APPENDIX A

Illinois Appellate Court
Decision

FIFTH DIVISION
March 24, 2017

No. 1-14-1068

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 15810
	)	
JERMAINE BRAZILL,	)	Honorable
	)	James L. Rhodes and
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions for felony murder and aggravated unlawful use of a weapon affirmed over his contention that his fitness hearing failed to meet the minimal due process requirements and his sentence for felony murder affirmed over his contention that it was excessive. Defendant's mittimus to be corrected to reflect four additional days of presentence custody credit.

¶ 2 Following a bench trial, defendant Jermaine Brazill was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2010)) and aggravated unlawful use of a weapon (720 ILCS 5/24-

1.6(a)(2), (a)(3)(A) (West 2010)), and sentenced to 80 years' imprisonment.[1] On appeal, defendant contends that: (1) his fitness hearing failed to meet minimal due process requirements where the trial court merely adopted an expert's conclusion based on stipulated testimony that he was fit to stand trial; (2) his sentence was excessive; and (3) he is entitled to four additional days of presentence custody credit. For the reasons below, we affirm as modified.

¶ 3 The State charged defendant in a 62-count indictment with various offenses related to the May 24, 2010, shooting death of Destin Hernandez and wounding of Eric Atkins. Prior to trial, defense counsel requested, and the trial court ordered, a behavioral clinical examination of defendant to assess his fitness to stand trial, his sanity and his ability to understand *Miranda* warnings.

¶ 4 On November 29, 2011, Dr. Roni L. Seltzberg, a forensic psychiatrist, submitted her report to the court, finding defendant fit to stand trial. The report stated that defendant "was able to demonstrate his understanding of the nature of the charges against him, the purpose of the proceedings against him, and he is capable of assisting counsel in his defense." It also stated that he had the ability to understand *Miranda* warnings. However, the report stated that Dr. Seltzberg's opinion regarding defendant's sanity had been "deferred" because he did not want to "discuss his alleged participation in the allegations."

¶ 5 Nicholas Jasinski, a clinical psychologist, also submitted a report to the court on November 29, 2011, finding defendant fit to stand trial. The report stated that defendant did "not

[1] In defendant's reply brief on appeal, he asserts his first name is "Jamaine," though the brief also refers to him as "Jermaine." Defendant's opening brief on appeal refers to him as "Jermaine," as does the trial court record, and we will do the same.

manifest any symptoms of a mental condition that would negatively impact his fitness," and he demonstrated "an adequate understanding of the nature and purpose of legal proceedings." On that date, the parties also appeared in court. Defense counsel stated "I believe we have to set for stipulated hearing, Judge," and an assistant State's Attorney agreed. The trial court responded, stating "[b]y agreement ***. Stipulated for hearing on [the behavioral clinical examination]."

¶ 6 On January 6, 2012, the parties again informed the trial court that they had agreed to proceed by way of stipulation in the fitness hearing. The trial court admonished defendant about his right to a fitness hearing by jury. Defendant told the court that he was waiving this right and signed a written jury waiver. An assistant State's Attorney then read the stipulated testimony of Dr. Seltzberg into the record. According to the stipulation, Dr. Seltzberg would have established that she was an expert in forensic psychiatry and opined that, after evaluating defendant and reviewing the available records, defendant was fit to stand trial. She further would have testified that defendant "was able to demonstrate his understanding of the nature of the charges against him, the purpose of the proceedings against him, and he [was] capable of assisting Counsel in his defense if he so [chose]." After the court "accept[ed] the stipulation," both parties rested without presenting any other witnesses or evidence, and both parties waived closing argument. The trial court concluded "[t]here will be a finding of fitness" without further comment.[2]

¶ 7 The case proceeded to trial, where the evidence established that, in the afternoon of May 24, 2010, Eric Atkins was with Fitzgerald Wilson, Jesse House and Derrick Clark in a vehicle

[2] The fitness hearing and the proceedings leading up to it were held before Judge James L. Rhodes. Defendant's trial and sentencing were held before Judge Anna Helen Demacopoulos.

