2014 IL App (2d) 120670-U
No. 2-12-0670
Order filed February 6, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Carroll County.
Plaintiff-Appellee,	)	
v.	)	No. 02-CF-0034
JEREMY ALLEN ROSE,	)	Honorable Val Gunnarsson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not waive his sentencing issues on appeal when the trial court failed to properly admonish him pursuant to Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001). Also, the trial court did not abuse its discretion in sentencing defendant to 80 years' imprisonment for the murder of his girlfriend's three-year-old daughter. Finally, we modified the sentence to reflect a $100 credit toward defendant's domestic violence fine, and we reduced his Violent Crimes Victims' Assistance Assessment from $25 to $12. The judgment was affirmed as modified.

¶ 2 Following a jury trial, defendant, Jeremy A. Rose, was found guilty but mentally ill of the first degree murder of three-year-old Felicity Eppenstein. 720 ILCS 5/9-1(a)(1) (West 2002).

He was subsequently sentenced to a mandatory term of natural life imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2002). His conviction was affirmed on direct appeal. *People v. Rose*, 2-03-1404 (Dec. 21, 2005) (unpublished order under Supreme Court Rule 23). He later filed a post-conviction petition, which was dismissed. On appeal, this court affirmed the dismissal of the post-conviction petition, but vacated the term of natural life imprisonment because the provision under which defendant was sentenced had been declared unconstitutional. See *People v. Rose*, 2-08-1227 (March 30, 2011) (unpublished order under Supreme Court Rule 23). On remand, a new sentencing hearing was held, and defendant was sentenced to a term of 80 years' imprisonment. He now appeals that sentence. On appeal, defendant argues: (1) the trial court failed to comply with Illinois Supreme Rule 605(a)(3) (eff. Oct. 1, 2001), and therefore his claims of error should not be subject to waiver on appeal; (2) the trial court abused its discretion at the re-sentencing hearing when it failed to recognize the mitigating effects of his mental illness, his remorse for the crime, and his potential for rehabilitation; and (3) he is entitled to $5 a day in *per diem* credit for time served against his $100 domestic violence fine, and his Violent Crimes Victims' Assistance (VCVA) assessment should be reduced. For the following reasons, we affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 The evidence adduced at trial showed the following.[1] Defendant was cohabiting with Samantha Eppenstein, and Eppenstein's daughter, Felicity. Defendant and Eppenstein began

[1] A majority of the facts as set out in this order are taken from this court's order affirming defendant's conviction. See *People v. Rose*, 2-03-1404 (Dec. 21, 2005) (unpublished order under Supreme Court Rule 23).

their relationship when she was about five months pregnant with Felicity. The evidence showed that defendant treated Felicity as and considered her to be his daughter. Further, until June 1, 2002, the date of the offense, defendant had never harmed or mistreated Felicity. Defendant and Eppenstein had been living together off and on for about three years before the offense. Around May 25, 2002, defendant confronted Eppenstein with his concerns about her infidelity. Testimony indicated that Eppenstein told defendant that she was going to a family party at her grandfather's home. When defendant called there, he was told that the party was the next day.

¶ 5 After this, defendant apparently went to a nearby bar, CJ's Pizza. Penny Laborn testified that she and her husband observed defendant that day. Defendant appeared significantly intoxicated and was speaking on the phone located at the bar. Laborn and her husband, Roger Laborn, both testified that they heard defendant complain about Eppenstein and his fears that she was fooling around on him. They also testified they heard defendant say that he was going to get a gun and kill Eppenstein and her father, and that, as part of his tirade, he said, "I'm going to kill us all." The Laborns further testified that they had owned and run a bar previously, so they did not take what they believed to be drunken ramblings too seriously. They admitted that they did not contact the police or tell either Eppenstein or her father about the threats they overheard defendant make.

¶ 6 Linda Wieand testified that, on May 25, 2002, she was bartending at CJ's when defendant came in. Defendant appeared to be really upset and suspected Eppenstein of seeing someone else. Wieand was trying to calm down defendant when the Laborns came into the bar. Wieand testified that she overheard defendant making threats on the phone. Wieand explained that, as a bartender for over 30 years, she heard that sort of thing all the time. Wieand testified that defendant made a second phone call in which he threatened to kill Eppenstein and her

boyfriend. Defendant made a third phone call and, after he finished that call, defendant told Wieand that he would kill Felicity to make Eppenstein hurt as much as she had hurt him.

