2011 IL App (2d) 100018-U
No. 2-10-0018
Order filed December 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-2791
CHAVEZ K. SAULSBERRY,	)	Honorable T. Jordan Gallagher,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: (1) Automatic juvenile transfer provision is not unconstitutional.
(2) The trial court did not abuse its discretion in accepting a transcript of testimony from another trial and incident reports from a juvenile detention facility concerning other crimes committed by defendant in lieu of live testimony. The trial court erred in accepting police reports concerning another crime committed by defendant in lieu of live testimony, but the error did not rise to the level of plain error because the evidence was not closely balanced and the error did not affect the fairness of defendant's sentencing.
(3) Defendant's sentence was not excessive.
(4) Defendant was not eligible for credit based on time spent in custody before sentencing against the $200 DNA analysis fee because it was a compensatory fee and not a punitive fine.

¶ 1 Defendant, Chavez K. Saulsberry, appeals the judgment of the circuit court of Kane County following his conviction of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) of Montrell Fluellen and his sentence to a term of 55 years in prison. Defendant contends that the automatic transfer provision of the Illinois Juvenile Court Act (705 ILCS 405/5-130 (West 2005)) is unconstitutional because it provides for automatic transfers of 15- and 16-year-old juvenile defendants without a hearing and individualized consideration of the juvenile's circumstances. Defendant also challenges his sentencing, contending that the trial court considered unreliable hearsay evidence and failed to take into account his youth as a factor in mitigation. Last, defendant contends that he is entitled to a $5-per-day presentence incarceration credit toward the DNA analysis fee imposed as a condition of his sentencing. We affirm.

¶ 2 On November 4, 2005, the victim, Montrell Fluellen (also known as Monty), was shot to death outside of his home. Defendant was charged with first degree murder and, because he was 15 at the time, his case was automatically transferred to adult court. In August 2009, the matter finally advanced to a bench trial.

¶ 3 Two witnesses testified about their observations at the time of the shooting. Anthony Tijerina was standing on his front porch when he heard two gunshots. Tijerina testified that he observed a man wearing a hooded sweatshirt chase an African American man across Plum Street while shooting at him. The African American man fell in the middle of the street, and the shooter stood over him and shot him a number of times. Tijerina was unable to identify the shooter or to discern the shooter's race or sex. Tijerina testified that the shooter ran away through the nearby alley. Alejandro Juarez testified that he was helping his father put up siding on their garage the evening of the shooting when he heard a number of gunshots coming from the direction of Plum Street. Juarez testified that he observed an African-American man, about five feet and seven or

eight inches tall, dressed in a gray T-shirt and dark pants, running down the alley off of Plum Street. Juarez testified that he saw a car drive into the alley, drive toward the running man, and turn off its headlights as it proceeded down the alley. Once this occurred, Juarez was unable to see what happened to the man who was running. Juarez testified that he heard screams from Plum Street and, when he investigated, observed Monty, whom he knew from the neighborhood, lying in the middle of the street.

¶ 4 Police and paramedics at the scene found the victim to be unresponsive with no signs of life. Efforts to resuscitate the victim were unavailing. The victim had been shot six times with a .45 caliber weapon. Police recovered spent cartridges of .45 caliber, along with fired bullets from the scene. The victim's autopsy revealed that four or five of the gunshot wounds would have been individually fatal, and that the victim had died from multiple gunshot wounds.

¶ 5 Elijahiel Moore testified that, in November 2006, he was in the Challenge Program at the Kane County Juvenile Justice Center. He encountered defendant in the receiving area of the detention center as he was performing his duties there. Something happened, and he was placed into a cell adjacent to defendant's in the receiving center. Moore testified that he could see defendant's reflection in the glass of the showers across from their cells. Moore asked defendant what he was "in for." Moore testified that defendant told him that "they" were trying to put a murder on him. Defendant told Moore he had killed "Monty," and Moore called defendant "a bitch" because he knew Monty and thought Monty was a "cool guy." Moore, who testified that he had hung out with the Gangster Disciples, a rival gang of the Latin Kings, stated that defendant told him that Monty's murder had been committed as a part of "a mission" so defendant could receive "his crown" ("corona") from the Latin Kings.

¶ 6 Blake Pannell testified that he had been a member of the Aurora Latin Kings and had held various positions in the gang, including cacique–the number two position in the gang (briefly), enforcer and hood enforcer. In 2005, Pannell was in a boot camp program administered by the Department of Corrections, when he was approached by the authorities. Pannell began cooperating. Pannell explained that he ultimately agreed to infiltrate the Aurora Latin Kings wearing a recording device to capture information about the gang's criminal activities. Pannell also told authorities about his own involvement in various crimes, including murdering Roderick Robb, and agreed to testify in court when necessary. Pannell also noted that, by agreeing to cooperate with the authorities, he had become subject to a "death violation." Pannell explained that, in spite of this penalty, he agreed to cooperate with and testify for the authorities because he realized that other members of the gang were already testifying against him on a number of cases. Pannell testified that, in exchange for his cooperation, undercover recording, and testimony, he had received housing, cash, a car, tattoo removal, and medical expenses (he received a broken eye orbital that needed surgical repair when he was punished by the Latin Kings) totaling over $30,000. Additionally, he had been immunized from prosecution of the Robb murder and other Kane County crimes, and a residential burglary conviction had been reduced to burglary so he could receive probation.

