2019 IL App (1st) 162296-U

No. 1-16-2296

Order filed June 13, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 21034
	)	
BEDNACO HARPER,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for first-degree murder and concealment of a homicidal death and his aggregate 40-year sentence are affirmed where the trial court did not err in refusing to provide the jury with an instruction on second-degree murder based on mutual combat, his trial counsel did not provide ineffective assistance, and the court did not sentence him excessively. Cause remanded, however, so defendant can file a motion in the trial court to correct his mittimus.

¶ 2 Following a jury trial, defendant Bednaco Harper was convicted of first-degree murder and concealment of a homicidal death. The trial court subsequently sentenced him to an aggregate total of 40 years' imprisonment, 35 years for murder and 5 years for concealment of a

homicidal death, which by law had to be served consecutively. On appeal, defendant contends that: (1) the trial court erred by refusing to provide the jury with an instruction on second-degree murder based on mutual combat; (2) his trial counsel was ineffective in multiple manners, but predominantly where, despite successfully filing a pretrial motion *in limine* to bar evidence of him cutting his arm while in an interview room at the police station, counsel allowed video evidence of him doing so to be given to the jury during its deliberations; (3) the trial court imposed an excessive sentence on him; and (4) his mittimus must be corrected to accurately reflect his convictions. For the reasons that follow, we affirm defendant's convictions and sentence, but remand the matter so defendant can file a motion to correct his mittimus in the trial court.

¶ 3 I. BACKGROUND

¶ 4 A. Pre-Trial

¶ 5 On November 7, 2011, the dead body of Jermaine Reynolds was discovered in a bedroom closet in an apartment belonging to defendant. The police subsequently took defendant into custody and placed him in an interview room at the police station from 5:50 p.m. on November 9 until just after midnight on November 11. During the time defendant was in the room, the police questioned him for periods of time and took him outside the room occasionally. But for the majority of the time, defendant was in the room by himself. And every minute he was in the room, the police recorded him except for when his attorney entered the room. The following is a synopsis of the video recording of defendant.

¶ 6 At approximately 5:50 p.m. on November 9, defendant entered the interview room. An hour later, the police informed defendant of his *Miranda* rights and he invoked his right to counsel. Thereafter, defendant was alone in the interview room, at times sitting on a bench and at

times laying on the bench. Over the next hour, defendant periodically used a small, unknown object to cut his left arm, sometimes using forceful slashes. On occasion, he rubbed the object back and forth against the bench, as if he were attempting to sharpen the object. At around 7:43 p.m., a police officer entered the room and took photographs of defendant's head, face, arms, hands and upper body. Once the officer left the room, a detective entered the room and informed defendant that he was under arrest for first-degree murder but had not yet been charged. Defendant sat back down on the bench and smoked a cigarette given to him by the detective. The detective left the room. At approximately 8 p.m., defendant attempted to tie something around his neck and appeared to pull that object while sitting down and while lying down. For about 15 minutes, defendant continued this behavior until he heard the detective about to enter his room at which point he removed the object from his neck and put it in his hands. The detective entered the room and informed defendant that his attorney had arrived. While waiting for his attorney, defendant did not harm himself. At around 8:21 p.m., his attorney entered the room, and the video went all black and contained no sound. The video and sound re-appeared at 8:48 p.m. when his attorney left the room.

¶ 7 For the next hour or so, defendant slept on the bench, appeared to cut his arm again and at times pulled the object around his neck. From about 10 p.m. the night of November 9 until 10:30 a.m. the following day, November 10, defendant mostly slept except for some instances where he left the interview room. From 10:30 a.m. until 1:08 p.m., defendant was awake, at times standing, walking around the room, sitting on the bench and eating food. At 1:08 p.m., defendant laid down on the floor and appeared to try and fall asleep, which lasted until about 2 p.m. Defendant then was awake and mostly sitting up, though he did lie down on the bench for a little while. Shortly before 3 p.m., defendant again rubbed the small, unknown object back and forth

against the bench, which he continued to do until about 3:10 p.m. when he left the room. When he returned some five minutes later, defendant sat on the bench and at times continued his motion of appearing to sharpen the object, but eventually, he laid back down on the floor.

¶ 8 At around 4:05 p.m., defendant stood up then sat on the bench, and again appeared to sharpen the object. Three minutes later, defendant used the object to cut his left wrist and arm several times over the course of the next 30 minutes. At 4:36 p.m., a detective informed defendant that the police had a search warrant to obtain his DNA, noticed his arm and asked if he needed a doctor. Defendant responded that he was fine. An officer proceeded to take defendant's DNA and left the room. Again alone in the room, defendant proceeded to cut his arm several times for a few minutes. At nearly 4:51 p.m., the video cut out and did not resume until 5:35 p.m.[1] When the video resumed, defendant had a bandage on his left arm and two detectives were in the process of giving him *Miranda* warnings. Afterward, defendant informed the detectives that the wounds on his arm were self-inflicted, he did not "plan on making it through this" and he "did not feel like living no more." For portions of the next two or so hours, defendant discussed what happened between him and Reynolds with the detectives. At around 7:15 p.m., the detectives left the room.

¶ 9 Over the next five and a half hours, defendant was in the interview room alone with periodic entrances by a detective. During this time, defendant laid down and slept, sat on the bench, and ate food. He also fiddled with his bandage, was able to remove portions of it from his arm, and at times, appeared to cut himself again. At 12:45 a.m. on November 11, a detective walked into the room and noticed that defendant's arm was bleeding through the bandage. The

[1] As will be explained more thoroughly later, while the jury was deliberating, defense counsel, with the State's agreement and the trial court's permission, edited portions of the video to remove instances of him cutting himself and subsequent medical treatment.

detective asked defendant if wanted to go to the hospital, and defendant agreed. At 1 a.m., defendant went to the hospital, and the recording stopped.[2]

¶ 10 The following month, a grand jury indicted defendant on three counts of first-degree murder, one count of armed robbery and one count of concealment of a homicidal death.

¶ 11 As the case proceeded toward trial, defendant filed a motion to suppress the statements made to the detectives, arguing that his emotional state, as evinced by his self-harming behavior and suicidal ideations, precluded him from appreciating and understanding the full meaning of his *Miranda* rights. The trial court denied the motion.

¶ 12 Defendant later filed a motion *in limine* requesting, in part, that the State be barred at trial from: (1) playing the portions of the video recording of him cutting his wrist; (2) commenting on him cutting his wrist; (3) referencing that he had to be transported to a hospital for treatment and a psychiatric evaluation following the incidents in the interview room; and (4) showing any of the photographs that depicted his self-inflicted wounds. The State did not object to defendant's requests and noted that it had already omitted these instances from the video it would play for the jury at trial. The trial court granted the motion *in limine* on these matters. Prior to trial, the State dismissed one of the additional counts of first-degree murder and the count of armed robbery.