driven by Lawrence Clark.[3] The group drove to Thornridge High School in Dolton to pick up Lawrence's cousins, Brandy and Earl, the latter who had been robbed earlier in the day. When they arrived, Brandy and Earl were not there, so Lawrence and Fitzgerald exited the vehicle and began talking to some people they knew. A few minutes later, Lawrence and Fitzgerald saw Brandy and Earl coming out of school. Lawrence asked Earl who had taken his money, and Brandy pointed at defendant and his companion who were a block away near Baba's Restaurant. Lawrence and Fitzgerald walked up to the men and asked them if they liked "robbing little kids." Lawrence heard defendant's companion tell defendant to take out his firearm and state "we got guns bigger than this mother f***. Bang that b***. Kill him." Defendant reached for a firearm in his right pocket, but had trouble pulling it out.

¶ 8 Around this time, Eric, who was with Jesse and Derrick inside the vehicle, observed Lawrence and Fitzgerald speaking with some individuals Eric did not know near the restaurant. As Derrick drove toward the parking lot of the restaurant, Lawrence and Fitzgerald began backing up toward the vehicle in a rushed manner. When the vehicle approached Lawrence and Fitzgerald, defendant and his companion ran away. Lawrence and Fitzgerald were about to enter the vehicle when Eric "hopped" out. Eric saw a police officer and tried to point the officer in the direction of defendant, alerting the officer that defendant had a firearm. Lawrence and Fitzgerald also noticed the police officers and alerted them that defendant had a firearm.

¶ 9 Eric continued to chase after defendant, eventually following him into an alley where he jumped over a fence. Eric left the alley and walked toward the street. As he crossed the street, he

[3] As both Derrick and Lawrence have the same last name, we will refer to all of the individuals by their first name.

heard gunshots, started running and was hit by a bullet in his right leg. Lawrence and Fitzgerald, who had tried to follow Eric, eventually observed defendant coming out of a gangway. Defendant fired several shots at them, but they were not hit. Lawrence subsequently observed someone in the restaurant's parking lot lying on the ground. That person was 15-year-old Destin Hernandez, who later died as a result of a gunshot to his face. Eric testified that he, Fitzgerald, Jesse, Derrick and Lawrence did not have firearms on them that day.

¶ 10 Additional evidence at trial established that Dennis Williams knew defendant from elementary school and was near the restaurant at the time of the shooting. Williams observed defendant shoot a firearm and hit Hernandez. Other evidence, including video, demonstrated that, at the time of the shooting, the area was populated with many people, including children. The day after the shooting, Eric and Lawrence individually identified defendant in a photo array. On August 13, 2010, the police arrested defendant in Danville. Eric and Jesse individually identified him in a lineup.

¶ 11 Defendant testified that, on the morning in question, he had a conversation with Brandy, who told him that her cousins and brother would come out and kill him. Defendant did not go home after Brandy's comment because he thought "she was just a young girl *** that was mad." Later that afternoon, defendant was with his friend in the parking lot of Baba's Restaurant when two men approached them and accused defendant of robbing their cousin. Defendant stated the men were acting "aggressive" and "reaching for their waists." Because defendant thought these men were related to Brandy and were going to kill him, he reached for his firearm and ran. The men chased defendant into an alley. Defendant jumped over a fence and then walked into a

gangway. While there, he heard two or three gunshots and "fired back," fearing his life was in danger. Defendant acknowledged he kept his firearm with him every day.

¶ 12 The trial court found defendant guilty of 26 counts, subsequently merging the counts into one conviction for felony murder and one conviction for aggravated unlawful use of a weapon. In rejecting his claim of self-defense, the court found that defendant, who brought a loaded firearm with him that day, was the aggressor of the entire situation. Defendant filed multiple unsuccessful motions for new trial.