¶ 7 Pannell testified that, on November 6, 2005, he had a conversation with another gang member about defendant regarding moving a murder weapon. The next day, Pannell wore the recording device and recorded a 40-minute long conversation with defendant as they drove around in Pannell's car. During part of the recorded conversation, another Latin King gang member, Jesse Lopez (known as K-Dog) was also present. Pannell testified that, right after the conversation was recorded, he gave the recording to the FBI. Pannell identified the male voices on the tape as Lopez

and defendant, and he identified the female voices at the beginning of the recording as Hope Gonzalez and Rachel Perry.

¶ 8 Pannell testified that defendant described how he killed Monty during the conversation. According to Pannell, defendant stated that he crept up on Monty and pointed his gun, a .45 caliber pistol, at Monty's head. Monty turned and defendant pulled the trigger, but he had forgotten to chamber a round, so the gun did not fire. Monty started running, trying to get into his house. Defendant gave chase, chambered a round, and began firing. Defendant told Pannell that he was "cool" with Monty, "but you ride with the flakes, you die with the flakes." According to Pannell, defendant related his belief that Monty had been wearing black and green, colors of a rival gang.

¶ 9 Pannell was vigorously cross-examined. On cross-examination, Pannell admitted that he had shot perhaps a dozen people during the time he was a gang member. Pannell also admitted that, even thought he signed an agreement to cooperate, he had still committed illegal acts, had accompanied a gang member during a shooting, and had been arrested for a domestic battery in Kane County. The domestic battery was later *nol-prossed* by the State. Pannell also admitted that he had been arrested in another jurisdiction for filing a false police report.

¶ 10 On redirect examination, Pannell testified that the reason he participated in illegal activities was to maintain his cover and not trigger the gang members' suspicions that he might be cooperating with the police. Pannell noted that his agreement to cooperate was in place before he agreed to wear the recording device and record his conversation with defendant. Pannell testified that he believed that defendant received his crown, meaning full-fledged membership in the Aurora Latin Kings gang, for killing the victim.

¶ 11 Hope Gonzalez, briefly heard on the Pannell recording, testified that, on November 7, 2005, she lived in a house on Union Street in Aurora with Rachel Perry and several children. Gonzalez

testified at trial that she knew Pannell, but denied that she knew defendant. Gonzalez testified that she did not recall speaking to an FBI agent and two Aurora police officers on October 18, 2006. Gonzalez also denied that she told the agent and officers that defendant frequently came to her house and often spent the night.

¶ 12 Officer Matt Thomas, an Aurora police officer, testified that, on October 18, 2006, he along with FBI agent Camacho and Detective Nilles spoke with Gonzalez. During that conversation, Gonzalez told them that she knew defendant, and he came to her house on Union "all the time" and often spent the night. Thomas was also present when the November 7, 2008, recording was played for Gonzalez. Gonzalez identified the speakers on the recording as Pannell, defendant, herself, Rachel Perry, and her and Perry's children.

¶ 13 Detective Nilles, of the Aurora police department, testified that he received a letter from Gonzalez. The letter had been written by defendant to Gonzalez while he was in the Kane County jail. Nilles also testified that Gonzalez heard the recording of the November 7, 2005, conversation between defendant and Pannell and identified the voices of Pannell, defendant, and her and Perry's children.

¶ 14 Jesse Lopez testified on defendant's behalf. Lopez testified that he was formerly a Latin King. Lopez testified that he listened to the recording of the November 7, 2005, conversation in which Pannell identified his and defendant's voices. Lopez denied that his or defendant's voices were on the recording or that, on November 7, 2005, he was in a car with Pannell and defendant. Lopez testified that Pannell had previously testified against him at trial. On cross-examination, Lopez confirmed that he had written to his attorney and asked her, "How do you feel about me just saying that wasn't me on the recording." Lopez also admitted that his nickname was K-Dog and that he knew defendant.

¶ 15 Following the evidence, the trial court found defendant guilty of first degree murder. The matter was continued for sentencing.

¶ 16 On December 22, 2009, the trial court held the sentencing hearing. The State moved to introduce the transcript of Ezequiel Rivera's testimony during the trial of Salvador Gonzalez (Kane County case No. 09-CF-855) into evidence. Defendant objected, arguing that the evidence was improper and unreliable because he had no opportunity to cross-examine Rivera. The trial court overruled the objection, reasoning that, even though the transcript was hearsay, the trial court itself had heard Rivera's testimony during the Gonzalez trial and had reviewed the transcript.

¶ 17 Rivera's testimony, as pertinent to defendant's case, showed that, on November 28, 2005, Rivera was present in a van with other Latin King gang members, including defendant. Rivera testified in that trial that defendant was handed a black pistol. Defendant then shot the pistol a number of times at a white car containing suspected rival gang members. Michael Moore was killed in this shooting.