¶ 7 On June 1, 2002, Felicity was killed. The testimony adduced at trial showed that defendant appeared to act fairly normally at the beginning of the day. In the mid-morning of June 1, 2002, defendant visited his landlord, Charles Corey. Corey testified that he maintained an office on the first floor of the building in which defendant and Eppenstein resided. The first floor contained businesses; the upper floors of the building contained apartments. The third floor was vacant at the time of Felicity's death. Corey testified that he is a paramedic. On June 1, 2002, Corey was working on the books of his business. Sometime mid-orning of June 1, 2002, Corey spoke with defendant. Defendant complained that the water tasted funny. Corey told defendant that it was city water and there was nothing that he, as landlord, could do about it. Corey suggested that defendant purchase the materials from the hardware store to fix his sink. Corey explained to defendant that he had arranged for the hardware store to bill him directly—defendant indicated that he had lined up someone to perform the repairs on the sink in the hopes that it would cure the problem of the funny-tasting water.

¶ 8 At about 11:30 a.m., Lani Pidde, whose ex-husband, Guy, was defendant's cousin, encountered defendant walking down the street with Felicity. As they talked, defendant invited Pidde to see his apartment as she had not seen it before. While in defendant's apartment, Pidde and defendant talked about defendant's relationship with Eppenstein. Defendant confided that he and Eppenstein were not getting along and, in fact, were considering breaking up. Pidde asked where Eppenstein was and defendant stated that she was supposed to be shopping with her mother for groceries. Pidde stated that she hoped Eppenstein was not visiting Guy. This remark upset defendant. Defendant began crying and pacing. Pidde then told defendant that it was too

early to visit Guy, who was in prison. Defendant told Pidde that he had found a letter from Guy to Eppenstein which upset him. Pidde described defendant's behavior as normal, but that he was acting as though he was "coming down off drugs," a condition of his she had previously witnessed.

¶ 9 Pidde testified on cross-examination that she could not smell the odor of marijuana in defendant's apartment; rather, there was an odor of bleach. Defendant also specifically told her that he was not coming down from drugs. Pidde stated that she had known defendant for about seven years, and on this day, defendant would act normally for a while, then begin crying and pacing the floor. Pidde observed that defendant "was just all over the place," and unable to maintain a train of thought. Defendant would also hold his neck, placing his thumb on one side of his neck and his fingers on the other side. According to Pidde, defendant was not angry, but was expressing sadness. Pidde also characterized defendant that day as disoriented and off in his own little world.

¶ 10 Pidde stated that, at the time of Felicity's death, she was still married to Guy, but (because he was in prison) they were no longer living together. Pidde admitted that she was upset over Eppenstein and Guy's affair and admitted that she was not fond of Eppenstein.

¶ 11 Corey testified that, at around noon, defendant had locked himself out of his apartment while doing laundry. Corey testified that defendant appeared to be behaving normally at that time. Later, defendant again stopped by, this time complaining that he was ill. Defendant told Corey that he thought he was having a heart attack. Corey observed that defendant was shaking, breathing very fast, and appeared to be hyperventilating. Corey had defendant sit down. When Corey attempted to take defendant's pulse, defendant was shaking so much that he could not take it. As defendant was sitting there, he wondered aloud where Eppenstein was. Defendant

indicated that he did not believe that Eppenstein was with her mother, shopping, as she had told him. Corey told defendant that he had seen Eppenstein's car at the Subway restaurant where she worked. This information seemed to calm defendant. Defendant told Corey that he had left Felicity in the apartment on the couch and wanted to go upstairs to check on her.

¶ 12 Eppenstein testified about the events of June 1, 2002. She stated that she first went to a meeting at the Subway restaurant where she worked. After the meeting, she went shopping with her mother. She returned to the apartment at about 3 p.m. She brought some groceries up to the apartment and defendant opened the door for her, but gave her a look like "where the hell have you been all day?" Defendant told her that Pidde had visited the apartment earlier. Defendant confronted Eppenstein by telling her that Pidde had told him about her affair with Guy. They proceeded to argue.

¶ 13 Eppenstein testified that this was not the first time that defendant accused her of having an affair. The difference in this argument was that, for the first time, defendant confronted her with Guy's letter, and this was the first time that Eppenstein admitted to the infidelity. While she noted that defendant was upset, he was not as upset as she thought he would be. They discussed getting relationship counseling as well as individual counseling for defendant, who was having problems resulting from his mother's death and his belief that his father had abandoned him. Defendant began pacing the floor and grabbing his neck. Eppenstein characterized this behavior as normal and explained that defendant grabbed his neck because he would get a head rush upon releasing his hold.

