officer Daniels had not been subpoenaed by defendant and was leaving for a trip; and officer Mitchell had just testified. In again speaking with defendant, the court asked for an offer of proof as to officers Daniels and Mitchell, and again, defendant refused, other than to say he needed them "for impeachment." The court stated there was no need to call officer Daniels, as defendant had never asked anybody about any conversations had with her. Then, with respect to officer Mitchell, the court pointed out that he had already testified and that defendant had had the opportunity to cross-examine him. Defendant interrupted by stating that officer Mitchell had testified as the State's witness and, although he had cross-examined him, he "didn't have an opportunity to exam[ine] him the way [he] wanted to." Once again, the court asked for an offer of proof, and again defendant refused, stating, "I don't plan on giving the State the opportunity to deal with what I am going to say and how I am going to say it ahead of time." Finally, in an effort "to be fair," the court allowed defendant to call one of the public defenders, which he did. After that witness, the court again asked defendant to provide an offer of proof with respect to any other witness he wanted to call, and again, defendant refused, stating "I am not going to give you any more information." The court then asked defendant if he was prepared to testify on his own behalf, to which he replied affirmatively.

¶ 16 During his testimony, defendant averred that he was not guilty, and that he was a truthful person and not a liar. He also averred that he never killed anyone, including James, that he had

never pointed a gun at anyone, and that he had never tried to kill anyone. He explained that, although he was a thief and robbed people, at times admittedly while armed with a gun, he never discharged a gun during any robbery and that victims of his robberies were happy that he was the perpetrator because they knew he would not harm them. And, he insisted that whenever he did commit a crime, he confessed to it and served his time in jail.

¶ 17 With respect to the instant murder, defendant testified that on the morning in question, he was on parole for two prior armed robbery convictions. At about 4:30 a.m., he was trying to get home on the bus, but exited before his stop, walked to 63rd Street and tried to get a ride with Johnson, whom he had never met, because he could not find a cab or bus. He averred that while he was negotiating a price for the ride with Johnson, railroad officers Grady and Kurzweil drove in front of Johnson's car. He next testified that the State told Johnson to testify that he saw officer Grady take a gun from him, even though this was not true. Defendant denied possessing a gun that morning and denied being at or near the tavern, killing James or shooting Woods.

¶ 18 On cross-examination, defendant admitted that he had changed his name and lied about his identity in the past. Additionally, he admitted that he had been in a fight with John Szumigala many years ago, which resulted in defendant's conviction for robbing him. Defendant, however, described that Szumigala had attacked him, and defendant denied kicking Szumigala in the face. Defendant referred to medical records, not presented at this trial, asserting they established Szumigala lied because when he was released from the hospital following that incident, he had only a few bruises.

¶ 19 At the conclusion of defendant's testimony, the court dismissed the jury and asked

defendant if he had any other witnesses, believing defendant "might reconsider my offer and make an offer of proof" as to the witnesses they had previously discussed. Defendant responded that he had "said openly I am not going to do what you requested." Accordingly, the court determined he had no more witnesses to present.

¶ 20 In its case in rebuttal, the State sought to present a transcript of deceased witness Szumigala's testimony from defendant's capital sentencing hearing, stating that it would directly impeach defendant's testimony denying that he had ever harmed Szumigala. Defendant objected, claiming that hospital records showed the injuries Szumigala had testified to were false. Upon discussion with the parties, the trial court allowed the testimony, concluding that defendant had "opened the door when he testified in the manner he did concerning this witness." However, the court acknowledged the discrepancies between Szumigala's testimony and the injuries he had reported, noting, as defendant pointed out, that the transcript showed "all he suffered were bruises, and he was treated and released."

¶ 21 Szumigala's transcript was read into evidence. He had testified that in February 1971, he was a 17-year-old student walking to work at about 7:45 p.m. when defendant and 5 other young men approached him. Defendant punched him in the stomach, sending Szumigala to his knees; two of the men grabbed him by the arms and dragged him under a bridge. Defendant stood in front of Szumigala and ordered the other men to check him for weapons. They took his wallet and defendant told Szumigala to take off his watch, which he did; defendant took his watch. Defendant also ordered the other men to take Szumigala's rings; Szumigala was able to get one off and one of the men tried to get the other but could not. Defendant told the man to cut off

Szumigala's finger. Szumigala was quickly able to get the ring off and gave it to defendant. Defendant then ordered Szumigala to take off his coat.

¶ 22 Szumigala stated that defendant began punching him hard in the stomach several times and told the others present that he was "going to kill this guy." Defendant grabbed Szumigala by the shirt and smashed the back of his head into a brick wall, whereupon Szumigala fell to the ground and could not get up. As one of the men held him up, defendant kicked him in the right eye. Szumigala again fell to the ground; he was stomped in the head several times and kicked in the ribs and chest. Szumigala stated that defendant stood on his shoulder and his wrist, and kicked him in the face, nose and forehead. Only after one the men told everyone that Szumigala was dead did the group stop; defendant kicked Szumigala one more time before leaving.

¶ 23 Szumigala further testified that soon after reaching the hospital, police asked him to view some people they had brought in for identification. Szumigala identified defendant, who was wearing Szumigala's coat. Szumigala averred that he suffered multiple injuries, including that his right eye had been forced up into its socket and stone and gravel was lodged therein. He also described that he was treated injuries to his face, hands and his shoulder, and claimed that several body parts, including his shoulder, knee, ankle and fingers had been dislocated. He could no longer continue at his job as a costume and set designer, as he lost the ability to distinguish between colors, and he had severe headaches and difficulty reading. He also claimed to have had extensive dental work done to repair his face, had problems with his ear canal and his shoulder would dislocate.

¶ 24 At the close of the State's case in rebuttal, the cause went to the jury, who found

defendant guilty of James' murder, Woods' attempted murder, and the attempted armed robberies of both James and Woods. The jury also found the additional factor that defendant had committed the murder of someone 60 years old or older.