¶ 18 The State also moved to introduce police reports which described an incident in LaSalle County. Defendant again objected, and again, the trial court admitted the police reports. The reports detailed an incident in which defendant reportedly fired at two men outside of a bar, seriously injuring one of them.

¶ 19 In addition, the State moved to introduce an "Incident Report" from the Kane County Juvenile Justice Center. The report described an incident in which defendant and another detainee were hitting each other. The trial court allowed this report into evidence as well. Defendant notes that the presentence investigation report did not indicate that defendant was convicted or adjudicated delinquent for any of the incidents described in the transcript of Rivera's testimony, the LaSalle County police report, or the Kane County Juvenile Justice Center incident report.

¶ 20 Next, members of the victim's family read their victim impact statements to the court. Following this, the parties argued.

¶ 21 The State argued that defendant had killed both the victim in this case and Michael Moore. The State further argued that, but for his poor shooting, the total could have been higher as a result of the shooting at the bar in LaSalle County. The State proposed that defendant should receive a 65-year sentence (40 years for the murder plus 25 years for the mandatory add-on for personally firing a firearm during the crime), while defendant sought the minimum 45-year sentence (20 years for the murder plus the 25-year add-on), arguing that his crime was mitigated by his youth and lack of maturity and the opportunity to one day be released and become a productive member of society. Defendant spoke in allocution, denying responsibility for the victim's death, maintaining that he was not a participant in the recording Pannell made, and questioning Pannell's truthfulness.

¶ 22 The trial court then sentenced defendant to a 55-year term of imprisonment (30 years for the murder plus the 25-year add-on). The trial court reasoned:

> "I've considered the testimony at trial and all the evidence at trial, the testimony as well as the exhibits, the presentence investigation as amended, factors in aggravation and mitigation, I will go over these quickly, the arguments of Counsel, the Defendant's statement, the statement[s] of the victim's family.
>
> And in going over the factors in mitigation, I don't find any of them present. I don't think any of them apply.
>
> Factors in aggravation, considering No. 3, the prior criminal history, there is a history of violence and weapons in his background.
>
> Under 7, I think a sentence is necessary to deter others. Certainly in the whole State of Illinois and the County of DeKalb and in particular in the area of Aurora where young

people are getting involved in gangs, and I think the number one message that should go out, one of the reasons that [defendant] is sitting here today is because the leadership of his gang all turned on him and they turned on everybody else. So these kids are out there committing these horrendous crimes and they're getting turned in by their leaders.

And I don't disagree that Mr. Pannell is not a good man. And I'd love to see him in the penitentiary because I think that's where he belongs, but he cut a deal and turned you in. And so I don't have any control to do anything with Mr. Pannell, but I do have the power to do something with you.

No. 12, you were on parole at the time.

No. 15, it's a gang killing. If you're going to be involved in gangs, you want to be a big man with the gangs, you're going to be the target of gangs.

Based on everything that I've heard, I'm going to sentence you to 30 years on the murder with a 25-year add-on for a total of 55 years. I think the time runs from when you were first in custody, which is at the age of 15, which means you will be 70 years old when you're out. The normal costs will be applied."

Defendant timely appeals.

¶ 23 On appeal, defendant does not challenge his conviction. Rather, defendant argues that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2005)) violates his due process rights. Defendant also argues that the trial court relied upon unreliable evidence, namely, the transcript of Rivera's testimony and the police and incident reports, in the sentencing hearing, and that the trial court did not properly take into account his youth and rehabilitative potential in sentencing him. Last, defendant argues that he is entitled to the $5-per-day presentence incarceration credit against his DNA analysis fee. We consider each contention in turn.

¶ 24 Defendant first contends that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2004)) is unconstitutional. The automatic transfer provision provides:

> "The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (1) first degree murder [(720 ILCS 5/9-1 (West 2004))] ***.
>
> These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." 705 ILCS 405/5-130(1)(a) (West 2004).

According to defendant, the automatic transfer provision violates due process (see U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2) because there was no individualized judicial consideration of his youthfulness or his rehabilitative potential.

¶ 25 Statutes are presumed constitutional, and it is the court's duty to construe a statute so as to affirm its constitutionality if it is reasonably possible to do so. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). The constitutional validity of a statute presents a question of law which we review *de novo*. *Cornelius*, 213 Ill. 2d at 188.

¶ 26 Defendant concedes that no fundamental right or suspect classification is at issue here. Accordingly, we proceed under rational basis review of the constitutionality of the automatic transfer provision. *Cornelius*, 213 Ill. 2d at 203. Under rational basis review, the court's review of a legislative classification is "limited and generally deferential." *Miller v. Rosenberg*, 196 Ill. 2d 50, 59 (2001). "The rational basis test is satisfied where the challenged statute bears a rational relationship to the purpose the legislators intended to achieve in enacting the statute." *Cornelius*, 213 Ill. 2d at 203-04. Stated more familiarly, under rational basis review, the court must determine whether the statute is rationally related to a legitimate governmental interest. *Miller*, 196 Ill. 2d at 59.

