2018 IL App (1st) 160311-U

SIXTH DIVISION
September 21, 2018

No. 1-16-0311

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ESTEBAN SOTELO, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 13 CR 15735 Honorable Evelyn B. Clay, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's sentence is neither excessive nor an unconstitutional *de facto* life sentence. We correct defendant's mittimus to reflect only one conviction for attempted murder.

¶ 2 Following a bench trial, defendant Esteban Sotelo was found guilty of attempted first degree murder, aggravated battery, and aggravated discharge of a firearm, and sentenced to 52 years' imprisonment. On appeal, defendant contends that (1) his sentence is excessive, (2) the armed habitual criminal statute is facially unconstitutional, and (3) his "fines and fees order" should be corrected. We affirm as modified.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with six counts of attempted murder (720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012)), one count of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)), one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), and eight counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6 (West 2012)). Defendant waived his right to a jury trial, and the case proceeded to a bench trial. Since defendant does not challenge the sufficiency of the evidence, we will limit our discussion of the facts to those necessary to resolve the issues raised on appeal.

¶ 5 The evidence adduced at trial indicated that, at around 4:30 p.m. on July 25, 2013, Rafael Diaz Cardoso, his wife, and their 20-month-old daughter were leaving Cardoso's mother's house in Chicago. They left the house with Cardoso's mother and his nine-year-old niece, both of whom remained near the front lawn of the house. As Cardoso was placing his daughter into her car seat, a man with a "dollar sign" tattoo on his face walked up to within a few feet of him, pulled out a gun, shot six times, and fled the scene on foot. Cardoso shielded his daughter during the shooting, and she was unharmed. Cardoso testified that he shouted to the shooter that he had his daughter in the car, but defendant kept shooting. Although defendant was wearing a white t-shirt over the lower half of his face, Cardoso's wife and mother both identified defendant in a lineup and in court. Cardoso's wife had also identified defendant at the hospital where Cardoso had been rushed immediately following the incident. Cardoso was hospitalized for a month, had numerous surgeries, and still suffered the effects of the gunshot wounds, including the following: (1) three bullets were still inside of him, which he can feel if he tries to sleep on his side; (2) his jaw was "displaced," so he cannot close his mouth completely, affecting his ability to eat; (3) he

cannot see well out of his right eye; (4) the right side of his face is permanently numb; and (5) he has six scars from the bullet entry wounds. Cardoso confirmed he was never a gang member.

¶ 6 The subsequent police investigation revealed that, at the time of the shooting, a 14-year-old juvenile codefendant, Jose Alfaro, had been "on probation to officially join the Latin Kings" street gang, and to advance from probationary status, he had to shoot someone. At around 3:30 p.m. on the day of the shooting, defendant, who had been a member of the Latin Kings since the age of 10, was with other gang members on Sacramento Avenue when members of a rival gang, the Satan Disciples, drove by, "flashed signs[,] and yelled stuff." Defendant said that "they" decided to retaliate, so defendant obtained a .38-caliber revolver. Alfaro understood that the plan was for Alfaro to shoot a member of the Satan Disciples, but according to Alfaro, defendant saw that Alfaro "wouldn't go through with shooting someone," so defendant would do the shooting and Alfaro would act as a look-out for the police. Defendant and Alfaro then went separately to the scene of the shooting, which defendant characterized as "SD [Satan Disciples] territory."

¶ 7 Alfaro arrived at the scene and saw "a bunch of people and kids" out on the street. Alfaro also saw a man near a car, but did not know the man's name and had never seen him before. Alfaro, however, said the man was wearing a cap turned to the right, which indicated he was "Folks," *i.e.*, not a member of the Latin Kings. Defendant then walked up the sidewalk toward the man and asked, "[W]hat's up, folks?" The man responded, "[W]hat's up" and turned back toward the car. Defendant then removed the gun from his waistband and shot six times.

¶ 8 Alfaro became scared when he saw defendant shoot the man and immediately fled the scene. Defendant also ran from the scene after the shooting and caught up to Alfaro. Defendant told Alfaro to take the gun, but Alfaro refused, so defendant broke away and ran down an alley.

Alfaro heard an individual from behind yelling to the police that they had shot the individual's brother. Police apprehended Alfaro shortly thereafter.