¶ 25 The cause proceeded to sentencing. As that hearing began, defendant informed the court that he did not have a copy of his PSI. When asked where his copy was, he told the court that he had not been "worried" about it because he knew he was "not going to get no probation." The court explained to him that the PSI was more important than whether he was going to receive probation, as it may contain information that he "may want to take issue with or talk about in mitigation." The State provided defendant with another copy of his PSI. After reviewing it, the State sought to make some amendments, and the court also asked defendant if he wanted to make any corrections or additions, which he did not.

¶ 26 The parties argued in aggravation and mitigation. After reviewing all the applicable factors, the court described that it found "very, very aggravating" the fact that the victims in this cause had submitted to defendant's demands, yet he still shot them. The court sentenced defendant to concurrent terms of life in prison for the murder of James and 30 years for the attempted murder of Woods; it further sentenced him to 15 years for each of the two attempted armed robbery convictions, to run concurrent with each other but consecutive to his sentence for the attempted murder of Woods.

¶ 27 ANALYSIS

¶ 28 Defendant presents five contentions for our review. We address each separately.

¶ 29 I. Offer of Proof and Witness Testimony

¶ 30 Defendant's first contention on appeal is that the trial court violated his due process right to present evidence when it denied his request to call officer Mitchell in his case-in-chief after defendant refused to provide the court with an offer of proof as to his testimony. Defendant asserts that officer Mitchell's testimony, which was vital to his defense, was otherwise material and obvious to the court and, thus, did not require an offer of proof. He further insists that calling him, after he had just testified for the State only the day before, would have been easy and would not have delayed the proceedings and, thus, the trial court's ruling denying such testimony was clearly in retribution for defendant's representation of himself *pro se*. We disagree with defendant's contention.

¶ 31 The crux of defendant's argument is that the trial court wrongly excluded evidence he sought to present in his own defense, namely, officer Mitchell's testimony, which he says was vital to his defense theory of misidentification and his allegation that he was not in possession of a gun on the morning in question. When, as here, a defendant claims that the trial court barred him from presenting evidence on his own behalf, he "must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been." *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010), citing *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002); accord *People v. Gibbs*, 2016 IL App (1st) 140785, ¶ 36. The purpose of an offer of proof is to disclose the nature of the offered evidence to the trial court and to enable a reviewing court to determine whether the exclusion of that evidence was proper. See *People v. Andrews*, 146 Ill. 2d 413, 421 (1992); accord *People v. Boston*, 2016 IL App (1st) 133497, ¶ 63. An adequate offer of proof is more than the unsupported speculation of what a witness may say;

rather, the proponent of this evidence must explain to the trial court, with particularity, the substance of that evidence and its admissibility. See *Andrews*, 146 Ill. 2d at 421; accord *Pelo*, 404 Ill. App. 3d at 875-76; see also *Gibbs*, 2016 IL App (1st) 140785, ¶ 36. "[T]he failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Andrews*, 146 Ill. 2d at 421; accord *People v. Peeples*, 155 Ill. 2d 422, 457 (1993) (when trial court refuses proposed evidence, no appealable issue remains unless proper offer of proof is made).

¶ 32 Moreover, even where an offer of proof can be construed as adequate, a trial court's refusal of it is not error if the suggested evidence is not relevant. See *People v. Stewart*, 229 Ill. App. 3d 886, 889 (1992). Evidence is relevant if it has any tendency to make the existence of any consequential fact either more or less probable than it would be without the evidence. See *People v. Pike*, 2016 IL App (1st) 122626, ¶ 33. While a defendant does have the right to present a defense, ultimately, a trial court has broad discretion in ruling on the relevancy of the evidence he seeks to present. See *People v. Bohn*, 362 Ill. App. 3d 485, 490 (2005). The admissibility of evidence is within the sound discretion of the trial court and we will not overturn its decision in this respect absent an abuse of that discretion. See *People v. Caffey*, 205 Ill. 2d 52, 89 (2001); see also *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133 (we review via abuse of discretion standard a defendant's claims that his right to present complete defense was denied due to improper evidentiary ruling).

¶ 33 In the instant cause, after the State rested its case-in-chief, the trial court reviewed defendant's witness list, which included several public defenders and police officers. It asked defendant what he had done to secure these witnesses, and he responded he did nothing but

provide the court with his list. At this point, the court asked him to make offers of proof as to each witness; defendant refused to do so, stating he "was not going to give [the court] no outline for [it] to help the State design their outline for what I have got to say." With respect to the police officers he sought to call, officers Wilson and Ham were dead, officer Daniels had never been subpoenaed and was leaving for a trip, and officer Mitchell had already testified. The court asked defendant for an offer of proof as to officers Daniels and Mitchell; again, defendant refused, stating only that he needed them "for impeachment." Noting that officer Daniels never really came up in any conversation throughout trial, the court determined there was no need to call her. And, it acknowledged that officer Mitchell had just testified for the State and defendant had just cross-examined him. Defendant told the court that he "didn't have an opportunity to exam[ine]" officer Mitchell "the way [he] wanted to." So, again, the court asked him for an offer of proof, and again, defendant refused, stating he did not want to give "the State the opportunity to deal with what I am going to say and how I am going to say it ahead of time." After defendant presented one witness, which the court allowed him to do, it, for a fourth time, asked defendant to provide an offer of proof as to any other witness he wanted to call, and defendant, for a fourth time, refused, stating "I am not going to give you any more information." Defendant then testified on his own behalf and, following this, the court gave him one last opportunity, asking if he "might reconsider my offer and make an offer of proof" if he wanted to call any other witness. Defendant responded that he had "said openly I am not going to do what you requested." No more witnesses were presented.