¶ 14 Eppenstein testified that, as she prepared to leave, defendant said something under his breath. Eppenstein responded by telling him that it was she who paid the bills and bought the groceries, and all that he did was drink beer and smoke drugs, and that if he did not like the

arrangement, then he should leave. At some point, they both smoked a quantity of marijuana. Eppenstein testified that defendant seemed to be pacing more than was usual for him, but she thought that he was angry. Eppenstein also testified that, when she returned to the home that day, she could not detect the odor of freshly-smoked marijuana. As she left to go to work, she told defendant that she loved him, and she thought defendant told her the same. She thought that they had resolved the argument.

¶ 15 The evidence showed that, at about 4:30 p.m., defendant emerged from his apartment, crossed into the street into oncoming traffic, and was struck by a passing car. Defendant was knocked over the hood of the car and landed next to the driver's door. Defendant apparently exchanged words with the driver who struck him, and the driver sped off. Passersby came to defendant's aid. Terry Sturtevant testified that he assisted defendant to sit on the curb after he had been struck. As he was helping defendant, Sturtevant heard defendant say three different times that he had just killed his daughter upstairs. Sturtevant told an onlooker to call the police because defendant was hurt and had just told him that he murdered his daughter. Sturtevant told John Granata, the proprietor of a nearby restaurant who had come out to help, what defendant said. He and Granata ran up to defendant's apartment. The apartment was very dark, so when they found Felicity in her crib, they could not see what had happened to her. They carried her to the front room of the apartment, which had better lighting, and laid her on the couch. There, Sturtevant noticed that Felicity had been stabbed in the chest. When shown a photograph of Felicity on the couch, Sturtevant began to cry and the trial court called a short recess in the trial.

¶ 16 Sturtevant testified on cross-examination that defendant did not appear to walk deliberately in front of the car. Sturtevant testified that defendant appeared to be excited after he had been struck by the car. After defendant told him that he had killed his daughter, Sturtevant

noticed that defendant was crying and shaking. When Sturtevant returned from defendant's apartment, he noticed that defendant was excited and mumbling. Sturtevant also noted that, at no time before he was arrested, did defendant attempt to leave the scene.

¶ 17 Granata's testimony corroborated Sturtevant's. Granata testified that, when he heard a commotion in front of his restaurant, he went outside to investigate. He saw defendant sitting on the curb. When Granata asked defendant if he was all right, defendant told him that he had killed his daughter. Granata went upstairs to investigate, and discovered that Felicity had been stabbed in the chest. When Granata returned to the street, he attacked defendant and tried to "break his neck." Granata was pulled off of defendant. On cross-examination, Granata testified that he did not recall that defendant offered any resistance.

¶ 18 Kim Granata testified that, in the commotion, she ended up seated next to defendant on the curb. Defendant told her that he had killed his daughter. On cross-examination, she testified that defendant was crying, rubbing his hands together, and saying, "Oh my God." Kim Granata further testified that she noticed that, at this time, defendant's eyes were opened really wide.

¶ 19 Cassandra Martinez testified that she was walking down the street at the time defendant was struck by the car. She knew defendant as Eppenstein's boyfriend. Martinez also testified that she heard defendant repeatedly say that he could not believe that he had killed his daughter. Martinez characterized defendant as being hysterical, which she defined as being very loud and very shaky.

¶ 20 Daniel Underwood, the dishwasher at Granata's restaurant, testified that he went outside to investigate the commotion in front of the restaurant. There, he observed defendant rocking back and forth, saying that he had just killed his daughter.

¶ 21 At about 4:40 p.m., Corey, the paramedic and defendant's landlord, received an

ambulance call to respond to a location in front of his office. He pulled his truck around to the accident and saw that it was defendant who was the individual who had been hit by a car. Someone told him that there was a dead girl in defendant's apartment. Corey investigated and confirmed that Felicity was dead. He kept the crime scene secured until police arrived.

¶ 22 The police officers who testified talked about the procedures they employed to collect Felicity's body. The all testified that they did not find marijuana, illegal drugs, or drug paraphernalia in defendant's apartment. Further, the police witnesses testified that they did not discern any odor of marijuana in the apartment.

¶ 23 Michael Moon, the chief of police in Savannah, testified that he interviewed witnesses at the scene. Moon noted that, as he approached defendant, defendant was crying and no one was restraining him. Moon also heard defendant say, "Oh my God, what have I done?" Moon asked defendant what he had done and defendant admitted that he had stabbed Felicity. Moon handcuffed defendant and placed him in the back of his squad car. Moon made sure the scene was secured and then drove defendant to the jail. On cross-examination, defendant attempted to inquire as to the conversation that occurred between Moon and defendant during the ride. The trial court sustained the State's objection and told defendant to take it up during his case-in-chief.

