2015 IL App (2d) 121216-U
No. 2-12-1216
Order filed April 22, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-4004
DRESHAWN LUNA,	)	Honorable Mark L. Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We reject defendant's arguments that: (1) counsel was ineffective for telling the jury in opening statements that it would hear from a witness who never testified; (2) statutes requiring his transfer from juvenile to adult court, resulting in his exposure to adult sentencing and "truth in sentencing" provisions, are unconstitutional; and (3) the jury instructions and verdict supported only a 20-year, not 25-year, firearm enhancement. We agree with defendant's argument that the DNA fee assessed against him must be vacated. Per defendant's request, we conducted an *in camera* review of sealed medical documents. Affirmed in part, and vacated in part.

¶ 2 In 2012, a jury convicted defendant, Dreshawn Luna, of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West

2010)) for crimes that he committed on July 4, 2010, when he was age 15. Specifically, the jury found that, on July 4, 2010, outside of a Ramada Inn in Waukegan, defendant killed Farkhan Jones and injured Patrick Enis. Further, the jury found that, with respect to the first-degree murder conviction, defendant "personally discharged a firearm." The trial court sentenced defendant to consecutive prison terms of 51 years for the first-degree murder conviction (26 years for the murder, plus 25 years as an enhancement for personally discharging a firearm that proximately caused death) and 10 years for the aggravated battery conviction.

¶ 3 On appeal, defendant argues first that his counsel was ineffective because he promised the jury in opening statements that it would hear testimony from a witness who never testified. Second, defendant argues that Illinois law is unconstitutional where the mandatory transfer of juveniles to adult court (705 ILCS 405/5-130 (West 2010)), the application to juveniles of mandatory firearm enhancements (see 730 ILCS 5/5-8-1(a)(1)(d) (West 2010)), mandatory consecutive sentencing (see 730 ILCS 5/5-8-4(d)(1) (West 2010)), and application of adult sentencing ranges and "truth in sentencing" provisions (730 ILCS 5/3-6-3(a)(2)(i), (ii) (West 2010) (requiring that he serve 100% of the murder sentence), do not permit consideration of youthfulness at the time of the offense.[1] Third, defendant argues that, because the jury

[1] As similar issues were being considered, we ordered this case held in abeyance pending our supreme court's review of *People v. Pacheco*, 2013 IL App (4th) 110409 (pet. for leave to appeal allowed, No. 116402 (Sept. 25, 2013)) or *People v. Jenkins*, 2013 Il App (1st) 103006-U (pet. for leave to appeal allowed, No. 115979 (Sept. 25, 2013)). On January 27, 2015, however, the supreme court determined that those petitions were improvidently granted and, therefore, it vacated those orders and denied the petitions for leave to appeal. Accordingly, this disposition no longer needs to be held in abeyance.

instructions and verdict forms only reflect the jury's finding that he personally discharged a firearm, *not* that he personally discharged a firearm that proximately caused death, the sentencing enhancement must be reduced from 25 to 20 years. Fourth, defendant argues that the $200 DNA analysis fee assessed against him must be vacated because his DNA had been previously submitted for analysis. Finally, defendant requests that we conduct an *in camera* inspection of sealed medical documents to determine whether the court abused its discretion in deciding not to disclose those documents to the defense or, alternatively, for us to determine whether he could make a good faith argument that the court abused its discretion in that regard and to allow further briefing.

¶ 4 For the following reasons, we reject defendant's first three arguments. We agree with his fourth argument. Finally, per defendant's request, we have conducted an *in camera* review of documents and have determined the trial court did not abuse its discretion.

¶ 5 I. BACKGROUND

¶ 6 A. Charging Instrument

¶ 7 As summarized above, on July 4, 2010, outside of a Ramada Inn in Waukegan, Farkhan Jones was shot and killed, and Patrick Enis was shot and injured. Defendant was arrested and charged with the incidents. The two-count, first-degree murder indictment stated, for each count, that defendant shot Jones "with a handgun, thereby causing [his] death[.]" Further, the indictment noted:

> "The State is seeking that a sentence of 25-years or up to a term of natural life shall be added to the term of imprisonment imposed by the court pursuant to 730 ILCS 5/5-8-1(a)(1)(d)(iii), in that during the commission of this offense the defendant personally

discharged a firearm *that proximately caused death* to another person, being Farkhan Jones." (Emphasis added.)