¶ 34 Within this context, it becomes very clear not only why the trial court asked defendant

for offers of proof for the various witnesses he sought to call to testify, but also the propriety of its decision to bar him from presenting these witnesses, particularly officer Mitchell.[2]

¶ 35 First, the record demonstrates, and defendant articulates at several points on appeal, that his theory of defense was two-fold: that he was misidentified as the perpetrator and that he was never in possession of a gun on the day of the crimes. The witnesses he sought to call were three public defenders and several police officers. With respect to the public defenders, defendant told the court he wanted to call them so that they could testify about what he had discussed with them regarding his case. The testimony they would provide, then, was only tenuously linked to his theory of defense. However, in an effort "to be fair," the court did allow him to call one of these public defenders to testify in his case-in-chief.

¶ 36 The situation became more complicated with respect to the police officers defendant sought to call. Again, on his witness list, defendant had named officers Ham, Wilson, Daniels and Mitchell. However, he admitted that he did nothing more than this to secure them at trial, *i.e.*, he never subpoenaed them, etc. The record reveals that officers Ham and Wilson were both dead. The State had contacted officer Daniels; however, due to her minor role in the incident, and the fact that she was leaving for a trip, the State was not going to call her. The court concurred that no other testimony during trial really involved her or her investigation into the crimes. Again, there was nothing she could provide that was relevant to his theory of defense.

¶ 37 This left officer Mitchell. He had testified that at 3:45 a.m., before the crimes, he was on

[2]We make clear for the record that the issue defendant raises on appeal here is the trial court's denial of officer Mitchell's testimony only, not of any of the other witnesses defendant sought to present but eventually did not.

patrol and saw defendant standing at the bus stop about 20 feet from the tavern. A half hour later, officer Mitchell received a radio call about someone having been shot; he went to the reported scene, saw that several other police had already responded and, thus, left and continued on his patrol. It was not until later that he received a radio call to go meet railroad police to take someone into custody and transport him to the station. Officer Mitchell complied with the directive, obtained defendant, and was handed a gun which railroad police explained defendant had in his possession when they took him into custody.

¶ 38 Defendant was given the opportunity to cross-examine (and re-cross-examine) officer Mitchell. Defendant elicited from him that he did not know that there was an ongoing murder investigation until after he transported defendant to the station–long after the crimes had occurred. That is, officer Mitchell did not know a murder, attempted murder or robberies took place when he went to the tavern and saw that other officers had already responded, nor when he was later called to go meet railroad police officers Grady and Kurzweil to pick up someone (defendant) in their custody for transport, nor when officer Grady handed him, with his bare hands, the gun he told officer Mitchell he took off defendant when they apprehended him. Officer Mitchell explained he only learned about the crimes, and defendant's involvement, after he had brought him to the station and turned in the gun. Most critically, defendant was able to elicit during his cross-examination that officer Mitchell had, indeed, also touched the gun with his bare hands and that he had not thought to investigate the origin of the gun or to preserve any fingerprints on it during its chain of custody from the time he obtained it from officer Grady to the time he turned it into the station.

¶ 39 In asking to allow him call officer Mitchell in his case-in-chief, defendant told the trial court that, during this cross and re-cross-examination, he had not been able to question him "the way [he] wanted to." Yet, when asked what more he wanted to elicit, defendant refused to provide an offer of proof as to what more testimony from officer Mitchell would entail. It is our view that it would not have been much, if any, and certainly nothing relevant or material to his theory of defense. Officer Mitchell had just testified that he had noticed defendant at a bus stop near the tavern at 3:45 a.m., but did not see him again until later when he was asked to transport someone to the station. And, defendant had elicited from him that he did not know any details about the crimes other than that something had happened near the tavern and, therefore, he did not think about chain of custody concerns or evidence preservation when he went to pick up defendant and was handed a gun he was told had been on his person. Foundationally, then, further testimony from officer Mitchell in defendant's case-in-chief would not have been relevant to his theory of defense. Not only was officer Mitchell not a witness to any incident involving defendant (the crimes, their investigation or his apprehension), his testimony would have done nothing to establish defendant had been misidentified or did not have a gun. By the time officer Mitchell became involved, he was responding to a directive to retrieve someone who was in railroad police custody, for what he did not know, and bring him to the station. With respect to identification and possession concerns, the witnesses who could have testified as to these–the witnesses defendant should have sought to call in his case-in-chief–were railroad officers Grady and Kurzweil, who had identified him on 63rd and State pursuant to Chicago police descriptions, placed him in custody, and recovered the gun on his person.

¶ 40 With no citation to any other case law, defendant relies solely on *People v. Christen*, 82 Ill. App. 3d 192, 196 (1980), for the proposition that, although an offer of proof is generally required to preserve a question involving the wrongful exclusion of evidence, one "need not be tendered" where the trial court is sufficiently aware of the purpose for which the evidence is offered and the substance of the testimony sought to be elicited. While defendant is correct that this principle is discussed in *Christen*, that case is wholly distinguishable from the instant cause and this proposition does not aid his argument in light of the facts presented here.

¶ 41 First, factually, *Christen* is not at all similar to defendant's cause. There, the trial court barred the defendant from testifying about his own state of mind and intent immediately prior to shooting the victim, which he claimed he did in self defense, because he failed to make an offer of proof when the court sustained the State's objections to his testimony eliciting his state of mind. See *Christen*, 82 Ill. App. 3d at 195. The reviewing court found this to be reversible error, declaring that, because a claim of self defense rests precisely on a defendant's reasonable belief, and because the trial court in this case was fully aware that he would seek to raise this defense and would testify with respect to it during his direct examination, an offer of proof in those circumstances was technically not required. See *Christen*, 82 Ill. App. 3d at 196-97.

¶ 42 Clearly, *Christen* involved a question of the defendant's intent and the barring of the prime piece of evidence that undoubtedly directly determined that question–his own testimony. In contradistinction, in the instant cause, the nexus between the theory of defense (misidentification and lack of possession) and the evidence barred (officer Mitchell's testimony) is in no way as strong. Other than the evidence defendant had already elicited from officer

Mitchell on cross and re-cross-examination–evidence which, by the way, was minimal in relation to the crimes at hand–there is nothing in the record that indicates the trial court here was aware of the purpose or substance of any additional testimony defendant claimed he would have elicited if he had been able to call officer Mitchell in his case-in-chief. Simply put, there was not much more to which officer Mitchell could testify with respect to misidentification and lack of possession. If there was, it was not obvious and, therefore, defendant needed to make an offer of proof.