¶ 13 The case proceeded to sentencing. Defendant's presentence investigative report (PSI) revealed he was 19 years old when he committed the instant offenses. He had one prior felony conviction for burglary and three prior juvenile adjudications, two for burglary and one for aggravated discharge of a firearm. He additionally had several other juvenile cases against him dismissed. Defendant grew up in Dolton and was raised by both of his parents until his father passed away in 2003, when defendant was approximately 12 years old. He "always had a good relationship" with his mother and the rest of his siblings. At around age 11, defendant began smoking cannabis, which he continued to do until being jailed for the instant offenses, but did not think he had a drug problem. Defendant also had consulted with mental health professionals since the age of 13 for mood swings and depression.

¶ 14 At the sentencing hearing, Donna Henry, Destin Hernandez's mother, testified about the impact of his death on her and her community. Defendant's older brother, Leon Brazill, testified that, after their father passed away in 2003, defendant "gravitated" more toward "his peers and the streets" than his home even though the relationship with his mother was "good."

¶ 15 Defendant spoke in allocution, stating that Hernandez "was a friend" of his and a "good kid." He saw Hernandez every day at school when they were younger and would frequently talk with him. Defendant never meant to hurt anyone and he was sorry his actions "took an innocent, good person's life," but understood his "words" could not undo Hernandez's death.

¶ 16 The State argued in aggravation that the case was "tragic" as the 15-year-old Hernandez was an innocent bystander who became caught in defendant's conflict. It asserted that defendant's actions in shooting his firearm across a busy street "at a time where the children [were] being dismissed from school was outrageous and *** inexcusable." The State highlighted that the video played at trial depicted numerous children in the area at the time "scurrying" like "ants" to avoid the gunfire. It also noted that defendant, who consciously chose to arm himself with a firearm that day, escalated a verbal conflict into one with a firearm. In requesting a sentence of natural life imprisonment, the State argued defendant's conduct caused or threatened serious harm, he had a prior history of delinquency and criminal activity despite a "decent upbringing," and a severe sentence was necessary to deter others from committing similar acts.

¶ 17 Defense counsel responded in mitigation that both defendant and his brother "spoke best" for defendant and rested on their statements.

¶ 18 Prior to sentencing defendant, the court stated it would sentence him based on the facts of the case and the statutory aggravating and mitigating factors. The court observed that "the greatest" aggravating factor was that defendant's conduct caused or threatened serious harm, not only because Hernandez had been killed, but also because Eric Atkins had been shot and there were numerous children on the street at the time of the shooting. The court commented that the

video of the children "running away from [the] violence" was "absolutely frightening to watch." The court noted that defendant came from a loving and supportive family, which had afforded him the opportunity to "live a law-abiding life." The court, however, found that, despite this opportunity, defendant chose to involve himself in criminal activity beginning at age 14 with a juvenile battery charge that was eventually dismissed and continuing with further juvenile charges and adjudications. It further observed that, as an adult, defendant had been convicted of burglary, for which he was on probation at the time of the offenses, and he testified at trial that he kept a firearm on "him all the time." Lastly, the court asserted that, while the intended targets of defendant's conduct "may not have been acting like responsible adults," there was no evidence they had any weapons. The court subsequently sentenced defendant to 80 years' imprisonment for felony murder, which included a mandatory 25-year firearm enhancement, and 7 years' imprisonment for aggravated unlawful use of a weapon, to run concurrently.

¶ 19 Defendant unsuccessfully moved the court to reconsider, arguing the sentence was excessive in light of the aggravating and mitigating evidence. This appeal followed.

¶ 20 Defendant first contends that his fitness hearing failed to meet minimal due process requirements where the trial court merely adopted Dr. Seltzberg's conclusion, as provided in her stipulated testimony, that defendant was fit to stand trial instead of conducting an independent inquiry and making its own conclusion as to his fitness. The State responds that defense counsel was the one who proposed the stipulated hearing, defendant himself agreed to it, no evidence had been presented during pretrial proceedings that raised a *bona fide* doubt as to defendant's fitness

and the court properly relied on Dr. Seltzberg's stipulated testimony in finding defendant fit to stand trial.