¶ 8 The section upon which the State relied for its enhancement request, section 5/5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (Code), provides that, for a first-degree murder conviction, a minimum *25-year* sentencing enhancement must be added if the defendant, during commission of the offense, "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person[.]" In contrast, however, we note that section 5/5-8-1(a)(1)(d)(ii) of the Code provides (again, for a first-degree murder conviction) that a *20-year* sentencing enhancement must be added if, during the commission of the offense, the defendant "personally discharged a firearm[.]" 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2010).

¶ 9 B. *In Camera* Inspection of Psychiatric Records

¶ 10 On February 23, 2012, defendant moved for supplemental discovery seeking, in part, any fitness evaluations performed on one of the State's potential witnesses, Rashee Bell. On March 5, 2012, the court denied the request. On March 30, 2012, defendant filed a second motion seeking Bell's psychiatric reports. On April 2, 2012, at oral argument on the motion, counsel noted that Bell had, at one time, been found unfit to stand trial. The assistant State's Attorney asserted that she had not seen the records, did not know what they contained, and that Bell had been restored to fitness and pleaded guilty in his own case in May 2010, prior to the July 2010 shooting. The court agreed to review the records *in camera*. On April 11, 2012, the court stated that it had reviewed Bell's mental health records *in camera* and had determined that none of the documents would be tendered to either side. The court ordered the records, totaling 13 pages, sealed and included in the record on appeal.

¶ 11 C. Trial Evidence

¶ 12 On May 30, 2012, defense counsel presented his opening statement. Counsel argued that the evidence would show competing versions of events and that the State's witnesses, who identified defendant as the July 4, 2010, shooter, should not be credited. Instead, counsel argued that the jury should consider the testimonies of Shawn Smith and Rashee Bell, who both identified the shooter as Marquise Coleman. Counsel noted that, because Smith and Coleman grew up together, Smith was reluctant to identify Coleman. Counsel summarized "the State's version [of events,] that will be competing not only with the facts of Smith and Bell but also with your common sense."

¶ 13 The evidence reflected that, on July 3, 2010, and into the early morning hours of July 4, 2010, a party took place at a Ramada Inn in Waukegan. Although the party started out small and relatively quiet, more people and uninvited guests arrived. Cameron White testified that he was at the party, and defendant was also present. According to White, Marquis Coleman was playing dice and was angry because he was losing money. Coleman left the room for around 10 minutes, returning with a gun in his hands. He said, "y'all know what this is," meaning a robbery, and White, Jones, and others dropped money on the ground. Coleman took the money and left. The party then broke up, and people moved outside. Once there, White saw defendant on a cell phone. About 10 minutes later, a car pulled into the parking lot and Coleman exited the vehicle. He returned money to White and Jones. Afterwards, Jones, who was seated in the driver's seat of a vehicle, drove away. However, his car quickly returned and Coleman and defendant walked up to it. They stood by the driver's door, where Jones was seated. White approached the front passenger door, where Daaron Dixon was seated. Patrick Enis was in the back seat, but he got out of the car to speak with Coleman. White heard gunshots and ran across the parking lot to his

car. When he arrived, defendant was already there. Defendant climbed into the front seat of White's car, while White's friend, "J.T.," climbed in back. Defendant told White to drive him to a location about five minutes away in south Waukegan. Defendant had a gun on his lap. At trial, White testified that defendant did not say anything while in the car. In his July 13, 2010, police statement, however, White stated that defendant wiped the gun with his sweatshirt and said that Jones was shot because he reached for the gun. Further, in his written statement, White recounted that, after dropping off defendant, defendant said to White "y'all was never with us." White testified he signed the written statement only because he had been at the police station for six hours and he wanted to leave.

¶ 14 Detective Larnell Farmer testified that he first spoke with White on the telephone on July 8, 2010. At that time, White said that Coleman and defendant were both at the July 4, 2010, party, but he did not say that defendant was the shooter or had a gun. On July 13, 2010, Farmer interviewed White at the police station. At first, White was not forthcoming with information. According to Farmer, White was a "reluctant witness." After a few hours, White became more cooperative and completed a written statement. Farmer reviewed White's statement with him. At that time, White confirmed that, when he drove defendant away from the hotel, defendant cleaned a gun with his sweatshirt and stated that Jones was shot because he grabbed the gun. Farmer testified that White identified defendant in a photo lineup and, unprompted, wrote on the paper defendant's nickname (*i.e.*, "Bald Head") and that he "cleaned the gun with his sweatshirt." Further, Farmer testified that White also identified Coleman in a photo lineup and, again unprompted, wrote on it "[Coleman] robbed the dice game with a gun."