¶ 43 Defendant further insists that the trial court barred him from calling officer Mitchell as retribution for representing himself *pro se* throughout his cause. However, a defendant, acting as his own attorney, must comply with the rules of procedure required of attorneys and a court will not apply a more lenient standard to *pro se* litigants. See *People v. Allen*, 401 Ill. App. 3d 840, 854 (2010). Under the circumstances here, defendant was required to make an offer and, despite request after request by the trial court at several points during the proceedings in an effort to assist him in doing so, he refused–not once, not twice, but five times. We would be hard pressed to find where, would an attorney repeatedly refuse to provide an offer of proof directly out of gamesmanship as defendant five times did here, a trial court's decision to bar that evidence would be considered improper.

¶ 44 Ultimately, under these circumstances, defendant was required to make an offer of proof as to what officer Mitchell would have testified to on direct examination during his case-in-chief. He was not excused from this and, without it, he waived the issue on appeal. Moreover, even if he did not, any further evidence from officer Mitchell, who had already testified and whom

defendant had already cross- and re-cross-examined, was not relevant or material to his theory of defense, as it would not have established he was misidentified or did not have a gun. He simply cannot show how the outcome of his trial would have been different if officer Mitchell–who did not witness the crimes, was not part of their investigation and did not even know they had occurred until after defendant was out of his control–would have testified in his case-in-chief and, frankly, we cannot conceive that it would have been. We therefore conclude that the trial court's decision to deny defendant's request that officer Mitchell testify in his case-in-chief, where defendant did not provide an offer of proof as to that testimony, was not an abuse of discretion.

¶ 45 II. Rebuttal Testimony

¶ 46 Defendant's second contention on appeal is that the trial court erred by admitting the rebuttal testimony of Szumigala, regarding what he claims are disputed details of a collateral incident, as evidence of his violent character. He asserts that not only was Szumigala's testimony unreliable as it was contrary to his medical records, but it was also inadmissible because it was inflammatory, improper and highly prejudicial, particularly where he, at most, opened the door to only general character traits but not to a specific incident such as this.

¶ 47 Rebuttal testimony is "that which is adduced by the prosecution to explain, repel, contradict, or disprove evidence presented by the accused." *People v. Rios*, 145 Ill. App. 3d 571, 584 (1986). However, it may be used only to rebut the defendant's evidence as to material matters, not collateral or irrelevant ones. See, *People v. Williams*, 96 Ill. App. 3d 958, 964 (1981). Moreover, it is generally inadmissible when presented in response to testimony elicited

on cross-examination unless the cross-examination related to a specific, relevant issue or the rebuttal evidence discredits the witness in some respect. *People v. Rudi*, 94 Ill. App. 3d 856, 860 (1981). Whether to admit rebuttal testimony is a matter within the sound discretion of the trial court and its decision in this respect will not be overturned unless it has abused its discretion. See *People v. Woods*, 2011 IL App (1st) 091959, ¶ 26; accord *Williams*, 96 Ill. App. 3d at 964 ("the admissibility of rebuttal evidence is a matter left to the discretion of the trial court and is subject to review only in cases of clear abuse").

¶ 48 In the instant cause, defendant testified on his own behalf. During his direct examination, he stated he was a truthful person and not a liar. In addition to denying any involvement in the instant crimes, he testified that, in general terms, he never killed anyone, had never tried to kill anyone, and had never pointed a gun at anyone. He explained that he was a thief and that he robbed people, admittedly while armed with a gun at times, but he never discharged a gun during any robbery he ever committed. On cross-examination, with respect to his truthfulness, he admitted that he had changed his name and lied about his identity in the past. And, he admitted that he had been in a fight with Szumigala, which resulted in his conviction for robbery. But, he insisted that he was not the aggressor in that incident and had not harmed him. After his testimony, the State sought to present a transcript of Szumigala from defendant's prior capital sentencing hearing as part of its case in rebuttal to impeach his testimony denying he had harmed Szumigala. The trial court allowed this testimony, concluding that defendant had "opened the door when he testified in the manner he did concerning this witness."

¶ 49 We find no error on the part of the trial court in admitting Szumigala's testimony in

rebuttal here. Yes, this rebuttal evidence involved a specific incident in defendant's past before the instant crimes took place, and this may initially appear to be a collateral matter. However, defendant testified on direct examination that he was a peaceful person who, even though he was an armed robber, had never hurt anyone. Accordingly, he himself made the question of his violent history a material one in this cause.

¶ 50 Defendant points out on appeal that he only spoke about the particular incident with Szumigala on cross-examination, which the State elicited from him, and not on direct examination. However, as we discussed above, while rebuttal evidence is generally inadmissible when presented in response to testimony elicited on cross-examination, it may be admissible if that cross-examination is related to a specific, relevant issue or the rebuttal evidence discredits the witness in some respect. See *Rudi*, 94 Ill. App. 3d at 860. Admittedly, the incident with Szumigala could be viewed as collateral to the crimes involving James and Woods, but it certainly discredited defendant, as he had just testified on direct that he was generally a truthful, peaceful person who had never harmed anyone, and on cross-examination that he was not the aggressor in the incident with Szumigala, which landed Szumigala in the hospital and defendant in prison on a robbery conviction. By testifying as he did, defendant placed in issue on his own direct examination not only his credibility, but also his self-serving statement that he had an honest, nonviolent nature. As the trial court found, he opened the door to rebuttal evidence on these subjects. See, *e.g.*, *People v. Ford*, 163 Ill. App. 3d 497, 507 (1987) ("[w]hen a defendant chooses to testify in his own behalf, he places his credibility in issue, and when he introduces an issue on direct examination, though collateral to the issue to be proved, his statement may be

attacked both on cross-examination and through rebuttal witnesses").