¶ 13 B. Trial

¶ 14 1. The State's Case-in-Chief

¶ 15 In the State's case, the evidence showed that, in the beginning of November 2011, Robert Square, a friend of both defendant and Jermaine Reynolds, was staying at defendant's one-bedroom apartment located on the 4000 block of South Lake Park Avenue in Chicago. During the evening of November 3, Square and defendant went to the house of Reynolds' long-time

[2] This video was admitted into evidence at defendant's trial as People's Group Exhibit No. 70.

girlfriend, Lizabeth Henderson, to buy drugs from Reynolds. After buying drugs from Reynolds, Square returned to defendant's apartment. At some point that night, defendant, Reynolds and Square were all hanging out at defendant's apartment and watching a movie. Eventually, Square became tired and went to sleep in the bedroom on a bed, which is where defendant allowed him to sleep. According to Square, defendant preferred to sleep on a makeshift bed of pillows and blankets in front of the actual bed. That night the bedroom closet was open, and the closet had been open since Square had been staying at defendant's apartment.

¶ 16 The next day, around 10:30 a.m., as Square was leaving the apartment, he saw Reynolds coming back into the apartment with drugs. During that day, Henderson had been in contact with Reynolds and picked up her vehicle from him at defendant's apartment. Later in the day, Henderson talked to Reynolds on the phone.

¶ 17 According to Square, he returned to defendant's apartment a little after midnight on November 5. Defendant was there, but Reynolds was not. Square observed that defendant was acting "a little weird" and "getting mad" for no reason. Both of them used drugs, and eventually, Square decided to lay down in the bedroom. This time, he noticed that the closet was closed. Defendant, however, instructed Square to sleep in the living room instead, and Square complied. Meanwhile, during the day of November 5, Henderson was unable to get in contact with Reynolds, and other people she had talked to had not heard from him either. After 24 hours without contact, Henderson called the police to report Reynolds missing.

¶ 18 Two days later, an engineer at defendant's apartment building entered defendant's unit based on complaints of an odor in the apartment. As the engineer moved from the living room to the bedroom, he noticed the odor getting stronger. The engineer opened the closet in the bedroom and observed a pile of clothes lying on the floor. He tapped the pile with his foot and

felt something hard. He tapped again and suddenly, a jacket fell off the pile revealing the head of a human. The engineer called the management office, and someone there called the police.

¶ 19 After the police arrived at the apartment, Chicago Police Officer Joseph Scumaci, an evidence technician, observed Reynolds' dead body in the bedroom closet. With the help of other officers, Officer Scumaci processed the apartment for evidence. There was blood on various objects in the apartment, including a staple gun that was recovered next to the bedroom closet. Officers also recovered an "awl," an object with a metal point and wooden handle, a gold-colored horseshoe and a fake black revolver. After the evidentiary items were collected, they were tested. Testing revealed no latent fingerprint impressions on either the awl or staple gun, but did reveal blood on both objects. DNA analysis determined that the blood on both objects matched Reynolds and did not match defendant.

¶ 20 On August 8, 2011, Dr. Adrienne Segovia, an assistant medical examiner, performed an autopsy on Reynolds and concluded that his death was a homicide and caused by several sharp force injuries. Specifically, Dr. Segovia found 12 incised or sharp-cut wounds to various places on his head and body, 4 stab wounds to his head and neck, and 6 blunt force wounds to his head and body. Dr. Segovia also determined that Reynolds tested positive for Benzoylecgonine, ethanol, cocaine and morphine.

¶ 21 Within a couple days of Reynolds' body being discovered, the police placed defendant into custody and put him in an interview room at the police station. According to Chicago Police Detective Daniel Stanek, when the police interviewed any homicide suspect, they video and audio recorded the interview room so long as the suspect remained in custody. The recording of the interview room would continue even if the suspect left the room for some reason, such as a bathroom break. The recording would only stop if a suspect's attorney entered the room.

¶ 22 When Detective Stanek first met defendant, he observed injuries to defendant's head and arms, and as a result, had an evidence technician photograph defendant and his injuries. Detective Stanek asked defendant about the injuries to his arms, and defendant told him that they had occurred the previous day. Later, while defendant was in the interview room, Detective Stanek along with Detective Scott Reiff questioned him about Reynolds' death. At trial, Detective Stanek did not recall asking defendant about his head injury and testified that defendant never indicated that the injuries had been caused by Reynolds.

¶ 23 Additionally at trial, Detective Stanek identified People's Group Exhibit No. 70 as seven DVDs which contained the unedited recording of defendant in the interview room. Detective Stanek also identified People's Exhibit No. 71 as a single DVD containing a portion of defendant's time in the interview room, in particular a portion of his and Detective Reiff's questioning of defendant. The State offered People's Exhibit No. 71 into evidence and played the DVD for the jury. The DVD contained approximately 20 minutes of Detectives Stanek and Reiff interviewing defendant on November 10, 2011, about Reynolds' death, spread over four distinct clips. Although the audio was difficult to hear occasionally, the following is what those clips depicted.

¶ 24 In the first clip, time stamped from 6:50 p.m. to 7:08 p.m., defendant informed the detectives that Reynolds would not give him back his "[debit] card" so the two exchanged "words" after which Reynolds hit him. The detectives insinuated that Reynolds had taken and used the card, apparently because defendant owed him money, a fact that defendant acknowledged. Defendant claimed it was only $40 as opposed to $600, which is what the detectives alleged. According to defendant, after Reynolds hit him, the two became involved in a "tussle" that got "out of hand" where defendant punched Reynolds back. During the fight,

defendant acknowledged "snapp[ing] out" and continuing to hit Reynolds using a "nail punch." The pair fought in various places in defendant's apartment, and the fight lasted several minutes. At some point during the fight, though defendant could not pinpoint exactly when, Reynolds pulled out a gun which defendant thought was real, and the two began wrestling over it. Eventually, defendant learned the gun was a toy, but "it was too late" according to him. When pressed by the detectives whether the gun was his, defendant denied it belonged to him.

¶ 25 According to defendant, eventually Reynolds stopped breathing, which caused defendant to "panic[]" and drag Reynolds' body to the bedroom closet, where he put clothes on top of the body. Defendant was adamant to the detectives that he did not want Reynolds to die. Defendant then left his apartment, but returned at some point. He thought about calling somebody, but was still panicked and did not know what to do. Later that night, Square came over to defendant's apartment. Defendant wanted to tell Square what happened, but he did not know what to say and did not tell Square anything. Square stayed the night, but slept in the living room. Defendant told the detectives that, the following day, he left his residence and did not stay there the rest of the weekend.