¶ 15 Patrick Enis testified that Jones was his best friend. They were at the Ramada party together, and people were shooting dice. Enis stepped outside. Jones later came outside looking

scared and breathing hard. Jones said that someone named "Quis" or "Qui" had robbed the dice game. Enis, Jones, and Dixon got into Jones's car. Jones was driving, Dixon was in the front passenger seat, and Enis was in the back seat on the passenger side. As they were driving away, Enis saw someone standing in the parking lot, gesturing for them to stop. Enis was upset by the fact that Jones, a friend, was scared and upset, so he told Jones to turn the car around. Jones did so, and Enis exited the vehicle and walked up to the person in the parking lot. The person, whom Enis testified was defendant, was standing near a street light. Enis noticed defendant's light skin and "pretty eyes." Defendant stood with his hand on his back pocket. The two spoke briefly, and then Enis returned to Jones's car, which had pulled up near him. The back door was locked, and Enis was trying to get inside when defendant walked up and stood by the window near Jones. Defendant was less than one foot away from Enis, and Enis saw defendant take a gun out from his pocket and hold it near Jones's head. Jones leaned back and tried to push the gun out of his face. Enis testified that the car began to roll forward, and he realized that he would not be able to get inside of it, so he turned to run. As he turned to run, he heard the first gunshot. He heard more gunshots and felt a bullet pass by him. Enis looked behind him to see if defendant was following him, and he saw defendant aiming a gun in his direction. Enis heard another shot and was hit in the back. He ran over a depressed portion of a fence and flagged down a car and then, ultimately, an ambulance. Enis testified repeatedly that he was "100%" positive that defendant was the person who shot him.

¶ 16 Dixon testified consistently with Enis. Namely, that he was at the party and saw a dice game taking place. Dixon went outside. Jones came running outside to the car and said "Let's go." Jones told Dixon that someone robbed the dice game and took some of his money. They got into Jones's car, with Jones driving, Dixon in the front passenger seat, and Enis in back. As

they were driving out of the parking lot, Enis said to stop the car. Enis said he wanted to know why the dice game was robbed, and he exited the vehicle and walked toward defendant. Dixon testified that he spoke with White outside of his car window, and then Jones drove up to get Enis back in the car. Enis and defendant were talking and arguing. Enis tried to get back in the car, but the door was locked. Jones told Dixon to open the door. Defendant was standing outside of Jones's door. Dixon saw defendant make a grabbing motion toward his pants. Dixon saw defendant point a gun at Jones through the window. Jones grabbed the gun, and Dixon heard a "bang." The car was in drive, so, after the gunshot, Jones's dead weight was on the gas pedal. Dixon was trying to hold Jones, and the car crashed into a hotel room. Dixon heard more gunshots. Dixon did not know where Enis was at that point, but Enis was not in the car.

¶ 17 Dixon did not immediately tell the police who shot Jones. Indeed, he initially told police and wrote a statement saying that he did not see the shooter. On July 5, 2010, he was shown a photo lineup that included defendant's photo. The police asked him whether anyone in the lineup was at the party, and whether it appeared that they had a weapon or were "on anything." At that time, Dixon circled defendant's picture and wrote that he did not seem like he was "on anything." Dixon agreed that he knew at that time that defendant shot and killed his friend, but he did not tell the police officer that information because "that's not what he asked me." Dixon did not want to volunteer any additional information, and he was nervous, scared, and in shock. On July 6, 2010, however, after consulting with his mother, Dixon returned to the station, identified defendant as the shooter, and issued a written statement identifying defendant and explaining how Jones was shot. Dixon testified that he saw Coleman at the party, but did not see Coleman do anything.

¶ 18 On July 4, 2010, Sergeant Devin Roush was on duty when, around 12:14 a.m., he heard four gunshots coming from the area of the Ramada Inn, north of his location. He proceeded to the Ramada Inn and saw four individuals running, three together and a fourth about 40 to 50 feet behind the others. Roush pursued one individual while his partner, Officer Andrew White, followed the other three. Roush identified himself to the individual by yelling "police," and he noticed that the individual had both hands in his pockets. Roush repeatedly ordered the individual to remove his hands from his pockets. The individual did so and laid down on the ground as directed. Roush handcuffed the individual and learned that he was Marquis Coleman. He searched for weapons and contraband and found none. Roush walked Coleman over to where Officer White had detained the other three individuals, including Rashee Bell. Roush asked them why they were running, and one responded that someone shot at them and they ran away. The individuals were ultimately transported to the police department for questioning.