¶ 51 We understand defendant's concerns with respect to this issue and recognize the risk he points out that the admission of Szumigala's testimony in rebuttal created a "distracting mini-trial" on that incident that could have "confused" the trier of fact. However, even were we to accept defendant's arguments here and find that the trial court should not have allowed the admission of Szumigala's testimony in rebuttal, we note that not every impropriety requires reversal. Rather, it may be harmless if it is inconsequential or if it appears that it did not affect the outcome of the trial, particularly when considered in light of the evidence introduced to establish the defendant's guilt. See, *e.g.*, *People v. Trolia*, 107 Ill. App. 3d 487 (1982); *People v. Glover-El*, 102 Ill. App. 3d 535 (1981), *People v. McCabe*, 89 Ill. App. 3d 554 (1980).

¶ 52 In the instant cause, the evidence against defendant was overwhelming. Woods, a victim and direct eyewitness to the crimes, unrebuttedly testified that defendant approached her and James on the morning in question as they closed the tavern, first upon a ruse about whether a certain bus was still running, and then forcing them, at gunpoint, into James' car, whereupon he demanded money. James and Woods complied with his armed mandate, with Woods running into the bar to clear the cash registers and James waiting with defendant as his insurance. When Woods did not return quickly enough to give defendant the money, which was much less than he had demanded, defendant grabbed James by the collar and shot him in the head as James pled with him to let a pregnant Woods go. Defendant then got out the car, ran after the only living eyewitness able to identify him, stood above her as she fell and turned her stomach to the ground to protect her unborn baby, and shot her. The descriptions Woods provided of defendant were

detailed and consistent and, upon their broadcast by police, defendant was stopped nearby on 63rd and State by railroad police officers Grady and Kurzweil as he ran to Johnson's car, banged on the passenger door and demanded a ride. Officers Grady and Kurzweil, who both testified defendant matched the broadcasted description in ethnicity, clothing and hairstyle, recovered a gun from defendant's waistband. Defendant's photograph was then included in an extensive array to Woods at the hospital, and she identified him as the man who shot and killed James, shot her, and robbed them both at gunpoint. And, forensic evidence established that the gun recovered from defendant was, indeed, the gun that murdered James.

¶ 53 Ultimately, here, the trial court did not err in allowing the State to present a transcript of Szumigala's testimony in its rebuttal case against defendant. Significantly, this testimony was not a surprise, as it had been presented in defendant's original trial on this matter and, accordingly, defendant knew of its existence and content; he cannot legitimately claim prejudice. Even if error did occur in this respect, in light of the record before us and the overwhelming evidence presented of defendant's guilt, it was harmless, as we do not believe that the jury could have reached any different conclusion had this testimony been excluded.

¶ 54 III. Sentencing and PSI

¶ 55 Defendant's next contention on appeal is that the trial court erred in sentencing him without an adequate PSI report prepared in full accordance with section 5-3-2 of the Unified Code of Corrections (Code). See 730 ILCS 5/5-3-2 (West 2012). He asserts that, because his PSI did not include the statutorily required information about his "physical and mental history and condition, family situation and background, economic status, education, occupation and

personal habits," the court, in sentencing him, effectively treated the PSI as a right defendant could waive, which he legally cannot and, thus, his sentence must be vacated and his cause remanded for resentencing. The State, meanwhile, contends that defendant has forfeited this issue for review because he failed to challenge the completeness of the PSI before the trial court. The State also asserts that defendant cannot now challenge the PSI when his own conduct was the reason for its failure to be completed. Based on the particular circumstances before us as presented in the record, we agree with the State.

¶ 56 As noted earlier, the record demonstrates that following his convictions, a probation officer attempted to interview defendant in order to prepare his PSI. Defendant, however, declined to participate, telling the probation officer that "they already have all this information...my whole criminal history, jail history and many other reports." Other than confirming that he had been incarcerated for 43 of the last 45 years, he provided no other information to the probation officer. Accordingly, the probation officer filled out the PSI as much as possible, detailing defendant's prior convictions, providing an "official version" of the instant offenses, and providing a summary of the interview with defendant. The report further shows that the probation officer examined Chicago arrest records, consulted a LEADS response, and conferred with the Cook County Circuit Clerk's computer system, as well as its juvenile computer system, in order to obtain information defendant refused to provide. The probation officer attached printouts of these searches to the PSI. The PSI did not contain information regarding defendant's physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits. The court provided

defendant with a copy of the PSI, and defendant acknowledged receipt of it.

¶ 57 Later, on the day of his sentencing hearing, the court asked defendant if he had his copy of his PSI, to which he responded, "[n]o." After reaffirming that it had provided him with one and that defendant had received it, the court asked him where his original copy was. Defendant responded that he "didn't count it for nothing," since he knew he was "not going to get no probation," so he "wasn't worried about it." The court provided him with another copy, explaining to him that his PSI was not just about the chance of receiving probation but, rather, that it contained information the court would review in mitigation on his behalf and that it would allowed him to "take issue with or talk" about factors that would be presented therein in an effort to determine his sentence. The court then provided him with time to review the PSI. The State noted that some portions of the PSI needed to be amended, including some dates and facts with respect to defendant's prior crimes, and the court allowed this, tracking each amendment and confirming each with defendant, ensuring that the parties and the court were in agreement. Following this, the court gave defendant the chance to amend the PSI, asking him if he had "any corrections or additions you want to make." Defendant did not, only telling the court that he wanted to make a statement after any witnesses testified at the sentencing hearing.

¶ 58 Pursuant to section 5-3-1 of the Code, a "defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court." 730 ILCS 5/5-3-1 (West 2012). Statutorily, and relevant to the instant cause, the PSI must contain information regarding the defendant's "history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education,

occupation and personal habits." 730 ILCS 5/5-3-2 (West 2012).[3] Our supreme court has held that a PSI–the actual presentence investigation and the accompanying written report–are mandatory legislative requirements which cannot be waived unless both the State and the defendant agree to the imposition of a specific sentence. See *People v. Youngbey*, 82 Ill. 2d 556, 561, 564-65 (1980) (the PSI is to inform the court of sentencing considerations as well as for the benefit of the defendant and, thus, it is not a personal right of the defendant which he may waive).

