NO. 5-08-0459

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 06-CF-100
	)	
BOBBY O. WILLIAMS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

RULE 23 ORDER

Held: Defendant's sentence of natural life in prison for the murder of Sharon Bushong is affirmed.

Defendant, Bobby O. Williams, *pro se*, appeals the June 17, 2008, order of the circuit court of St. Clair County sentencing him to natural life in prison for the November 3, 1994, murder of Sharon Bushong. Originally, defendant received the death penalty; however, the supreme court vacated the death sentence and remanded. *People v. Williams*, 193 Ill. 2d 1, 737 N.E. 2d 230 (2000). Defendant was resentenced after then-Governor George Ryan entered a commutation order that removed capital punishment as a sentencing option. In this appeal, defendant raises the following issues: (1) whether the sentence was an abuse of discretion, (2) whether the sentence was excessive, (3) whether the circuit court's denial of defendant's motion to substitute for cause was an abuse of discretion, (4) whether the State proved beyond a reasonable doubt that defendant actually killed Sharon Bushong, (5) whether section 9-1 of the Criminal Code of 1961 (720 ILCS 5/9-1 (West 1994)), is unconstitutional, (6) whether defendant was entitled to a new trial under sections 5-5-4(a), and 5-5-3(d) of the Unified Code of Corrections (730 ILCS 5/5-5-4(a), and 5-5-3(d) (West 2004)), (7) whether the penalties available for first-degree murder violate the proportionate penalties clause or the equal protection clause, (8) whether the natural-life sentence is a product of double enhancement, and (9) whether defendant was denied a fair sentencing hearing because of improper closing argument by the prosecutor. We affirm.

BACKGROUND

On November 3, 1994, Sharon Bushong was shot to death during a robbery at a convenience store in Belleville where she worked as a clerk. Bushong was the only clerk working at the time of the robbery. A surveillance videotape recorded by the store's security cameras recorded Bushong's murder. A spent cartridge case from a .38-caliber pistol fired during the robbery was retrieved from the scene, and a .38-caliber bullet was recovered from Bushong's body during her autopsy.

The surveillance videotape, which was played to the jury during defendant's trial, shows two African-American males entering the store at 12:49 a.m. on the morning of the murders. One of the men was wearing shorts and a short-sleeve, dark-colored shirt with piping or thin stripes around the collar, shoulders, sleeves, and bottom. He was wearing only one ankle-high sock. He was also wearing some type of light-colored garment over his head. The second man was wearing a baseball cap and covered his face with his hands and shirt. Neither man's face was visible.

The videotape shows the man with the garment over his head standing next to Bushong after she opened the cash register drawer. After Bushong opened the drawer, the man raised his left hand and shot Bushong in the head. Bushong immediately fell to the ground. The man then shifted the gun to his right hand and took cash out of the register with his left hand. During this time, the second man can be seen leaning over and reaching into a display rack filled with potato chips. After the shooter removes the money from the cash register, the two men exit the store.

A forensic photographic examiner with the FBI provided expert testimony that after examining the videotape and photos made from the videotape, he determined that the person who shot Bushong was 6 feet 1 inch or 6 feet 2 inches in height. Additional evidence established that defendant is 6 feet 1 inch. Testimony also established that defendant is left-handed.

On February 15, 1995, defendant was arrested in Washington Park, a town near Belleville. At the time of his arrest, defendant was carrying a .38-caliber pistol, which a forensic firearms examiner later determined was the gun used to shoot Bushong. Defendant's neighbor, who had known defendant for approximately 18 years, testified that in the middle of November 1994, he saw a .38-caliber pistol on the floor of defendant's car. In court, the neighbor was shown the gun taken from defendant at the time of his arrest. The neighbor stated that it looked like the one he saw in defendant's car but that he could not be certain.

Another witness, Michael Cook, testified that he had known defendant for approximately one year and had seen defendant with a .38-caliber pistol on four or five occasions during the summer of 1994. Cook also thought the gun taken from defendant at the time of his arrest looked like the gun defendant had been carrying in the summer of 1994. Cook explained that it looked the same because it was scraped and scratched around the barrel and because it had lost some of its black coloring at the tip of the barrel. Cook also positively identified the shirt the shooter was wearing in the videotape as a shirt defendant had worn while playing basketball in the summer of 1994. Cook further testified that he had seen defendant wearing just one sock while playing basketball.

Lavarro Jenkins testified that he saw defendant with a .38-caliber handgun in January 1995 while he and defendant were driving in a car in Belleville. Jenkins identified the gun taken from defendant at the time of his arrest as the gun defendant had shown him in the car. Jenkins knew that it was the same gun because he had offered to buy it from defendant. While discussing the possible purchase of the gun, defendant told Jenkins, "There's a hot one on it." Jenkins testified that this is slang terminology which means the gun had been used in a murder. Jenkins also testified that while driving down the part of West Main Street where the murder occurred, he and defendant passed a convenience store, at which time defendant reached over, pointed to the convenience store, and said "that's one of them." On cross-examination, Jenkins admitted that he had been convicted of theft over $10,000 for stealing a car, acknowledged there were two felony forgery counts pending against him, and admitted that defendant never said he was the one who "committed a hot one" with the .38-caliber pistol.