¶ 21 Initially, we note, and the parties agree, that defendant failed to properly preserve his claim of error for review, as he did not object during the fitness hearing to its deficiencies and include such an argument in a posttrial motion. See *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). However, alleged errors concerning the fitness of a defendant to stand trial involve a substantial right, thereby making plain-error review appropriate. See *People v. Shaw*, 2015 IL App (4th) 140106, ¶ 23; *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 28, *appeal allowed*, No. 119594 (Nov. 23, 2016). However, before determining whether an error is plain error, we first must determine whether an error actually occurred. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 22 The fourteenth amendment's due process clause precludes the prosecution of a defendant who is unfit to stand trial. *People v. Holt*, 2014 IL 116989, ¶ 51. A defendant is unfit to stand trial if a mental or physical condition prevents him from understanding the nature and purpose of the proceedings against him or assisting in his defense. 725 ILCS 5/104-10 (West 2010). The issue of fitness to stand trial may be raised by the trial court, the defense, or the State at any time before, during, or after trial, and the court may order a behavior clinical examination of the defendant by a psychologist or psychiatrist. 725 ILCS 5/104-11(a), (b) (West 2010); 725 ILCS 5/104-13(a) (West 2010). After the court has ordered an examination and received the corresponding report, it must hold a hearing to determine the defendant's fitness. 725 ILCS

5/104-16(a) (West 2010). "On the basis of the evidence before it, the court *** shall determine whether the defendant is fit to stand trial." 725 ILCS 5/104-16(d) (West 2010).

¶ 23 At the fitness hearing, "the trial court may consider an expert's stipulated testimony to assess a defendant's fitness but may not rely solely on the parties' stipulation to an expert's *conclusion* that the defendant is fit." (Emphasis in original.) *Gipson*, 2015 IL App (1st) 122451, ¶ 30. "However, where the parties stipulate to what an expert would testify, rather than to the expert's conclusion, a trial court may consider this stipulated testimony in exercising its discretion." *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). Although the court may utilize an expert's conclusion as to the defendant's fitness, the ultimate decision is that of the court, not the expert. *Shaw*, 2015 IL App (4th) 140106, ¶ 26; see *Contorno*, 322 Ill. App. 3d at 179 ("A trial court must analyze and evaluate the basis for an expert's opinion instead of merely relying upon the expert's ultimate opinion."). The court's finding of fitness will not be reversed absent an abuse of discretion. *Shaw*, 2015 IL App (4th) 140106, ¶ 25. But, because the " 'issue is one of constitutional dimension, the record must show an affirmative exercise of judicial discretion regarding the determination of fitness.' " *Id.* (quoting *Contorno*, 322 Ill. App. 3d at 179).

¶ 24 Our supreme court's decision in *People v. Lewis*, 103 Ill. 2d 111 (1984) is instructive. In *Lewis*' two consolidated cases, the trial courts had found the defendants' fitness had been restored, based on stipulated expert testimony. *Id.* at 113-114. In finding the trial courts' fitness conclusions were proper, our supreme court distinguished improper stipulations "to the conclusion" that a defendant was fit from proper stipulations "to 'the findings' " of psychiatrists, as contained in their reports, that a defendant was fit. *Id.* at 115-116. Our supreme court further

observed that, in *Lewis*, "[t]he stipulations were not to the fact of fitness, but to the opinion testimony which would have been given by the psychiatrists." *Id.* at 116. Therefore, "[u]pon considering these stipulations and personally observing defendants, the circuit court could find defendants fit, seek more information, or find the evidence insufficient to support a finding of restoration to fitness." *Id.*

¶ 25 In the present case, we find the trial court's determination that defendant was fit to stand trial was proper. Prior to the date of the fitness hearing, the parties agreed that the hearing would proceed by way of stipulation. On the day of the hearing, the parties stipulated to the testimony of Dr. Seltzberg, which the State read into the record. Dr. Seltzberg would have testified that, after her review of the available medical records and her examination of defendant, it was her opinion that defendant was fit to stand trial. Further, she would have testified that defendant was able to understand the nature of the charges against him, the purpose of the proceedings against him and capable of assisting in his defense. The court accepted the stipulation, and both parties agreed that there would be no more evidence presented on the issue of defendant's fitness. Both parties also waived argument on the issue. The court then stated "[t]here will be a finding of fitness" without further comment.