¶ 24 When Moon delivered defendant to the jail, defendant was processed and then Moon and Officer Dimmick conducted an audiotaped interview with defendant. The tape of the interview was played for the jury. During the interview, defendant stated that he was struggling with good and evil, expressed a belief that, because of the World Trade Center attack, the Persian Gulf War, anthrax attacks, and the mail box bomber, there were signs of the coming apocalypse. Defendant claimed a lot of "strange stuff" had happened that day. He admitted to Moon that he stabbed Felicity in the chest when "[s]omething told me that that was the will of God. Something just

kind of overcame me and I couldn't pass my pain and I did it!" Defendant claimed that, when he stabbed Felicity, she was not sleeping but was "[g]rowling at me, kind of." When asked why he did this, defendant stated that she was the Antichrist. When asked to explain this statement further, defendant explained that he thought Felicity was the Antichrist because "she was doing certain things and one minute she would go from not knowing something to all of a sudden being intelligent and soothing me and then she'd stop."

¶ 25 In defendant's case, Moon was asked if defendant made any statement during the drive to the jail. Moon stated that he had. When defendant attempted to explore the statements made by defendant, the State objected on the basis of hearsay. The statements defendant wanted to elicit from Moon were: (1) that defendant asked Moon to take him to the Sabula Bridge so that he could "end it;" (2) "I stabbed her with a knife. Oh, my God. What have I done.;" (3) "God, why haven't you taken me yet;" and (4) "I thought I was doing the right thing." The trial court overruled the State's objection on the first three statements holding that the statements went to defendant's state of mind, and not the truth of the matter asserted; the trial court sustained the hearsay objection to defendant's statement, "I thought I was doing the right thing." When the examination resumed, Moon testified to the first three statements made by defendant.

¶ 26 The State also asked all of its witnesses personally acquainted with defendant if they knew whether defendant ever made mention of a battle between good and evil, killing the devil, that the apocalypse was approaching, or a shadow monster. All of the witnesses stated that they never heard defendant mention any of those things.

¶ 27 In defendant's case, he called two correctional officers who testified that, on June 1, 2002, defendant appeared "very crushed" and emotionally spent, and was crying and sobbing. On the next day, defendant was observed to be crouched or laying in the corner of his cell in a

fetal position the whole day. One of the correctional officers believed that defendant did not know where he was as he was being booked, and appeared not to register his surroundings as he was taken to court for the first time. Neither of the correctional officers heard defendant mention anything about killing the devil or the apocalypse.

¶ 28 Defendant called Laura Snider from the Sinnissippi Center, a mental health agency. Snider testified that, on May 31, 2002, she spoke with defendant. Defendant told her that he was having emotional problems and made an appointment for an examination. Snider further testified that she did not receive any information indicating that defendant was undergoing an emergency or that defendant was suffering from hallucinations.

¶ 29 When defendant was processed, blood and urine samples were taken. Testing on the samples revealed the recent marijuana use, but the amount was not quantified.

¶ 30 Defendant also called Michael Chiapetta, a clinical psychologist, who evaluated defendant. Chiapetta opined that defendant was undergoing a brief psychotic disorder that rendered him legally insane at the time of the stabbing and could not appreciate the criminality of his conduct. Chiapetta based his opinion on information he obtained from interviewing and testing defendant as well as the collateral information contained in some other psychological testing conducted on defendant and the police reports.

¶ 31 On rebuttal, the State called Dr. Carl Wahlstrom, a psychiatrist. Wahlstrom rendered the opinion that defendant was not legally insane and could appreciate the criminality of his behavior. According to Wahlstrom, defendant's conduct immediately following the stabbing was an expression of remorse and not the manifestation of a psychotic break. Wahlstrom was asked specifically about the day defendant spent in his jail cell curled into a fetal position and if this did not evidence that defendant was experiencing a brief psychotic disorder. Wahlstrom

stated that, after the trauma of the incident, it was possible that defendant experienced a period of psychosis.

¶ 32 The State also called defendant's coworkers from the Swiss Colony plant, where defendant worked from August to December 2001. They all testified that defendant appeared to be a good worker and none of them heard defendant ever mention the battle between good and evil, that the apocalypse was approaching, that Felicity was evil, or that he was possessed by the devil. The State also called a barber who had given defendant a haircut not quite three weeks after his arrest. The barber testified that defendant seemed normal, was not crying or despondent, and may have chuckled about something. The barber further testified that defendant was polite and courteous and made no mention of the battle between good and evil or the apocalypse.

