2020 IL App (1st) 130545-UB

SIXTH DIVISION
November 30, 2020

No. 1-13-0545

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STESHAWN BRISCO, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 21078 Honorable Stanley J. Sacks, Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justice Walker concurred in the judgment.
Justice Pierce dissented.

O R D E R

¶ 1 *Held*: Defendant's convictions for first degree murder and aggravated battery with a firearm affirmed where the State presented sufficient evidence to sustain the convictions, the court did not commit plain error in admitting prior out-of-court statements of trial witnesses, and no prejudice resulted from the prosecutor's closing argument or the admission of an autopsy photograph into evidence. Defendant's sentences are vacated and the case is remanded for a new sentencing hearing where he committed the offenses when he was a juvenile and the trial judge sentenced him to a *de facto* life sentence of 75 years without consideration of specific youth-related sentencing factors.

¶ 2 This case is before us on remand from a supervisory order of our supreme court. Following a jury trial, defendant Steshawn Brisco was convicted of first degree murder and aggravated battery with a firearm for crimes committed when he was 17 years old. The trial court sentenced him to consecutive terms of 55 years' imprisonment for first degree murder and 20 years' imprisonment for aggravated battery with a firearm. On appeal, Mr. Brisco contended that (1) the State failed to present sufficient evidence to prove him guilty beyond a reasonable doubt; (2) the court erred in admitting certain prior inconsistent statements of witnesses; (3) he was denied a fair trial because the prosecutor's comments during closing argument and the admission of an autopsy photograph were prejudicial; and (4) his sentences were grossly disproportionate to the sentences imposed on his codefendant, who was convicted of the same charges.

¶ 3 On March 17, 2015, this court issued a decision affirming Mr. Brisco's convictions and sentences. *People v. Brisco*, 2015 IL App (1st) 130545-U. On April 21, 2015, Mr. Brisco filed a petition for leave to appeal (PLA) to the Illinois Supreme Court from that order. The supreme court denied the PLA on September 30, 2015. Mr. Brisco moved to have the supreme court reconsider the denial of the PLA on November 2, 2015, and the supreme court withdrew its denial of his PLA on November 16, 2015.

¶ 4 On March 25, 2020, our supreme court issued a supervisory order again denying the PLA, but in that order, the supreme court directed us to vacate our initial order and:

> "consider the effects of th[e supreme court's] opinion in *People v. Buffer*, 2019 IL 122327, on the issue of whether defendant's sentence constitutes a *de facto* life sentence in violation of the Eighth Amendment and *Miller v. Alabama*, 567 U.S. 460 (2012), and determine if a different result is warranted." *People v. Brisco*, No. 119159 (Ill. Mar. 25, 2020) (supervisory order).

¶ 5 Although we vacated our 2015 decision on May 8, 2020, and we now issue this decision in place of it, we draw upon the 2015 decision to the extent that it is not impacted by our supreme court's supervisory order.

¶ 6 On the part of that decision that is impacted by the supervisory order, we asked the parties to file supplemental briefing. The parties agree and we find that, in light of *Buffer*, Mr. Brisco's sentence of 75 years total is a *de facto* life sentence that was imposed without proper consideration of Mr. Brisco's youth, and therefore a new sentencing hearing is necessary. Mr. Brisco also argues that his case should be remanded to a different judge. The State does not agree. Because we agree with the State that the record does not support Mr. Brisco's request that we take the unusual step of reassigning this case, we remand this case to the trial court judge who sentenced Mr. Brisco originally for a new sentencing hearing.

¶ 7 I. BACKGROUND

¶ 8 On the evening of August 10, 2010, Tanaja Stokes, an eight-year old girl, was shot in the head and killed as she played outside in front of her house at 10716 South Indiana Avenue in Chicago, Illinois. Ariana Jones, a seven-year old girl who had been playing with Tanaja, was also struck in the head by a bullet. Despite suffering a skull fracture and subarachnoid hemorrhage from the bullet wound, Ariana survived the shooting. The police investigation revealed that the gunshots had been directed at a group of young men standing on the corner of 107th Street and Indiana Avenue. Witnesses identified Mr. Brisco and Marcus Cocroft, the codefendant who is not a party to this appeal, as the perpetrators of the shooting.

¶ 9 The day after the shooting, Mr. Brisco surrendered at the police station and was arrested. He was 17 years old at the time. Mr. Cocroft was arrested after the police apprehended him in Rockford, Illinois, two months later. The State charged Mr. Brisco and Mr. Cocroft with multiple

felony counts, but ultimately proceeded to trial on two counts of first degree murder and one count of aggravated battery with a firearm against each of them, and nol-prossed the remaining counts. Mr. Brisco and Mr. Cocroft were tried as adults in the same trial but with separate juries.

¶ 10 A. Occurrence Witnesses

¶ 11 During the trial, the State presented testimony from occurrence witnesses who were outside on the street near the scene of the shooting when it occurred. The testimony of four of these witnesses—Amos Wise, Ralphael White, Justin Wise, and Charles Huntley—are at issue in this appeal.

¶ 12 1. Amos Wise

¶ 13 Amos Wise testified that he lived at 10716 South Indiana Avenue with several other residents, including his brother Justin, his cousin Deborah Thomas, and her daughter Tanaja Stokes. Amos explained that the Roseland area of Chicago contains two neighborhoods referred to as "up the hill" and "down the hill," the latter also known as "D block." He lived in the "down the hill" neighborhood, whereas Mr. Cocroft lived in the "up the hill" neighborhood. Amos knew Mr. Cocroft from previous altercations with him. Between 7 and 8 p.m. on the night of the shooting, Amos and Justin were standing on a sidewalk across the street from their house. With them were Amos's friends, Ralphael White, Phillip White, and Charles Hunley, all of whom were from "down the hill." From where he was standing, Amos could see the intersection at 107th Street and Indiana Avenue. He testified that it was still light out when he saw two men on bikes heading towards the corner where he and his friends were standing. Both men were wearing black pants, black short-sleeved shirts, and red baseball caps. They appeared to be coming from "up the hill" and were near the middle of the intersection when Amos saw them point their guns and begin shooting in his direction. Amos began to run but was able to observe the shooters for about 10

seconds. He identified the men on bikes as Mr. Brisco and "Little Marcus" Cocroft. The next day, Amos spoke with police officers and identified Mr. Cocroft from photos. A day or two later, he identified Mr. Brisco as the other shooter from a lineup. Subsequently, Amos also identified Mr. Cocroft from a lineup.

¶ 14 At the time of the trial, Amos was serving prison sentences for convictions of robbery and aggravated fleeing and eluding police. During cross-examination, he admitted that he knew Mr. Cocroft, but did not know Mr. Brisco at the time of the shooting. He also denied having identified Mr. Brisco as the person firing the gun, and, instead, explained that he "saw the flame coming from both [Mr. Brisco's and Mr. Cocroft's] direction" and that "[b]oth of them was next to each other."

¶ 15 2. Ralphael White

¶ 16 Ralphael White testified that, in August 2010, he was living at 10632 South Indiana Avenue in the "down the hill" neighborhood with his grandfather and his cousin Phillip White. He recalled that on the night of the shooting, he had been hanging out with two girls from "up the hill," but the girls left after a disagreement and returned to their neighborhood. Later, at around 7 or 8 p.m., Ralphael saw "[t]wo dudes riding on bikes" at the corner of the block, who then pointed their guns south and started shooting in his direction. Ralphael recognized Mr. Cocroft as one of the shooters. During questioning at the police station the next day, Ralphael identified Mr. Cocroft through his photograph. Months later, Ralphael also identified Mr. Cocroft from a lineup. At trial, Ralphael acknowledged that he had originally identified a man named "Dahve" as the other shooter. He admitted, however, that he did not actually see Dahve or the other shooter's face; he merely assumed that Dahve was with the man with Mr. Cocroft because "they always was together."

¶ 17 3. Justin Wise

¶ 18 Justin Wise, Amos's brother, testified that he lived with Amos and others at 10716 South Indiana Avenue. On the night of the shooting, he was walking to a friend's house when he noticed two men, both wearing red baseball caps, riding on bikes a block away from Indiana Avenue. As he was returning to his house, Amos saw the two men at the corner of 107th Street and Indiana Avenue. They were pointing their guns and shooting. Justin recognized Mr. Cocroft but did not see the other shooter's face. He later identified Mr. Cocroft from both a photo array and a lineup.

¶ 19 4. Charles Hunley

¶ 20 Charles Hunley testified that Deborah Thomas, Amos, and Justin are his cousins. At approximately 8 p.m. on the night of the incident, Mr. Hunley was outside near 10716 South Indiana Avenue with Justin, Amos, and Phillip. Shortly before 8 p.m., he saw Ralphael arguing with some girls. A few minutes later, Mr. Hunley saw two men who started shooting in his direction. He recognized Mr. Cocroft as one of the shooters. They had known each other since grammar school but were not friends. The next day, at the police station, Mr. Hunley identified Mr. Cocroft from a photo array. During cross-examination, Mr. Hunley admitted that in his initial conversation with detectives and his handwritten statement, he had stated that he was not sure whether the second man had a gun. He further admitted that in his grand jury testimony, he answered "no" when asked if he saw a gun in the second man's hand.