Fred Jones, a friend of defendant, testified for the State. In exchange for his testimony, the State agreed to dismiss a murder charge pending against him and instead recommend a 6- to 15-year prison sentence for armed robbery. Jones testified that he saw defendant sometime after midnight on November 3 or November 4, 1994, at which time defendant told him that he "and a couple more boys went up to Belleville to rob the convenience store and they shot the lady." Sometime after this admission, Jones saw defendant carrying a black .38-caliber pistol. Jones identified the gun taken from defendant at the time of defendant's arrest as the gun defendant had with him in November 1994. Jones also identified the shirt worn by the shooter in the surveillance video as the one that defendant was wearing when he saw him on November 3 or 4, 1994.

Jones was cross-examined about six separate, conflicting statements he had given to the police regarding the Bushong murder. Jones initially denied any knowledge about the murder and robbery, but by the sixth statement he gave details similar to his direct testimony at the trial. Jones explained that he initially lied to police because he "was scared and didn't want to get [him]self further involved in it."

Defendant's cousin, Andrew Towns, testified that he saw defendant with a .38-caliber pistol in the early part of November 1994. He identified the gun taken from defendant at the time of his arrest as the one that defendant had in November, based on a worn area on the tip of the gun's barrel. He also testified that sometime around November 1994, he overheard defendant and Ricardo Spratt laughing when defendant said, "Don't forget the chips." At the trial, he described what defendant had told him when he asked defendant what the phrase meant: "[Defendant] and some more people robbed a liquor store or convenience store. And while they were running out the store, [defendant] yelled, 'Don't forget the chips' to another person." He also said defendant told him that "he shot the bitch" who worked at the convenience store. He testified that he had seen defendant wearing a shirt like the one worn by the shooter in the surveillance video. Towns acknowledged that when he was arrested along with defendant in February 1995, he was carrying his father's .38-caliber gun. The cousin was a juvenile at the time, and no charges had been filed in relation to the .38-caliber weapon. On cross-examination, Towns admitted that when he was first questioned by the police on February 15, 1995, he denied any knowledge of the Bushong murder. Towns admitted that he was given immunity with respect the charges relating to the .38-caliber gun, but he denied that the immunity was given in exchange for his testimony.

Lucille Adams, defendant's grandmother and Andrew Towns' aunt, testified for the defense that Towns did not have a good reputation in the community for truthfulness. Carvon Jones testified that sometime in November 1994, around midnight, he rode in defendant's car with defendant, Ricardo Spratt, and Fred Jones. Carvon testified that he never heard defendant say anything about robbing a convenience store or shooting anyone and did not see defendant with a gun but did see Ricardo and Fred with guns. Carvon thought the gun taken by defendant at the time of his arrest looked like the one Ricardo had been carrying, but he could not be certain it was the same gun. On cross-examination, Carvon admitted that he had seen defendant with a .38-caliber gun in the past and admitted that in a statement he gave in February 1995 he had said that while in the car in November 1994 Fred Jones made a reference to "the white lady in Belleville."

The defense also presented evidence from various law enforcement officials. For example, Thomas Gamboe, a forensic scientist with the Illinois State Police, testified that defendant's shoes did not match any of the footwear impressions found at the convenience store. A Belleville police officer testified that he transported defendant to the police station after defendant's February 1995 arrest and that defendant's clothes and shoes were taken from him.

After hearing all the evidence, the jury convicted defendant of first-degree murder and found defendant eligible for the death penalty. Following a hearing in aggravation and mitigation, the jury found that there were no factors sufficient to preclude the imposition of the death penalty, and it sentenced defendant to death. On direct appeal, the Illinois Supreme Court affirmed defendant's conviction for first-degree murder but vacated the death sentence and remanded for resentencing. *People v. Williams*, 193 Ill. 2d 1, 737 N.E.2d 230 (2000). The facts set forth above are recounted from that opinion.

On January 10, 2003, George Ryan issued a commutation order that removed the death penalty as a sentencing option, making natural life in prison without the possibility of parole the maximum sentence which could be imposed. On April 23, 2004, the State filed a notice that it intended to seek an extended-term sentence in this case. On July 28, 2004, defendant filed a motion to bar the imposition of an extended-term sentence. Defendant later filed an amended motion to bar the imposition of an extended-term sentence. After two judges recused themselves, the case was transferred to Judge John Baricevic. On August 2, 2005, the circuit court denied defendant's motion to bar the imposition of an extended-term sentence. The circuit court later denied a motion to reconsider.