¶ 33 After the jury found defendant guilty but mentally ill of murdering Felicity he was sentenced to a term of natural life imprisonment. With regard to fines and costs, the trial court said, "[a]ll mandatory fines and costs are imposed including the VCVA Fund fine of $25.00, Arrestee's Medical Fund Fine $10.00, Violence Fine Fund $100.00, Criminal Surcharge of $4.00. Credit for time in custody will satisfy the Arrestee's Medical Fund Fine."

¶ 34 On re-sentencing, the State presented a victim impact statement from Eppenstein, which the court read. In her statement, Eppenstein said that defendant took her world away when he killed Felicity, who would never again have a birthday or a school event. Eppenstein opined that defendant should get the maximum allowable prison sentence.

¶ 35 Dr. Phyllis Tolley, a clinical psychologist with the Illinois Department of Corrections, testified that she met with defendant approximately once a month in Stateville Correctional Center. She said that defendant had been diagnosed with psychosis, depression and anxiety. In

her opinion, defendant's condition could be treated with a lot of psychiatric help and therapy. She had seen other patients with similar conditions and as long as they stayed on their medication, went to outpatient treatment, and were willing to ask for help, they were manageable. However, Tolley could not offer an opinion as to whether defendant's condition would be "manageable" if he were released from prison because she had only worked with him in a structured environment. She said that if defendant were released from prison he would need to be stabilized on medication and he would need daily group counseling. From her experience, most patients like defendant would have difficulty holding down a full-time job.

¶ 36 Defendant testified that his mental health had improved in prison, but that he felt he needed more treatment. He had been prescribed several antipsychotic medications. He said that he could not accept what he had done, and he could not forgive himself. Also, he felt tremendous guilt for the pain he had caused Felicity's family. Defendant admitted that about a week before he killed Felicity he had been upset with Eppenstein. He had suspected her of being unfaithful to him, and he talked to others about it. He said he was losing control of himself, and Eppenstein had "grounded" him and kept him level headed.

¶ 37 Defendant admitted that he had prior mental hospitalizations and had failed to follow up on their treatment recommendations that he receive counseling. He had tried to get emergency help on the day before the offense, but the healthcare center that he had contacted could not see him for several days.

¶ 38 A presentence investigation report detailed defendant's minimal criminal history, sporadic employment history, psychiatric history, and an extensive history of substance abuse.

¶ 39 After the parties' arguments, defendant made a statement in allocution expressing his remorse for Felicity's murder. He denied hurting Felicity because he was angry at Eppenstein,

and said that he was "sick, scared, and confused." Since Felicity's murder he had learned to recognize the symptoms of a breakdown, and he said he could now manage those symptoms and be a productive member of society.

¶ 40 The trial court then commented on the evidence presented at trial as well as at the sentencing hearing. It expressed disbelief at defendant's trial testimony that he committed the offense because he was hearing voices. Instead, it found that defendant had killed Felicity to punish Eppenstein, and then had "freaked out" and had run out of the building. It characterized Felicity's murder as "especially heartless and cruel." The trial court said it did not find any statutory factors in mitigation present in this case. In aggravation, however, the court found defendant occupied a position of trust over Felicity at the time of the offense, and stated that a significant sentence was warranted to deter others from murdering a child in their care. The court then made the following statement:

> "I have considered very carefully this case for some time. I have considered the nature and circumstances of the offense, the evidence presented today, the arguments of the parties, the defendant's statement in allocution, the information contained within the presentence report, and the factors in mitigation and aggravation under the statute. I'm taking into account the need to protect the public and the need to deter the defendant and others from approaching [*sic*] this kind of crime. I don't see any substantial possibility of rehabilitation of the defendant."

¶ 41 The trial court sentenced defendant to 80 years' imprisonment with credit for time served. With regard to costs and assessments, the trial court said, "[t]here were various costs and financial assessments imposed the first time the sentencing was performed. Those are imposed again ***." The court then admonished defendant that, if he wished to appeal, he needed to file

a notice of appeal within 30 days and that his counsel would be available during that time to help him file an appeal. It said that if a notice of appeal was requested, the clerk would file it "unless there's something else requested by [d]efendant." Defendant has been in custody since June 1, 2002.

¶ 42 II. ANALYSIS

¶ 43 On appeal, defendant raises three issues: (1) after he was sentenced, the trial court failed to properly admonish him pursuant to Illinois Supreme Rule 605(a)(3) (eff. Oct. 1, 2001), and therefore his sentencing issues should not be waived on appeal; (2) the trial court abused its discretion in failing to recognize the mitigating effects of defendant's mental illness, remorse for his crime, and his potential for rehabilitation; and (3) he is entitled to $5 a day in *per diem* credit for time served against his $100 domestic violence fine, and his VCVA assessment should be reduced.