¶ 27 Defendant argues that the automatic nature of the juvenile transfer statute works to deprive him of his rights. Defendant contends that the fact that the statute does not provide for an individualized determination regarding his youthfulness and his amenability to rehabilitation before he is consigned to the adult criminal court is constitutionally flawed in light of *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). Specifically, defendant points to passages in *Graham* and *Roper* that set forth the penological justifications supporting criminal sentencing decisions, namely, retribution, deterrence, incapacitation, and rehabilitation, and asserts that they do not apply to juveniles. See *Graham*, 130 S. Ct. at 2028 (discussing the justifications in relation to a life-without-parole sentence for a juvenile); *Roper*, 543 U.S. at 571-73 (discussing the justifications in relation to a sentence of death for a juvenile). Defendant's reliance on *Graham* and *Roper*, however, is inapposite.

¶ 28 In each case, the focus was on the type of sentence imposed on the juvenile: in *Graham*, it is life without parole; in *Roper*, it is a death sentence. *Graham*, 130 S. Ct. at 2028; *Roper*, 543 U.S. at 571. In neither case is there a discussion about the procedure of transferring a juvenile into the adult criminal system. Instead, each case deals with the propriety of punishing the juvenile with one of the two stiffest adult sentences. Thus, in attempting to construct his syllogism, defendant starts at the most extreme point possible and uses the discussions to attempt to support the idea that the possibility of any criminal sentence at all is inappropriate for a juvenile unless the court first provides individualized consideration via a hearing. The claim cannot bear scrutiny.

¶ 29 In the first instance, defendant is conflating substance and procedure. In making his challenge to the transfer provision, defendant is attacking the procedure whereby the juvenile is transferred into adult criminal court. Yet in supporting his argument, defendant ignores the procedure and looks instead to the substantive matters of punishment. In other words, because

Graham and *Roper* deal with whether a specific punishment may be imposed on a juvenile offender, they are inapposite as they do not consider the procedure of transfer that makes the juvenile eligible for adult punishment. This is further demonstrated because each case questions whether the punishment is allowed under the eighth amendment, as opposed to this case, which raises its claim under the fourteenth amendment. For this reason, *Graham* and *Roper* are inapposite.

¶ 30 Second, the only case cited by defendant dealing with the transfer process itself is *Kent v. United States*, 383 U.S. 541 (1966), which held that the trial court's failure to hold a hearing before the transfer was made was erroneous in light of the statute's command that transfer could be effected only after " 'full investigation,' " meaning a hearing was required on the issue of transferring the juvenile to adult criminal court. *Kent*, 383 U.S. at 553-54. However, when faced with a challenge to this state's transfer provision, our supreme court held that, especially as regards a juvenile charged with murder, the provision satisfied constitutional requirements because the different treatment of such a juvenile "is rationally based on the age of the offender and the threat posed by the offense to the victim and the community because of its violent nature and frequency of commission." *People v. J.S.*, 103 Ill. 2d 395, 404 (1984). Our supreme court also expressly distinguished *Kent*, noting that the "full investigation" required in the transfer provision in *Kent* was standardless and, because there were many factors of varying weight that could be considered, the statute in that case could be satisfied only if a hearing were held before the transfer decision was made. *J.S.*, 103 Ill. 2d at 405. Our supreme court observed that the Illinois transfer provision eliminated any disparity in treatment because all 15- or 16-year-olds who committed the enumerated offenses, which offenses had not been arbitrarily or unreasonably selected by the legislature, were transferred to the adult criminal system for prosecution. *J.S.*, 103 Ill. 2d at 405. Our supreme court determined that *Kent* was distinguishable because the statute in that case required a hearing (at

which different results for similarly situated offenders could be reached), while the Illinois provision did not require a hearing (so there was no possibility of disparate results for similarly situated offenders). Thus, our supreme court determined that *Kent* did not govern a challenge to the constitutionality of the Illinois transfer provision (now codified at 705 ILCS 405/5-130(1)(a) (West 2004)).

¶ 31 Defendant argues that *dicta* in *Graham* and *Roper* require us to revisit the constitutionality of the transfer provision. We disagree. As we have already noted, *Graham* and *Roper* deal with the type of penalty that may be imposed on a juvenile defendant, and not with whether a juvenile may be tried as an adult. Defendant conflates procedure and substance and wrenches *dicta* about the allowable goals of punishment out of context in trying to make his argument. Properly considered, *Graham* and *Roper* offer no insight into the allowable scope of the juvenile transfer statute, only the types of punishment that cannot be imposed on a juvenile.