¶ 9 Defendant ran to a nearby building and noticed a bag of dirt near the front door. Defendant put the gun into the bag, and ran upstairs to hide. A police officer found defendant and the hidden gun "after a few minutes." Alfaro and defendant both gave incriminating statements to the police. Alfaro recanted his statement at trial, and defendant elected not to testify or present any evidence on his behalf. Following closing arguments, the circuit court found defendant guilty of all six counts of attempted murder, as well as the aggravated battery and aggravated discharge of a firearm counts.[1] The court then continued the matter for sentencing and ordered the preparation of a presentence investigation report (PSI).

¶ 10 On September 23, 2015, the circuit court held defendant's sentencing hearing. The court asked the parties if there were any corrections to be made to the PSI, but the parties indicated that there were none, other than the year of birth of defendant's son.

¶ 11 In aggravation, the State asked for a sentence of 56 years' imprisonment. The State recounted the circumstances of the crime, noting that the evidence established that defendant caused great bodily harm to the victim, which would increase the potential sentencing range to 31 years to life imprisonment. The State further commented that defendant continued shooting all six rounds at the victim, despite the victim "screaming" at defendant to stop shooting because his 20-month-old daughter was in the car, and despite the victim turning to protect his daughter

[1] The report of proceedings indicates that the circuit court stated that it was finding defendant guilty of "Counts 1 through 8 *** that includes multiple counts of attempt[ed] murder and two counts of aggravated discharge of a firearm." Defendant's indictment, however, included only one count (count 8) for aggravated discharge of a firearm. Counts 1 through 6 alleged various theories of attempted murder, and count 7 alleged aggravated battery. Nevertheless, the court subsequently merged the aggravated battery and aggravated discharge of a firearm convictions into the attempted murder conviction.

from being shot. The State also reminded the court that the shooting took place in broad daylight in front of the victim's wife, who was five feet from defendant; the victim's mother, who was also screaming at defendant to stop shooting; the victim's nine-year-old niece; and various other residents who were outside at that time.

¶ 12 The State also presented the victim impact statements of Cardoso and his wife. Cardoso's wife stated that she was in the hospital for weeks taking care of Cardoso while their children were cared for by other family members. She added that the children were frightened because they were not used to being without their parents. Cardoso's wife said that she also was scared of "everyone" and of having her family in the house after the crime, and she did not trust anyone. She further disclosed that she could not sleep and suffered nightmares, and her daughter would wake up crying in the middle of the night. Cardoso's wife ended her statement with the following: "I forgive Esteban Sotelo who caused so much pain to my family."

¶ 13 In his statement, Cardoso said he was in substantial pain and was hospitalized for multiple days, including a stay in the intensive care unit. He added that, for a time, he could only have liquids because he could not fully open his mouth. The vision in one of his eyes was blurred, and he required emergency surgery on his eye. While hospitalized, he could not see his children because they were not allowed on his floor. When he left the hospital, he had to use a walking cane for "months." He added that he still had pain, which cold weather aggravates. He also said that he could not play sports with his children because of a fear of being "hit" where the bullet remains in his body. He also missed work for so long that his job was in jeopardy. He had to pay to get admitted to another hospital, but his private insurance refused to pay for it without a referral, which required a lengthy delay. Finally, Cardoso said he "fell behind" on his bills, and it took a long time to "get back on track."

¶ 14 The State further commented on the details in defendant's PSI. Notably, the State indicated that, at the time of the offense, defendant was 19 years old and on probation for two prior drug-related convictions. Defendant admitted that he was active with the "Boulevard 2-4" street gang, which the State explained was a "set" of the Latin Kings. Defendant's street name was "Sniper," but he had no role or rank within that gang. In addition, defendant had prior juvenile adjudications for criminal damage / trespass to property, robbery, and aggravated battery with a weapon other than a firearm. The first two adjudications resulted in dispositions of probation that defendant subsequently violated, and the last adjudication resulted in commitment to the Department of Corrections.

¶ 15 Additionally, defendant described his childhood as "medium-fair," but that he had no contact with his birth father while growing up, and he took the last name of " 'another guy' " his mother was with. Defendant stated that he was diagnosed with learning disabilities and attention deficit hyperactivity disorder. When he was in the fifth grade, defendant was hospitalized for behavioral problems for one month. Although he had been given medication to calm himself, he stopped taking the medication when he was released. Defendant further admitted that he first drank alcohol and smoked cannabis at the age of 13.