¶ 26 In the second clip, time stamped from 7:08 p.m. to 7:10 p.m., Detective Reiff confirmed with defendant that he and Reynolds were arguing about the debit card when Reynolds punched him. Detective Reiff also confirmed with defendant that he punched Reynolds back and the pair began "tussling." According to defendant, after fighting in the living room and hallway of the apartment, Reynolds fell to the ground. Because Reynolds kept moving and trying to get up, defendant grabbed a knife from the kitchen counter and hit Reynolds with it once in his face. Defendant admitted to the detectives that he "f*** up" and "lost it."

¶ 27 In the third clip, time stamped from 7:11 p.m. to 7:12 p.m., defendant acknowledged that he lied to the detectives when he said Reynolds had the gun. And in the final clip, time stamped from 7:13 p.m. to 7:14 p.m., defendant acknowledged putting clothes on top of Reynolds' body because he did not know what to do.

¶ 28 Detective Stanek further testified that, during the interview, defendant never informed him that Reynolds had the awl, staple gun or horseshoe in his hand. Detective Stanek added that, although defendant initially informed him that Reynolds had threatened defendant with a gun, defendant later admitted that the gun was fake and Reynolds never used it. According to Detective Stanek, throughout the interview, defendant only stated that Reynolds had hit him with his hands. Detective Stanek acknowledged that, although he requested forensic testing of the gold-colored horseshoe, he was unsure if it was actually tested.

¶ 29 At the conclusion of the State's case, it sought to admit all of its exhibits into evidence, including People's Group Exhibit No. 70. Defense counsel did not object to any of the exhibits' admission, and the trial court granted the State's request.

¶ 30 2. The Defense's Case

¶ 31 In the defense's case, defendant testified that, in November 2011, he had been recently laid off from a woodworking company where he had worked for seven years. At the time, he was receiving unemployment benefits, and the money would be deposited to a debit card every two weeks. That money was his primary source of income. Although defendant was familiar with Reynolds from around the neighborhood for several years, only in the year 2010 had they become friendly.

¶ 32 On November 3, 2011, Reynolds came over to defendant's apartment. The next day, around 6 p.m., defendant was looking around his apartment for his wallet that contained his debit

card, though he was relatively certain he had left it on the kitchen counter the previous night. Around this time, Reynolds returned to the apartment and sat down. Defendant could tell that Reynolds was under the influence of drugs and even observed Reynolds take part of a Methadone tablet and use heroin. Meanwhile, defendant continued to search for his wallet, but to no avail. Defendant then accused Reynolds of taking his wallet, though Reynolds denied it. Defendant told Reynolds that he was the only person at the apartment over the past day, and the pair subsequently "exchanged words." Defendant asked Reynolds to leave his apartment, and defendant told him that he would be contacting the police. Reynolds responded that, if he did, "the folks would be at you," which defendant interpreted as a threat. As defendant attempted to open the door of his apartment so Reynolds would leave, Reynolds took the keys in his hand and punched defendant in the face, using the metal carabiner key chain to make contact. Reynolds attempted to punch defendant again, but defendant tripped over a barstool and fell to the ground.

¶ 33 Defendant tried to get up, but Reynolds kept punching him in the head, still with the keys in his hand. Defendant was able to crawl over to a tool bag, grabbed an awl and hit Reynolds with it in the thigh area, which pushed Reynolds off of defendant. After defendant stood up, he attempted to retreat to the backdoor of his apartment to leave, but felt something in his back. The pair continued to fight into the hallway of defendant's apartment, where Reynolds tried hitting defendant with a staple gun while defendant fought back with the awl. Reynolds and defendant made their way back to defendant's bedroom, where the fighting persisted. In the bedroom, Reynolds grabbed a decorative horseshoe off a dresser and used it as they both continued to fight. After leaving the bedroom, the fighting continued down the hallway and into the kitchen and living room, where both men fell to the ground and began wrestling. As they were wrestling on the floor, defendant dropped the awl and things became "blurry" for him. At some point,

defendant grabbed a knife, and Reynolds bit defendant's hand. They also wrestled over the knife for a little bit, but eventually, the two became separated. When Reynolds attempted to attack defendant again, defendant hit him with the knife in the head.

¶ 34 Thereafter, because defendant was bleeding, he ran to the sink to put water on his face and he spit out a tooth. Defendant observed that Reynolds tried to get up, but could not, and eventually, Reynolds stopped moving. Defendant estimated the fight lasted between five and seven minutes. Defendant was in shock and did not call the police, but explained at trial that he did not know what to do and simply could not "absorb what had happened." Defendant eventually moved Reynolds' body to the bedroom "to try to figure out what to do." Defendant left his apartment and sat at a local park for a few minutes before returning to his apartment. Defendant left the apartment again and went to a friend's house, where he stayed for the weekend before being taken into custody by the police.

¶ 35 At trial, defendant testified that he believed his actions that day saved his life. He acknowledged that, when he was interviewed by the police, he initially lied to them by saying he had been robbed with a gun. Defendant further acknowledged not telling the police that Reynolds used keys, a staple gun or the horseshoe to attack him, but explained that the police never asked him what weapons Reynolds had used. Defendant identified several photographs of him taken at the police station that depicted various injuries to his head and body, which he asserted were from the fight with Reynolds. While defendant testified that he told the police those injuries were caused by Reynolds, he was not sure if it occurred on camera in the interview room, though he later testified that he only discussed the fight with the detectives while in the interview room. And, according to defendant, some of those discussions were not included in the video played for the jury. Defendant also disputed much of the timeline of events testified to by

Square during the State's case, in particular that Square had stayed at his apartment before the fight with Reynolds.

¶ 36 3. The State's Rebuttal Case

¶ 37 In the State's rebuttal case, Detective Stanek testified that he did not have any conversations with defendant that were not recorded, defendant never stated that the injuries on his body were caused by Reynolds, and defendant never mentioned Reynolds using anything other than his fists.

¶ 38 4. Jury Instructions Conference

¶ 39 During the jury instructions conference, defense counsel requested an instruction on self-defense and, with the agreement of defendant, instructions on second-degree murder based on both serious provocation and an unreasonable belief of self-defense. Counsel argued that defendant was hit in the head with a weapon in his own home, which constituted serious provocation. The State objected to such an instruction, arguing that being hit in the head did not constitute serious provocation. The trial court allowed the instruction on self-defense and an instruction on second-degree murder based on an unreasonable belief of self-defense, but, without explanation, denied an instruction on second-degree murder based on serious provocation.

¶ 40 Following the instructions conference, the trial court discussed with the parties what evidence would be sent to the jury during deliberations. The court mentioned the video of defendant in the interview room and noted that the State only played a portion of the video, which it could provide to the jury. The State, however, remarked that it admitted the entire video of defendant in the interview room—all seven DVDs—into evidence, and it wanted both People's Group Exhibit No. 70 and People's Exhibit No. 71 to go back to the jury. The court

highlighted defendant's testimony that some things he told the police were not included in the portions of the interview played for the jury and asserted that the jury was therefore entitled to all seven DVDs. Defense counsel did not object, and the court proceeded to discuss the photographic exhibits.