¶ 44 A. Illinois Supreme Court Rule 605(a)(3)

¶ 45 Defendant first contends that the trial court failed to comply with Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001) at his re-sentencing hearing when it gave him insufficient admonishments after sentencing him. Since he was inadequately admonished, he argues, he has not waived his claims of sentencing error on appeal, and we should address the merits of these claims. In the alternative, defendant argues that we should remand this case to the trial court for proper admonishments pursuant to Rule 605(a)(3) (eff. Oct. 1, 2001).

¶ 46 Illinois Supreme Court Rule 605(a)(3) provides that in cases where a defendant is sentenced after a plea of not guilty the trial court shall, at the time of sentencing, admonish defendant: (1) that the right to appeal the judgment of conviction, excluding the sentence imposed or modified, will be preserved only he files a notice of appeal in the trial court within 30

days of the date on which the sentence is imposed; (2) if he seeks to challenge his sentence, or any aspect of the sentencing hearing, he must file a written motion to reconsider the sentence within 30 days of sentencing; (3) any claim of error regarding the sentence imposed, or any aspect of the sentence, shall be deemed waived if not raised in the written motion to reconsider the sentence; and (4) defendant must file a notice of appeal in the trial court within 30 days from the entry of the order disposing of the motion to reconsider sentence or order disposing of any challenges to the sentencing hearing, if he wishes to preserve his right to appeal. Ill. S. Ct. R. 605(a)(3) (eff. Oct. 1, 2001).

¶ 47 Here, defendant argues that the trial court failed to admonish him with regard to prongs two, three, and four of Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001). In response, the State agrees with defendant that he was improperly admonished. The question, then, is whether this court should remand for proper admonishments in accordance with Rule 605(a)(3), or address the merits of defendant's sentencing claims.

¶ 48 Where a trial court fails to properly admonish a defendant on preservation of sentencing issues for appeal, "remand is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment." *People v. Henderson*, 217 Ill. 2d 449, 466 (2005). Since defendant does not allege that he has been prejudiced or denied justice as a result of the inadequate admonishments, and in fact he urges this court to view the merits of his sentencing issues on appeal, we find that a remand is unnecessary. Accordingly, we turn to the merits of the issues raised on appeal.

¶ 49 B. Sentencing Errors

¶ 50 Defendant argues that the trial court erred at the re-sentencing hearing in three ways: (1) it ignored his showing of remorse by failing to acknowledge it; (2) it minimized his mental

illness; and (3) its statement that there was no substantial possibility of his rehabilitation was contrary to the evidence.

¶ 51 Trial courts have broad discretion in sentencing, and a sentence within the applicable statutory range may not be disturbed on appeal absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such an abuse of discretion occurs where the sentence is greatly at variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Null*, 2013 IL App (2d) 110189, ¶55. All sentences should consider the seriousness of the crime and the objective of returning the offender to useful citizenship. *Id*. ¶56; Ill. Const. 1970, art. I, §11. Careful consideration must be given to all mitigating and aggravating factors including the defendant's age, demeanor, habits, and mentality, along with the need for deterrence and the potential for rehabilitation. *Null*, 2013 IL App (2d) 110189, ¶ 56.

¶ 52 With regard to defendant's showing of remorse, the record reflects that before sentencing him the trial court specifically said that it had considered both the evidence presented at the hearing and defendant's statement in allocution. Therefore, it did in fact consider defendant's remorse in sentencing him. Although defendant claims that the trial court did not acknowledge any mitigating factors here, statutory or otherwise, the record reflects that the court only stated that it did not find any *statutory* factors in mitigation present in this case. Remorse is not a statutory factor in mitigation. See 730 ILCS 5/5-5-3.1(a) (West 2002). While we agree with defendant that an offender's remorse can be considered a non-statutory mitigating factor (see *People v. Smith*, 177 Ill. 2d 53, 100 (1997)), defendant has cited no authority for the proposition that the trial court is required to specifically list every non-statutory mitigating factor that might be present in a case. As we have noted, the trial court specifically acknowledged that it had

considered both the evidence presented at the re-sentencing hearing and defendant's statement in allocution. Therefore, we reject defendant's claim that the trial court did not take his remorse into consideration when sentencing him.