¶ 19 Detective Michael Mandro testified that, around 4 a.m. on July 4, 2010, he performed a gunshot residue test on Coleman's hands. Mary Wong, a forensic scientist, testified that she analyzed the gunshot residue test performed on Coleman. To a reasonable degree of scientific certainty, Wong opined that test results show that Coleman "may not have discharged a firearm with either hand. If he did, then the particles were removed by activity or [were] not detected by the procedure or not deposited." In sum, the test revealed no evidence of gunshot residue. However, Wong agreed that the passage of time from the time of firing a weapon to the time of the test (here, four hours and 15 minutes) can affect whether gunshot residue is found on a person's hands. She further agreed that, if a person runs, sweats, or repeatedly wipes his or her hands on clothes, particles can be removed.

¶ 20 The police searched the grounds around the crime scene. No gun was recovered. The bullets recovered from the victims' bodies were determined to have been fired from the same firearm.

¶ 21 Marquis Coleman (age 20 on July 4, 2010) testified that, during the party, some people were playing dice. Defendant was playing dice and losing money. Coleman did not go to school with defendant or know him well, and he agreed that defendant was "a lot younger" than him. The party grew in size, and some of the uninvited guests, including Coleman, Shawn Smith, Tyler McKinney, and defendant, were asked to leave. In the parking lot, defendant was complaining that he needed his money back, so Coleman decided to rob the dice game. Coleman asked defendant for his gun (he had previously asked defendant if he had it with him), and defendant removed it from his waistline. Coleman returned to the party with defendant's gun and robbed the people playing dice, including Jones, at gunpoint. He returned to the parking lot, and defendant demanded that Coleman return the gun and the money defendant lost in the game. Coleman did so, but he did not like that defendant was treating him like a "kid." Thereafter, other partygoers came into the parking lot, and Coleman gave them back their money. Defendant waived at a car that was driving away, motioning for it to come over. A man, later identified as Enis, exited the vehicle and walked up to defendant. Enis and defendant appeared to have an unfriendly conversation. They walked toward the driver's side of the car. Coleman saw defendant point the gun at the driver, Jones, and shoot. Enis ran away, and defendant shot at him while he was running. The car rolled forward and crashed into the hotel. Coleman started running and saw three men running ahead of him. Coleman had to hold up his pants while he ran to keep them from falling down. Coleman and the others were stopped by police.

¶ 22 On July 3, 2010, Coleman was on probation for possession of a controlled substance with intent to deliver. Coleman initially told police that he did not know anything about the shooting other than that he exited the hotel and the shooting suddenly started. Coleman testified that he did not want to implicate defendant because he was scared of him. Coleman testified that he was ultimately charged with armed robbery in connection with the July 4, 2010, incident, and he knew that, for a time, police suspected he was the shooter. Further, he knew that he faced 6 to 30 years of imprisonment on the armed robbery charge. Coleman was testifying pursuant to a plea agreement where, in exchange for his cooperation and truthful testimony, he would plead guilty to a lesser charge of aggravated robbery and be sentenced to 4 to 10 years (to be served at 50%). Coleman never identified defendant as the shooter until after his plea agreement was in place. Further, Coleman did not sign his agreement until a handwritten paragraph was added, specifying that he would not be charged with the murder.

¶ 23 After the State rested, the court denied defendant's motion for a directed verdict. The day before starting his case, defense counsel indicated to the court, outside the presence of the jury, an intention to call both Shawn Smith and Rashee Bell. Ultimately, of those two, he called only Bell to the stand.[2] Bell testified that he was present at the party at the Ramada Inn on July 3, 2010. Bell was shooting dice with Jones, Coleman, and others. Bell testified that defendant was not shooting dice. Coleman appeared to lose money, stopped playing, and then left the game. Coleman then pointed a gun at everyone and demanded their money. Bell testified that he was terrified. Coleman left. People left the party and went outside. Bell testified that he heard several voices, including Coleman's, talking loud or arguing in the parking lot. He saw

[2] Defendant called numerous other witnesses, but their testimonies are not relevant to the issues on appeal.

Coleman arguing with Jones, who was sitting in a car with a group of guys standing around it. When asked if he saw who committed the shooting, Bell testified "No, I did not. I took off running after I heard the shots."