¶ 41 The following day, defense counsel asked the trial court to reconsider its denial of the second-degree murder instruction based on serious provocation. Counsel argued that there was sufficient evidence of mutual combat between defendant and Reynolds, and defendant was entitled to have the jury instructed accordingly. Counsel highlighted that, based on defendant's testimony, he was not acting in self-defense after the fight was initiated by Reynolds, but rather was an active and willing participant. In response, the court asked if counsel wanted to withdraw the self-defense instruction, but counsel did not. The State replied that mutual combat was inapplicable because, based on defendant's testimony, he acted in self-defense to protect himself from Reynolds. After hearing the parties' arguments, the court denied the motion to reconsider, again without explanation.

¶ 42 5. Closing Arguments

¶ 43 In the State's closing argument, it asserted that defendant "snapped," "went overboard" and committed first-degree murder by killing Reynolds. The State posited that defendant's testimony was merely a concocted "story" developed over the past couple years, which was supported by defendant being a self-admitted liar. The State highlighted defendant's lie to the police about being robbed and noted that, although he claimed at trial that Reynolds used the staple gun against him, it was actually Reynolds' blood that was found on the object, not defendant's. In the State's argument, it did not specifically mention the video evidence.

¶ 44 In defendant's closing argument, his defense counsel asserted that Reynolds' death resulted from his own actions when he attacked defendant after defendant asked about the debit card. According to counsel, Reynolds became angry, refused to leave defendant's apartment and then hit defendant over the head. Counsel posited that, when defendant was on the ground, he grabbed anything he could to protect himself, which happened to be the awl, and used it against Reynolds. Counsel concluded that defendant never intended to kill Reynolds and only acted to save his own life that night. Lastly, counsel posited that, even if the jury did not believe that defendant acted reasonably in protecting himself, the jury could find that he acted under an unreasonable belief of the need to defend himself.

¶ 45 During argument, defense counsel also commented on defendant's time in the interview room and the questioning of him by the police. Counsel asserted that defendant "was there over the course of several days" yet the jury only "heard 20 minutes of that interview." Counsel continued:

> "The State played for you the portions of the interview that they wanted you to hear. There are three days' worth of video that you are going to have access to. You are going to have in the jury room with you seven disks. *** [T]hose three days that [defendant] sat in Interview Room 7 at the police station. You will have those. You will have a TV. Feel free to play that video as much as you want. Play the parts that they showed you, play other parts. Look at it yourself and see what [defendant] said about what happened that night because that is what matters."

¶ 46 In rebuttal, the State remarked that the jury could watch defendant's entire interview with the police and observe firsthand that defendant lied at trial about his version of events.

¶ 47 6. Jury Deliberations and Verdict

¶ 48 After the jury was sent to the jury room to begin its deliberations, but before the exhibits were sent back, one of defendant's attorneys acknowledged that she told the jury that it could watch all of the video of him in the interview room. But counsel noted that part of the recording showed defendant cutting his arm, which was subject to the pretrial *in limine* order, and another part showed defendant invoking his right to counsel, which the State and counsel had previously agreed would not be mentioned at trial. The trial court inquired if those portions of the video could be edited out. While the State agreed they could be, it expressed concern with whether that could happen immediately because the State's audio-video specialist was not present. Defendant's other attorney stated he could remove the portion of the video showing defendant cutting himself and when he invoked his right to counsel. The State, however, noted that, while defendant was in the interview room, he cut himself multiple times, the issue of his arm bleeding came up "numerous times," and he made multiple references to not wanting to live. Defendant's attorney responded that she was not suggesting every reference be edited out, but rather there was "a portion early on [in the video] where you see him doing it and which goes on for awhile" as well as a portion where he received medical treatment in the room. The State agreed with editing the video in this manner, and the court noted that the jury may not even ask for the video, but if it did, the video would be ready. Defendant's attorney proceeded to edit the video accordingly.

¶ 49 It is unclear from the record what time the jury began its deliberations, but at 3 p.m. on the same day the deliberations began, the jury sent out a note requesting the transcript of defendant's trial testimony and the DVDs. At the time, defendant's testimony had not yet been transcribed and his attorney was still in the process of editing the video. With no objections from

either party, the trial court responded to the jury that the transcript was not available yet, the video would be available shortly and to continue deliberating.

¶ 50 At 4:05 p.m., the jury sent out another note, asking if it could just see the transcript of the portion of defendant's testimony where he discussed fighting with Reynolds in the kitchen and when defendant picked up the knife. As the parties discussed the note and attempted to contact the court reporter to find out when the transcripts would be compete, defendant's other attorney came back with the edited video. At 4:20 p.m., the trial court responded to the jury that the transcript of defendant's testimony would be available in approximately 30 minutes, and it was sending the video back.

¶ 51 At 5:25 p.m., without having been given the transcript of defendant's trial testimony, the jury informed the trial court that it had reached verdicts. The jury found defendant guilty of first-degree murder and guilty of concealment of a homicidal death. Defense counsel requested that the jury be polled, and each member of the jury confirmed the verdicts.

¶ 52 7. Posttrial

¶ 53 Defendant filed a motion for new trial, arguing in part that the trial court erred in denying his second-degree murder instruction based on serious provocation because the court ignored the evidence of mutual combat. In the motion, counsel stated that, following the jury's deliberations, she met with the jurors for nearly 45 minutes and asked whether a provocation instruction based on mutual combat would have changed their verdicts. According to counsel, "[t]he answer, nearly unanimous, was yes, that such an instruction *could have* and *likely would have* changed their verdict in this case." (Emphasis in original.) Counsel also highlighted an anonymous letter received by her from one of the jurors approximately a week after the jury rendered its verdicts. In the letter, the juror stated that the "experience has left me a little sad and second guessing my

decision. I felt the need to reach out to thank you for addressing us once the trial ended. I hope you will use my letter in the event that a future trial on [defendant] will include the 'combat' language you spoke about. There would have been a different outcome! Peace, to me, comes in that I did follow the law that was given to us. Juror #33157883." (Emphasis in original.) Counsel posited that the letter "highlight[ed] exactly why the provocation instruction" had been needed.

¶ 54 The trial court denied defendant's motion for new trial, finding that the evidence failed to show any mutual combat, but rather only showed defendant defending himself from Reynolds. The court added that it was troubled by the juror letter as an attempt to impeach the jury's verdicts and refused to give the letter any weight. The case proceeded to the sentencing phase.

¶ 55 8. Sentencing

¶ 56 Defendant's presentence investigative report revealed that he had three prior felonies: for theft in 1984, for burglary in 1993 and for burglary in 1999. While defendant was incarcerated on one of his felony convictions, he obtained a woodworking certification. Defendant later worked as a woodworker for seven years before being imprisoned for the instant offenses. Prior to being a woodworker, defendant was a self-employed property manager for 17 years. The report revealed that, in defendant's childhood, he suffered emotional and physical abuse from his father, and later in life developed substance-abuse issues.