¶ 32 In fact, defendant uses the *Graham* and *Roper dicta* to reason that, without a hearing, the transfer provision is unconstitutional. *J.S.*, however, reasoned that the transfer provision was constitutional precisely because it treated all 15- and 16-year-olds who had been charged with an enumerated offense identically by doing away with an individualized hearing (at which disparate results could have been reached). In other words, defendant asks us to overrule *J.S.* and vitiate its central holding that the transfer provision does not require a hearing to satisfy due process concerns. This we cannot do, and we reject defendant's invitation. In fact, we note that, in at least three more cases, the transfer provision (now codified at 705 ILCS 405/5-130 (West 2004)) had been held to be constitutional. See *People v. M.A.*, 124 Ill. 2d 135 (1988); *People v. P.H.*, 145 Ill. 2d 209 (1991); *People v. R.L.*, 158 Ill. 2d 432 (1994).

¶ 33 Defendant's central point seems to be that there are four legitimate penological goals: retribution, deterrence, incapacitation, and rehabilitation. With regards to juvenile defendants, none of these goals are met unless the transfer occurs after a hearing. Defendant's argument is faultily constructed. In *Graham*, the idea that the penological goals do not provide an adequate justification for punishing a juvenile defendant is specifically limited to cases involving a sentence of life without parole for juvenile nonhomicide offenders. *Graham*, 130 S. Ct. at 2028. The key problems with defendant's logic are, first, that *Graham* deals with punishment, not procedure (namely, in which forum a juvenile may be tried), and the limitation to the class of juvenile nonhomicide offenders who have received a sentence of life without parole. Here, neither limitation is in play, so defendant's reasoning is unconvincing.

¶ 34 Likewise, *Roper* is also limited, this time to juvenile homicide offenders who received a sentence of death. *Roper*, 543 U.S. at 571-74. While defendant here is a juvenile homicide offender, he did not receive a sentence of death, and we remain unconvinced by defendant's reliance on this case. Because defendant's reasoning is flawed and drawn from inapposite cases, and because defendant's argument would require us to overrule our own supreme court and hold that the transfer provision is unconstitutional for precisely the reason that our supreme court found the transfer constitutional in the first place, we reject defendant's contentions on this issue.

¶ 35 Next, we turn to defendant's sentencing contentions. Initially, defendant argues that the trial court abused its discretion in admitting certain evidence at the sentencing hearing. In particular, defendant complains about the admission and consideration of the transcript of Rivera's testimony in the Gonzalez trial on the murder of Michael Moore, the submission of the police reports regarding the shooting at the bar in LaSalle County, and the incident report from the juvenile detention facility.

Defendant contends that these sources were unreliable and that the trial court should have accepted only live testimony rather than records that could not be cross-examined.

¶ 36 The admission of evidence at a sentencing hearing is left to the broad discretion of the trial court. *People v. Bilski*, 333 Ill App. 3d 808, 818 (2002). The usual evidentiary rules are not applicable to a sentencing hearing; the focus, however, is on the relevance along with the accuracy and reliability of the evidence. *People v. Stephenson*, 198 Ill. App. 3d 189, 198 (1990).

¶ 37 Defendant complains of the three items described above. According to defendant, the trial court considered the transcript of Rivera's testimony. The trial court, after overruling defendant's objection to the transcript, noted that:

> "While this is a transcript–it's basically hearsay in that respect, I did hear the actual witness testify, but I have reviewed the transcripts; and if someone wanted to bring him into court for the sentencing hearing, they could have done that, but I am going to admit it and I have read it and heard the evidence, so I want that clear on the record."

Next, the trial court admitted into evidence a number of police reports describing defendant's alleged involvement in a LaSalle County shooting. The trial court stated that it had reviewed the reports and would consider the reports "for whatever its worth for purposes of sentencing, keeping in mind that it is police reports and not testimony." Last, and again over objection, the trial court admitted into evidence an incident report from the juvenile detention facility. Defendant's sole argument is that the transcript and reports were unreliable because they were not presented as live testimony subject to defendant's cross-examination. Defendant concludes that, as a result, he was subjected to an unfair sentencing hearing because the trial court was influenced by unreliable evidence. We disagree.

¶ 38 Initially, we note that defendant has forfeited this contention because he failed to raise it in a written postsentencing motion. *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32 (2010). Defendant argues that we may consider this issue as plain error. Ill. S. Ct. R. 615 (eff. Jan. 1, 1967). In order for defendant's claim of plain error to succeed, however, he must first demonstrate that the trial court's decision on this issue constituted error. Absent error, no plain-error claim may be sustained. *People v. Blair*, 2011 IL App (2d) 070862, ¶28. Accordingly, we consider this issue to see if error occurred. If so, we continue the plain-error analysis; if not, our inquiry ends.

¶ 39 Overall, we hold that defendant did not prove the existence of plain error in this case. In the first place, it is well established that ordinary rules of evidence which govern at trial are relaxed at a sentencing hearing. *People v. Harris*, 375 Ill. App. 3d 398, 408 (2007). A sentencing court may receive a wide variety of types of evidence touching upon the defendant's general moral character and propensity to commit crimes. *Harris*, 375 Ill. App. 3d at 408-09. Because the evidence here touched on defendant's general character and propensity to commit crimes, it was of types that are generally relevant for the sentencing procedure.