¶ 53 Next, defendant argues that the trial court minimized his mental illness because it did not mention Dr. Tolley's testimony that he had been diagnosed with psychosis. He also attempts to draw an analogy between mentally retarded defendants and himself, because he has been diagnosed with psychosis. Specifically, he argues, "[b]y analogy to *Atkins v. Virginia*, 536 U.S. 304 (2002), the fact that [he] was mentally ill at the time of the offense (hence the verdict of guilty but mentally ill) makes him less culpable from a sentencing viewpoint than someone who had committed the same offense without any mental illness."

¶ 54 Again, the trial court is under no requirement to comment on every detail testified to at a sentencing hearing. The trial court noted that it had considered the evidence presented at the hearing, and Dr. Tolley's testimony was part of that evidence. Further, defendant's mental illness was not a statutory mitigating factor. The only statutory mitigating factor with regard to mental ability is mental retardation (730 ILCS 5/5-5-3.1(13) (West 2002)), and there was no evidence introduced at the sentencing hearing that defendant was mentally retarded. See 730 ILCS 5/5-1-13 (West 2002) (mentally retarded means sub-average general intellectual functioning). We are also not persuaded by defendant's argument that his mental illness is comparable to mental retardation, citing to *Atkins v. Virginia*, 536 U.S. 304 (2002) (the eighth amendment to the United States Constitution (U.S. Const. amend. VIII) prohibits the execution of the mentally retarded). Mental illness is very distinct from mental retardation, which is why, before the death penalty was abolished in Illinois, a guilty-but-mentally-ill defendant could lawfully receive a death sentence. *People v. Runge*, 234 Ill. 2d 68, 149 (2009) (distinguishing

Atkins on the same ground). Therefore, we reject defendant's contention that he is less culpable for this offense because of his mental illness.

¶ 55 While mental illness can be a non-statutory factor for a trial court to consider in sentencing (*People v. Robinson*, 221 Ill. App. 3d 1045, 1052 (1991)) not every mental or emotional problem is necessarily mitigating. *People v. Coleman*, 168 Ill. 2d 509, 537 (1995) (death penalty hearing). In fact, psychological disorders can be viewed as either mitigating or aggravating factors, depending on whether the evidence evokes compassion or shows the possibility of future dangerousness. *People v. Thompson*, 222 Ill. 2d 1, 43 (2006) (death penalty hearing). Viewed in this light, the trial court was not required to view the evidence as mitigating. Here, defendant's mental illness did not greatly affect his ability to function on a daily basis. Further, we agree with the trial court's comments that defendant's testimony that he killed Felicity because he was hearing voices was unbelievable, and that instead he killed her to punish Eppenstein. These conclusions are clearly supported by the evidence. At trial, a bartender at CJ's Pizza testified that *a week before he murdered Felicity* defendant told the bartender that he would kill her to make Eppenstein hurt as much as she hurt him. The premeditated murder of a child is the most reprehensible act of violence one can commit, topped only by the rape and murder of a child. For all these reasons, we find that defendant's mental illness was not a mitigating factor in this case.

¶ 56 Within this argument, defendant also claims that it is a "questionable proposition" that his sentence would effectively deter other mentally ill persons from committing this "strange yet awful crime." We need not determine if such a statement is true, however, because the statutory provision which lists deterrence as an aggravating factor enables the trial court to consider whether defendant's sentence is necessary to deter *others* from committing the same crime. 730

ILCS 5/5-5-3.2(a)(7) (West 2002). Illinois law does not require that those "others" be limited to mentally ill people when a defendant suffers from mental illness. We agree with the trial court that defendant's sentence was necessary to deter other from committing this same type of horrific crime. Accordingly, we find no error on this point.

¶ 57 Finally, defendant argues that the trial court did not give sufficient weight to his potential for rehabilitation. Specifically, he argues: (1) Dr. Tolley testified that it was her opinion that defendant's mental health had improved and that, if he were released from prison, his impairments were manageable with medication if he would ask for help when needed; (2) he had asked for help while he was in prison; (3) the court had found that defendant had been functional and employed prior to the offense.

¶ 58 We are not persuaded. We must first note that the trial court did not find that defendant had *no* potential for rehabilitation; instead, it found he had no *substantial possibility* of being rehabilitated. Dr. Tolley testified that she did not know how defendant would function if released from prison because she had only seen him in the structured environment of a prison. Further, simply because defendant had asked for help when in prison is not evidence that he would do so when released from prison. Although defendant may have been "functional" and held a few jobs prior to murdering Felicity, Dr. Tolley testified that most patients like defendant would have difficulty holding down a full-time job.