¶ 21 B. Overhear Witnesses

¶ 22 The State also presented testimony from three witnesses who purportedly overheard Mr. Brisco and Mr. Cocroft discussing a shooting later in the evening: Marwin Sanders, Marcquette Verner, and Beverly Vaughn.

¶ 23 1. Marwin Sanders

¶ 24 Marwin Sanders testified that he lived in the "up the hill" neighborhood and knew both Mr. Brisco and Mr. Cocroft. He recalled seeing them in the "up the hill" neighborhood at around 7 or 7:30 p.m. on the night of the shooting. Mr. Brisco and Mr. Cocroft were talking to a group, which included Mr. Sanders, about "what just went down, what happened." Mr. Sanders testified that he heard Mr. Brisco refer to "D Block" and say, "[w]e went down there. We did a hit" and "yeah, mother**** we just did that hit." While he initially denied that Mr. Brisco said "we just killed one of them n***," Mr. Sanders admitted, upon further questioning, that he had previously told the grand jury that Mr. Brisco "was like, man, we just did it to them" and that Mr. Brisco was "quiet, and happy about it too, like, yeah, we just went down there and did a hit, man. We just killed one of them n***."

¶ 25 Mr. Sanders also testified that while Mr. Brisco was talking, Mr. Cocroft was next to him, nodding his head and smiling when Mr. Brisco said they had done "a hit." Mr. Sanders subsequently admitted that he had told the grand jury that he heard both Mr. Cocroft and Mr. Brisco talking about the shooting, but that Mr. Cocroft "start[ed] talking *** when [Mr. Brisco] started kicking it up." He denied telling the grand jury that he overheard Mr. Cocroft saying that he "just did it to them boys, just killed some people *** just went down there and did a hit, woo, woo, woo like that." However, he admitted that he had told the grand jury that Mr. Cocroft said, "we did it to them, man. This is what we do. I just did a hit, woo, woo, woo like that."

¶ 26 2. Marcquette Verner

¶ 27 Like Mr. Sanders, Marcquette Verner was in the "up the hill" neighborhood on the night of the shooting. Mr. Verner testified that he knew Mr. Cocroft and Mr. Brisco by their nicknames and saw them riding around on bikes, wearing black shirts and red hats, at approximately 8 p.m.

on the night of August 10. He testified that although he did not personally speak to Mr. Brisco or Mr. Cocroft, he observed their conversation with Mr. Sanders and some other men. Initially, Mr. Verner testified that he "wasn't too close" to Mr. Cocroft and Mr. Brisco and could not hear what was being said, but he also testified that he heard Mr. Brisco say that "something [that] [s]ounded like he said he air somebody out or something."

¶ 28 Despite giving the foregoing testimony, Mr. Verner admitted that on the day after the shooting, he told detectives that both Mr. Brisco and Mr. Cocroft were "gloating," and that he heard Mr. Brisco say that they "aired out D block" and "[y]eah, yeah, we got down on those n*** on 107th Street. We let loose on them." Mr. Verner explained to the detectives that "got down" meant "shot at them" and that "aired out D block" meant that "they shot up 107th and Indiana." He also admitted that in his grand jury testimony, he said he heard Mr. Brisco say "they aired out D block."

¶ 29 On cross-examination, Verner admitted that he currently had a contempt charge pending against him. He testified that he gave statements about Mr. Brisco to the detectives at the police station because he wanted "to go home." He then explained that, at the time he overheard Mr. Brisco's statements, he had been across the street from Mr. Brisco and was not engaged in a conversation with him. On redirect examination, however, Mr. Verner confirmed that he heard Mr. Brisco say "they aired out D block."

¶ 30 Chicago Police Detective Brian Forberg was called as an impeachment witness and confirmed that Mr. Verner had said the foregoing to him during an interview. Detective Forberg had investigated the shooting and interviewed Mr. Verner about the incident prior to the trial. According to Detective Forberg, Mr. Verner identified both Mr. Cocroft and Mr. Brisco and told Detective Forberg that they "were gloating, yeah, yeah, yeah, we got down on those ni*** on

107th, we let loose on them," and that they said that they "aired out the D block."

¶ 31 The State also called Assistant State's Attorney (ASA) Jamie Santini to testify about the grand jury testimony that Mr. Verner had given prior to the trial. ASA Santini recounted that Mr. Verner told the grand jury that he heard Mr. Brisco "bragging, talking about what they did" and saying that "they aired out down the hill. They aired out D Block," and that this meant "that they shot up the block."

¶ 32 3. Beverly Vaughn

¶ 33 Beverly Vaughn testified that that she lived in the "up the hill" neighborhood in 2010 and knew both Mr. Brisco and Mr. Cocroft. On the day after the shooting, Ms. Vaughn spoke with police officers at her school and again at the police station later with her parents present. She left the station after giving a handwritten statement prepared by the ASA. She also testified before the grand jury about the statements that she heard from Mr. Brisco.

¶ 34 At trial, she testified that on August 10, she and her friend Marlina were walking back home from "down the hill" when she heard gunshots. They continued walking and met up with two other girls. Mr. Brisco approached the group of girls and, as Ms. Vaughn described, was "sweating," breathing "heavy," and "looked tired." He told the group of girls, "me and Little Marcus just went down and aired them out." When Ms. Vaughn and Marlina asked Mr. Brisco whom he meant, he responded, "D Block." When they asked him whether "the girls [were] down there"—referring to "older girls" who had been in the area earlier that night, Mr. Brisco answered, "I don't care. We just let the whole 40 clip go."

¶ 35 C. The State's Firearms and Medical Evidence

¶ 36 Dana Inempolides, a firearms expert, examined the bullet and the cartridge casings recovered from the scene. She testified that the bullet was fired from either a .40-caliber or 10-

millimeter automatic firearm. She further testified that all of the recovered cartridge casings were fired from the same firearm.

¶ 37 Dr. Mitra Kalelkar, a former Cook County deputy chief medical examiner, testified that she performed an autopsy on Tanaja Stokes. She testified that the bullet that struck Tanaja caused "an extensive laceration of [Tanaja's] brain" and that this gunshot wound caused her death. Dr. Kalelkar identified certain autopsy photographs to explain her conclusion that Tanaja's death was caused by a homicide.

¶ 38 D. Instructions, Verdict, and Sentence

¶ 39 Following the State's presentation of its case, Mr. Brisco rested without presenting any evidence. The trial court denied Mr. Brisco's motion for a mistrial and instructed the jury on circumstantial evidence and accountability. Following deliberation, the jury found Mr. Brisco guilty of first degree murder and aggravated battery with a firearm. A separate jury found Mr. Cocroft guilty of the same offenses.

¶ 40 The sentencing hearing took place on January 15, 2013. In aggravation, the State called Cook County corrections officer Gary Webb to testify about a charge of aggravated battery that Mr. Brisco had subsequently incurred based on an incident in the jail. Officer Webb testified that he was working in the clothing intake room for Cermak Hospital on August 15, 2010, and he instructed Mr. Brisco to change into a department of corrections uniform, but Mr. Brisco refused. Officer Webb ordered Mr. Brisco to change again and, according to Officer Webb, Mr. Brisco again refused and spat in the officer's face. After Officer Webb contacted his supervisor, Mr. Brisco complied without further incident. On cross-examination, Officer Webb denied punching Mr. Brisco or seeing blood on Mr. Brisco's shirt.

¶ 41 The State also presented victim impact statements from the mothers of Ariana and Tanaja.

¶ 42 In mitigation, and in response to the testimony of Officer Webb, Mr. Brisco testified that an Officer Spann ordered him to change. When Mr. Brisco arrived at the changing room, another individual was inside complaining that his clothing was too small. Officer Spann entered and yanked the shirt down the other man's body. Mr. Brisco laughed in response, and Officer Spann asked why Mr. Brisco was laughing, then commented on Mr. Brisco killing "little girls." Mr. Brisco testified that Officer Spann then punched him three times in the jaw and he fell to the ground, resulting in a bloody nose and lip. Mr. Brisco wiped his face on his shirt. Mr. Brisco denied spitting on Officer Webb. Mr. Brisco did not present any other evidence in mitigation.

¶ 43 During argument, the State recounted the facts of the shooting, the statements that witnesses overheard from Mr. Brisco after the shooting, and the fact that Mr. Brisco had expressed no remorse for the shooting. The State also noted that Mr. Brisco had a prior juvenile conviction for robbery and an adult conviction for unlawful possession of a weapon. Mr. Brisco had been on probation for the unlawful possession offense when the shooting occurred. The State also commented on the jail incident and argued that there was "little hope" that Mr. Brisco would change his ways. The State requested a sentence commensurate with Mr. Brisco's "deed, his lack of remorse and the lack of rehabilitative potential."