¶ 24 Despite his testimony that he did not see the shooter, Bell agreed that, on the night of the shooting, he provided police with a written statement in which he wrote that Coleman was the shooter. Further, Bell also agreed that, the night of the shooting, he reviewed a photo lineup and he circled Coleman's photo, writing on the lineup that Coleman was the person who robbed the dice game and was the shooter. Finally, he agreed that he verbally told police that Coleman was the shooter and that the shooter was tall. Bell agreed on cross-examination that, in 2009, he was convicted of robbery and, further, that, prior to July 3, 2010, he did not know Coleman. Bell agreed on cross-examination that he did not see the shooting itself and did not see who was the shooter. Bell testified that he had assumed that Coleman was the shooter because Coleman was the only person he had seen that night with a gun. Finally, Bell agreed that, after his first statement on July 4, 2010 (claiming Coleman was the shooter), he made a second statement on July 7, 2010, that Coleman was *not* the shooter and, instead, that the shooter was a "short, light-skinned guy." Bell testified that police told him what facts to write in that second statement. Bell testified that he knew defendant from their neighborhood, but he did not know Coleman.

¶ 25 D. Jury Instructions and Verdict Forms

¶ 26 In contrast to the wording of the indictment (wherein the State alleged that defendant personally discharged a firearm *that proximately caused death* to another person), the jury was instructed only that "the State has also alleged that during the commission of first degree murder the defendant *personally discharged a firearm*." (Emphasis added.) Further, it was instructed that, if it found defendant guilty of first-degree murder, it should then deliberate to decide

whether the State has proved beyond a reasonable doubt the allegation that the defendant "personally discharged a firearm." Finally, the jury was instructed that "to sustain the allegation made in connection with the offense of first degree murder, the State must prove *** [t]hat during the commission of the offense of first degree murder the defendant personally discharged a firearm. A person is considered to have 'personally discharged a firearm' when he, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm."

¶ 27 Consistent with the foregoing instructions, the jury received and signed verdict forms finding: (1) defendant guilty of two counts of first-degree murder; (2) that the allegation that defendant "personally discharged a firearm" was proven; and (3) defendant guilty of aggravated battery with a firearm (caused injury to Enis).

¶ 28 The trial court denied defendant's motion for a new trial and sentenced defendant to consecutive prison terms of 51 years for the first-degree murder conviction (26 years for the murder, plus 25 years as an enhancement for personally discharging a firearm that proximately caused death) and 10 years for the aggravated battery conviction. Before announcing the sentence and 25-year enhancement, the court stated "the jury has determined that this crime was the result of [defendant] personally discharging a firearm resulting in a death of Farakhan [*sic*] Jones." Defendant's motion to reconsider the sentence was denied. Defendant appeals.

¶ 29 II. ANALYSIS

¶ 30 A. Ineffective Assistance of Counsel

¶ 31 Defendant argues first that he was denied effective assistance of trial counsel where his attorney, in opening statements, promised the jury that it would hear from two witnesses, Smith and Bell, who would testify that Coleman was the shooter. Instead, the jury heard only from

Bell, who testified that he did not see the shooting. Defendant argues that, where he promised the jury that it would hear exculpatory evidence and then he failed to deliver on that promise, counsel's performance was unreasonably deficient and prejudicial. We disagree.

¶ 32 An ineffective-assistance claim requires a defendant to show that his or her counsel's performance was objectively unreasonable (performance prong) *and* there is a reasonable probability (sufficient to undermine confidence in the outcome) that, but for counsel's errors, the jury's verdict would have differed (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To succeed on the ineffective-assistance claim, both prongs must be satisfied. *Id.* at 687; *People v. Williams*, 181 Ill. 2d 297, 320 (1998).

¶ 33 The cases defendant cites in support of his argument primarily concern the performance prong. However, we may dispose of defendant's ineffective-assistance claim by proceeding straight to the prejudice prong without addressing the performance prong. *People v. Hale*, 2013 IL 113140, ¶ 17. Here, even if we assume *arguendo* that counsel's allegedly-reneged promise constituted deficient performance, we do not agree that it prejudiced defendant such that there is a reasonable probability that, but for the alleged error, the result of his trial might have been different. Defendant argues that the failure to fulfill a promise to produce significant exonerating evidence is itself highly prejudicial. We disagree under the facts of this case. First, although in his opening statement counsel announced an intention to call both Smith and Bell, who would testify that Coleman was the shooter, this "promise" was not overly emphasized. In fact, counsel expressly couched his ability to produce Smith as one that would be difficult, noting for the jury that Smith was reluctant to identify Coleman, since Smith and Coleman were good friends. After opening statements, Smith's appearance or lack thereof was never again mentioned before the jury. Accordingly, this case is nothing like one upon which defendant relies, *People v.*