On January 10, 2006, the circuit court filed an application under Supreme Court Rule 308 (eff. Feb. 1, 1994), asking this court for direction regarding whether or not a hearing on defendant's eligibility for an extended-term sentence could be held in this case. The application was dismissed on the basis that Supreme Court Rule 308 applies only to civil cases. On September 29, 2006, defendant filed another motion to bar the imposition of an extended-term sentence or for a new trial. On January 9, 2007, the circuit court denied that motion.

On November 19, 2007, defendant filed a *pro se* motion to substitute judge for cause, alleging that Judge Baricevic was prejudiced against him. On December 6, 2007, defendant filed a motion to proceed *pro se* in this case. On December 13, 2007, the circuit court granted defendant's motion to proceed *pro se.* On January 10, 2008, defendant's *pro se* motion to substitute judge was denied. Defendant later filed a motion to reconsider, which was also denied.

On March 28, 2008, a hearing was held on defendant's motion *in limine* to preclude the State's use of the original indictment returned against defendant as evidence of guilt during the sentencing eligibility hearing. That motion was taken under advisement. On April 14 and 15, 2008, the eligibility hearing was held. The circuit court informed the venire that it was a sentencing procedure, because defendant had previously been found guilty of murder. During the hearing, the State moved to admit into evidence and publish to the jury a certified copy of the indictment and the original verdict of guilt. The exhibits were admitted over defendant's objection.

The State also presented the prior testimony of Shirley Etherton, who was the store manager at the time of the murder. Etherton died after the first trial and, therefore, was unavailable to testify. Etherton explained that Bushong was an employee of the store and that the store was equipped with a video camera security system. Etherton said she watched the videotape and knew that Bushong had been murdered. After the murder, Etherton conducted an inventory of the store and determined that $77 was missing. The parties stipulated that People's Exhibit 29 was the original videotape of the murder. The videotape was admitted into evidence, and relevant portions were played for the jury. The State rested and the defense rested without presenting any evidence.

Ultimately, the jury found defendant eligible for an extended-term sentence. On June 17, 2008, a sentencing hearing was held, after which the circuit court sentenced defendant to natural life in prison. Defendant now appeals.

ANALYSIS

I. Abuse of Discretion

The first issue raised by defendant is whether the circuit court abused its discretion by sentencing defendant to natural life in prison. Defendant contends that the circuit court relied on improper factors in sentencing defendant and contends his sentence should be reduced to 30 years' imprisonment or the sentence vacated and the cause remanded for resentencing. Defendant insists that the sentencing judge "attached great significance" to the sentencing factor found in section 5-5-3.2(a)(1) of the Unified Code of Corrections–"the defendant's conduct caused or threatened serious harm" (730 ILCS 5/5-5-3.2(a)(1) (West 1994)). Defendant asserts that the court considered the death of the victim and, thus, considered conduct inherent in the offense. Defendant also maintains that, when imposing this sentence, the court improperly considered that defendant had formerly been sentenced to death. The State replies that defendant has failed to show that the court's imposition of natural life in prison was an abuse of discretion. We agree with the State.

The circuit court is vested with wide discretion in sentencing a defendant, and its decision is entitled to great deference. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d

882, 883-84 (1977). While Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) grants a reviewing court the power to reduce a sentence imposed by the circuit court, we will not invoke that power unless the defendant's sentence is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. See *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 210 (1999).

Here, the record reflects that the sentencing judge reviewed evidence in aggravation and in mitigation. The sentencing judge noted, as do we, from reading defendant's *pro se* pleadings, that defendant is smart and has educated himself about the law while incarcerated. The sentencing judge noted that defendant grew up in a bad setting and believed that society had "dumped on" him. The circuit court was clear that it would have been more inclined to be lenient on defendant if he had gone into the store with a baseball bat or used the gun only to scare the clerk into submission; however, because defendant went into the store with the intent to kill the clerk, as evidenced by the videotape of the murder, the sentencing judge refused defendant's request for leniency.

There is no indication from the record before us that the sentencing judge considered the death of the victim as a factor in aggravation. We agree with the State that the circuit court mentioned intent and the fact that defendant felt he had been "dumped on" to show that defendant feels put upon by society and is at war with society. There is nothing improper in the sentencing judge considering the degree to which defendant deems himself at war with society. *People v. Ward*, 113 Ill. 2d 516, 528-29, 499 N.E.2d 422, 427 (1986). It is clear from the record that the sentencing judge believed the sentence of natural life imprisonment was necessary to deter others, and this is a proper factor to consider in aggravation.