¶ 40 Second, turning to consider the individual items of evidence, we note that the incident reports from the juvenile detention facility are of a type that has long been held to be admissible in sentencing hearings. *People v. Casillas*, 195 Ill. 2d 461, 494 (2000) (contents of prison disciplinary records admissible in penalty phase of trial so long as they are accurate and reliable). As to the incident reports' reliability or accuracy, defendant only argues that they are unreliable as they present hearsay; defendant makes no other argument regarding their unreliability. The hearsay aspect of the challenge to the incident reports has been rejected because hearsay evidence has long been deemed admissible in sentencing hearings. *Casillas*, 195 Ill. 2d at 494. The fact that defendant does not raise any other grounds of unreliability dooms his argument. When making a claim of

unreliability, the defendant must provide specific reasons why the evidence is unreliable, or the court may deem the admission of the evidence not to constitute error. *People v. Jackson*, 182 Ill. 2d 30, 84 (1998). Here, because defendant points only to the hearsay nature of the records as a basis for their unreliability, we conclude that the trial court did not err in admitting them.

¶ 41 The transcript of Rivera's testimony presents interesting issues. The primary issue is the reliability of the transcript. We note that the transcript itself is reliable and accurate and appropriately certified. The content or substance of the transcript presents another question. In our view, Rivera's testimony should be deemed reliable. It was given under oath and subject to penalties for perjury. This suggests reliability. In addition, we note that Rivera was testifying for the State in the trial of Salvador Gonzalez about the murder of Michael Moore. We believe that this circumstance supports an inference of reliability. Defendant was not the focus of the Gonzalez trial and the witness had no reason to take the gun out of defendant's hand. If anything, he had a reason to try to implicate Gonzalez. As his testimony about defendant was incidental to the purpose of the Gonzalez trial, it suggests that there would be little if any motive for the witness to lie about defendant's involvement. Accordingly, because there is little motive to lie under the circumstances, coupled with the fact that the witness provided sworn testimony subject to penalization for perjury, we determine that the transcript was reliable.

¶ 42 This does not resolve all of the issues with the transcript, however. The trial court acknowledged that he had heard Rivera testify, recalled the testimony, and reviewed the transcript of Rivera's testimony. This is somewhat troubling, because defendant did not have the opportunity to cross-examine Rivera during the Gonzalez trial. However, the focus is on the reliability of the evidence, and the transcript possesses ample indicia of reliability. To the extent that the trial court's discussion of its review and recollection of Rivera's testimony raises the specter that it was using

or relying on material outside of the evidence presented at the sentencing hearing, namely, its recollection of Rivera's testimony and its credibility determination based on presiding over the proceedings at that time, we note that a trial court is presumed to consider only proper evidence (*People v. Ruano*, 387 Ill. App. 3d 181, 190 (2008)); use of its recollection in place of the transcript would be improper, but there is no evidence that the trial court in fact used improper evidence in reaching its sentencing determination. In addition, we note that, although defendant objected to the use of the transcript, when the trial court revealed that it recalled the witness's testimony, defendant did not further object or otherwise indicate that he believed the trial court was straying into dangerous territory. As a result, we conclude that the transcript was properly admitted.

¶ 43 Even if the admission of the transcript were erroneous, it does not rise to the level of plain error. Under plain-error analysis, the reviewing court considers a forfeited error in two circumstances: (1) where the evidence is so closely balanced that the error alone threatened to tip the outcome against the defendant regardless of the seriousness of the error; or (2) the error is so serious that it threatened the fairness of the defendant's trial and challenged the integrity of the judicial process regardless of the closeness of the evidence. *People v. Gonzalez*, 2011 IL App (2d) 100380, ¶ 18. The defendant bears the burden of persuasion in plain-error review. *Gonzalez*, at ¶ 18. Defendand does not contend that the evidence of aggravation and mitigation was closely balanced. Further, the error is not so serious as to challenge the integrity of the judicial process because the sentence imposed was amply warranted. The brutal circumstances of the crime alone provided ample aggravation and justification for a sentence that was only 10 years over the minimum. The evidence of the crime showed that defendant showed neither mercy nor hesitation in murdering the victim. When his first pull of the trigger did not make the gun fire, defendant did not hesitate or run away, but chased the victim while continuing to fire at him. When the victim fell

to the ground, defendant stood over him and continued shooting him. These facts alone easily justify the sentence that was a scant 10 years over the minimum. Indeed, if the trial court were (improperly) considering the transcript and the police reports as proof that defendant committed another murder and nearly murdered a third person in the LaSalle County shooting, we might expect that the sentence would be significantly longer than 10 years above the minimum.