Bryant, 391 Ill. App. 3d 228, 230 (2009), where the defendants did not testify despite the fact that, in opening statements, the defense counsel *repeatedly* advised the jury that the defendants themselves would testify to what happened on the night in question, even stating: " 'My clients will testify in this trial, make no bones about it. We know you want to hear it from their mouths. We will let them tell you, in the [d]efense's case, exactly what they did, and you will make up your mind[s] then, by listening to all of the evidence and by listening to their side.' " In contrast, here, counsel *did* produce one of the witnesses briefly mentioned in opening statements. Although Bell wound up testifying that he did not see the shooting, counsel was still able to elicit from him an agreement that he had previously identified Coleman as the shooter. We simply do not think that the jury was left wondering what happened to Smith and, even if it was, it had been forewarned by counsel that Smith would be, at best, a reluctant witness. Finally, we note that, although counsel represented that Smith would testify that Coleman was the shooter, we do not know what, in actuality, Smith's testimony would have been, had he taken the stand.

¶ 34 Second, even if we were to assume that the failure to produce Smith was noticed by the jury, it still remains that the result of the trial would not, absent the error, have been different. Three eyewitnesses, Enis, Dixon, and Coleman, testified explicitly that defendant was the shooter. Another witness, White, placed defendant with a gun immediately following the shooting. The jury could have further rejected defendant's theory that Coleman was the shooter by the evidence reflecting that gunshot residue tests on Coleman did not come back positive, and that he was apprehended running from the scene, but no weapon was found either on his person or at the scene of the shooting. While defense counsel did an admirable job cross-examining the witnesses and challenging the State's case, the jury credited that evidence. We do not think that

there is a reasonable probability that, if counsel had not reneged on his promise to produce Smith, the jury would have issued a different verdict.

¶ 35 B. Constitutionality of Juvenile Transfer

¶ 36 Defendant next argues that the confluence of statutes that caused him to be tried and sentenced as an adult are unconstitutional. Specifically, defendant argues that the "excluded jurisdiction" provision of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq.* (West 2010)), which provides that minors 15 years old or older who commit certain crimes, including first-degree murder, be excluded from juvenile court, unconstitutionally subjects minors to adult prosecution and sentencing without any consideration of their youthfulness and its attendant circumstances. See 705 ILCS 405/5-130(1)(a)(i) (West 2010). Defendant further notes that, once transferred to adult court, minors are subject to adult sentencing provisions without any consideration of their youth. Given that the statute leaves no room for the trial court to make an individualized assessment of the propriety of charging him as an adult (where, for example, the crime that triggered the transfer was implicated only because he was charged as accountable for another's actions), defendant asserts that section 5-130 is unconstitutional. Further, defendant contends that recent authority from the Supreme Court makes clear that juvenile offenders are inherently different from adult offenders, and, therefore, section 5-130 of the Juvenile Court Act, which does not take into account those differences, violates the eighth amendment (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11 (which are read co-extensively, *see In re Rodney H.*, 223 Ill. 2d 510, 518 (2006))). We disagree.

¶ 37 The Supreme Court decisions upon which defendant relies emphasize that juvenile offenders are inherently different from adult offenders and, therefore, that which may be

constitutional as applied to an adult might not meet constitutional muster when applied to a juvenile. See *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2469 (2012) (even for those convicted of homicide, the eighth amendment prohibits "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (when imposed on juvenile offenders for crimes other than homicide, a life sentence without the possibility of parole violates the eighth amendment); *Roper v. Simmons*, 543 U.S. 551, 568-73 (2005) (capital punishment for juvenile offenders violates the eighth amendment). However, our supreme court in *People v. Patterson*, 2014 IL 115102, ¶¶ 89-111, rejected the arguments that defendant raises here, namely, that *Miller*, *Graham*, and *Roper* operate to render unconstitutional section 5-130 of the Juvenile Court Act. The court in *Patterson* essentially reaffirmed existing caselaw holding that section 5-130 of the Juvenile Court Act does not violate due process, the eighth amendment, or the proportionate penalties clause. *Id.*; see, *e.g.*, *Harmon*, 2013 IL App (2d) 120439, ¶¶ 54-56, 59-62 (despite holdings in *Miller*, *Roper*, and *Graham*, section 5-130 does not violate eighth amendment); *People v. Willis*, 2013 IL App (1st) 110233, ¶ 53 (despite holdings in *Miller*, *Roper*, and *Graham*, section 5-130 does not violate eighth amendment or proportionate penalties clause); *Pacheco*, 2013 IL App (4th) 110409, ¶¶ 55, 65 (same); *People v. Jackson*, 2012 IL App (1st) 100398, ¶¶ 17, 19 (despite holdings in *Roper* and *Graham*, section 5-130 does not violate eighth amendment or proportionate penalties clause); *People v. Salas*, 2011 IL App (1st) 091880, ¶¶ 66, 76-80 (same).