As for the fact the sentencing judge knew that defendant had previously been sentenced to death, the sentencing judge stated that he was not giving any weight to that fact:

"I am not going to sentence you because somebody else gave the death penalty–

> somebody else gave you the death penalty. I do think it's an appropriate factor for me to know and it's obvious in the record that another trier of fact did think that this crime was so serious that it deserved your life to be taken. As we all know, Governor Ryan thought otherwise and commuted you."

The circuit court, while aware defendant had previously been sentenced to death for this crime, specifically stated that it did not base its sentence on this fact. Therefore, we are unconvinced by defendant's argument that the circuit court improperly considered the fact that defendant was formerly sentenced to death for this crime.

Finally, defendant is correct that the record does not show he received any type of compensation for committing the murder but that the sentencing judge recited it as a factor in aggravation. The sentencing judge might have been referring to the fact that $77 was stolen from the convenience store. In any event, defendant failed to raise the issue in his postsentencing motion, thereby forfeiting the issue. *People v. Montgomery*, 373 Ill. App. 3d 1104, 1123, 872 N.E.2d 403, 419 (2007). Even assuming, *arguendo*, that the issue was not forfeited, we find any error to be harmless because the sentencing judge mentioned it in passing and it does not appear that the sentence would have been any different had the factor of compensation not been considered. After considering the record as a whole, we find the sentence imposed to be proper. We refuse defendant's request for us to reduce his sentence or remand for a new sentencing hearing.

II. Excessive Sentence

The second issue raised by defendant is whether the natural-life sentence is excessive. Defendant contends the sentence is excessive because it is greatly at variance with the purpose and spirit of the law. We disagree.

When reviewing a claim that a sentence within statutory limits is excessive, we must consider whether, given the particular facts of the case, the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210. As the State points out, defendant makes no real argument that the sentence of natural-life he received for the murder of Sharon Bushong is greatly at variance with the spirit and the purpose of the law or manifestly disproportionate to the nature of the offense. Defendant's argument in this regard is really nothing more than a request for us to reweigh the factors the sentencing court considered after the jury found him eligible for an extended-term sentence. However, we have been warned to "proceed with great caution," and we "must not substitute [our] judgment for that of the trial court merely because [we] would have weighed the factors differently." *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209.

Defendant basically restates the arguments he made with regard to the first issue, which we need not address again. We also point out that defendant's reliance on *People v. Andrews*, 132 Ill. 2d 451, 548 N.E.2d 1025 (1989), is misplaced because here defendant was found eligible by a jury for an extended-term sentence pursuant to a different factor than was present in *Andrews*. In the instant case, defendant was found eligible for an extended-term sentence because he murdered Sharon Bushong during the course of another felony (720 ILCS 5/9-1(b)(6) (West 1994)).

Defendant deliberately shot Sharon Bushong in the head after she opened the cash register for him. He callously shot Bushong, despite the fact that Bushong had no way to identify him because he was wearing some type of clothing on his head that obscured his identity. He then took $77 out of the cash register, told his partner not to forget the potato chips, and exited the store. Under these circumstances, defendant has failed to convince us that his natural-life sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.

III. Motion to Substitute

The third issue raised is whether the sentencing judge abused his discretion in denying defendant's motion to substitute for cause. Defendant contends that Judge Baricevic was biased and prejudiced against him because Judge Baricevic could not set aside his knowledge of the facts that defendant had been sentenced to death in a previous proceeding and that defendant had been given a partial pardon by then-Governor Ryan, who commuted all death sentences.

It is well-settled that the disqualification of a judge on the basis of bias or prejudice is only required under the most extreme cases. *People v. Del Vecchio*, 129 Ill. 2d 265, 275, 544 N.E.2d 312, 317 (1989). In the instant case, there is no contention that Judge Baricevic has any type of pecuniary interest or any possible temptation. Defendant contends that the sentencing judge could not set aside his knowledge that defendant had previously been sentenced to death for this murder. In order for there to be bias or prejudice, the record must reflect "active personal animosity, hostility, ill will or distrust towards the defendant." *People v. Hooper*, 133 Ill. 2d 469, 513, 552 N.E.2d 684, 707 (1989). In the absence of that showing, there is no actual prejudice that would prevent a fair hearing. *Hooper*, 133 Ill. 2d at 513, 552 N.E.2d at 707. In the instant case, defendant has failed to show actual prejudice.

Judge Baricevic specifically stated that he was not going to sentence defendant based upon the fact that defendant had previously been given the death penalty. While Judge Baricevic noted that he thought it was appropriate that he knew that fact, he pointed out that it was not going to unduly influence him. The record shows that Judge Baricevic was patient with this *pro se* defendant and took extra time answering defendant's questions. The record here shows that the sentencing judge was thorough and that his decisions were well-researched and logical.