¶ 44 In mitigation, defense counsel argued that Mr. Brisco was 17 years old at the time of the shooting, had a rough childhood, and had dropped out of school. Counsel also noted that Mr. Brisco turned himself into the police the day after the shooting and that Mr. Brisco did not intend to shoot Ariana or Tanaja, indeed did not intend to shoot "little girls." As to the incident at the jail, counsel argued that Mr. Brisco was upset because he felt that it had been misrepresented by the officer and he was still just a troubled 17-year-old kid. Counsel requested the minimum sentence.

¶ 45 Before he imposed the sentence, the trial judge commented on the facts of the case,

specifically noting that he could not imagine a more horrible crime and the fact that the statements after the shooting showed Mr. Brisco and Mr. Cocroft did not care who got shot. The judge said he would go through the factors in aggravation and mitigation that were required to be considered at that time, pursuant to sections 5-5-3.1 and 5-5-3.2 of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2012)). The judge determined none of the statutory mitigating factors applied to Mr. Brisco and, in his discussion of those factors, the judge only mentioned Mr. Brisco's age when commenting on Mr. Brisco's criminal history. As to the factors in aggravation, the judge noted that Mr. Brisco's conduct could have caused serious harm to other individuals besides Ariana and Tanaja and also noted the youth of the victims. The judge also stated that Mr. Brisco's criminal history was significant for a 17-year-old, and that a long sentence might have some deterrent effect. Finally, the judge said that "[i]n considering this crime and [Mr.] Brisco's prior record, I feel he cannot be restored to citizenship whatsoever, useful citizenship that is."

¶ 46 The judge then gave a lengthy commentary, stating that when a person commits certain types of crimes, that person forfeits his right to be on the street. The judge told Mr. Brisco, "every single day you get, Steshawn, you have earned it. You can live a useful life inside. Get used to that possibility." And although the judge acknowledged Mr. Brisco did not have a great childhood, he did not consider it to be a mitigating circumstance because at 17 or 18 years old, Mr. Brisco was a "grown-up man." He also described Mr. Brisco as having exhibited callous indifference to human life. Ultimately, the trial judge sentenced Mr. Brisco to 55 years' imprisonment for the first degree murder and 20 years' imprisonment for the aggravated battery with a firearm, to run consecutively for a total of 75 years. When the judge remarked that, "[a]t least people on the D block will know you won't be out there shooting on the D block again," Mr. Brisco responded, "I'll be back." Later, the judge said, "[h]opefully those people on the D block will never see [Mr.] Brisco again unless

they visit him inside somewhere," and Mr. Brisco responded, "[t]hey will see me." At this point, the judge told Mr. Brisco to "shut up. Take your attitude back to the jail or back to the penitentiary."

¶ 47 When defense counsel sought leave to file a motion to reconsider Mr. Brisco's sentence, the judge responded, "[r]econsider upwards?" Defense counsel responded in the negative, and the motion was denied.

¶ 48 Mr. Cocroft was sentenced to consecutive prison terms of 37 ½ years and 17 ½ years for his convictions.

¶ 49 II. JURISDICTION

¶ 50 Mr. Brisco timely filed his notice of appeal on January 15, 2013. We have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013) and Rule 606 (eff. July 1, 2017), governing appeals from final judgments of conviction in criminal cases. The sequence of events following our initial decision on appeal is outlined above and the case is again before this court because of our supreme court's supervisory order. *Brisco*, No. 119159.

¶ 51 III. ANALYSIS

¶ 52 In this direct appeal, Mr. Brisco raises several issues. First, he contends that the State failed to prove his guilt beyond a reasonable doubt. Second, he maintains that the trial court erred in admitting Mr. Verner's out-of-court statements to police either as impeachment or substantive evidence. Third, Mr. Brisco asserts that he was denied his right to a fair trial due to the inflammatory comments made by the prosecutor during closing arguments and by the admission of photographs depicting the murder victim's injuries. Finally, Mr. Brisco contends that his sentences are grossly disproportionate to that of his codefendant. We consider each of those arguments in turn, adopting our analysis form our original decision in this case, and then turn to

the sentencing issue that is before us on our supreme court's remand.

¶ 53 A. Sufficiency of the Evidence

¶ 54 Mr. Brisco contends that the State failed to prove him guilty of first degree murder and aggravated battery with a firearm beyond a reasonable doubt. He argues that Amos Wise was lacking in credibility and had a limited opportunity to view the shooters. He also argues that the witnesses who allegedly overheard him lacked credibility and gave inconsistent testimony. Finally, he argues that there was no physical evidence showing that more than one gun was used in the shooting.

¶ 55 "When a defendant challenges the sufficiency of the evidence," we do not "retry the defendant." *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we "must determine 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." *Id.* It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not reverse a criminal conviction "unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 56 To prove Mr. Brisco guilty of first degree murder, the State needed to prove that Mr. Brisco either intended to kill or do great bodily harm to the victim, or knew that such acts would cause death to that individual or another (720 ILCS 5/9-1(a)(1) (West 2010)), or knew that such acts created a strong probability of death or great bodily harm to that individual or another (720 ILCS 5/9-1(a)(2) (West 2010)). To prove Mr. Brisco guilty of aggravated battery with a firearm, the State needed to establish that Mr. Brisco knowingly or intentionally discharged a firearm, causing

injury to another person, while committing a battery. 720 ILCS 5/12-4.2(a)(1) (West 2010).

¶ 57 Mr. Brisco was tried by the State on a theory of accountability. Under this theory, a defendant may be deemed legally accountable for another's conduct and convicted for the charged offense when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). A defendant's mental state is generally shown circumstantially by inferences reasonably drawn from the evidence. *People v. Jones*, 376 Ill. App. 3d 372, 383 (2007). Furthermore, "[a]ctive participation has never been a requirement for the imposition of criminal guilt upon the theory of accountability." *People v. Ruiz*, 94 Ill. 2d 245, 254-55 (1982). A defendant's presence at a crime scene, knowledge that a crime is being committed, voluntary attachment to and close affiliation with his companion before and after the crime was committed, failure to report the crime, and flight from the scene are all circumstances which may be considered to determine if a defendant shared a common criminal design or agreement with a principal. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995).

¶ 58 We find sufficient evidence in the trial record to support Mr. Brisco's convictions. The evidence adduced at trial established that on the evening of August 10, 2010, Mr. Brisco was at the scene of the shooting when it occurred, that he was with Mr. Cocroft prior to and after the shooting occurred, and that he told other people about the shooting later on the same evening. Amos, Justin, and Raphael each testified that there were two shooters. Four occurrence witnesses identified Mr. Cocroft as one of the shooters. Amos testified that he saw Mr. Brisco with Mr. Cocroft during the shooting and that they both had guns. Although Amos did not testify that the gunfire was from Mr. Brisco's gun, he testified that he saw "flames coming from" Mr. Brisco's

and Mr. Cocroft's direction during the shooting. Mr. Verner and Mr. Sanders testified that they observed Mr. Brisco with Mr. Cocroft the evening of the shooting after the incident. Mr. Verner, Mr. Sanders, and Ms. Vaughn further testified that they heard Mr. Brisco bragging about a shooting that had just occurred in "D Block." At the time, these three witnesses saw Mr. Brisco with Mr. Cocroft and both of them acknowledged that there had been an incident in the "down the hill" neighborhood.

¶ 59 The State presented abundant evidence of Mr. Brisco's acts, during and after the shooting incident, from which a rational trier of fact could reasonably infer that he possessed the requisite mental intent to facilitate the crime, and aided, abetted, or attempted to aid another person in the commission of the crime. 720 ILCS 5/5–2(c) (West 2010); *Jones*, 376 Ill. App. 3d at 383. See also *People v. Stanciel*, 153 Ill. 2d 218, 234 (1992) ("the intent to promote or facilitate a crime may be shown by evidence that the defendant shared the criminal intent of the principal, or by evidence that there was a common criminal design"). Furthermore, we have no reason to doubt the jury's understanding of the court's instructions on circumstantial evidence and accountability. Nothing in the record shows any objection or challenge from Mr. Brisco regarding these instructions. Viewing this evidence in the light most favorable to the State, we cannot conclude that no rational juror could have found Mr. Brisco guilty beyond a reasonable of murder and personal discharge of a firearm under the accountability theory.

¶ 60 Mr. Brisco also notes, without elaboration, that the State did not present any physical evidence that more than one gun was used in the shooting. We reject this "argument" because Mr. Brisco does not explain why this lack of evidence would be a basis for a new trial (see Ill. S. Ct. R. 341(h)(7) (eff. Feb.6, 2013) (requiring a clear statement of contentions with supporting citation of authorities)), nor does he challenge the jury instruction on accountability that was given by the

court (see People's Instruction No. 13). In any event, Mr. Brisco's point is unavailing because culpability based on accountability "may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he *directly* participated in the criminal act itself." (Emphasis added). *In re W.C.*, 167 Ill. 2d 307, 338 (1995).