¶ 16 In mitigation, defense counsel argued that the minimum sentence of 31 years was warranted. Defense counsel stated that defendant's age of 19 increased the likelihood that he could be rehabilitated. Counsel further commented that defendant's childhood was "screwed up" because of his membership in a street gang, the absence of his biological father (exemplified by defendant's taking the last name of "one of his mother's boyfriend[s]"), his hospitalization for behavioral issues, and his drug use. Counsel also stated that only defendant's girlfriend—with whom he had recently had a baby—was consistently present in court during the trial. Counsel

concluded by reiterating that the minimum sentence was already "hefty," but it would at least afford defendant an opportunity to be rehabilitated.

¶ 17 When asked by the circuit court, defendant elected to make a statement in allocution, but only stated, "I'mma [*sic*] come back on my appeal because I didn't [*sic*] this, and I know I didn't that's pretty much it." Defendant made no further statement.

¶ 18 The court then noted that the factors in aggravation were "enormous," and it recounted that the motive for the shooting was "training a young person who got weak knees at the last moment, and you stepped in to show him how it's done, a gang shooting." The court further characterized defendant's actions as having a "wanton disregard for human life and a family man strapping his daughter into her car seat, in the face of his wife and his mother." After further describing defendant's background prior to the offense as "a life of violent crime," the court stated as follows.

> "And you're young. You're a young person. The potential for rehabilitation ***, but that's the only mitigation there is ***, your youth.
>
> And you can—you can turn your life around. But from what you just stated, you didn't do this, it's going to be a herculean task for you to do this.
>
> But you got to accept responsibility for what you did."

The trial court then sentenced defendant to 52 years' imprisonment.

¶ 19 Defendant filed a motion to reconsider sentence, asking that his sentence be reduced to the minimum of 31 years. Following a hearing, the court denied defendant's motion. The court then explained that defendant's sentence would be 52 years' imprisonment for attempted murder,

which included a mandatory 25-year firearm enhancement, and the remaining counts would all merge. Defendant's mittimus, however, lists a 27-year sentence for attempted murder (count 1), a 52-year sentence for attempted murder (count 4), and a 5-year sentence for aggravated discharge of a firearm (count 8). This appeal followed.

¶ 20 ANALYSIS

¶ 21 Defendant first contends that his sentence is excessive. In particular, defendant argues that the circuit court erroneously considered his claim of innocence as an aggravating factor and "failed to consider his personal history, his youth, and his potential for rehabilitation." Defendant asks that we reduce his sentence to the mandatory minimum of 31 years. In response, the State argues that defendant has forfeited this issue. Defendant acknowledges that this claim was not raised at the sentencing hearing or in a post-trial motion and is therefore forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant, however, asks that we review this issue under the plain error doctrine

¶ 22 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). Defendant argues that both prongs of the plain error doctrine apply. Under the first prong, he must prove "prejudicial error," *i.e.*, he must show both that there was plain error and that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* at 187. Under the second prong of the plain error doctrine, a defendant must show that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Id.* However, we must first determine whether any error occurred, for if there is no error, there is no plain error. *Id.*

¶ 23 Defendant's claim centers on the sentence imposed by the circuit court. In imposing a sentence, the circuit court must balance relevant factors, such as the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). The court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Id.* In addition, a court is not required to expressly outline its reasoning for sentencing, and absent some affirmative indication to the contrary (other than the sentence itself), we must presume that the court considered all mitigating factors on the record. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). Since the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, and the presence of mitigating factors neither requires a minimum sentence nor precludes a maximum sentence. *Alexander*, 239 Ill. 2d at 214.

¶ 24 We review a sentence within statutory limits for an abuse of discretion, and we may only alter such a sentence when it varies greatly from the spirit and purpose of the law, or if it is manifestly disproportionate to the nature of the offense. *Id.* at 212. So long as the trial court does not ignore pertinent mitigating factors or consider either incompetent evidence or improper aggravating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range. *Perkins*, 408 Ill. App. 3d at 762-63. This broad latitude means that this court cannot substitute its judgment simply because it might have weighed the sentencing factors differently. *Alexander*, 239 Ill. 2d at 212-13.