¶ 26 The stipulation was a proper basis for the trial court's decision, as it was based on the opinion testimony that Dr. Seltzberg would have provided had she been called as a witness and not on her ultimate conclusion that defendant was fit to stand trial. See *Lewis*, 103 Ill. 2d at 116; *Shaw*, 2015 IL App (4th) 140106, ¶ 30. The trial court could properly rely on this evidence when

utilizing its own discretion and making its own conclusion as to whether defendant was fit to stand trial. See *Shaw*, 2015 IL App (4th) 140106, ¶ 30.

¶ 27 Defendant argues the fitness hearing was constitutionally deficient because the trial court failed to engage in any independent analysis of defendant's fitness. Although the court only stated "[t]here will be a finding of fitness" without further comment, the stipulation on which it based its decision was to Dr. Seltzberg's opinion testimony, not her conclusion. Therefore, the court appropriately exercised its discretion and independent judgment when it relied on that opinion in determining defendant was fit for trial. See *id.* ¶ 32. We thus find the fitness hearing satisfied due process requirements.

¶ 28 Defendant argues that *People v. Cook*, 2014 IL App (2d) 130545, and *People v. Contorno*, 322 Ill. App. 3d 177 (2001), in which the appellate court found deficient fitness hearings, mandate remand for a new trial following proper fitness proceedings. However, in both cases, it was unclear whether the parties had stipulated to the experts' ultimate conclusions or the experts' opinion testimony. *Cook*, 2014 IL App (2d) 130545, ¶¶ 5-6, 19; *Contorno*, 322 Ill. App. 3d at 179. In the present case, there was no ambiguity. The parties' stipulation was to Dr. Seltzberg's opinion testimony and the basis therefore, not her ultimate conclusion. As our supreme court explained in *Lewis*, 103 Ill. 2d at 116, upon considering proper stipulated expert testimony and personally observing defendant, here, throughout multiple pretrial proceedings and during the fitness hearing, the trial court could find defendant fit to stand trial. For that reason, *Cook* and *Contorno* are distinguishable.

¶ 29 During the pendency of this case, this court granted defendant leave to cite *People v. Gillon*, 2016 IL App (4th) 140801, as additional authority in support of his contention that his fitness hearing was deficient and remand is warranted. In *Gillon*, the trial court initially found the defendant unfit to stand trial and placed him in the custody of the Illinois Department of Human Services (Department). *Id.* ¶¶ 7-8. Two weeks later, the Department prepared a report finding he was fit to stand trial based on an evaluation by a social worker. *Id.* ¶ 9. During the defendant's fitness restoration hearing, the parties' stipulated to the Department's report. *Id.* ¶ 10. The trial court accepted the parties' stipulation and neither party presented any further evidence or argument on the issue. *Id.* The trial court stated it considered the report and, based on the report, found the defendant fit to stand trial. *Id.* ¶ 25. On appeal, the defendant claimed the trial court erred when it found him fit to stand trial. *Id.* ¶ 17.

¶ 30 The appellate court agreed, finding the trial court had erred in accepting the parties' stipulation that the defendant had been restored to fitness. *Id.* ¶ 31. The appellate court found that it was "apparent from the record *** the trial court relied solely on the parties' stipulations in finding defendant had been restored to fitness" and concluded that "the trial court should have given close consideration to the circumstances of this particular case." *Id.* ¶¶ 25-26. However, the appellate court's conclusion was premised on the fact that "certain circumstances existed which gave rise to pivotal concerns questioning defendant's fitness." *Id.* ¶ 26. Specifically, the defendant had been found unfit to stand trial only two weeks prior to the Department's report which concluded he was fit to stand trial, the report itself was based on an evaluation by a social worker, rather than a psychiatrist or a psychologist, and the defendant's behavior in trial

proceedings following the fitness restoration hearing should have put the trial "court on notice as to whether the Department's opinion was correct." *Id.* ¶¶ 28-30. Conversely, here, there are no circumstances that raise any question regarding defendant's fitness. Defendant was not previously found unfit to stand trial and the testimony stipulated to by the parties was based on an evaluation by Dr. Seltzberg, a psychiatrist. Moreover, the record reflects that defendant did not exhibit any behavior inconsistent with Dr. Seltzberg's opinion that he fully understood the proceedings, was capable of assisting in his defense and was fit to stand trial. We therefore find *Gillon* readily distinguishable.