¶ 61 Mr. Brisco takes issue with Amos's identification of Mr. Brisco as one of the shooters. According to the record, only Amos actually witnessed the shooting and identified Mr. Brisco as one of the shooters. It is settled, however, that the credible and positive testimony of a single witness is sufficient to convict. *People v. Siguenza–Brito*, 235 Ill. 2d 213, 228 (2009). See also *People v. Lewis*, 165 Ill. 2d 305, 356 (1995) (even "[a] single witness'[s] identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting positive identification").

¶ 62 Mr. Brisco further maintains that Amos had only a limited opportunity to view the shooter. When assessing the reliability of identification testimony, factors to consider include "(1) the opportunity the [witness] had to view the criminal at the time of the crime; (2) the witness'[s] degree of attention; (3) the accuracy of the witness'[s] prior description of the criminal; (4) the level of certainty demonstrated by the [witness] at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Slim*, 127 Ill.2d 302, 307–08 (1989). "An identification may be positive even though the witness viewed the accused for a short period of time," and any doubts regarding "[t]he sufficiency of the opportunity to observe [are] for the trier of fact to determine." *People v. Wehrwein*, 190 Ill. App. 3d 35, 39 (1989). Here, Amos observed the shooters for about 10 seconds as shots were being fired. Considering that it was still light out at the time, we find this to be a sufficient amount of time to identify Mr. Brisco. Courts have often upheld identifications that occurred in only a matter of

seconds. See, *e.g.*, *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (finding an eyewitness had sufficient opportunity to view the defendant where he observed his face for "several seconds" at close range); *People v. Negron*, 297 Ill. App. 3d 519, 530-31 (1998) (finding no reasonable doubt where the victims had "several seconds" to view their attackers). Amos also gave a description of Mr. Brisco's clothes and mode of transportation—black shirt, red baseball cap, on a bike—that was later corroborated by another witness, Mr. Verner, who saw Mr. Brisco that night. Two days after the shooting, Amos positively identified Mr. Brisco, lending additional support for the reliability of his identification. There is no indication that Amos has ever expressed doubt that Mr. Brisco was one of the shooters. Under the circumstances, we find that the jury could have rationally relied on his identification testimony when reaching its verdict.

¶ 63 Mr. Brisco argues that many of the State's witnesses were, nonetheless, lacking in credibility. He contends that Amos's credibility is suspect because he was a convicted criminal, was related to the victims, and was biased due to his history of altercations with Mr. Cocroft as well as other "up the hill" residents. Additionally, Mr. Brisco argues that Mr. Verner lacked credibility because he was facing a contempt charge at the time he testified and his trial testimony was inconsistent with his grand jury testimony. Mr. Brisco also challenges Mr. Sanders's credibility because Ms. Sanders testified that the conversation he overheard took place between 7 and 7:30 p.m. (approximately 30 minutes to an hour before the shooting) and his testimony was inconsistent with Mr. Verner's. Finally, Mr. Brisco argues that Ms. Vaughn lacked credibility because her version of events differed from Mr. Sanders's and Mr. Verner's testimony and she did not come forward with information until the police arrived at her school the next day.

¶ 64 "A conviction shall not be reversed simply because the defendant claims a witness was not credible." *People v. Diaz*, 297 Ill. App. 3d 362, 369 (1998); see also *People v. Rodriguez*, 187 Ill.

App. 3d 484, 491 (1989) (noting that "guilty verdicts are unassailable to the extent that they reflect a credibility determination"). "The trier of fact is best equipped to judge the credibility of witnesses" and its "findings concerning credibility are entitled to great weight." *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). The weight of the evidence and credibility of the State's witnesses was a question for the jury, not a question for this court to second-guess on appellate review. *Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Additionally, whether the minor inconsistencies between the recollections of Amos, Justin, Ralphael, and Charles irreparably undermined their credibility was a matter for the jury to decide. *People v. Rouse*, 2014 IL App (1st) 121462, ¶ 53. We have previously held that "[s]light discrepancies do not destroy the credibility of an eyewitness but only go to the weight to be given his testimony" and that "[i]t is within the province of the trier of fact to determine what effect these minor discrepancies have upon the witness'[s] credibility." *People v. Gregory*, 43 Ill. App. 3d 1052, 1055 (1976). Therefore, the jury was "free to accept or reject as much or as little as it please[d]" of the witness testimony in this case. *People v. Logan*, 352 Ill. App. 3d 73, 80-81 (2004). Given the deferential standard of review and the lack of any physical evidence that contradicts the testimony of the witnesses, we cannot say that the evidence was so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of Mr. Brisco's guilt. We therefore find no reason to disturb the verdict reached by the jury.

¶ 65 B. Admissibility of Prior Inconsistent Statements

¶ 66 Mr. Brisco next contends that the trial court erred in allowing certain impeachment evidence against Mr. Verner. First, he argues that it was improper to allow the State to impeach Mr. Verner at trial with his testimony admitting that during his August 11, 2010, interview with the detectives, he informed them that he heard Mr. Brisco saying "[y]eah, yeah, we got down on those ni*** on 107th. We let loose on them" and "[they] aired out D Block." Second, he argues

that Detective Forberg's testimony that Mr. Verner told him Mr. Brisco made these statements should not have been admitted. According to Mr. Brisco, this impeachment evidence was inadmissible because Mr. Verner's trial testimony did not affirmatively damage the State's case. Mr. Brisco concedes that the plain-error standard applies because he failed to properly preserve this issue for appellate review. In the alternative, Mr. Brisco contends that his trial counsel was ineffective for failing to preserve this issue.

¶ 67 The State maintains that this testimony was admissible as a prior inconsistent statement under section 115-10.1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10.1 (West 2012). Alternatively, the State asserts that even if the statements were admitted in error, Mr. Brisco cannot show the requisite prejudice to demonstrate either plain error or ineffective assistance of counsel. Because we agree with the State that Mr. Brisco cannot establish the requisite prejudice, we limit our analysis to that issue.

¶ 68 Where, as here, a defendant's ineffective assistance of counsel claim is predicated on an evidentiary error, our analysis is similar to our plain-error review under the "closely-balanced-evidence prong" (*i.e.*, the first prong) "insofar as a defendant in either case must show that he was prejudiced[.]" *People v. White*, 2011 IL 109689, ¶ 133. The defendant must demonstrate "that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him" (plain-error test); "or that there was a 'reasonable probability' of a different result had the evidence in question been excluded" (ineffective assistance of counsel test). *Id.* ¶ 133 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). If a "defendant cannot show prejudice," "[t]here is no reason to go further for purposes of either an ineffective assistance analysis or one founded upon the closely balanced prong of plain error." *Id.* ¶ 134.

¶ 69 In this case, even if we were to assume that the admission of Mr. Verner's out-of-court

statements was error, it was not prejudicial because the statements were "merely cumulative" of other admitted evidence whose admission Mr. Brisco has not challenged on appeal. See *People v. Munson*, 171 Ill. 2d 158, 185 (1996) (finding Mr. Brisco could not show that a witness's testimony concerning the defendant's admissions was prejudicial because it was "merely cumulative" of evidence "properly admitted" through the testimony of other witnesses). For example, apart from the challenged evidence, Mr. Verner affirmatively stated during his trial testimony that he heard Mr. Brisco say that they "aired out D block." See *Rodriguez*, 187 Ill. App. 3d at 491 ("a trier of fact is free to accept one part of a witness'[s] testimony and reject another"). Likewise, Mr. Sanders's and Mr. Vaughn's testimony related similar admissions. According to Mr. Sanders, he overheard Mr. Brisco talking about "D Block" and saying "[w]e went down there. We did a hit," and "[y]eah, motherf*** just did that hit." And Mr. Vaughn testified that Mr. Brisco told her that they "aired them out" in "D Block." Thus, even assuming that evidence of Mr. Verner's out-of-court statements to the police was erroneously before the jury, it was cumulative of other testimony, including Mr. Verner's, and accordingly it was not prejudicial. See *Munson*, 171 Ill. 2d at 185.

¶ 70 For this same reason, Mr. Brisco cannot satisfy the second prong of the plain-error test under the circumstances of this case. Based on our determination that the evidence of Mr. Verner's statements did not prejudice Mr. Brisco, he likewise cannot demonstrate the alleged error was " 'so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process[.]' " *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Accordingly, the admission of Mr. Verner's out-of-court statements does not warrant a new trial.

¶ 71 C. Right to a Fair Trial

¶ 72 Mr. Brisco also argues that certain remarks during the prosecutor's closing argument, coupled with the admission of photographic evidence of the murder victim's injuries, were prejudicial and denied him of his right to a fair trial. We disagree.