¶ 25 Defendant first argues that the circuit court erroneously considered his protestation of innocence during allocution as an aggravating factor. We disagree. "A trial court should not automatically and arbitrarily consider a defendant's insistence on his or her innocence as an

aggravating factor when sentencing him." *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011) (citing *People v. Ward*, 113 Ill. 2d 516, 529 (1986)). Under certain circumstances, however, a defendant's "continued insistence and concomitant lack of remorse 'may convey a strong message to the trial judge that the defendant is an unmitigated liar and at continued war with society.' " *Id.* (quoting *Ward*, 113 Ill. 2d at 528). These circumstances can include "the unshaken credibility of the victim." *Id.* (citing *People v. Barger*, 251 Ill. App. 3d 448, 468 (1993)). Under those circumstances, the court can consider a defendant's lack of remorse or denial of guilt as it affects his prospects for rehabilitation. *Id.*

¶ 26 Here, the circuit court did not automatically and arbitrarily consider defendant's claim of innocence as an aggravating factor. To the contrary, the court found defendant's relative youth to be a mitigating factor. It then expressed belief that defendant could "turn [his] life around," but noted that defendant's claim of innocence would make that a "herculean" task in the absence of him taking responsibility for his actions. These statements did not negate the mitigating factor of defendant's youth; rather, the court's statement acknowledged that defendant's claim would make it very difficult for defendant to redirect his life away from gang-related violence.

¶ 27 Moreover, defendant's claim of innocence was hollow: his conviction was supported by the identification of him as the shooter by two eyewitnesses—one of whom was within *a few feet* of defendant—who saw the shooting unfold in broad daylight while several neighborhood residents were outside. Even the victim, who at the time of the shooting was crouched over his 20-month-old daughter (and whom he had just placed in her car seat), was able to recall that the person who shot—and emptied—a revolver at him had a "dollar sign" tattoo on his face. In light of the "unshaken credibility" of not only the victim, but also two witnesses, the court could quite properly conclude that defendant's "continued insistence and concomitant lack of remorse"

rendered him " 'an unmitigated liar and at continued war with society.' " *Perkins*, 408 Ill. App. 3d at 763 (quoting *Ward*, 113 Ill. 2d at 528). As such, the court did not abuse its discretion in considering defendant's specious assertion of innocence with respect to his likelihood of rehabilitation. See *id.* Defendant's argument on this point is thus meritless.

¶ 28 Moreover, defendant's citation to *People v. Byrd*, 139 Ill. App. 3d 859 (1986), and *People v. Speed*, 129 Ill. App. 3d 348 (1984), does not alter our holding. In *Byrd*, the court held, "A more severe sentence may not be imposed because a defendant refuses to abandon his claim of innocence, ***." *Byrd*, 139 Ill. App. 3d at 866. This is contrary to our supreme court's subsequent holding in *Ward* that, under certain circumstances, a trial court *may* consider a defendant's claim of innocence. See *Ward*, 113 Ill. 2d at 528-30.

¶ 29 In *Speed*, the cause was on remand for resentencing, and at the resentencing hearing, the defendant admitted committing "some crime" but not the one he had been convicted of (and which had been affirmed on a prior appeal). *Speed*, 129 Ill. App. 3d at 349-50. The trial court stated that it had considered resentencing the defendant to ten years, but then noted that "[w]hen Mr. Speed said he didn't commit the crime which he stands charged and convicted again tilted the scale the other way." *Id.* at 351. It then sentenced the defendant to an 11-year term of imprisonment. *Id.* Here, the court's observation—that defendant's refusal to accept responsibility would be a substantial obstacle to turning his life around—did not indicate that the court decided to increase defendant's sentence after defendant's statement. Therefore, defendant's reliance on both *Byrd* and *Speed* is unavailing.

¶ 30 Defendant's argument that the circuit court failed to take into account his "personal history, his youth, and his potential for rehabilitation" fares no better. At the sentencing hearing, the court referred to defendant's PSI, which included defendant's age, by asking whether there

were any corrections or additions, and the State went through the PSI in detail during its argument in aggravation. Defense counsel argued that defendant's age enhanced defendant's potential for rehabilitation, and counsel also referred to the PSI in discussing defendant's prior record and behavioral issues. Defense counsel further noted for the court that the mother of defendant's infant son had been present during the proceedings, although no one else from defendant's family was. Moreover, the thrust of defense counsel's argument in mitigation was that even a minimum sentence was still "hefty" for someone of defendant's age. Following arguments, the court found defendant's age was the sole mitigating factor, but the "enormous" aggravating factors and the seriousness of the crime far outweighed that mitigation. The trial court had a superior opportunity to evaluate defendant's credibility, demeanor, and character, and we are prohibited from substituting our judgment for that of the trial court simply because we might have weighed the sentencing factors differently. *Alexander*, 239 Ill. 2d at 212-13.