¶ 59 When a trial court does consider a PSI, any objection to a deficiency therein is considered waived by the defendant's failure to object. See *People v. James*, 255 Ill. App. 3d 516, 530 (1993), citing *People v. Meeks*, 81 Ill. 2d 524, 533 (1980) (it is the duty of the parties to alert the court to any deficiencies or inaccuracies in a PSI). Also, and more significantly here, a defendant cannot object to the incomplete nature of a PSI when the deficiencies in that report are due to his own absence or refusal to cooperate. See *James*, 255 Ill. App. 3d at 530, citing *People v. Gomez*, 114 Ill. App. 3d 935, 942 (1986).

¶ 60 Here, the record makes clear that defendant refused to speak with the probation officer when the officer interviewed him in order to prepare his PSI. This is noted in his PSI, along with the information the officer was able to fill in and the reports the officer obtained to supplement

[3]We note for the record that there is additional information required by statute to be contained in a PSI, where applicable, including, for example, information about "special resources within the community" which may assist the defendant with rehabilitation, the effect of the offense on the victims, and the defendant's status since arrest. 730 ILCS 5/5-3-2 (West 2012). However, the focus of defendant's appeal here is solely on the information cited in our decision.

this. Defendant felt he did not need to talk to the officer, telling him "they already have all this information...my whole criminal history, jail history and many other reports." Prior to his sentencing hearing, defendant acknowledged receipt of his PSI; however, he never sought to amend it or contribute any more information–the information he now claims was missing at his sentencing. Later, upon the trial court's questioning, defendant told the court he did not have a copy of his PSI. Acknowledging receipt of it, he admitted that it was not important to him because he knew he was not going to received a sentence of probation in the instant cause. The court stopped the proceedings and explained to defendant that the PSI was more significant than whether he received probation, and that it instead would give him the opportunity to talk about factors impacting his sentence and would give the court an opportunity to examine any mitigating factors he presented. So, the court gave defendant time to again review the PSI and, after the State made amendments to it, asked him if he wanted to correct or add any information. Defendant chose not to. Clearly, not only was it defendant's initial denial to speak to the probation officer, but also his later refusal to accept the opportunity directly provided to him by the trial court to amend or add information, that were the reasons for any alleged deficiencies in his PSI. Therefore, defendant cannot now challenge the PSI on appeal. See *James*, 255 Ill. App. 3d at 530.

¶ 61 Defendant maintains that, regardless, it was error for the trial court to sentence him in the absence of a PSI prepared in accordance with the guidelines of section 5-3-2 of the Code. However, this is not a case where a PSI was not prepared, since the record shows that a PSI was presented to the trial court, that it was also presented separately to defendant before his hearing,

that he acknowledged receipt of it, and that the parties, including defendant specifically, were given the opportunity to review it multiple times and correct it, modify it, and add to it. See *Youngbey*, 82 Ill. 2d at 565 (PSI is mandatory legislative requirement). Instead, in this cause, defendant refused to take part in the preparation of his PSI, and now tries to use that refusal to argue in our Court that the resulting PSI was "inadequate." This is a prime example of a defendant attempting to use a ruling he himself procured to now seek reversal of his cause on appeal. See, *e.g.*, *People v. Villareal*, 198 Ill. 2d 209, 227 (2001) (this violates fairness in our judicial system). It is true, as defendant consistently points out, that a PSI is not a personal right belonging to a defendant which he can waive. However, to make the leap that, because this is so, he cannot waive or refuse to speak to a probation officer is wholly absurd. A defendant *can* refuse to participate; but a trial court will not be held hostage from sentencing him if he so chooses. To hold otherwise would effectively prevent sentencing from ever taking place.

¶ 62 We would further note that, based on the record before us, even were we to accept defendant's claims here that his PSI was so inadequate as to prevent the trial court from sentencing him, we would nonetheless find no error in this particular cause. This is because, although the information cited may not have been contained in his written PSI, it was still presented to the trial court for consideration. As noted, the trial court gave defendant the opportunity to amend or add to his PSI. He chose not to, and instead asked the trial court if he could make a statement after the State presented its case in aggravation. The trial court allowed this. In his statement, which we have read thoroughly and repeatedly, defendant discussed directly with the trial court every aspect he now says was not presented for consideration. For

example, as to his "physical and mental history and condition," the court already knew that defendant was a diabetic, and that he had been treated for this condition since he was imprisoned in 1983. With respect to his family situation and background, defendant told the court during their exchange that since the years have passed, his wife and mother were both deceased, and his children and grandchildren had all reached the age of maturity. Moreover, he admitted to the court that he had no skill-set or job waiting for him on the outside. He had been an artist, but because of his advanced age and resulting poor eyesight, he could no longer paint. He told the court that were it to release him, "all [he] can be is a bum on the streets, a panhandler," and he would "rather be in the penitentiary" than be that. Undoubtedly, defendant did provide a statement to the trial court which included the information from his PSI which he had refused to share with the probation officer. He chose of his own accord to wait to do so until he was before the court. His decision will not be rewarded with the vacation of his sentence and remand for resentencing upon a claim of technicalities here.

¶ 63 Ultimately, defendant cannot challenge any alleged deficiencies in his PSI on appeal because they were the direct result of his refusal to cooperate in the preparation to the document. See *James*, 255 Ill. App. 3d at 530. Even if he could, he himself presented information about these alleged deficiencies in his statement to the trial court before his sentencing, and the record shows that the court considered them. There is no error here and, accordingly, his argument fails.

¶ 64 IV. Consideration of Sentencing Factors

¶ 65 Defendant's fourth contention on appeal is that the trial court improperly considered

mitigating factors as aggravating factors in determining his sentence. Specifically, he claims that his sentence must be vacated and his cause remanded for resentencing because, in his view, the court declared he would receive better medical care for his diabetes if he remained incarcerated and because it noted he lacked any dependents upon which his incarceration would inflict hardship. Defendant insists the court used these factors inappropriately to "justifying a longer sentence." We disagree.