¶ 44 The police reports present a closer and more difficult question. They are obviously akin to the prison or detention facility incident and disciplinary reports that are generally admissible at sentencing hearings. *E.g.*, *Casillas*, 195 Ill. 2d at 494. However, the State has offered no cases specifically dealing with the admissibility of police reports at a sentencing hearing being used to inform the trial court about the defendant's morality and character in order to give the trial court insight in to the defendant's propensity towards crime. Likewise, our research has uncovered no similar line of cases supporting the admission of a police report without live the testimony of a witness with personal knowledge and subject to cross-examination. On the other hand, defendant points to cases holding that live testimony subject to cross-examination is preferred to prove then reliability of uncharged or untried other-crimes evidence submitted at a sentencing hearing. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992) (hearsay evidence of other crimes for which there is neither a conviction nor prosecution should be presented through live testimony of witnesses subject to cross-examination); *People v. LaPointe*, 88 Ill. 2d 482, 498-99 (1981) (same). Defendant does not challenge the reliability of the police reports describing the investigation into the LaSalle County shooting on any grounds other than hearsay. Nevertheless, in light of defendant's authority and the lack of authority on the State's side of the argument, we believe that the trial court erred in admitting these reports for consideration, despite the general admissibility of hearsay evidence at sentencing

hearings and despite defendant's failure to raise a particular challenge to their reliability (see *Jackson*, 182 Ill. 2d at 84).

¶ 45 As error occurred, we must proceed with plain-error analysis. In the first place, the evidence was not closely balanced because the trial court had other evidence on which it could properly rely, including the transcript of the testimony in the trial on the Moore murder and the juvenile detention facility incident reports. This evidence alone was sufficient to support the trial court's sentencing decision. Additionally, no serious error threatening the integrity of the judicial process occurred because the trial court accepted the police reports, stating that it would only consider the reports for "whatever its worth for purposes of sentencing, keeping in mind that it is police reports and not testimony." In our view, this shows that the trial court did not uncritically or unquestioningly accept the information in the police reports, but always bore in mind the fact that defendant was unable to cross-examine the report makers and thereby determine their reliability. In rendering its sentencing decision, the trial court did not specifically point to the police reports as influencing its decision (we note that the court did acknowledge that it had reviewed the reports, but we are confident, based on the trial court's statement that it would keep in mind that it was considering police reports and not testimony, that it attached only the weight the reports were due based on their reliability or lack thereof). Accordingly, we determine that the admission of the police reports on the LaSalle County shooting was not plain error.

¶ 46 We have determined that no error accrued from the trial court's decisions to admit the transcript or the incident reports from the juvenile detention facility. As no error occurred, defendant cannot sustain his claim of plain error arising from those items. *Blair*, at ¶ 8. We have concluded that error accrued from the admission of the police reports about the LaSalle County shooting. However, for the reasons given above, we believe that the error did not rise to plain error

because the evidence was not closely balanced and the error was not serious enough to render the sentencing hearing unfair or challenge the integrity of the process. *Gonzalez*, at ¶ 18. Accordingly, we reject defendant's plain-error claim.

¶ 47 Defendant notes that, in *Jackson*, 149 Ill. 2d at 548, *LaPointe*, 88 Ill. 2d at 498-99, and *People v. Kirk*, 62 Ill. App. 3d 49 (1978), the courts have expressed a preference that evidence of other crimes be presented at a sentencing hearing via live witness testimony which is subject to cross-examination. In this way, the reliability of the evidence can be demonstrated. We acknowledge the holdings and authority, but we believe that it is largely distinguishable here.

¶ 48 First, we note that *Jackson* expresses a *preference*, not a command. Live witnesses should be used, but it is not required that live witnesses present evidence at sentencing hearings. *Jackson*, 149 Ill. 2d at 548-49. Second, as previously noted, the incident reports from the juvenile detention facility were sufficiently similar to prison disciplinary and incident reports so as to fall under the long-standing exception for such items. Defendant has presented nothing to show why the incident reports should be treated any differently. Accordingly, we believe that the incident reports were appropriately deemed to be sufficiently reliable for admission at the sentencing hearing.

¶ 49 Further, the transcript presented sufficient indicia of reliability for admission. It was a transcript of sworn testimony subject to penalties for perjury. This alone suggests its reliability. In addition, the witness was testifying against a different person and had no reason, in the context of the Gonzalez trial, to place the gun into defendant's hands. If anything, he may have had reason to place the gun into Gonzalez's hands in an effort to curry favor with the State, with which the witness was cooperating. Thus, the circumstances also support the reliability of the substance of the transcript. As a result, we believe that the transcript was also properly deemed to be admissible in the sentencing hearing.

¶ 50 Finally, we think that the police reports fall squarely within the ambit of defendant's authority. It would have been far preferable for the State to present the testimony of a witness with personal knowledge of some of the investigation into the LaSalle County shooting. (We also note that it would have been preferable for the State to have presented a witness instead of the transcript of Rivera's testimony, if only to forestall an issue on appeal.) The State has not pointed to any cases in which police records (as differentiated from prison disciplinary records and incident reports) have been admitted standing alone without live testimony to promulgate them. In this instance, cross-examination was necessary to settle the issue of reliability and we agree with defendant that the trial court abused its discretion in admitting the police reports. See *Jackson*, 149 Ill. 2d at 548; *LaPointe*, 88 Ill. 2d at 498-99; *Kirk*, 62 Ill. App. 3d at 54. As we have noted, however, the error accruing from the police reports did not rise ot the level of plain error, so while we agree with defendant's argument as to the existence of error in the case of the police reports, we do not accept his argument regarding the effect. Accordingly, we reject defendant's contentions on this point.