¶ 31 As noted above, the circumstances of this offense were egregious: defendant shot an innocent individual six times while he was placing his young child in her car seat because defendant mistakenly believed the victim was a rival gang member, and defendant was retaliating against that gang for having "flashed signs and yelled stuff" at defendant's gang. Since defendant's sentence falls within the sentencing range, we cannot say that it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* at 212. As a result, the court did not abuse its discretion in imposing this sentence. *Id.* Since there is no error, there is no plain error, and we must honor defendant's forfeiture of this issue. See *Herron*, 215 Ill. 2d at 187.

¶ 32 Defendant's reliance upon *People v. Brown*, 2015 IL App (1st) 130048, is unavailing. In that case, the 16-year-old defendant was tried as an adult and convicted of aggravated battery

with a firearm and three counts of attempted first degree murder. *Id.* ¶ 1. On review, this court reduced defendant's sentence from 50 years to 31 years in part because the trial court "relied on the speculative evidence of defendant's gun jamming." *Id.* ¶ 47. The Brown court had further noted that the defendant had family support, and "his criminal record consisted only of a recent adjudication of delinquency for residential burglary." *Id.* ¶ 45. Here, defendant was not a juvenile, there was no speculative evidence that the circuit court considered (Alfaro's getting "weak knees"—that is, refusing to shoot someone—was established in his statement), defendant had no similar family support at trial (other than the mother of his son), and defendant's prior record was considerably more serious. *Brown* is thus distinguishable.

¶ 33 Defendant next contends that his sentence is an unconstitutional *de facto* life sentence pursuant to the proportionate penalties clause of the Illinois constitution. Defendant argues that as well as the reasoning of *Miller v. Alabama*, 567 U.S. 460 (2012), apply to him, despite the fact that he was 19 years old at the time of the offense. Defendant concludes that, since his sentence is unconstitutional as applied to him, we must either reduce his sentence to the minimum or remand this matter for resentencing. We review *de novo* whether a sentence is constitutional. *People v. Taylor*, 2015 IL 117267, ¶ 11.

¶ 34 The proportionate penalties clause of the Illinois constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A sentence violates the proportionate penalties clause if it is "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005) (citing *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). We may determine whether a sentence shocks the moral sense of the community by considering both objective evidence and

also "the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 35 Attempted first-degree murder, during which a defendant personally discharges a firearm that causes "great bodily harm, permanent disability, permanent disfigurement, or death," is a Class X felony to which an additional term of 25 years to natural life must be added. 720 ILCS 5/8-4(c)(1)(D) (West 2014). Class X felonies have a sentencing range of 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2014). Thus, defendant's sentencing range for attempted first degree murder during which he discharged a firearm causing great bodily harm was a minimum of 31 years and a maximum of natural life. The court sentenced defendant to a total of 52 years in prison, stating that it consisted of 27 years for the crime itself and 25 years for to firearm enhancement. Defendant may be released after serving 85% of this sentence (about 44 years), when he is 65. 730 ILCS 5/3-6-3(a)(2)(ii) (West 2014). Though it was not at the minimum end of the range, the court's sentence was well within the sentencing range.

¶ 36 In this case, the evidence established that defendant emptied a revolver into someone he believed was a rival gang member but was an innocent individual placing his child in a car seat while his wife and mother looked on. The victim's injuries required multiple surgeries (with three bullets still inside of him, affecting his ability to sleep), permanent displacement of his jaw that impairs his ability to eat, impaired vision in his right eye, permanent numbness on the right side of his face, six scars from the bullet wounds, a lengthy hospitalization, and near financial destitution. We cannot say that defendant's sentence of 52 years, for which he may be released after only 44 years, is disproportionate to this offense or otherwise shocks the moral sense of the community. *Sharpe*, 216 Ill. 2d at 487.