¶ 38 Accordingly, we reject defendant's arguments.

¶ 39 C. Firearm Enhancement

¶ 40 Defendant argues next that, because the jury instructions and verdict forms reflect only the jury's finding that he personally discharged a firearm, *not* that he personally discharged a

firearm *that proximately caused death*, the sentencing enhancement must be reduced from 25 to 20 years. We disagree.

¶ 41 As recited above, there are two statutory enhancement sections at play here. The first is that which the State referenced in the indictment. Specifically, section 5/5-8-1(a)(1)(d)(iii) of the Code provides that a minimum *25-year* sentencing enhancement must be added if the defendant, during commission of the offense, "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person[.]" 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). The second section, the one upon which defendant relies, is section 5/5-8-1(a)(1)(d)(ii), which provides that a *20-year* sentencing enhancement must be added if, during the commission of the offense, the defendant "personally discharged a firearm[.]" 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2010). Critically, to apply a 25-year enhancement, section 5/5-8-1(a)(1)(d)(iii) requires a finding not only that the defendant personally discharged the firearm (which both sections require), but *also* a finding that the discharge "proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person[.]" It is that second finding that defendant argues is absent here.

¶ 42 We note first that defendant concedes that he did not raise this argument below; however, he argues that it is not forfeited because if the enhancement exceeded that authorized by statute, it is void and can be challenged at any time. The State does not disagree with defendant's assertion that his argument implicates a void sentence. Further, it raises no forfeiture argument. Accordingly, because forfeiture arguments can be forfeited (see, *e.g.*, *People v. Harris*, 228 Ill. 2d 222, 229 (2008)), and forfeiture is a limitation on the parties, not this court (see, *e.g.*, *People v. Demitro*, 406 Ill. App. 3d 954, 959 (2010)), we will address defendant's argument.

¶ 43 Defendant argues that there was error here where, despite the language in the indictment seeking a 25-year firearm enhancement, the instructions and special verdict forms allowed the jury to find only that defendant "personally discharged a firearm," without any reference to "proximately causing death." The State does not directly respond to this particular argument. To be clear, the State asserts, with no elaboration or citation to authority, that it "correctly submitted the correct jury verdict forms," *i.e.*, that there was no error. However, the State does not assert, for example, that, when seeking the 25-year enhancement, it is unnecessary for the instructions and special verdict forms to reference "proximately causing death" or that it is proper to omit any such reference. Instead, it simply asserts that, regardless of the language in the instructions and special verdict forms, we can "infer" that the jury made the requisite finding. As the assertion of "no error" is undeveloped and unsupported, we will presume for our analysis that the absence of the language in the instructions and verdict forms constitutes error.

¶ 44 Nevertheless, even if we presume instructional error, we disagree with defendant that the error requires a reduction in sentence. Defendant argues that, because the enhancement element "proximately caused death" was missing from the instructions and special verdict forms, the jury did not consider or find it to be an aggravating factor and, therefore, his sentence must be reduced. However, instructional errors, even those pertaining to facts contributing to sentencing enhancements, are subject to harmless-error analysis. See, *e.g.*, *People v. Thurow*, 203 Ill. 2d 352, 368 (2003). Specifically, the failure to instruct the jury on an enhancement element is harmless error where the evidence supporting the omitted element was uncontested, overwhelming, and where "it is clear beyond a reasonable doubt that a properly instructed, rational jury" would have found the missing element. *Id.* at 369; see also *Neder v. United States*, 527 U.S. 1, 18-19 (1999) (where an omitted element is supported by uncontroverted evidence,

the error is harmless). It is the State's burden to prove harmless error. *Thurow*, 203 Ill. 2d at 363.