¶ 31 As we have found no error committed by the trial court, there can be no plain error. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008). Accordingly, defendant's convictions are affirmed.

¶ 32 Defendant next contends that his 80-year sentence for felony murder is excessive because the trial court failed to demonstrate adequate consideration of his rehabilitative potential. Specifically, he argues the court sentenced him to a "de *facto* natural life sentence" despite committing the offense as a 19-year-old and where there was other substantial mitigating evidence, including his addiction to cannabis, mental illness, strong remorse for his actions and strong ties to his family.

¶ 33 As defendant was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2010)), he was subject to a sentence of between 20 and 60 years' imprisonment. 730 ILCS 5/5-4.5-20(a) (West 2010). However, because he discharged the firearm that caused Hernandez's death, a mandatory firearm enhancement of between 25 years' to natural life imprisonment had to be

added to his sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). Consequently, the sentencing range for defendant's offense was between 45 years' and natural life imprisonment.

¶ 34 The Illinois Constitution requires trial courts to impose sentences according to the seriousness of the offense and with the objective of restoring the defendant to useful citizenship, *i.e.*, to consider a defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. However, the most important factor in determining a sentence is the seriousness of the offense. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. In determining the proper sentence, trial courts are given broad discretionary powers (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), and a sentence will not be reversed absent an abuse of that discretion. *People v. Geiger*, 2012 IL 113181, ¶ 27. Reviewing courts give such deference to the trial court because it had "the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 35 Reviewing courts begin with the presumption that the trial court properly considered the defendant's rehabilitative potential and all relevant mitigating evidence, including the statutory mitigating factors, unless the defendant can affirmatively show the contrary. *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 87; *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38; *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Although the trial court's consideration of statutory mitigating factors is required, it does not have to expressly indicate its consideration of, and assign weight to, each factor. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. When a sentence falls within the statutory range, it is presumed to be proper (*Knox*, 2014 IL App (1st)

120349, ¶ 46), and may only be "deemed excessive and the result of an abuse of discretion" where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 36 In the present case, defendant's 80-year sentence for felony murder is presumed proper, as it was within the statutory range for the offense. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, we do not find the sentence greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. The most important factor in determining a sentence is the seriousness of the offense. *Kelley*, 2015 IL App (1st) 132782, ¶ 94. As the trial court found, defendant's conduct caused and threatened serious harm. He killed an innocent 15-year old bystander, shot Eric Atkins and endangered the lives of many children on the street who had just finished school for the day. The court specifically found the video of the children "running away from violence" "absolutely frightening to watch." The court also noted that such a severe sentence was necessary to deter others from committing similar acts. See *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 41 (deterrence is a proper consideration in fashioning a sentence). Although defendant was young, only 19 years old at the time, he had already amassed a lengthy criminal history, including one felony conviction for which he was on probation at the time he committed murder, and multiple juvenile adjudications, thus warranting a sentence substantially above the minimum required. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009).

¶ 37 Furthermore, the trial court specifically referenced defendant's supportive and loving family as mitigating evidence, but found, despite these strong family ties, that defendant chose to

carry a firearm with him wherever he went. While the court never explicitly referenced defendant's potential for rehabilitation, we must presume the court considered it unless defendant can affirmatively demonstrate the contrary. See *Brazziel*, 406 Ill. App. 3d at 434. He has not. Consequently, as "[t]he seriousness of the offense" and "the need to protect the public may outweigh mitigating factors and the goal of rehabilitation" (*People v. Sims*, 403 Ill. App. 3d 9, 24 (2010)), we cannot find defendant's 80-year sentence was excessive.