¶ 73 1. Closing argument

¶ 74 As an initial matter, the parties disagree on the proper standard of review for Mr. Brisco's claim of prosecutorial misconduct: Mr. Brisco contends that the standard of review is *de novo*, while the State maintains that it is abuse of discretion. We acknowledge that authority supports both positions. Compare *Wheeler*, 226 Ill. 2d at 121 ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo.*"), with *People v. Macri*, 185 Ill. 2d 1, 51 (1998) ("The trial court is in the best position to determine the prejudicial effect of a remark made during closing argument, and, therefore, absent a clear abuse of discretion, its ruling should be upheld."). Here, however, we need not resolve this conflict, because under either standard our result is the same.

¶ 75 A "defendant faces a substantial burden in attempting to achieve reversal based upon improper remarks made during closing argument." *People v. Byron*, 164 Ill. 2d 279, 295 (1995). The State generally has "wide latitude" in the content of its closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). Indeed, the State may comment on the evidence and any fair and reasonable inferences to be drawn, even when those "inferences reflect negatively on the defendant." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). While "[a] closing argument must serve a purpose beyond inflaming the emotions of the jury," the prosecutor nevertheless "may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear, when such argument is based upon competent and pertinent evidence." *Id.* at 121-22.

We "consider the closing argument as a whole, rather than focusing on selected phrases or remarks." *Perry*, 224 Ill. 2d at 347. And we will only find reversible error "if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial that 'real justice [was] denied or that the verdict of the jury may have resulted from the error.' " *Evans*, 209 Ill. 2d at 225 (quoting *People v. Jones*, 156 Ill. 2d 225, 247-48 (1993)).

¶ *76* a. Inflammatory statements

¶ 77 Mr. Brisco first focuses on allegedly "inflammatory" statements from the prosecutor's closing argument. For example, Mr. Brisco highlights the prosecutor's repeated description of the victims as "little" and the statement: "Because of the hate and avarice of Steshawn Brisco and Marcus Cocroft, eight-year-old Tanaja is gone and seven-year-old Ariana Jones will never be the same. The image of her dead cousin will haunt her for the rest of her days." Mr. Brisco also identifies the prosecutor's following appeals to the jurors' sense of justice: "[Mr.] Brisco wants justice. He wants justice now? What justice did Ariana and Tanaja get back then," and "[w]hat [Mr. Brisco] wants is to not be responsible for what he did."

¶ 78 Mr. Brisco further cites to the prosecutor's statement that the evidence was "screaming" at the jury as well as his question about whether it would make them "a little sick" to find Mr. Brisco not guilty. Finally, Mr. Brisco relies on the prosecution's request for a "reckoning" for Mr. Brisco's behavior and his appeal to the jury, cautioning them against returning a "not guilty" verdict: "After the last week of evidence, my point is this, how could you do such a thing?"

¶ 79 These statements, however, were not properly preserved for appellate review. To preserve an issue for appeal, "*both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Based on our review of the record, Mr. Brisco's counsel did

not object to many of these challenged statements. Nor were any of the statements adequately identified in Mr. Brisco's amended motion for a new trial. Rather, the motion merely alleges that "[t]he state made improper remarks in both opening statement and closing remarks" without specifying any of the challenged statements. Such cursory allegations do not suffice. *People v. Moss*, 205 Ill. 2d 139, 168 (2002) (holding that a motion "alleg[ing] generally that the prosecutor 'made prejudicial, inflammatory, and erroneous statements in closing argument designed to arouse the prejudices and passions of the court,' " was "insufficient to preserve" statements in the prosecutor's closing argument for appellate review). We find that Mr. Brisco has forfeited this issue and we therefore review the prosecutor's statements for plain error. *Id.*

¶ 80 As an initial matter, the trial court actually sustained defense counsel's objection to the "What justice did Ariana and Tanaja get back then?" and the "a little sick" statements and instructed the jury to disregard them, thereby curing any potential error. See *People v. Bartell*, 98 Ill. 2d 294, 317 (1983) ("The immediate objection by the defense counsel which was sustained by the trial court and the instructions to the jury [to disregard the remarks] cured any error in the prosecution's attempt to admit this testimony."). Although "[i]n some cases, sustaining an objection and appropriate instructions to the jury may not be sufficient to cure an error," here, the accused statements were not "so inflammatory or prejudicial that a proper instruction did not cure any error." *Id.*

¶ 81 With respect to the remaining challenged statements, we likewise find no reversible error. As to the prosecution's repeated description of the victims as "little," these statements were a proper commentary on the evidence—the underlying offenses were the murder and aggravated battery of two young girls—rather than a plea to the jurors to base their verdict on their sympathies. Courts have rejected similar challenges to the prosecutor's closing arguments. See *People v.*

Childress, 158 Ill. 2d 275, 299-301 (1994) (rejecting the defendant's argument that the prosecution's remarks "improperly stressed the family status of the victim, the youthfulness of her son, and the human suffering produced by these crimes"), *overruled by statute on other grounds*, 720 ILCS 5/19-1, 19-3 (West 2002); *People v. Bell*, 343 Ill. App. 3d 110, 115 (2003) (holding that the prosecutor's comments during closing argument that the defendant—who was charged with selling drugs across the street from a church—was a " 'businessman' whose work 'destroys our children, our family,' and 'our lives' " were not error).

¶ 82 When viewed in the context of the entire closing argument, the prosecutor's references to the victims' ages do not rise to the level of reversible error. *People v. Ford*, 113 Ill. App. 3d 659 (1983), cited by Mr. Brisco, is distinguishable. There, in contrast to this case, the prosecutor's statement that the defendant preyed on "poor, innocent, susceptible children in our community who are tempted and forced by peer pressure" was unrelated to the defendant's charged offense (unlawful delivery of cannabis) and the evidence presented at trial. *Id.* at 662. And also significant, the court in *Ford* acknowledged that it "would be reluctant to order a new trial based on any one of the errors standing alone"; rather, the court relied on the "cumulative impact" of the prosecution's improper statements during closing arguments, which included arguing that a witness was more credible because she was a police officer and making "repeated references" to her police officer status, to hold that the improper comments warranted a new trial. *Id.* at 662-63.

¶ 83 We reach a similar conclusion as to the remaining statements: all of the remarks either fall within the scope of permissible argument concerning the strength of the evidence (see *People v. Cloutier*, 178 Ill. 2d 141, 171 (1997) (recognizing that the prosecutor's closing argument can include "permissible comment on the strength of the evidence")), the evil effects of Mr. Brisco's crime (see *Nicholas*, 218 Ill. 2d at 121-22), or encouragement to the jury to apply the law and

provide justice (see *id.*; *People v. Desantiago*, 365 Ill. App. 3d 855, 864 (2006) ("A prosecutor does not engage in misconduct *** simply because the prosecutor dwells upon the evils results of the crime and urges the fearless administration of justice.")). Ultimately, these statements did not result in reversible error.

¶ 84 b. Misstatement of the evidence

¶ 85 Next, Mr. Brisco contends that the prosecutor misstated the evidence twice during closing arguments. Because these alleged misstatements of evidence were not identified in Mr. Brisco's amended motion for a new trial, like the above statements, they too are forfeited. *Moss*, 205 Ill. 2d at 168. We review them only for plain error.

¶ 86 First, Mr. Brisco identifies the prosecutor's description of Beverly Vaughn's conversation with Mr. Brisco, arguing that the prosecutor misstated Ms. Vaughn's trial testimony. At trial, Ms. Vaughn testified that after Mr. Brisco told her that they "aired them out" in "D Block," she asked Mr. Brisco, "[w]eren't the girls down there?," referring to "older girls." According to Ms. Vaughn, Mr. Brisco responded: "I don't care. We just let the whole 40 clip go." During closing arguments, the prosecutor paraphrased Ms. Vaughn's testimony, replacing "girls" with "kids," saying, "the kids were right there *** jumping rope, doing cheerleading and playing, and Steshawn Brisco just didn't care. Beverly asked him, Weren't there *kids* out there? I don't care. We just let the whole 40 clip go." (Emphasis added.)

¶ 87 Mr. Brisco argues that the prosecutor mischaracterized Ms. Vaughn's testimony to improperly argue that Mr. Brisco did not care whether any kids were shot. We disagree. Whether "kids" or "girls," the thrust of the prosecutor's argument was that Mr. Brisco did not care who was shot—a reasonable inference to draw from Ms. Vaughn's testimony that Mr. Brisco responded to her question, "I don't care. We just let the whole 40 clip go."