¶ 45 The State's argument on appeal is that, in light of the jury instructions and the verdict forms the jury signed on the charge of first-degree murder and the enhancement, we can reasonably infer that the jury would find defendant's personal discharge of a firearm proximately caused death. Though inartful, we construe the State's argument as one asserting that, given the facts of this case and the jury's findings, any alleged instructional error was harmless. On the very specific facts here, we agree. In this case, the jury found that defendant murdered Jones, and it found that he personally discharged a firearm. The missing element from the enhancement instruction, that defendant's personal discharge of a firearm "proximately caused death," was supported by uncontroverted evidence. Specifically, the evidence was overwhelming and uncontroverted that it was the discharge of the firearm that proximately caused the death. There was no evidence of multiple assailants, accountability, intervening causes of death, or any other factor that might interrupt proximate cause. The issue at trial concerned the identity of the shooter, not whether the shooter's personal discharge of a firearm was the proximate cause of death. As such, the disputed evidence at trial touched on identity, not the elements of the enhancement. Accordingly, it is clear beyond a reasonable doubt that *if* the jury had been properly instructed, it would have found that defendant's personal discharge of a firearm proximately caused death. Therefore, the presumed error was harmless.

¶ 46 D. DNA Analysis Fee

¶ 47 Defendant argues next that he is entitled to have the DNA fee that was assessed against him vacated because he has previously submitted his DNA for analysis. The State agrees.

¶ 48 We review *de novo* whether the defendant was assessed an unauthorized fine. *People v. Pohl*, 2012 IL App (2d) 100629, ¶ 3. Our supreme court has held that a DNA analysis fee can be obtained only once from a defendant. *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011). As the parties agree that records show defendant's DNA was collected on April 13, 2005, in relation to another matter, it was improper to impose upon him another fee for the same procedure. We vacate the $200 DNA fee.

¶ 49 E. *In Camera* Review of Records

¶ 50 Defendant's final argument on appeal concerns the trial court's *in camera* inspection of Rashee Bell's mental health records. Specifically, defendant requests this court to conduct our own inspection of the records. He notes that, after he filed two motions seeking production of Bell's psychiatric records and fitness evaluations, the trial court reviewed them *in camera* and determined that the records would not be tendered to either party. Defendant does not contest that it was proper for the court to conduct an *in camera* inspection; however, he asserts that he does not know whether he could make a reasonable argument that the court abused its discretion in not producing the documents because he does not know what the records show. Defendant questions whether the information contained in the impounded documents would have warned the defense that Bell would be an unreliable witness. The State asserts that this court should not be burdened with an *in camera* inspection. Further, the State argues that, regardless of what the records show, defendant put Bell on the stand to elicit testimony that Coleman was the shooter, a point that was accomplished by virtue of establishing that Bell made a prior statement to that effect at the time of the shooting.

¶ 51 We note first that we find somewhat disingenuous defendant's implication that, without the records, he was left unaware that Bell might be an unreliable witness. Certainly the record

reflects that defendant knew of that possibility. Defendant knew Bell had once been found unfit to stand trial, which led to his repeated requests for the records. Indeed, elsewhere in his appellate brief defendant concedes that counsel sought access to Bell's records because "counsel thus knew of the potential for Bell to be an unreliable witness[.]" In other words, regardless of the contents of the records, defendant knew that calling Bell was a gamble. We further note that this is not a situation where defendant was left unable to effectively cross-examine a State witness because he was left in the dark about the contents of the record. To the contrary, although the State listed Bell as a potential witness, *defendant* is the one who called him.

¶ 52 In any event, this court has, per defendant's request, conducted our own review of the impounded records. As they remain confidential, we will not disclose their contents here. However, we note that the information did not implicate Bell's ability to perceive or recall the events to which he testified. Certainly the trial court did not abuse its discretion in determining that the documents were not of a nature requiring disclosure to either side, nor would any such error have changed the result of trial. See, *e.g.*, *People v. Bean*, 137 Ill. 2d 65, 102 (1990) (reviewing court may conduct *in camera* inspection of documents to determine whether the trial court abused its discretion by not providing them to a party).

¶ 53 III. CONCLUSION

¶ 54 For the forgoing reasons, the judgment of the circuit court of Lake County is affirmed in part, and vacated in part. We vacate the $200 DNA analysis fee. Further, as part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 55 Affirmed in part, and vacated in part.