Moreover, we point out that a motion for a substitution of judge must be filed at the earliest practical moment before a judge has ruled on a substantive issue in order to permit a defendant to find a judge more favorably disposed to him. *People v. Algee*, 228 Ill. App. 3d 401, 406, 591 N.E.2d 1001, 1005 (1992). Here, defendant filed his motion to substitute after arguments on defendant's motion to bar the imposition of an extended-term sentence. While the motion to bar had not yet been ruled upon, we agree with the State that the timing of defendant's motion is suspect. Most importantly, however, defendant has failed to show that the sentencing judge demonstrated any prejudice or bias; therefore, we find that the circuit court did not abuse its discretion in denying defendant's motion to substitute for cause.

IV. Reasonable Doubt

The fourth issue is whether the State proved beyond a reasonable doubt that defendant actually injured or killed Sharon Bushong during the course of an armed robbery. Defendant asserts there was insufficient evidence presented to the extended-term-qualifying jury to prove beyond a reasonable doubt that he was the person who actually killed Sharon Bushong during the course of an armed robbery.

When a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). We may not substitute our judgment for that of the circuit court and will not reverse a conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Lundy*, 334 Ill. App. 3d 819, 825, 779 N.E.2d 404, 410 (2002) (citing *People v. Clemons*, 277 Ill. App. 3d 911, 923, 661 N.E.2d 476, 484 (1996)).

On direct appeal, defendant argued that the evidence produced at the trial was insufficient to prove him guilty of first-degree murder beyond a reasonable doubt. However, viewing the evidence in the light most favorable to the State, the supreme court found the evidence sufficient to support the jury's verdict finding him guilty of first-degree murder. *People v. Williams*, 193 Ill. 2d 1, 25-26, 737 N.E.2d 230, 244-45 (2000). Nevertheless, the supreme court vacated defendant's sentence of death and remanded for a new sentencing hearing at which time the State could again seek the death penalty on the felony-murder aggravating factor found in section 9-1(b)(6) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)(6) (West 1994)). *Williams*, 193 Ill. 2d at 46, 737 N.E.2d at 255. The circuit court determined that the State was not precluded from seeking an extended-term sentence, and the court empaneled a jury to determine whether defendant was eligible for an extended-term sentence.

At the hearing, a certified copy of defendant's criminal indictment, which charged defendant with the first-degree murder of Sharon Bushong, was introduced into evidence, along with a certified copy of the original jury's verdict finding defendant guilty of the charge. The videotape of the murder was also introduced into evidence. We agree with the State that this evidence was sufficient. As previously noted, the supreme court already rejected defendant's claims that the evidence presented during the trial was insufficient to prove him guilty of first-degree murder beyond a reasonable doubt. In affirming defendant's conviction, the supreme court noted: (1) defendant admitted to killing Bushong, (2) at the time of his arrest defendant was in possession of the weapon used to kill Bushong, (3) defendant had been seen with the gun in his possession prior to and after the Bushong murder, and (4) defendant not only is the same height as the person who shot Bushong but also is left-handed, as was the person who shot Bushong. *Williams*, 193 Ill. 2d at 25-26, 737 N.E.2d at 244-45. We agree with the State that defendant cannot now relitigate the issue of whether he was proven guilty beyond a reasonable doubt on the question of whether he was actually and intentionally the person who killed Bushong, nor can he claim that People's Exhibit 100, the guilty verdict, is not evidence of these facts.

Furthermore, we are well aware of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which holds that any factor used as a reason to increase a sentence must be submitted to a jury and proved beyond a reasonable doubt. That standard was met here by the submission of the indictment and the guilty verdict. A rational jury could have found the qualifying factor based upon the indictment and the guilty verdict. Nevertheless, this was not the only evidence presented. At the extended-term-qualifying hearing, the State also presented the testimony of Shirley Etherton by way of transcript from defendant's trial, because Etherton was deceased by the time of the hearing. Etherton had testified that she was the manager at the store where Bushong was killed. She had testified about the videotaping system in place at the store. The parties then stipulated that People's Exhibit 29 was the original VHS tape recovered from the store after the murder. The videotape was played for the extended-term-qualifying jury. Finally, the State presented evidence that defendant was over the age of 18 at the time of the murder by admitting a copy of his birth certificate. We find that this evidence, taken in the light most favorable to the State, was sufficient for the jury to conclude that the aggravating factor alleged was proven beyond a reasonable doubt.

V. Constitutionality of Section 9-1

The fifth issue we are asked to consider is whether subsections 9-1(b)(6), (c), (d), (e), (f), (g), and (h) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(b)(6), (c), (d), (e), (f), (g), (h) (West 1994)) are unconstitutional. Defendant argues that these subsections of the Code are unconstitutional because they force defendant to choose between one of two constitutional rights–either present a defense, thereby forfeiting his fifth amendment right against self-incrimination, or maintain his fifth amendment right and forfeit his fourteenth amendment due process right to present a defense. We disagree.