¶ 59 The nature and circumstances of the offense is one of the most important factors governing rehabilitative potential. *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010). Here, defendant brutally murdered an innocent child, one that he considered to be his daughter, solely to punish her mother. To disregard human life in such a vicious manner is strongly indicative of

defendant's lack of rehabilitative potential. For these reasons, the trial court properly found that defendant had no substantial possibility of being rehabilitated.

¶ 60 We have reviewed the evidence presented at the re-sentencing hearing, along with the trial court's comments, and find no error. Although defendant is correct that his sentence is 60 years above the minimum sentence allowable, it is also well within the 20 to 100 year range of extended term sentencing for the first degree murder of a child under the age of 12. 730 ILCS 5/5-8-1(a)(1)(a) (West 2002); 730 ILCS 5/5-5-3.2(b)(4)(i) (West 2002); 730 ILCS 5/5-8-2(a)(1) (West 2002). For all these reasons, we hold that the trial court did not abuse its discretion in sentencing defendant to an 80-year term of imprisonment.

¶ 61 C. *Per Diem* Credit & VCVA Assessment

¶ 62 Finally, defendant contends that he is entitled to $5 a day in *per diem* credit for time served against his $100 domestic violence fine, and that his VCVA assessment must be reduced from $25 to $12.

¶ 63 1. *Per Diem* Credit

¶ 64 Pursuant to section 5-9-1.5 of the Unified Code of Corrections, a fine of $100 shall be imposed upon any person who is convicted of murder, provided that the offender and the victim are household members. 730 ILCS 5/5-9-1.5 (West 2002). A defendant is statutorily entitled to $5 of credit for each day of time served on a bailable offense against fines that are imposed. 725 ILCS 5/110-14 (West 2002).

¶ 65 We initially note that defendant raises the issue of *per diem* credit for the first time on appeal. However, defendant argues, and the State agrees, that *per diem* credit can be requested for the first time on appeal. We agree with the parties, and we shall therefore address the merits of this issue. See *People v. Woodard*, 175 Ill. 2d 435, 457 (1997) (because there is a statutory

right to sentencing credit, an error regarding credit is not waived for the failure to raise it in the trial court).

¶ 66 The State concedes that since defendant has been in custody since June 2002 he has ample credit to satisfy the $100 domestic violence fine. We agree. Therefore, defendant is entitled to have his entire $100 domestic violence fine offset by his *per diem* credit for pre-sentence custody.

¶ 67 Next, we must note that within this argument defendant states that as of the original sentencing date in 2003, he had been in custody well over a year, and "had ample credit to satisfy both the $10 arrestee's medical fine [*sic*] and the $100 Domestic Violence Fine." The State does not respond to defendant's point about sentencing credit for the "arrestee's medical fine."[2] The record reflects that at the original sentencing hearing, the trial court did indeed note that defendant had sufficient sentencing credit to satisfy the "arrestee's medical fund fine [*sic*]." On re-sentencing, however, the trial court made no such finding, and had it done so, it would have been in error. This court has specifically held that the arrestee's medical costs fee is not covered by pre-sentence custody. See *People v. Elcock*, 396 Ill. App. 3d 524, 540, n. 2 (2009). Accordingly, that fee is still outstanding.

¶ 68 2. VCVA Assessment

¶ 69 With regard to the VCVA assessment, defendant admits that he did not object to the miscalculation of the VCVA amount, but he argues that this issue should be reviewed for plain error. We need not review this issue for plain error, however, since a VCVA assessment is

[2] Although defendant repeatedly refers to this cost as a "fine" it is accurately referred to as a fee. See 730 ILCS 125/17 (West 2002).

statutory in nature. A sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 26 (the issue of whether a VCVA assessment should be reduced may be raised at any time).

¶ 70 Defendant contends that the $25 VCVA assessment should be reduced because, under Illinois law, if any other fines are imposed, the VCVA penalty is $4 for every $40 or a fraction thereof. See 725 ILCS 240/10(c) (West 2002). Therefore, he argues that since the total amount of fines imposed was $110, his VCVA assessment should be reduced to $12.

¶ 71 The State concedes that defendant's VCVA assessment should be reduced from $25 to $12 since he received other fines with his sentence, and those fines totaled $110. Again, we note that the arrestee's medical cost is a fee, not a fine. Therefore, defendant was fined $100 total. However, we agree with the parties that a $100 fine would reduce the VCVA assessment from $25 to $12. Accordingly, we make such a reduction.

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we affirm defendant's sentence of 80 years' imprisonment. However, we modify his sentence to reflect a $100 credit against the domestic violence fine, and we reduce the VCVA assessment from $25 to $12.

¶ 74 The judgment of the circuit court of Carroll County is affirmed in part and modified in part.

¶ 75 Affirmed as modified.