¶ 57 At defendant's sentencing hearing, the State presented three victim impact statements, including one written by Reynolds' mother. Defendant also spoke during the hearing, asserting that, on November 4, 2011, he faced two options: defend himself from Reynolds who initiated the fight or die.

¶ 58 In the State's argument, it observed that defendant tried to hide the evidence of his crime and concealed Reynolds' body in his closet. The State highlighted defendant's past criminal

history and noted that he had still not accepted responsibility for his actions. The State requested defendant be sentenced to the maximum allowable by law.

¶ 59 In response, defense counsel noted that defendant was 52 years old at the time of sentencing and would most likely never leave prison, regardless of the sentence. Counsel acknowledged defendant's felony background, but highlighted that the most recent felony occurred in 1999 and none of the felonies were violent offenses. Counsel also noted that defendant's presentence investigative report revealed a troubled childhood consisting of emotional and physical abuse. Counsel observed that the instant offenses occurred inside defendant's apartment and stemmed from Reynolds, who was under the influence of various narcotics, taking defendant's debit card, which at the time was his only source of income. Counsel argued that, although the jury did not believe him, defendant truly believed he needed to defend himself. Although counsel did not request a specific sentence, she requested one closer to the minimum based on the mitigating facts of the case.

¶ 60 The trial court ultimately sentenced defendant to a total of 40 years' imprisonment, 35 years for murder and 5 years for concealment of a homicidal death, which by law had to be served consecutively. The court noted that it had considered defendant's presentence investigative report, the parties' arguments, the victim impact statements, the statutory factors in aggravation and mitigation, and the other mitigating circumstances. The court highlighted the trial evidence that defendant stabbed Reynolds several times with an awl and a knife after an argument that began because defendant thought Reynolds had stolen his debit card. Based on Reynolds' wounds, the court asserted that defendant killed him "in a very brutal fashion" and left his body in the closet. The court observed that, despite being in custody, defendant's family could still visit him, whereas Reynolds' family had "no such luxury."

¶ 61 Defendant unsuccessfully moved the trial court to reconsider the sentence, and he subsequently appealed.

¶ 62 II. ANALYSIS

¶ 63 A. Second-Degree Murder Instruction

¶ 64 Defendant first contends that the trial court erred by refusing to provide the jury with an instruction on second-degree murder based on serious provocation because there was some evidence at trial showing that he killed Jermaine Reynolds while engaged in mutual combat.

¶ 65 Where the evidence at trial supports a jury instruction on the defense's theory of second-degree murder, the defendant is entitled to have the jury instructed accordingly. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). The evidentiary threshold is minimal, and so long as "*some evidence*" exists that, if believed by the jury, would support that theory, the instruction must be given. (Emphasis in original.) *People v. McDonald*, 2016 IL 118882, ¶ 25; see also *People v. Melecio*, 2017 IL App (1st) 141434, ¶ 102 ("The standard for determining whether a defendant is entitled to a second degree murder instruction is whether defendant identified some evidence in the record that, if believed by the jury, would reduce the offense to second degree murder.") When determining whether some evidence exists, the trial court may not weigh the evidence or determine whether the evidence is credible. *McDonald*, 2016 IL 118882, ¶ 25. That is to say, the defendant's own words, supported by nothing else, are sufficient to warrant an instruction on second-degree murder. See *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 31 *overruled on other grounds by People v. Clark*, 2018 IL 122495 (fines and fees issues). Despite the fact the trial court may not weigh the evidence or determine the credibility of that evidence in deciding whether to allow an instruction on second-degree murder, we review its ruling for an abuse of

discretion, which occurs only when its ruling was arbitrary or unreasonable to the degree that no reasonable person would agree. *McDonald*, 2016 IL 118882, ¶¶ 32, 42.

¶ 66 As relevant here, first-degree murder occurs when a person, who performs the acts that cause death and without lawful justification, (1) intends to kill the victim, (2) knows that his acts will cause the victim's death, or (3) knows that his acts create a strong probability of death or great bodily harm to the victim. 720 ILCS 5/9-1(a)(1)-(2) (West 2010). Whereas self-defense under the proper circumstances can completely justify the killing of another person (720 ILCS 5/7-1(a) (West 2010)), the killing of another person may be mitigated from first-degree murder to second-degree murder under other circumstances. *McDonald*, 2016 IL 118882, ¶ 59.

¶ 67 Second-degree murder occurs when a person commits the offense of first-degree murder, but either of two mitigating factors is present: (1) sudden and intense passion resulting from serious provocation by the victim or (2) an unreasonable belief of the need to use self-defense. 720 ILCS 5/9-2(a) (West 2010); *McDonald*, 2016 IL 118882, ¶ 59. "Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2010). There are only four categories of provocation recognized by our supreme court as severe enough to constitute serious provocation: (1) substantial physical injury or assault, (2) illegal arrest, (3) adultery with the offender's spouse, and (4) mutual combat or quarrel. *McDonald*, 2016 IL 118882, ¶ 59. Defendant only argues that mutual combat is relevant.

¶ 68 "Mutual combat is a fight or struggle that both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *Id.* The crux of mutual combat "is a shared intent to fight between the parties" involved. *Camacho*, 2016 IL App (1st) 140604, ¶ 35. Mutual combat does not exist where the evidence reveals that the defendant was an unwilling participant in a fight

and acted only to defend himself. *Id.* ¶ 36. And to mutually fight upon equal terms means that the provocation by the victim "must be proportionate to the manner in which the accused retaliated." *People v. Austin*, 133 Ill. 2d 118, 126-27 (1989); see also *McDonald*, 2016 IL 118882, ¶62 (re-affirming that equal terms means that the provocation by the victim must be proportionate to the manner in which the accused retaliated).

¶ 69 In this case, the evidence did not show that defendant entered the fight with Reynolds willingly nor did it show that, upon a sudden quarrel and in hot blood, they mutually fought upon equal terms. The only evidence that could have supported a second-degree murder instruction based on mutual combat was defendant's own words, both to the police shortly after killing Reynolds as shown in the video recordings and his testimony at trial. While defendant's trial testimony was not completely consistent with the statements he made to the police in November 2011, he was consistent in one critical aspect: his actions were all in an effort to defend himself from Reynolds. Defendant was adamant that, after he confronted Reynolds about the debit card and the two exchanged words, Reynolds began punching him. And in response, defendant fought back. Later during the fight, according to defendant's trial testimony, he tried to escape his apartment, but felt something in his back, causing him to once again engage in the fight with Reynolds. Furthermore, at trial, defendant was resolute that he believed his actions saved his life.