We first note that defendant challenged the constitutionality of this statute during his direct appeal. The supreme court rejected defendant's arguments, finding, *inter alia*, that the statute did not place a burden of proof on the defendant that precluded meaningful consideration of mitigation. *Williams*, 193 Ill. 2d at 46-47, 737 N.E.2d at 255. We agree with the State that to the extent defendant attacks the statute on the same grounds, that argument is precluded. *People v. Tenner*, 206 Ill. 2d 381, 395, 794 N.E.2d 238, 247 (2002).

Moreover, we point out that defendant has failed to cite any authority to support his proposition that the statute in question is unconstitutional. We note that due process requires the State to prove beyond a reasonable doubt all the elements included in the definition of the offense with which the defendant is charged. *People v. Mitchell*, 221 Ill. App. 3d 926, 931, 583 N.E.2d 78, 81 (1991). Section 9-1(f) of the Code specifically states, "The burden of proof of establishing the existence of any of the factors [in aggravation] set forth in subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt." 720 ILCS 5/9-1(f) (West 1994). It is well-accepted that it is constitutional to require a defendant to prove mitigating factors in order to reduce a charge. See *People v. Hooker*, 249 Ill. App. 3d 394, 404-05, 618 N.E.2d 1074, 1082-83 (1993). After careful consideration, we are unconvinced by defendant's assertion that subsections 9-1(b)(6), (c), (d), (e), (f), (g), and (h) are constitutionally infirm.

VI. Unified Code of Corrections (UNIFIED CODE)

Defendant argues that upon remand he was entitled to a new trial under sections 5-5-4(a) and 5-5-3(d) of the Unified Code after the State filed its notice of intent to seek an extended-term sentence. The State replies that sections 5-5-4(a) and 5-5-3(d) do not apply to the circumstances of defendant's case because defendant's sentence was not vacated due to an *Apprendi* error but was reversed because of a jury verdict form error and the sentence was later commuted. We agree with the State.

Section 5-5-4(a) provides as follows:

"Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing. *If a sentence is vacated on appeal or on collateral attack due to the failure of the trier of fact at trial to determine beyond a reasonable doubt the existence of a fact (other than a prior conviction) necessary to increase the punishment for the offense beyond the statutory maximum otherwise applicable, either the defendant may be re[] sentenced to a term within the range otherwise provided or, if the State files notice of its intention to again seek the extended sentence, the defendant shall be afforded a new trial.*" (Emphasis added.) 730 ILCS 5/5-5-4(a) (West 2004).

Section 5-5-3(d) provides as follows:

"In any case in which a sentence originally imposed is vacated, the case shall be remanded to the trial court. The trial court shall hold a hearing under Section 5-4-1 of the Unified Code of Corrections which may include evidence of the defendant's life, moral character and occupation during the time since the original sentence was passed. The trial court shall then impose sentence upon the defendant. The trial court may impose any sentence which could have been imposed at the original trial subject to Section 5-5-4 of the Unified Code of Corrections. *If a sentence is vacated on appeal or on collateral attack due to the failure of the trier of fact at trial to determine beyond a reasonable doubt the existence of a fact (other than a prior conviction) necessary to increase the punishment for the offense beyond the statutory maximum otherwise applicable, either the defendant may be re[] sentenced to a term within the range otherwise provided or, if the State files notice of its intention to again*

> *seek the extended sentence, the defendant shall be afforded a new trial.*" (Emphasis added.) 730 ILCS 5/5-5-3(d) (West 2004).

The highlighted language in both sections was added pursuant to Public Act 91-953, which was effective February 23, 2001. This addition was a direct result of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Apprendi*, the Supreme Court held unconstitutional a New Jersey hate-crime statute that increased the normal 5- to 10-year range of imprisonment for possession of a firearm for an unlawful purpose to a 10- to 20-year term if the trial judge found by a preponderance of the evidence that the defendant, when committing the offense for which he was being sentenced, had acted with a racially biased purpose. *Apprendi*, 530 U.S. at 468-69. The Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

In *People v. Askew*, 341 Ill. App. 3d 548, 793 N.E.2d 56 (2003), our colleagues in the First District specifically found that the language in sections 5-5-4 and 5-5-3(d) of the Unified Code were added as amendments to the Unified Code in order to bring it into conformity with *Apprendi*:

> "We recognize that criminal statutes are to be construed in favor of the accused, but such construction should not be so rigid as to defeat the intent of the legislature. [Citation.] In determining legislative intent, courts attempt to ascertain the objective the legislature aimed to achieve, the reason and necessity for the law, and the evils it sought to remedy. [Citation.] In this case, it is clear that the legislature sought to amend the Code to bring its provisions into conformity with the decision handed down in *Apprendi*. As discussed earlier, *Apprendi* set forth certain criteria for the imposition of extended sentences, including proof of aggravating

> factors beyond a reasonable doubt, submission to a jury, as well as inclusion in the charging instrument (or other sufficient notice to the accused) of the factors that the State will seek to demonstrate." *Askew*, 341 Ill. App. 3d at 552-53, 793 N.E.2d at 60.