¶ 66 As a threshold matter, the State argues that defendant has waived this issue on review, while defendant argues the matter should be reviewed *de novo*. He goes on to insist that the waiver rule should be relaxed here because the conduct of the trial judge was at issue and, alternatively, his claim should still be reviewed pursuant to the plain error doctrine because the trial court's egregious error denied him a fair sentencing hearing.

¶ 67 For the record, defendant did not object during the court's sentencing colloquy and, while he did raise in his posttrial motion an assertion that the court "failed to consider in mitigation that imprisonment will endanger [his] medical condition," he did not allude to his current claim regarding his lack of dependents, nor, more specifically, did he assert a claim in that motion of inappropriate consideration of mitigating factors as aggravating. Undeniably, then, defendant has technically forfeited this issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (contemporaneous objection and mention in posttrial motion are required to preserve issue for review). We do recognize, however, that the failure to contemporaneously object during a trial court's colloquy during sentencing to point out an error on its part in its sentencing considerations may not necessarily be required to preserve a sentencing issue. See *James*, 255

Ill. App. 3d at 531; see also *People v. Dameron*, 196 Ill. 2d 156, 171 (2001), and *People v. Woolley*, 205 Ill. 2d 296, 301-02 (2002) (it is not always necessary to interrupt sentencing judge with objection to preserve error). Therefore, we may, as courts before us have, exercise our prerogative to review the instant issue, regardless of any technical missteps that may have occurred. See *People v. Hobson*, 2014 IL App (1st) 110585, ¶ 36.[4]

¶ 68 With that said, however, we make clear that the review we must employ is pursuant to plain error. See *James*, 255 Ill. App. 3d at 531, citing *People v. Martin*, 119 Ill. 2d 453, 459 (1988), and *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986) ("if a defendant asserts on appeal that a trial judge considered erroneous aggravating factors in determining the appropriate sentence of imprisonment, the issue will be reviewed under the 'plain error' doctrine"). Accordingly, the burden is squarely upon defendant to show a clear and obvious error occurred and it was so serious as to affect the fairness of his trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010) (the defendant has the burden under plain error review to demonstrate the applicability of the two prongs to his sentencing hearing). Ultimately, absent error, there can be no plain error. See *Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("the first step is to determine whether error occurred"); accord *People v. Simon*, 2011 IL App (1st) 091197, ¶ 89.

[4]We do note, however, that while we may consider the waiver rule "relaxed" here, we by no means absolve defendant from his failure to file a posttrial motion citing the alleged sentencing error he now asserts. It is one thing to find it futile to contemporaneously challenge a sentencing judge who may be relying on factors perceived to be improper at the time of sentencing, but it is another to then further choose not to list these alleged errors–the crux of one's appeal–in writing in a postsentencing motion, as the law requires.

¶ 69 Because, based on our thorough review of the sentencing record before us, we do not find any error in the trial court's consideration of aggravating factors against defendant, we, in turn, cannot find any plain error and his claim fails. See, *e.g.*, *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur); *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010) (absent error, there can be no plain error); *People v. Brooks*, 187 Ill. 2d 91, 137 (1999).

¶ 70 Turning to the merits of this issue, we begin by noting several general and well established principles with respect to the law on sentencing. Axiomatically, the trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 46, citing *People v. Price*, 2011 IL App (4th) 100311, ¶ 36. A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st)

121623, ¶ 15. A sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 71 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2014). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). Statutorily, mitigating factors include a defendant's lack of history of prior delinquency or criminal activity, the unlikely recurrence of his criminal conduct, his character and attitude toward recidivism, that imprisonment would entail excessive hardship on his dependents, and that imprisonment would endanger his medical condition. See 730 ILCS 5/5-5-3.1(a)(7), (8), (9), (11), (12) (West 2014). However, the seriousness of the offense is the most important of all the factors a court should consider in imposing a sentence. See *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 52, citing *Coleman*, 166 Ill. 2d at 261.

¶ 72 The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record, and "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131; see *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). It

is strongly presumed that the court based its sentencing determination on proper legal reasoning. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. This presumption is only overcome by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law or manifestly violates constitutional considerations. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 73 In support of his contention, defendant isolates a few particular statements made by the court during its colloquy in an otherwise lengthy sentencing hearing which was comprised of detailed arguments by the State and defendant about both defendant himself and the instant crime. First, defendant cites the court's statements regarding his medical condition that he has been treated for diabetes "throughout the period of his incarceration" and that he has "survived incarceration since 1983," which, in his view, indicated that the court believed he would get better treatment in prison than were he free. Second, he cites the court's statement regarding his dependents that "[e]verybody's gone from his life *** Even his grandchildren are adults," which, again in his view, indicated that the court was punishing him because he has "lost" all his loved ones, so no one would care if he were in prison for life. However, not only does defendant severely mischaracterize the court's comments here, but he also, quite dangerously, intimates meanings behind isolated phrases, taken out of context, as the main support for his argument. Rather, based upon our review of the sentencing hearing as a whole, it is undoubtedly clear that the court based its considerations on the proper, statutory factors before it.

¶ 74 Contrary to defendant's insistence, there is absolutely no indication that the court relied on his medical condition or his family situation in an effort to lengthen his prison sentence. It is

true, as defendant points out and as we have already noted, that a defendant's medical condition and the existence of dependents are mitigating factors a trial court must consider in fashioning a sentence. See 730 ILCS 5/5-5-3.1(a)(11), (12) (West 2014) (grounds weighing in favor of minimizing a sentence include that imprisonment may "endanger" a defendant's medical condition or "entail excessive hardship to his dependents"). Yet, this is precisely what the trial court did in the instant cause. Defendant simply fails to include the entire context of its colloquy in structuring his argument. That is, indeed, the trial court made the comments he cites. However, he neglects to mention its specific preface to those comments.