¶ 51 Defendant next contends that his sentence was excessive. We note defendant did not file a written postsentencing motion and has therefore forfeited this contention on appeal. *Ahlers*, 402 Ill. App. 3d at 731-32. Defendant urges that we consider this contention under the plain-error doctrine, because it involves a substantial right (Ill. S. Ct. R. 615(a) (eff. Jan 1, 1967)), namely, the proper consideration of the mitigating factor of youth and the general sentencing goal of restoring the offender to useful citizenship (730 ILCS 5/1-1-2 (West 2008)). We decline defendant's invitation because we perceive no abuse of discretion by the trial court and, hence, no error.

¶ 52 The trial court has broad discretion to fashion an appropriate sentence and the reviewing court will not disturb the trial court's sentencing decision absent an abuse of discretion. *People v. Mimes*, 2011 IL App (1st) 082747, ¶41. The trial court bases its decision on a consideration of the

individualized circumstances of the offense, including the seriousness of the offense, the need to protect the public and provide for deterrence and retribution, and the defendant's demeanor, general moral character, mental capacity, age, background, prior criminal history, rehabilitative potential and future dangerousness. *Mimes*, at ¶41. We also note that a sentence within statutory limits will not be deemed to be excessive unless it is greatly varies from the spirit and purpose of the law or is obviously disproportionate to the nature of the crime. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 53 Here, the offense was first degree murder. Defendant was eligible to receive a 20-60 year sentence (730 ILCS 5/5-4.5-20 (West 2009)) plus the mandatory 25-year addition for personally discharging a firearm (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2009)), for a total possible sentence extending from 45 to 85 years. Defendant received a 55-year aggregate sentence, 10 years over the minimum sentence he could have received, and well within the statutory limits.

¶ 54 Defendant argues that the trial court did not consider his youth and the goal of restoring him to useful citizenship in fashioning its sentence. Defendant provides an extensive argument regarding the difference between youth and adult offenders and urging that defendant's sentence be changed to the minimum. We reject defendant's contentions.

¶ 55 We note that there were multiple aggravating factors, including defendant's criminal history and the circumstances and remorselessness of the shooting itself. Defendant had been convicted of or adjudicated on a number of crimes of violence, and, since the offense in this case, had been charged with mob action, aggravated batteries, murder and armed violence. Defendant was on parole at the time of the instant offense, and this offense was gang related. See *Mimes*, at ¶43 (considering the significance of the defendant's commission of an attempted murder while out on bond). Defendant's subsequent history after the commission of the instant offense demonstrates that defendant had little in the way of rehabilitative potential (or of being restored to useful citizenship).

Additionally, even though defendant was only 15 years of age at the time of the offense here, this fact is of little mitigating weight when his record of regular and extreme violence continued throughout his teen years and into his early 20s. In addition, as noted above, the crime was committed in a manner that supports the sentencing decision. Defendant did not kill the victim in the heat of the moment; rather, defendant cold-bloodedly crept up on the victim, chased him, and continued to shoot into the victim's prone body after the victim had fallen to the ground. Given defendant's criminal history, his continuing violent criminal exploits after this crime, and the circumstances by which this crime was committed, we cannot find that the trial court abused its discretion where defendant received a sentence well within the statutory limits and only 10 years above the minimum possible sentence. Accordingly, we reject defendant's excessive-sentence contention.

¶ 56 Defendant last contends on appeal that he is entitled to a $5-per-day credit towards the $200 DNA analysis fee for each day of presentence incarceration he served. The State concedes error on this point. However, the State's concession is not conclusive and does not relieve us of our responsibility to make an independent determination of the issue. *People v. Stewart*, 66 Ill. App. 3d 342, 354 (1978). Upon so doing, we conclude that defendant is not eligible for credit against the DNA analysis fee.

¶ 57 Defendant argues that the DNA analysis fee is actually a fine for which he is eligible to accumulate credit based on time served in custody before sentencing. See 725 ILCS 5/110-14(a) (West 2008) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant"). Recently, in *People v. Guadarrama*, 2011 IL App

(2d) 100072, ¶13 (which was filed after the briefing in this case had been completed), we held that, based on the supreme court case of *People v. Marshall*, 242 Ill. 2d 285 (2011):

> "it is clear that a DNA analysis fee is not imposed on a defendant as any type of punishment. Rather, the fee is used to cover the costs incurred in collecting and testing a DNA sample that is taken from a defendant convicted of a qualifying offense. Thus, the DNA analysis fee is truly a fee, and, because it is not a fine, [the] defendant cannot offset it by any credit for the time he served in custody before sentencing."

Accord, People v. Stuckey, 2011 IL App (1st) 092535, ¶36.

¶ 58 We see no reason to depart from our holding in *Guadarrama*. Accordingly, we reject the State's concession of error as well as defendant's contention that he was eligible to receive a credit to offset the DNA analysis fee based on time spent in custody before sentencing.

¶ 59 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 60 Affirmed.