In the instant case, defendant's sentence was not vacated due to an *Apprendi* error.

As previously set forth, defendant's conviction was affirmed by our supreme court on July 6, 2000, but his death sentence was vacated and the cause remanded for a new sentencing hearing at which the State could again seek the death penalty on the felony murder aggravating factor found in section 9-1(b)(6) (of the Code) if it so desired. *Williams*, 193 Ill. 2d at 46, 737 N.E.2d at 255. While defendant was awaiting resentencing, then-Governor Ryan commuted all death sentences. We agree with the circuit court that nothing in the Governor's order precluded the State from seeking an extended-term sentence. As the circuit court noted, our supreme court on direct review specifically authorized a new trier of fact to determine the felony-murder aggravating factor found in section 9-1(b)(6). It was only because defendant's death sentence was reversed due to an error in the jury verdict form and Governor Ryan's later actions that defendant did not face a second death penalty hearing. Because the instant case does not involve *Apprendi* error, we refuse to grant defendant a new trial on the basis of sections 5-5-4(a) and 5-5-3(d).

VII. Proportionate Penalty and Equal Protection

The seventh issue is whether defendant's sentence violates the proportionate penalties clause or equal protection clause. Defendant argues that the four different maximum and two different minimum penalties for first-degree murder, which occurred during the commission of a felony, violate both the proportionate penalty clause and the equal protection clause. The State replies that a legislative determination to differentiate sentencing between certain classes of murderers is not irrational and that an extended-term sentence for murderers who have demonstrated their conduct with an intent to kill or acted with the knowledge that their acts created a strong probability of death or great bodily harm during the commission of an inherently violent crime is reasonably designed to remedy an evil and a legitimate means by which the legislature might seek to protect society. We agree with the State.

A proportionate penalty challenge derives from article I, section 11, of the Illinois Constitution of 1970, which provides, "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. There are three distinct ways in which a proportionate penalty challenge may be asserted:

> " 'First, a penalty violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community. [Citations.] Second, a penalty violates the proportionate penalties clause where similar offenses are compared and conduct that creates a less serious threat to the public health and safety is punished more severely. [Citations.] Finally, the proportionate penalties clause is violated where offenses with identical elements are given different sentences.' " *People v. Sharpe*, 216 Ill. 2d 481, 487, 839 N.E.2d 492, 498 (2005) (quoting *People v. Moss*, 206 Ill. 2d 503, 522, 795 N.E.2d 208, 220 (2003)).

Here, defendant bases his challenge on the third ground, but after careful consideration we find that this is not a case in which different sentences are imposed for crimes with identical elements.

As the State points out, the defendant in *Sharpe* made a similar argument to the one made here. In that case, the defendant argued that the 25-to-life enhancement under section 5-8-1(a)(1)(d)(iii) of the Unified Code (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)) violated the proportionate penalties clause because the crime of first-degree murder is composed of identical elements regardless of whether the crime is committed through the use of a firearm or not. Our supreme court rejected that argument on the basis that in order for the 25-to-life enhancement to apply, there are additional facts which must be proven, including that the perpetrator personally discharged the firearm during the commission of the offense and that he "caused great bodily harm, permanent disability, permanent disfigurement, or death to another person" (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)). *Sharpe*, 216 Ill. 2d at 526, 839 N.E.2d at 520.

Similarly, in the instant case, while different penalties may be applied, in order to do so additional facts must be proven before an extended-term sentence can be imposed. For example, a defendant may be found guilty of first-degree felony murder on a theory of accountability (720 ILCS 5/5-2(c) (West 2006)), but he is not subject to extended-term sentencing if he was not actually the murderer. 720 ILCS 5/9-1(b)(6)(a) (West 2006). Moreover, it is not enough that a "forcible felony" was committed; the felony must have an inherently violent nature, not limited to armed robbery, robbery, predatory criminal sexual assault of a child, etc. 720 ILCS 5/9-1(b)(6)(c) (West 2006). Accordingly, we reject defendant's proportionality challenge to his extended-term sentence.

Defendant also challenges his extended-term sentence under the equal protection clause, arguing that the four different maximum penalties for those facing sentencing for first-degree murder that occurred during the commission of a forcible felony have no logical or rational basis for distinguishing why defendants should be penalized differently. We disagree.