¶ 88 Second, Mr. Brisco argues that the prosecutor misstated the evidence by suggesting that two separate sets of witnesses identified Mr. Brisco *as the shooter*. But contrary to Mr. Brisco's characterization, the prosecutor properly recalled that "two different, completely different sets of witnesses identified Steshawn Brisco," which was consistent with the evidence: namely, that (1) Amos Wise, who was on the scene of the shooting, identified Mr. Brisco as a shooter; and (2) additional witnesses identified Mr. Brisco as bragging later that same night about a shooting in "D Block." Because these statements were consistent with the evidence, we find no reversible error.

¶ 89 Finally, Mr. Brisco argues that the prosecutor improperly shifted the burden of proof to Mr. Brisco in arguing that Mr. Brisco had the same subpoena power as the State and could have subpoenaed witnesses. Again, we disagree.

¶ 90 During closing arguments, defense counsel raised the State's failure to call certain individuals as witnesses and suggested the State was hiding evidence from the jury:

> "Let's talk about the investigation briefly. You heard names Trey Wade, Dahve, Ashanta, Ashmere Walker. You heard these names more than once. Where are they? The State didn't bring them here to tell you what, if anything, they knew. Why not? What are they trying to keep from you? Maybe the truth."

¶ 91 During rebuttal, the prosecutor responded to this argument:

> "[THE STATE]: *** I'll tell you something else, counsel has the same subpoena power that I do.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Just a moment. The burden stays on the State all the way through the entire case. Each side can call witnesses however.

> [THE STATE]: Absolutely, ladies and gentlemen. The burden is mine. **** [A]nd it never is removed from us. However, they have the same subpoena power that we do. You want to hear from Ashtanta Walker and Ashmere Walker, lay some paper on them, bring them on in."

¶ 92 *People v. Kliner*, 185 Ill. 2d 81 (1998), is instructional. There, our supreme court rejected a similar "burden-shifting" argument. In *Kliner*, during closing argument, defense counsel questioned why the prosecution had not called a certain witness to testify. In rebuttal, the prosecutor "pointed out *** that [the] defendant could have called [the individual] as a witness." *Id.* at 155. The court held that this comment did not improperly "shift the burden of proof to [the] defendant." *Id.* Rather, the court found that "the prosecutor's comments during rebuttal argument regarding defense counsel's ability to subpoena [the witness] were invited by defense counsel's argument that the State failed to call him as a witness." *Id.* Similarly here, defense counsel challenged the State's decision not to call certain individuals as witnesses, inviting the prosecutor's response. Consequently, we disagree that this comment was improper.

¶ 93 2. Admission of photographic evidence

¶ 94 Mr. Brisco next argues that the trial court erred by allowing the jury to view photographic evidence of the murder victim's injuries during both trial and deliberations. After defense counsel objected to three of the photographs, the trial court subsequently admitted only one of the disputed photographs into evidence. According to Mr. Brisco, the prejudicial effect of the photograph outweighed its probative value because the cause and manner of the victim's death were not in dispute.

¶ 95 We review the trial court's decision to admit photographic evidence for an abuse of discretion. *People v. Terrell*, 185 Ill. 2d 467, 495 (1998). "If photographs are relevant to prove any

fact at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probative value is outweighed." *Id.* If sufficiently probative, a photograph "may be admitted in spite of its gruesome or disgusting nature." *Id.* The State may rely on photographs of a deceased victim "to prove the nature and extent of the injuries, the force necessary to inflict the injuries, the position, location, and condition of the body, and the manner and cause of death; to corroborate a defendant's confession; and to aid in understanding the testimony of a pathologist or other witness." *Id.*

¶ 96 On appeal, Mr. Brisco identifies one photograph as being improperly admitted by the trial court. This photograph, which we have reviewed, depicts the inside of the victim's skull and the trajectory of the bullet through her brain; it does not reveal the victim's face or disclose gruesome, external images of her head wounds. As the trial court explained, it admitted the photograph into evidence to corroborate the doctor's testimony, finding it was "unpleasant" but not "unduly prejudicial":

> "The one photograph—we limited it down to one out of the three. The doctor can testify through the photograph the course of the wound. ****So I'm going to have one photograph of the course of the wound to corroborate the doctor's testimony[.] *** The photograph is unpleasant. It's not unduly prejudicial. Anything in a murder case is prejudicial to some extent because it tends to prove a person committed a crime. The State has to establish the manner and cause of death. The photograph tend[s] to show the course of the wound, how the wound entered, how it exited, and how it went through unfortunately the little girl's head. I limited it to one photograph. I limited it down to one of the three."

Additionally, prior to admitting the photographs, the court admonished the jury as follows:

> "[Y]ou will be seeing some photographs shortly that Dr. Kalelkar just talked about. The

> photographs you will be seeing are unpleasant. However, just keep in mind that you as jurors decide the case based on the evidence and the law and not to give any person sympathy, bias, or prejudice for anyone."

¶ 97 Based on our review of the photograph and the deference we afford to the trial court's decision, we cannot say that the court abused its discretion. The trial court concluded that the evidence was admissible to corroborate the doctor's testimony concerning the manner and cause of the victim's death. The State established that the medical examination and X-rays revealed that Tanaja's skull had been fractured but there was no bullet in the skull. Dr. Kalelkar testified that "the cause of death of Tanaja Stokes was a single gunshot wound that entered the right side of her ear, *** fractured the skull, lacerated the brain, and exited on the left side of her face; and the manner of death was homicide." While unpleasant, the photograph was relevant to corroborate medical examiner's testimony as to the cause of death and trajectory of the bullet. Moreover, after limiting the photographic evidence to only one of the three proposed exhibits, the court cautioned the jury that the photographic evidence it was about to see was "unpleasant" but that they should "decide the case based on the evidence and the law and not to give any person sympathy, bias or prejudice for anyone." The admission of this evidence does not warrant a new trial.

¶ 98 *People v. Garlick*, 46 Ill. App. 3d 216 (1977), cited by Mr. Brisco, is distinguishable. In *Garlick*, unlike here, the court described the erroneously admitted evidence as "a gruesome, color photograph of the deceased's massive head wound," which "could serve no purpose other than to inflame and prejudice the jury in the grossest manner." *Id.* at 224. The admitted photograph in the present case does not rise to this level of offensiveness.

¶ 99 In sum, neither the prosecutor's statements during closing argument nor the admission of the autopsy photograph—whether considered individually or in the aggregate—denied Mr. Brisco

of his right to a fair trial.

¶ 100 D. Sentencing

¶ 101 Mr. Brisco's sentencing argument on appeal was that the trial court abused its discretion in sentencing him to 75 years while sentencing his codefendant to 20 years less. We affirmed Mr. Brisco's sentences in our initial decision, finding no abuse of discretion. However, we have now been directed by our supreme court to consider whether "a different result is warranted" in light of that court's decision in *Buffer*.

¶ 102 On May 8, 2020, we directed the parties to file supplemental briefs in response to the supervisory order. In those briefs, the parties agreed that this court should vacate this 75-year *de facto* life sentence and remand to the trial court for consideration of all of the factors of youth as set forth in *Miller*, 567 U.S. 460, which have been codified in section 5-4.5-105(a) of the Code (730 ILCS 5/5-4.5-105(a) (West 2018)).

¶ 103 The *Miller* factors include:

> "(1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *People v. Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567 U.S. at 477-78).

¶ 104 "In *Miller*, the Supreme Court established a new substantive right: exemption, in all but the rarest of circumstances, from sentences of life in prison without the opportunity for parole for

juvenile offenders." *People v. Daniels*, 2020 IL App (1st) 171738, ¶ 24 (citing *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 734 (2016) (explaining the Court's holding in *Miller*)). Our supreme court has held that such rare circumstances exist only if the trial court determines, after consideration of the appropriate factors, "that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 46. Our supreme court has defined juvenile offenders as anyone under the age of 18 at the time of their crimes (*id.* (citing *Miller*, 567 U.S. at 465)), and has held that this rule applies to a life sentence, whether it was actual or *de facto* (*People v. Reyes*, 2016 IL 119271, ¶¶ 9-10) and whether it was mandatory or discretionary (*Holman*, 2017 IL 120655, ¶ 40).

¶ 105 In *Buffer*, 2019 IL 122327, ¶ 40, our supreme court defined a *de facto* life sentence as anything over 40 years. As the court explained:

> "[T]o prevail on a claim based on *Miller* and its progeny, a defendant sentenced for an offense committed while a juvenile must show that (1) the defendant was subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics in imposing the sentence." *Id.* ¶ 27.

¶ 106 Mr. Brisco was 17 years old when he committed these crimes and received a sentence of well over 40 years in prison. He clearly qualifies as a juvenile offender and, as *Buffer* recently made clear, the sentence he received was a *de facto* life sentence. The trial judge considered the statutory factors available at the time, but he failed to consider the *Miller* factors, specifically failing to consider "youth and its attendant characteristics," including impetuosity, immaturity, and failure to appreciate risks and consequences. This judge had no reason to view this sentence—which was far less than the maximum possible sentence—as a life sentence that could only be

imposed after consideration of specific youth-related factors and in rare circumstances.