¶ 75 The court was very methodical here. In fact, at the outset of its colloquy, it specifically stated that it was declining to accept or even consider the State's point in aggravation that defendant's prior sentence for these crimes, instituted following his initial trial, was the death penalty. The court also specifically declined to consider defendant's conduct pretrial or during trial, as he appeared *pro se*. Instead, it made clear that it would only be examining his conduct at the time of the crimes' commission, and the "very, very serious history of his delinquency and criminality."

¶ 76 The court then turned to factors in mitigation and tracked the statutory language of each, going "all the way down the list." For the record, it outlined these and described how not a single one of them "fit here." For example, it noted the factor in mitigation that a defendant's criminal conduct was the result of circumstances unlikely to recur. As to this, the court found the evidence presented rebutted it as, in its view, defendant "defines career criminal." Next, it noted the factor of a defendant's character and attitudes, and whether they indicated that he is

unlikely to commit another crime. As to this, the court noted defendant's own argument during sentencing in which he admitted that, if released, "all I can be is a bum on the streets," and that he would "rather be in the penitentiary." Then, with respect to his dependents and the potential hardship of his imprisonment upon them, the court noted that all of his dependents were "gone" and had grown to the age of maturity. However, not only was this a given fact, but defendant himself made this admission in his own statement before the court during sentencing. When given the opportunity to speak, defendant stated that his "wife is dead," his "mother is dead," and his grandchildren are "grown," and continued:

> "I have nothing left out there. So I should go back out and get right back into crime because that's the only chance I have of making some money because apparently I'm not going to get no money. Nothing."

And, with respect to his medical condition, the court acknowledged that while defendant had diabetes, he had been treated for it throughout his incarceration, which had begun in 1983, again, another relevant fact.

¶ 77 Clearly, the court discussed all the statutory mitigating factors, or, rather, what would have been mitigating factors in defendant's cause, were they to have been applicable. Instead, after reviewing them one by one, the court found that none of them applied to him. In its words, it "couldn't find one factor in mitigation that fits here." Contrary to defendant's view, the court did not "use" his lack of dependents and medical condition as aggravating factors against him. It discussed them and found that, as mitigating factors it was supposed to consider, they did not apply to his cause. Plainly, the court rejected them.

¶ 78 Moreover, what the court did make clear at the beginning of its colloquy was that the factors forming the basis of the life sentence it established were defendant's conduct at the time he committed the crimes and his "very, very serious history of delinquency and criminality." After going through the statutory list of mitigating factors, the court returned to these concepts to discuss them for the record. First, the court found "horribly aggravating" that defendant shot an older man in the head, killing him, while he was waiting for his employee to do what she had been instructed. Next, it found that it was "terribly, outrageously aggravating" that defendant shot a pregnant woman. "But the thing that" the court found to be "most aggravating" was that the victims were shot and brutalized even though they had "submitted to [defendant's] wishes." As it recounted, defendant shot and killed James because Woods was not quick enough in returning with the money and getting into the car, as he had ordered her to do at gunpoint. And then defendant shot a pregnant Woods–the only witness against him–while she tried to get away. The court explained, "[t]hat is the conduct I find very, very aggravating."

¶ 79 Accordingly, the justification for defendant's lengthy sentence was not his lack of dependents or the fact that he has been receiving treatment for his medical condition while in prison. To be sure, the record and defendant's own admissions indicate that these are factual truths. However, the court reviewed them in mitigation and found that they did not apply, which was its prerogative to do. Instead, what it found determinative was the nature of defendant's crimes, his conduct during their commission, and his history as a career criminal. It was upon these factors that the trial court fashioned its sentence.

¶ 80 Citing a few comments taken out of context does little to provide a viable basis for

defendant's assertions of error here. But even if, as defendant insists, the sentencing court did consider what should have been mitigating evidence of his dependents and medical condition as aggravating (which it did not), we would nonetheless find that there was no abuse of discretion. A court is not required to detail for the record the process by which it arrives at a defendant's sentence, nor to articulate the factors it considers and the mitigating or aggravating weight it affords them. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 48; accord *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). And, as we noted earlier, when mitigating evidence is presented, it is presumed that the court considered it, absent some contrary indication. See *Sutherland*, 317 Ill. App. 3d at 1131; *Cord*, 239 Ill. App. 3d at 969. Here, the record clearly demonstrates that the trial court looked at all the factors it was supposed to in their totality and made determinations as to which were applicable and which were not. As for those that were not, it left them by the wayside and focused on those that did, to wit, the nature of defendant's crimes and his history. In the court's view, any potential mitigating factors presented in defendant's cause simply did not comprise enough evidence in mitigation to combat the evidence presented in aggravation. Ultimately, a trial court is not required to give greater weight to any single factor, such as a defendant's dependents or his medical condition, over any other factor in consideration, such as the seriousness of the crime. See *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 113. Thus, we find no error in the cited comments.

¶ 81 V. Mittimus

¶ 82 Defendant’s final contention on appeal is that his mittimus must be corrected to reflect the correct crimes for which he was convicted. Based on the record, and according to the State’s

concession, we agree.

¶ 83 As defendant notes, his mittimus states that he was convicted of two counts of armed robbery. However, the record clearly reflects, and again, the State acknowledges, that he was convicted not of those crimes but, rather, of two counts of attempted armed robbery. Pursuant to Illinois Supreme Court Rule 615(b)(1) (Ill. S.Ct. R. 615) (eff. Jan. 1, 1967), a reviewing court on appeal may correct the mittimus at any time, without remanding the cause to the trial court. See *People v. Rush*, 2014 IL App (1st) 123462, ¶ 36. Therefore, we correct his mittimus to reflect his two convictions for attempted armed robbery.

¶ 84 CONCLUSION

¶ 85 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court, with a correction to defendant's mittimus to reflect two convictions of attempted armed robbery rather than two convictions of armed robbery.

¶ 86 Affirmed, mittimus corrected.