¶ 38 Defendant, however, argues that the trial court did not adequately consider his potential for rehabilitation. Citing to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) and *Graham v. Florida*, 560 U.S. 48 (2010), wherein the United States Supreme Court held that juvenile offenders cannot be subject to mandatory life sentences, defendant argues his young age supports a lesser sentence. His reliance on *Miller* and *Graham* is unpersuasive as he was not a juvenile at the time he committed the offense nor did he receive a mandatory life sentence.

¶ 39 Defendant further asserts that a lesser sentence is warranted as he "struggled with an addiction to cannabis," a drug he began using when he was 11 years old. This argument, however, is contrary to the PSI, wherein defendant only stated he began smoking cannabis at age 11. Nowhere in the PSI did it state that defendant had an "addiction" to cannabis. Instead, the PSI stated that defendant "does not think he has ever had an alcohol or drug problem."

¶ 40 Defendant's assertion that his mental illness and expressed remorse for his actions warrant a lesser sentence is also unpersuasive. Defendant's psychological history was in the PSI and therefore before the trial court. See 730 ILCS 5/5-3-1 (West 2010) ("A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and

considered by the court.") Further, the court heard defendant express remorse for his actions during the sentencing hearing. There being no evidence to the contrary, we must presume the court considered this evidence in fashioning the sentence (see *People v. Burton*, 184 Ill. 2d 1, 34 (1998)), and we will not reweigh mitigating evidence the court has considered. *People v. Jones*, 2015 IL App (1st) 142597, ¶ 40.

¶ 41 Lastly, defendant argues that his sentence should be reduced because he acted out of fear for his own life. See 730 ILCS 5/5-5-3.1(a)(3), (4) (West 2010) (statutory mitigating factors include where the defendant acted under strong provocation and where there are substantial grounds to justify his conduct even though they failed to establish a defense at trial). Although the trial court need not expressly state its consideration of the statutory mitigating factors (*Halerewicz*, 2013 IL App (4th) 120388, ¶ 43), the court clearly considered these factors when it observed that the intended targets of defendant's actions initiated the confrontation with him, but found there was no evidence they had weapons. Further, at trial, the court stated it did not believe defendant's self-defense claim, and at sentencing, it necessarily considered this finding when it stated it took "into consideration the facts of the case." Regardless of whether the court ascribed some weight to these mitigating factors or outright rejected them as unsupported by the evidence, it is clear the court considered them, and we will not reweigh mitigating evidence the court has clearly considered. *Jones*, 2015 IL App (1st) 142597, ¶ 40. Accordingly, defendant's 80-year sentence for felony murder must stand.

¶ 42 Defendant finally contends, and the State correctly concedes, that his mittimus must be corrected to reflect four additional days of presentence custody credit. A defendant held in

custody for any part of a day should be given credit against his sentence for that day (*People v. Williams*, 2013 IL App (2d) 120094, ¶ 37; see 730 ILCS 5/5-4.5-100(b) (West 2010)), excluding his day of sentencing. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 37.

¶ 43 The record shows that defendant was arrested on August 13, 2010, and remained in custody until he was sentenced on March 20, 2014, for a total of 1,315 days of presentence custody credit. The trial court granted defendant 1,311 days of credit. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we order the clerk of the court to correct defendant's mittimus to reflect 4 additional days of presentence custody credit, for a total of 1,315 days.

¶ 44 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed as modified.

¶ 45 Affirmed as modified.

APPENDIX B

Illinois Appellate Court
Denial of Rehearing

No. 1-14-1068

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JERMAINE BRAZILL, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 10 CR 15810 Honorable James L. Rhodes and Anna Helen Demacopoulos, Judges Presiding.

ORDER

IT IS HEREBY ORDERED that Defendant-Appellant's petition for rehearing is DENIED.

DATED: _____

Bertina Lampkin
JUSTICE

Hoffman
JUSTICE

Jesse G. Reyes
JUSTICE

APPENDIX C

Illinois Supreme Court

Denial of Review

Received 11/28/18

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

November 28, 2018

In re: People State of Illinois, respondent, v. Jermaine Brazill, petitioner.
Leave to appeal, Appellate Court, First District.
122132

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 01/02/2019.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court