¶ 70 The actions by defendant revealed unmistakably that he did not share the intent to have a physical fight with Reynolds, but rather "found himself the unwilling participant in a fight and acted only to defend himself from attack." *People v. Delgado*, 282 Ill. App. 3d 851, 859 (1996). Where this was the case, defendant was not entitled to a second-degree murder instruction based on mutual combat. See *id.*; see also *Camacho*, 2016 IL App (1st) 140604, ¶ 38 (holding that the defendant was not entitled to a provocation instruction where his "testimony established that his

actions were defensive as he feared for his life and did not suggest a willingness to enter into the fight with [the victim]"); *People v. Flores*, 282 Ill. App. 3d 861, 868 (1996) (holding that the defendant "was not entitled to a mutual combat instruction based on his testimony that he stabbed [the victim] in self-defense after [the victim] attacked him"); *People v. Lewis*, 229 Ill. App. 3d 874, 881 (1992) (holding that "[s]truggling with an attacker in an effort to ward off or defend one's self against an assault is not sufficient to warrant a provocation instruction.")

¶ 71 The evidence also did not show that, upon a sudden quarrel and in hot blood, defendant and Reynolds mutually fought upon equal terms. As previously noted, the phrase "equal terms" means that the provocation of the victim "must be proportionate to the manner in which the accused retaliated." *Austin*, 133 Ill. 2d at 126-27. Here, defendant testified that, at various times, Reynolds attacked him with keys, in particular the metal carabiner key chain, a staple gun and a horseshoe, all solid objects. However, defendant responded by attacking Reynolds with a knife and an awl, which looked like a screwdriver and had a pointed, metal head, and stabbed him several times. The knife and awl were undoubtedly more dangerous weapons than the keys, staple gun and horseshoe, and defendant's use of those weapons to stab Reynolds several times was vastly disproportionate to Reynolds' alleged use of the keys, staple gun and horseshoe to hit defendant. See *People v. Sutton*, 353 Ill. App. 3d 487, 496 (2004) (finding that the defendant responded disproportionately to being hit by the victim with a roller stake when he stabbed the victim 23 times).

¶ 72 Nevertheless, defendant argues that the evidence in his case is similar to *People v. Phillips*, 159 Ill. App. 3d 142 (1987), and therefore, the second-degree murder instruction based on mutual combat was warranted. In *Phillips*, the evidence at trial, mostly the defendant's testimony, revealed that he brought a knife to work to frighten his boss so that his boss would

stop harassing him. *Id.* at 143, 146. When the defendant's boss observed the knife, he grabbed it from the defendant and swung it at the defendant, which resulted in the defendant's wrist being nicked. *Id.* at 146. After the defendant and his boss fought, the boss dropped the knife, and they both wrestled for the weapon. *Id.* The defendant gained control of the knife, and in a state of panic, he stabbed his boss once or twice, but then began stabbing his boss uncontrollably, who died as a result of the stab wounds. *Id.* During the jury instructions conference, the trial court provided the jury with instructions based on self-defense and an unreasonable belief of self-defense, but refused to provide the jury with an instruction on serious provocation. *Id.* at 147. Ultimately, the jury found the defendant guilty of first-degree murder. *Id.*

¶ 73 On appeal, the defendant argued that the trial court erred when it refused to provide the jury with an instruction based on serious provocation. *Id.* This court observed that the jury could have found that the defendant intended to kill his boss from the moment he armed himself with the knife at work. *Id.* at 148-49. But the court asserted that the jury could have equally found the defendant was provoked into using the knife to kill his boss during the heat of mutual combat when his boss attempted to stab him with the knife. *Id.* Because of both possibilities, the appellate court found that the defendant was entitled to have the jury instructed on serious provocation and a new trial was warranted. *Id.* at 149-150.

¶ 74 Yet, as pointed out by this court in *Delgado*, 282 Ill. App. 3d at 859, the *Phillips* court failed to "explain[] how a fight between two individuals, one of whom does not wish to fight and acts only in self-defense, can be considered 'mutual,' a term that connotes a shared or common desire." Based on the *Phillips* court's failure to explain this critical aspect of a mutual combat theory, the *Delgado* court declined to follow the reasoning in *Phillips*. *Id.* And this court in *Camacho*, 2016 IL App (1st) 140604, ¶ 41, further agreed with *Delgado* and declined to follow

the reasoning in *Phillips.* Given the weight of authority against *Phillips*, we find defendant's reliance on the decision unpersuasive. Furthermore, in *Phillips*, the defendant's boss attempted to stab him with a deadly weapon, and in response, the defendant used that same deadly weapon and stabbed his boss. In contrast, here, Reynolds hit defendant with solid objects, and in response, defendant stabbed Reynolds with the awl and knife several times. Thus, *Phillips* is also inapposite.

¶ 75 In sum, where the evidence did not show that defendant entered the fight with Reynolds willingly nor did it show that, upon a sudden quarrel and in hot blood, they mutually fought upon equal terms, the trial court did not abuse its discretion when it refused to give the jury a second-degree murder instruction based on mutual combat.

¶ 76 B. Ineffective Assistance of Trial Counsel

¶ 77 Defendant next contends that his trial counsel provided ineffective assistance where, despite filing a successful pretrial motion *in limine* to bar any reference of him cutting himself while being held in the interview room, counsel failed to contemporaneously object to the State's admission of the entire video recording of his time in the interview room, later agreed that the entire video could be sent back to the jury and then failed to remove portions of that video that showed him cutting himself even though the defense had the opportunity to edit the video. Defendant also argues that, in light of counsel's failure to object to the admission of the entire video into evidence, a competent defense attorney would have had him explain at trial why he was emotional while in the interview room and then used that explanation to argue to the jury that his emotional state affected the reliability of his statements to the police. Additionally, defendant posits that these instances of ineffective assistance were compounded when, during closing argument, counsel misstated some of the trial evidence and implored the jury to watch

the entirety of his interview with the police to compare his statements to them with his trial testimony, which had the effect of highlighting the State's attempt to impeach his credibility.