¶ 37 In addition, we disagree with defendant's claim that the reasoning of *Miller* should apply to him. *Miller* and its predecessors, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), "explicitly limited their scope to the sentencing of those who were under 18 years old at the time of their crimes." *People v. Horta*, 2016 IL App (2d) 140714, ¶ 84; see also *People v. Pittman*, 2018 IL App (1st) 152030, ¶¶ 30-31; *People v. Thomas*, 2017 IL App (1st) 142557, ¶ 28.[2] Although defendant discusses various studies on brain development in juveniles and young adults, as well as the life expectancy of prisoners (defendant admits "there is no definitive report" on that subject), there is nothing in the record to show that it was presented and examined at the trial court level, and this is not the appropriate forum to first raise this argument. In *People v. Thompson*, 2015 IL 118151, the 19-year-old defendant argued for the first time on appeal that *Miller* should apply with equal force to him. *Id.* ¶¶ 18-21. Our supreme court, however, deferred consideration of the issue because, in as-applied challenges, "it is paramount that the record be sufficiently developed," and the record in that case contained nothing as to the " 'evolving science' on juvenile maturity and brain development" and its application to the circumstances in that case. *Id.* ¶ 38. We therefore decline defendant's invitation to expanding the reasoning of *Miller* to the case before us.

¶ 38 Furthermore, defendant's citation to various cases does not alter our holding. In *People v. House*, 2015 IL App (1st) 110580, ¶ 100, this court concluded that a 19-year-old defendant's mandatory life sentence was unconstitutional. In *People v. Williams*, 2018 IL App (1st) 151373, ¶ 24, the 19-year-old defendant was found guilty of two counts of first degree murder under an accountability theory and sentenced to mandatory natural life, but we held the sentence

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[2] Defendant also cites *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), a decision subsequent to *Miller*, but *Montgomery* did not expand the limited scope established in *Roper* and reaffirmed in *Graham* and *Miller*.

violated the proportionate penalties clause in part because "the circuit court had no discretion to consider individualized factors related to the defendant before imposing sentence." Finally, in *People v. Harris*, 2016 IL App (1st) 141744, ¶¶ 58, 69, we held that the mandatory 76-year sentence for the defendant who turned 18 a few months before the offense was unconstitutional because it was a *de facto* life sentence. These cases are all distinguishable because here, the defendant was neither sentenced to a mandatory natural life term, nor is his sentence—which may provide for release as early as age 65—a *de facto* life sentence. Accordingly, we reject defendant's claim that his sentence is an unconstitutional *de facto* life sentence.

¶ 39 Finally, defendant contends that his mittimus should be corrected to reflect only one conviction for attempted murder under the one-act, one-crime doctrine because all of his convictions were carved from the same physical act. The State agrees with defendant.

¶ 40 Under one-act, one-crime principles, a defendant cannot be convicted of multiple offenses "carved from the same physical act," where "act" is defined as "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). Instead, the circuit court must vacate less serious offense and impose sentence on the more serious offense. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004) (citing *People v. Garcia*, 179 Ill. 2d 55, 71 (1997)). One-act, one-crime challenges are subject to *de novo* review. *People v. Artis*, 232 Ill. 2d 156, 161 (2009). Finally, a violation of one-act, one-crime principles challenges the integrity of the judicial process and therefore passes the second prong of plain error analysis. *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009).

¶ 41 We agree with the parties. Defendant's most serious conviction for attempted murder was contained in count 4 of the indictment, which alleged that defendant committed the attempted murder while personally discharging a firearm and caused great bodily harm. 720

ILCS 5/8-4(c)(1)(D) (West 2012). We further note that, during a postsentencing hearing to correct the mittimus, the circuit court stated that all counts (including those alleging aggravated battery and aggravated discharge of a firearm) would merge into the attempted murder conviction, which no party challenged. It is well established that, where a sentence as indicated in the common law record conflicts with the sentence imposed by the trial judge as indicated in the report of proceedings, the report of proceedings controls and the common law record must be corrected. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993) (citing *People v. Casiano*, 212 Ill. App. 3d 680, 690 (1991); *People v. Thompson*, 51 Ill. App. 3d 447, 450 (1977)). As such, we must vacate the additional convictions on defendant's mittimus for this additional reason. Therefore, pursuant to Illinois Supreme Court Rule 615(b)(1), we correct defendant's mittimus to reflect only one conviction for attempted murder under count 4 of the indictment.

¶ 42 CONCLUSION

¶ 43 Defendant's sentence is neither excessive nor an unconstitutional *de facto* life sentence. We correct defendant's mittimus to reflect only one conviction for attempted murder.

¶ 44 Affirmed as modified.