¶ 107 In fact, some of what the trial judge said ran directly counter to the *Miller* factors. The trial judge specifically said that at 17 or 18 years old, Mr. Brisco was a "grown-up man." This statement is starkly inconsistent with the U.S. Supreme Court's exhortation that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. This horrific crime was committed by two kids on bicycles, and while the evidence demonstrated that they bragged, like kids, about it afterwards, nothing suggests that they considered in any kind of adult way what the consequences might be for themselves or for others. None of this appears to have factored into the sentencing decision.

¶ 108 As the Supreme Court stated in *Miller*, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*." (Emphasis added.) *Miller*, 567 U.S. at 472. The Court reemphasized this particular sentiment in *Montgomery*, saying that "*Miller*'s central intuition [is] that children who commit even heinous crimes are capable of change." *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 736. We do not see this principle reflected in the trial judge's sentencing of Mr. Brisco.

¶ 109 The dissent is correct that no court has required trial courts to find evidence of the defendant's "adult consideration of the consequences" of his or her actions before imposing a life sentence. But one of the *Miller* factors listed in *Holman* is "the juvenile defendant's chronological age at the time of the offense and *any evidence of his* particular immaturity, impetuosity, and *failure to appreciate risks and consequences*." (Emphases added.) *Holman*, 2017 IL 120655, ¶ 46. As noted above, the trial court here does not appear to have considered Mr. Brisco's age at the time of the offense in the context of his immaturity, impetuosity, or most importantly his failure to appreciate the consequences of his actions, instead citing Mr. Brisco's "grown-up" age and

demonstrated lack of remorse. The trial judge in this case focused heavily on the nature of this senseless and horrific crime and had no reason to view this as a life sentence or to apply the *Miller* factors.

¶ 110 The dissent relies on our supreme court's recent decision in *People v. Lusby*, 2020 IL 124046, where our supreme court recently reversed a decision by this court in which we had remanded the case to the trial court for a new sentencing hearing based on *Miller*. In *Lusby*, our supreme court confirmed that, in some cases, life sentences imposed on juveniles before the trial court understood that *Miller* and *Holman* had to be applied could survive where the court's "review" of the proceedings confirmed that "the trial court made an informed decision based on the totality of the circumstances that the defendant was incorrigible and a life sentence was appropriate." *People v. Lusby*, 2020 IL 124046, ¶ 35

¶ 111 However, the fact that *Lusby* confirms that this can happen does not mean that it should happen here—where both the State and Mr. Brisco agree that it should not. In *Lusby*, the supreme court went through each of the *Miller* factors and found that they had been appropriately considered by the trial court. Our supreme court pointed out that the trial court specifically and repeatedly acknowledged Ashanti Lusby's young age when he committed the crime (*id.* ¶¶ 39, 51) and considered his rehabilitative potential in light of other crimes that he committed before and after the crime for which he was being sentenced (*id.* ¶¶ 47-51). Those crimes included adult convictions for robbery, resisting arrest, and attempted obstruction of justice. *Id.* There was testimony at the sentencing hearing about an aggravated battery against a fellow prisoner while awaiting trial in which he inflicted a broken nose, a broken orbital bone, and the need for stitches. *Id.* ¶ 48. Ashanti Lusby acted alone to commit the rape and murder for which he was convicted. *Id.* ¶ 43. There was no evidence of his youth or incompetence at trial, where he testified on his

own behalf, and in the court's words, "[h]is testimony was clear, and his defense was vigorous." *Id.* ¶ 44.

¶ 112 In this case, in contrast, the trial court referred to 17-year-old Steshawn Brisco as a "grown-up man," negating any inference that the court took his youth into account. In specific reference to rehabilitative potential as reflected by other crimes committed, while the trial court did cite Mr. Brisco's criminal background, which began with a juvenile delinquency finding of robbery, his only adult conviction was for unlawful possession of a firearm. Like Ashanti Lusby, Steshawn Brisco had also been charged with aggravated battery while he was in jail awaiting trial, but the charged conduct—which Mr. Brisco disputed—was that he spat in a guard's face. Unlike Ashanti Lusby, Steshawn Brisco did not act alone and indeed, because it was unclear which gun shots killed the victims, the jury was instructed that it could find him guilty on a theory of accountability. Mr. Brisco turned himself into the police the day after the crime and, except for sabotaging himself during the sentencing hearing, he appears to have played no role in his defense. The supreme court in *Lusby* relied on the specific facts of that case, and those facts do not mirror the facts of this one.

¶ 113 Mr. Brisco argues in his supplemental brief that on remand his case should go to a different judge for his new sentencing hearing, "based on the judicial bias exhibited at the original sentencing hearing." The State disagrees with this request and insists that the original trial judge is best suited to consider the appropriate sentence in light of the *Miller* factors.

¶ 114 We presume a trial judge is impartial, and it is the burden of the party claiming bias to overcome the presumption. *People v. Burnett*, 2016 IL App (1st) 141033, ¶ 56. To make a showing of judicial bias, "something more than an unfavorable result to the defendant is required" such as "a showing of animosity, hostility, ill will, or distrust towards [a] defendant." (Internal quotation marks omitted.) *People v. Rademacher*, 2016 IL App (3d) 130881, ¶ 47 (quoting *People v. Vance*,

76 Ill. 2d 171, 181 (1979)).

¶ 115 Certainly, the judge spoke strongly at sentencing about the heinous nature of the crimes, Mr. Brisco's criminal history, and his potential for rehabilitation. The judge at one point directed Mr. Brisco to "shut up. Take your attitude back to the jail or back to the penitentiary." But all of this needs to be considered in context. Mr. Brisco was found guilty of committing a crime that was indeed horrific—a seven-year-old girl was shot in the head and an eight-year-old girl was killed. Moreover, Mr. Brisco, perhaps because of his youth, often failed to show appropriate respect to the court. This court has held that "[h]arsh criticism, based on the particular facts of a defendant's case, does not constitute any sort of evidence of prejudice derived from personal bias." *Id.* ¶ 48. Considering all of the circumstances, we do not think that Mr. Brisco has met his burden of demonstrating a need to transfer the case to a different judge for resentencing.

¶ 116 We agree with the State that this judge on remand should be given the opportunity to consider the holdings in *Miller* and its progeny. We have no reason to doubt that this judge will follow our supreme court's mandate that anything over 40 years is a life sentence and that such a sentence is appropriate for a juvenile offender only if the trial court applies the *Miller* factors and "determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 46. We agree with the State that this judge should be able to appropriately consider the *Miller* factors and the litany of cases since *Miller* that have expounded on the unique circumstances of youth.

¶ 117 To the extent that Mr. Brisco argues that we should rule at this juncture that he is not one of those rare juveniles who can constitutionally be given a life sentence, we decline to address it at this time. We will resolve that question, if necessary, after the trial court has had a fair

opportunity to review this sentence in light of the evolving case law.

¶ 118 IV. CONCLUSION

¶ 119 For the foregoing reasons, we affirm Mr. Brisco's convictions for first degree murder and aggravated battery with a firearm but vacate his sentences and remand the case for a new sentencing hearing consistent with this order.

¶ 120 Affirmed in part; sentences vacated; cause remanded.

¶ 121 JUSTICE PIERCE, dissenting in part:

¶ 122 I concur with the majority in affirming defendant's convictions in their entirety. I must respectfully dissent from that part of this decision that remands for resentencing because the trial court fully complied with the directives of *People v. Lusby*, 2020 IL 124046 and *People v. Holman*, 2017 IL 120655.

¶ 123 The majority has determined that because Brisco was 17 years old, just four days short of his 18th birthday, when he committed these crimes and because he received a sentence of well over 40 years in prison, he is a juvenile offender who received a *de facto* life sentence under *Buffer*. There is no doubt that defendant's sentence is a *de facto* life sentence under *Buffer*. However, that does not mean that he is entitled to a resentencing hearing based on a claimed *Miller* violation.

¶ 124 Under the directive of our supreme court, as expressed in *Holman* and *Lusby*, where the juvenile defendant had a sentencing hearing that afforded him the opportunity to present mitigating youthful characteristics and the court considered the "Miller factors," a resentencing is not warranted. Therefore, I respectfully disagree with the majority's conclusion that, although the trial court considered the statutory sentencing factors applicable at the time, the court failed to consider the *Miller* factors **by specifically failing** to consider defendant's youth and its attendant

characteristics.