¶ 78 A criminal defendant is guaranteed the effective assistance of counsel under both the United States and Illinois Constitutions. *People v. Peterson*, 2017 IL 120331, ¶ 79 (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). To establish that trial counsel was ineffective, the defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Peterson*, 2017 IL 120331, ¶ 79. Under this standard, he must show that his counsel's performance was deficient and the deficiency prejudiced him. *Strickland*, 466 U.S. at 687. More specifically, the defendant needs to show that his counsel's performance "fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Peterson*, 2017 IL 120331, ¶ 79. A " 'reasonable probability' " is " 'a probability sufficient to undermine confidence in the outcome' " of the proceeding. *People v. Simpson*, 2015 IL 116512, ¶ 35 (quoting *Strickland*, 466 U.S. at 694). Both elements of the *Strickland* test must be met (*Peterson*, 2017 IL 120331, ¶ 79), and we may analyze them in any order. *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 79 In this case, trial counsel filed a successful pretrial motion *in limine* that barred the State from, in relevant part, introducing any evidence that defendant cut his arm while in the interview room. At trial, the State played for the jury only 20 minutes of video from defendant's time in the interview room, specifically portions where he discussed the killing of Reynolds with the detectives, yet the State sought to admit the entirety of this video, or approximately 30 hours' worth, into evidence. Without an objection by trial counsel, the trial court allowed all of this video—People's Group Exhibit No. 70 which was seven DVDs—to be admitted into evidence. And during closing argument, trial counsel referenced that the jury had only seen a portion of

defendant's interview with the police yet there was additional video that the State did not play. And counsel implored the jury to watch that unseen video to determine what defendant said about his fight with Reynolds. In response to counsel's argument, the State then referenced defendant's entire interview with the police and that the jury could determine for itself that defendant was lying at trial about his version of events.

¶ 80 After closing arguments, trial counsel realized that she told the jury that it could watch additional video of defendant despite portions being subject to the pretrial *in limine* order. Eventually, the parties and the trial court agreed that counsel could remove a portion of the video "early on where" defendant cut himself, "which goes on for awhile," as well as a portion where he received medical treatment in the interview room. Despite this editing, the video that ultimately went back to the jury during deliberations contained multiple clips where defendant can be seen cutting his wrist and discussing the bleeding of his wrist.

¶ 81 Although trial counsel acted in this manner, we need not decide whether her actions fell below an objective standard of reasonableness, as we may analyze the prejudice component first. See *Hale*, 2013 IL 113140, ¶ 17. And here, we find that defendant was not prejudiced by counsel's actions.

¶ 82 At the core of defendant's contention concerning trial counsel's ineffectiveness is the fact that, during deliberations, the jury received video that showed him cutting his wrist and making references to his arm bleeding. However, the jury did not have access to this video until well into its deliberations. The trial court sent back the seven DVDs at 4:20 p.m., and the jury returned guilty verdicts just over an hour later at 5:25 p.m. The seven DVDs lasted more than 30 hours and only small portions of those 30 hours contained video of defendant cutting himself or discussing the bleeding of his arm. It is mathematically improbable that, in the hour the jury had

access to the entire video of defendant in the interview room, it observed any video of defendant harming himself or discussing his bleeding. "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Because defendant can only speculate that the jury might have watched some video of him cutting himself or discussing his bleeding, we could reject his contention of ineffective assistance on this basis alone. And given it is entirely speculative that the jury observed any instances of defendant harming himself or discussing his bleeding, we must reject his complimentary argument that a competent defense attorney would have had him explain at trial why he was emotional while in the interview room and then used that explanation to argue to the jury that his emotional state affected the reliability of his statements to the police.

¶ 83 Nevertheless, assuming *arguendo* that the jury did see some of this video, much of defendant's conduct would mean very little to the jury without the full context. In fact, the jury may not have even realized what exactly defendant was doing because neither party made any reference to these instances during trial and the quality of the video was poor. Having reviewed the video ourselves, we note that it was blurry and zoomed quite far out. There were moments, particularly toward the beginning of defendant's stay in the interview room where he forcefully cut his left arm, which were unmistakable attempts at self-harm. However, there were other times where he cut himself, and it would not be clear that he was attempting to harm himself without additional information. And to the extent that the jury observed defendant talking about his arm bleeding, again without more, that discussion would mean absolutely nothing to the jury.

¶ 84 But even if the jury observed these moments on video and immediately realized that defendant was attempting to harm himself or thinking about suicide, his actions did not support either his guilt or his innocence. What the video showed was someone dealing with an emotional

episode following actions of his that led to the death of a person with whom he had recently become friendly. Defendant's actions spoke to his sadness about the incident, but did nothing to corroborate the State's theory of first-degree murder or support the defense's theories of self-defense or second-degree murder based on an unreasonable belief of self-defense.

¶ 85 Though defendant cites *People v. O'Neil*, 18 Ill. 2d 461, 465 (1960) and *People v. Campbell*, 126 Ill. App. 3d 1028, 1053 (1984) for the proposition that a threat of suicide tends to show one's consciousness of guilt, those cases are much different than the present one. *O'Neil*, 18 Ill. 2d at 462-63, involved a defendant who had been charged with arson of an apartment building, and apparently raised a false confession defense. *Campbell*, 126 Ill. App. 3d at 1034, involved a defendant who, along with two others, was charged with armed robbery, during which one of the victims was shot. In *Campbell*, the defendant raised mistaken identity and alibi defenses. *Id.* at 1035. In neither of those cases did the defendants admit their actions and raise a legal defense to them, rather, those defendants argued they did not commit the alleged acts. Thus, those defendants' suicidal threats reasonably could demonstrate a consciousness of guilt without equally supporting their defenses of not committing the charged acts.

¶ 86 Here, in contrast, while defendant's suicidal threats and actions could be viewed as a consciousness of guilt for first-degree murder, his behavior equally could be viewed as supporting his innocence based on self-defense or guilt for second-degree murder given that he was indisputably in a state of emotional shock after having admittedly killed a person with whom he had recently become friendly. That is to say that, the video of defendant cutting himself and discussing his bleeding could bear equally on his guilt for first-degree murder, second-degree murder or innocence based on self-defense. While based on the trial court's pretrial *in limine* order, certain portions of the video of defendant in the interview room should not have been

made available for the jury, our confidence in the jury's verdicts have not been undermined by the slight chance that the jury observed those parts of the video.

¶ 87 Additionally, defendant claims that trial counsel's misstatement of the evidence during closing argument and her imploration to the jury to watch the entire video of him in the interview room were unreasonable actions. The latter, according to defendant, having the effect of highlighting the State's attempt to impeach his credibility. There was no question, and defendant admitted, that his acts caused Reynolds' death. The critical questions were whether defendant had the intent to kill, whether he was acting in self-defense and whether his use of self-defense was reasonable. Defendant's credibility was at the heart of all of these questions, and the jury undoubtedly focused on his credibility in resolving the case. In doing so, we can reasonably assume that it compared his various statements about Reynolds' death. Counsel's alleged highlighting of the State's attempt to impeach defendant's credibility did not cause the jury to consider his testimony and statements to the police any differently than it would have had counsel not acted in this manner.

¶ 88 With regard to trial counsel's alleged misstatement of the evidence, during closing argument, she asserted that the parties had stipulated that an officer photographed defendant's injuries in the interview room and he "described" the injuries he had received. However, the parties' stipulation only mentioned that the officer had photographed defendant's injuries, not that defendant described the injuries. While we agree that counsel did misstate the evidence, the misstatement was minor and innocuous. See *People v. Easley*, 192 Ill. 2d 307, 344 (2000) (stating a defendant is entitled to competent, not perfect, representation). Although defendant merely argues that counsel's misstatement and her alleged highlighting of the State's attempt to

impeach his credibility compounded her other alleged errors, we nevertheless find that, on their own, they did not prejudice defendant.