The equal protection clauses found in both the United States Constitution (U.S. Const., amend. XIV) and the Illinois Constitution (Ill. Const. 1970, art. I, §2) do not deny the State the power to draw lines that treat different classes of people differently. They only prohibit the State from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation. *People v.*

Shephard, 152 Ill. 2d 489, 499, 605 N.E.2d 518, 523 (1992). Equal protection requires that similarly situated individuals will be treated in a similar manner, and the same analysis is used in assessing equal protection claims under both the state and federal constitutions. *Shephard*, 152 Ill. 2d at 499, 605 N.E.2d at 523.

Rational-basis review is used when the legislative classification does not implicate a suspect classification or a fundamental right. *People v. Allen*, 382 Ill. App. 3d 594, 601, 888 N.E.2d 686, 692 (2008). Under the rational-basis test, the statute in question must bear a rational relationship to the purpose the legislature intended in enacting it. *Allen*, 382 Ill. App. 3d at 601, 888 N.E.2d at 693. We agree with the State that an extended-term sentence for the class of murderers who have demonstrated by their conduct an intent to kill or acted with the knowledge that their acts created a strong probability of death or great bodily harm during the commission of an inherently violent crime is reasonably designed to remedy the evil and a legitimate means by which our General Assembly might seek to protect society.

VIII. Double Enhancement

The eighth issue raised in this appeal is whether the imposition of an extended-term sentence constituted an improper double enhancement. Defendant contends his extended-term sentence constitutes improper double enhancement because the factor of armed robbery was used not only to establish the offense of first-degree murder but also to enhance his sentence to natural life. The State replies there was no double enhancement because the evidence presented at sentencing showed that defendant was found guilty of intentional murder by a jury, that defendant was the person who actually killed Sharon Bushong, that he was over 18 at the time of the murder, and that Bushong was killed during the course of the armed robbery. Even assuming *arguendo* that there was double enhancement, it was not impermissible pursuant to *People v. Rissley*, 165 Ill. 2d 364, 651 N.E.2d 133 (1995).

While it is a general rule of statutory construction that a factor implicit in an offense for which a defendant is convicted cannot be used as an aggravating factor at sentencing, where our General Assembly clearly intends to enhance the penalty based upon some aspect of the crime, and such an intention is clearly expressed, there is no prohibition. *Rissley*, 165 Ill. 2d at 390, 651 N.E.2d at 145. Because the unambiguous statutory language of section 9-1(b)(6) provides that a defendant is eligible for the death penalty if the defendant, either alone or in conjunction with another, intentionally or knowingly commits a murder during the commission of certain enumerated felonies, including armed robbery, there is no reason to resort to further principles of statutory construction. *Rissley*, 165 Ill. 2d at 391, 651 N.E.2d at 145-46. Relying on *Rissley*, we find that any double enhancement in the instant case was permissible.

IX. Closing Arguments

The final issue raised by defendant in this appeal is whether he was denied a fair sentencing hearing due to the State's closing arguments during the eligibility phase. Defendant argues the State uttered numerous improprieties during closing, including urging the jury to abrogate its responsibility to make its own determination of the evidence, shifting responsibility for eligibility to the 1996 jury, minimizing the State's burden of proof, making arguments unsupported by the evidence, and misstating the law of the case. We disagree.

First, we point out that defendant failed to object to all of the comments of which he now complains, thereby waiving several of the arguments. Second, we point out that the circuit court sustained some of the objections complained of herein. For example, defense counsel objected after the prosecutor stated: "But I submit to you that there is also an intent to kill. I submit to you that Sharon Bushong was dead the minute he walked in that convenience store because when she opened that–." The circuit court sustained the objection and instructed the jury to disregard comments not based on the evidence, thereby curing any error caused by that statement. *People v. Neal*, 111 Ill. 2d 180, 196, 489 N.E.2d 845, 851

(1985).

Finally, we point out that many of the arguments made during closing and complained of herein by defendant were not improper but were comments based upon the evidence. Prosecutors are generally accorded wide latitude in the content of their closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347, 864 N.E.2d 196, 217 (2007). They may comment on the evidence, along with any fair and reasonable inference the evidence may yield. *Perry*, 224 Ill. 2d at 347, 864 N.E.2d at 217-18. We are to consider the argument as a whole rather than focusing on selected phrases and remarks. *Perry*, 224 Ill. 2d at 347, 864 N.E.2d at 218. In order to constitute reversible error, an error in closing argument must result in substantial prejudice such that the result would have been different absent the comments of which the defendant complains. *People v. Cloutier*, 156 Ill. 2d 483, 507, 622 N.E.2d 774, 787 (1993). Here, we find that the prosecutorial conduct of which defendant complains was either waived, cured by the sustained objections and instructions to ignore, or harmless given the evidence against defendant. Defendant has failed to convince us he is entitled to a new sentencing hearing based upon alleged errors during closing or on any other basis.

CONCLUSION

For the foregoing reasons, we hereby affirm the extended-term sentence of natural life in prison imposed upon defendant for the murder of Sharon Bushong.

Affirmed.