¶ 89 In sum, despite the alleged errors made by trial counsel, our confidence in the jury's verdicts has not been undermined by them. Therefore, a reasonable probability does not exist that, but for these alleged errors, the result of the proceeding would have been different. Defendant has failed to demonstrate that he was prejudiced, and accordingly, his claim of ineffective assistance of counsel fails.

¶ 90 C. Excessive Sentence

¶ 91 Defendant next contends that his 40-year aggregate sentence for first-degree murder and concealment of a homicidal death was excessive. Defendant argues that the trial court placed too much weight on the seriousness of the offenses and retribution for Reynolds' gruesome death, but failed to adequately consider his rehabilitative potential, his emotional and psychiatric issues, his expression of remorse and the significant mitigating circumstances surrounding the offenses.

¶ 92 The Illinois Constitution requires trial courts to impose sentences according to the seriousness of the offense and with the objective of restoring the defendant to useful citizenship (Ill. Const. 1970, art. I, § 11), or, in other words, to consider the defendant's rehabilitative potential. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. In Illinois, the legislature prescribes the permissible sentencing ranges for criminal offenses, and the trial courts impose a sentence within the legislatively prescribed range. *People v. Charleston*, 2018 IL App (1st) 161323, ¶ 16. Generally, the sentencing range for first-degree murder is between 20 and 60 years' imprisonment. 730 ILCS 5/5-4.5-20(a) (West 2010). And the sentencing range for concealment of a homicidal death is between 2 and 5 years' imprisonment. 720 ILCS 5/9-3.4(c) (West 2010); 730 ILCS 5/5-4.5-40(a) (West 2010). By law, both sentences must run consecutively (730 ILCS

5/5-8-4(d)(5) (West 2010)), resulting in the sentencing range for defendant's two offenses being between 22 and 65 years' imprisonment.

¶ 93 In determining the proper sentence, trial courts are given broad discretionary powers (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), and a sentence will not be reversed absent an abuse of that discretion. *People v. Geiger*, 2012 IL 113181, ¶ 27. Reviewing courts provide such deference to the trial court because it had "the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). When a sentence falls within the statutory range, it is presumed to be proper (*Knox*, 2014 IL App (1st) 120349, ¶ 46), and may only be "deemed excessive and the result of an abuse of discretion" where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. The most important factor in determining a sentence is the seriousness of the offense. *People v. Kell*ey, 2015 IL App (1st) 132782, ¶ 94. And because this is the most important factor, the court need not give greater weight to the mitigating factors. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123.

¶ 94 In the present case, defendant's 40-year sentence for first-degree murder and concealment of a homicidal death was within the statutory range for the offenses and thus, presumptively proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, we do not find the sentence greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offenses. According to defendant's own testimony, he and Reynolds had become friendly six months prior to Reynolds' death. Based on the jury rejecting defendant's theories of self-defense and an unreasonable belief of self-defense, defendant not only committed a first-degree murder of Reynolds, essentially a friend, but also murdered him in gruesome fashion by inflicting 12

incised wounds, 4 stab wounds and 6 blunt force wounds to his head and body. What's more, when Reynolds stopped moving, defendant did not call for an ambulance or obtain help from elsewhere. Instead, defendant hid Reynolds' body in a closet, leaving him to be discovered by a building engineer. The seriousness of defendant's offenses warranted a long sentence and one substantially above the minimum allowable. See *Kelley*, 2015 IL App (1st) 132782, ¶ 94.

¶ 95 Although we recognize that defendant had never previously been convicted of a violent offense, had a troubled childhood, been employed consistently as a woodworker and property manager, and told the detectives during questioning that he never wanted Reynolds to die, the trial court does not need to expressly state how much weight it gave each mitigating factor or circumstance. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. Rather, we presume that the court considered all relevant mitigating factors and circumstances in determining a sentence unless the record contains explicit evidence to the contrary. *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 31. Nothing in our review of the record indicates that the court failed to consider the mitigating factors and circumstances. In fact, the opposite is true, the court expressly stated that it had considered defendant's presentence investigative report, the parties' arguments, the victim impact statements, the statutory factors in aggravation and mitigation, and the other mitigating evidence. The court was therefore well aware of defendant's criminal background lacking a violent offense, his troubled childhood, and his employment history. Moreover, having presided over defendant's jury trial, the court was equally aware that he told the detectives during questioning that he did not want Reynolds to die. Defendant's arguments in favor of a lesser sentence are nothing more than a request to this court to re-weigh the mitigating evidence considered by the trial court, which we cannot do. See *People v. Jones-Beard*, 2019 IL App (1st) 162005, ¶ 21 ("In reviewing a defendant's sentence, this court will not reweigh the factors and

substitute its judgment for that of the trial court merely because it would have weighed the factors differently.")

¶ 96 Given the most important consideration for the trial court in fashioning a sentence is the seriousness of the offense and defendant committed a gruesome first-degree murder of Reynolds then hid his body in a closet to conceal a homicidal death, we cannot say the trial court abused its discretion in sentencing him to an aggregate total of 40 years' imprisonment for the offenses, a sentence squarely toward the middle of the applicable sentencing range. Accordingly, we affirm defendant's sentence.

¶ 97 D. Mittimus

¶ 98 Lastly, defendant contends that his mittimus does not reflect the actual record in his case. Defendant's mittimus shows that he was convicted of two counts of first-degree murder, but the record in this case clearly demonstrates that he was convicted of one count of first-degree murder and one count of concealment of a homicidal death. With agreement from the State, defendant posits that, under Illinois Supreme Court Rule 615(b), we may order the correction of his mittimus without a remand.

¶ 99 However, on February 26, 2019, well after defendant filed his notice of appeal and after the parties completed briefing in this case, our supreme court adopted a new rule concerning the correction of sentencing errors. Under Illinois Supreme Court Rule 472(a) (eff. May 17, 2019):

> "[i]n criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on motion of any party: *** (4) Clerical errors in the written sentencing order or

> other part of the record resulting in a discrepancy between the record and the actual judgment of the court."

And further, under subsection (c) of Rule 472, "[n]o appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified above unless such alleged error has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Lastly, under subsection (e):

> "In all criminal cases pending on appeal as of March l, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule."

Ill. S. Ct. R. 472(e) (eff. May 17, 2019). Because defendant has attempted to raise a sentencing error covered by Rule 472, we decline to address it and remand the matter to the trial court for purposes of allowing him to file a motion to correct his mittimus.

¶ 100 III. CONCLUSION

¶ 101 For the foregoing reasons, although we remand the matter to the trial court so defendant may file a motion to correct his mittimus, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 102 Affirmed in part; remanded in part.