¶ 125 Recently, in *People v. Lusby*, 2020 IL 124046, our supreme court reversed the appellate court judgment ordering resentencing for a 16-year-old that received a *de facto* life sentence for a 1996 murder. The appellate court found the trial court did not address Lusby's age-related characteristics; rather, it gave "a generalized statement about youth and their poor judgment." *Id*. ¶ 27. Our supreme court restated the principles, initially expressed in *People v. Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567 U.S. at 477-78), that are to be applied by a reviewing court where the claim is a *Miller* violation. An important, if not critical consideration, is whether a sentencing hearing was held. "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not" (quoting *Miller*, 567 U.S. at 465). *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 735 (2016). The trial court is not required to utter "magic words" at the sentencing hearing and the trial court is not required to make a finding of fact regarding the juvenile's incorrigibility. *People v. Lusby*, 2020 IL 124046, ¶ 33, fn. 2. Referring to *Holman*, the *Lusby* court reiterated "that the inquiry looks back to the trial and the sentencing hearing to determine whether the trial court at that time considered evidence and argument related to the *Miller* factors. *** No single factor is dispositive. Rather, we review the proceedings to ensure that the trial court made an informed decision." *Id*. at ¶ 35.

¶ 126 Similarly, this court has found that nothing in *Miller* or *Holman* suggests that we are free to substitute our judgment for that of the sentencing court. *People v. Croft*, 2018 IL App (1st) 150043, ¶ 33, appeal denied, 98 N.E.3d 28 (Ill. 2018), and cert. denied sub nom. *Croft v. Illinois*, 139 S. Ct. 291 (2018). Our role is to evaluate the sentencing hearing to ensure that a juvenile defendant " had the *opportunity* to present evidence related to the hallmarks of youth and that the

circuit court considered the defendant's youth and its attendant characteristics." *Id*. ¶ 33 (Emphasis added.)

¶ 127 On direct appeal this court unanimously found that defendant had a fair sentencing hearing. *People v. Brisco*, 2015 IL App (1st) 130545-U, ¶¶ 92-94. We found that "the trial court's sentencing decision demonstrates a careful consideration of the relevant factors, including defendant's criminal history and overall character," and "specifically took into account the defendant's prior offenses and commented on his criminal record," that while he " 'was only 17 or 18 at the time,' he had already been on probation as both a juvenile and an adult," and that "defendant offered no witnesses who offered character or rehabilitation testimony as mitigation," that "[T]he court took into account defendant's age and turbulent childhood," and, finally, that "the record reflects the trial court's consideration of defendant's character and apparent lack of remorse for the deadliness of the crimes." *Id*. ¶¶ 92-93.

¶ 128 The majority now takes issue with the trial court calling defendant a "grown-up man" and concludes this shows a lack of appreciation for defendant's young age. The majority coldly characterizes this murder as being committed by two "kids" on bicycles who "bragged, like kids, about it afterwards," and that "nothing suggests that they considered in any kind of adult way what the consequences might be for themselves or for others." As if the mode of transportation used by a murderer is a relevant factor in deciding the defendant's sentence. And the defendant's absence of post-homicide reflection shows nothing other than the absence of any evidence of post-homicide reflection. This minimization of both the defendant and his "horrific" crime is simply not an acceptable basis to find that defendant is entitled to a resentencing based on a *Miller* violation. By using the term "kids on bicycles," the horror of defendant's act of intentionally arming himself with the express purpose of lighting up the corner completely denigrates the seriousness and

callousness of these crimes, as shown by the evidence at trial and as reflected in the victim impact statements considered by the court during the sentencing hearing. After he "aired out D block," defendant returned to brag about the shooting, not as "a kid," but as a cold-blooded killer. And the lack of evidence of "adult consideration of the consequences of the shooting," whatever that means, is not because defendant did not have the opportunity to present such "adult" evidence nor is the absence of such evidence a factor that any court has required.

¶ 129 Did Brisco have "the opportunity to present evidence related to the hallmarks of youth" and did "the circuit court consider[] the defendant's youth and its attendant characteristics"? *Croft*, 2018 IL App (1st) 150043, ¶ 33. We have previously found, unanimously, that he did. *People v. Brisco*, 2015 IL App (1st) 130545-U, ¶¶ 92-94. Brisco had an extensive and detailed sentencing hearing where the trial court considered the nature of the offense, the PSI, defendant's family, social and criminal background and, importantly, his young age. In aggravation, in addition to his criminal history, the State pointed out that defendant's demeanor at sentencing was combative and noted that defendant had expressed no remorse for his part in the crime. The State argued that the court should impose a sentence reflective of Brisco's "deeds, lack of remorse and lack of rehabilitative potential."

¶ 130 In mitigation, defense counsel argued that defendant was 17 years old on the day of the shooting, and he had a troubled childhood, which was outlined in greater detail in the PSI. He noted that defendant had dropped out of school in the 11th grade and did have some brief employment. Counsel argued that defendant turned himself into the police in this case and did not mean to kill the two girls. In conclusion, defense counsel argued that defendant "was still a troubled kid who comes off the street," and the court should give him the "lowest sentence he possibly can." It is important to note that, given the *opportunity* to present evidence of mitigating

youthful characteristics *applicable to this defendant*, no such evidence was offered by the defense.

¶ 131 The court then addressed in detail each statutory mitigation and aggravation factor and specifically noted that none of the statutory mitigation factors applied to defendant. The court noted that defendant was proud of his actions in "letting the whole clip go" and that he had utter disregard for any harm he had caused. The court characterized defendant as someone who could not behave himself on the street or in the jail: "For a young guy already on probation as a juvenile and shortly after then he had a gun charge, given probation, given a chance - - a young guy given a chance, and then within two months another gun add a murder at this point." These comments clearly reflect the trial court's consideration of both the defendant's age and rehabilitation prospects.

¶ 132 The court considered the mitigation evidence including defendant's PSI. The PSI reflected that defendant was 7 years old when his mother began using drugs. He was placed in DCFS custody when he was 11 and resided with his maternal great grandmother until he was 12. According to defendant, his maternal great grandmother abused him: "she called it discipline, I called it abuse – she hit me with an extension cord, a bat, a stick, a pole, anything." After that, defendant resided in group homes and shelters. At 15, defendant returned home to his mother. During his childhood, defendant lived in Englewood, which he described as "not good at all."

¶ 133 The court concluded that defendant's behavior demonstrated a "callous indifference to human life" and "[i]n considering this crime and [defendant's] prior record, I feel he cannot be restored to citizenship whatsoever useful citizenship that is." Finding that defendant had "earned being locked up forever," the court sentenced defendant to a 55-year term for murder, and a consecutive 20-year term for aggravated battery with a firearm. Again, the trial court's comments speak volumes on his view of defendant's rehabilitative potential and the majority's conclusion

that the trial court " had no reason to view this as a life sentence or to apply the *Miller* factors" (*Id*. ¶ 109) is simply not supported by the record. We previously considered the trial court's sentencing decision on direct appeal and found that it "reflects a careful deliberation of the underlying offenses as well as defendant's criminal history, rehabilitative potential, demeanor, age," and his "overall character, which justified longer sentences than those imposed on [co-defendant]." *Brisco*, 2015 IL App (1st) 130545-U, ¶¶ 92-94. On direct review, we found that:

> "The trial court specifically took into account the defendant's prior offenses and commented on his criminal record: 'Probation as a juvenile for burglary. As a young guy, probation on a weapons violation charge, Class IV felony, and then in two months the murder. So he has a significant prior history.' The court also noted that while defendant 'was only 17 or 18 at the time,' he had already been on probation as both a juvenile and an adult, and 'then something jumps off in the jail.' *** The court took into account defendant's age and turbulent childhood, but concluded that neither supported mitigation of his sentence: 'I know his come up wasn't the best way to come up. He was in foster homes, things of that nature, but it hardly is an excuse. It is hardly a justification or a mitigation to go and shoot up the D block with people all over the place.'
>
> Finally, the record reflects the trial court's consideration of defendant's character and his apparent lack of remorse for the deadliness of the crimes. The court noted that the evidence showed that defendant 'didn't care who got shot, the teenaged girls who were out there, the guys he was shooting at or, in this case, unfortunately, the little kids that got shot as well. *** The way he was 'talking about it with the witnesses was like, give me an Academy Award, I did a great job, I shot up the D block.' The transcript of the sentencing hearing further reveals defendant's combative attitude when the court said that the residents

> in D Block would not have to worry about him shooting up the neighborhood, to which defendant responded, 'I'll be back.'" (internal footnote omitted) *Brisco*, 2015 IL App (1st) 130545-U, ¶¶ 92-93.

¶ 134 As we stated in *Croft*, "a key feature of the juvenile's sentencing hearing is that the defendant had the '*opportunity* to present evidence to show that his criminal conduct was the product of immaturity and not incorrigibility.' " (Emphasis added). *Croft*, 2018 IL App (1st) 150043, ¶23 (quoting *Holman*, 2017 IL 120655, ¶49); see also *Lusby*, 2020 IL 124046, ¶52. In *Croft* we noted that the *Holman* factors are "a nonexhaustive list" and that "nothing in *Miller* or *Holman* suggests that we are free to substitute our judgment for that of the sentencing court" because the issue is not the particular sentence the trial court imposed but whether defendant had the opportunity to present evidence regarding his youth and that the court considered his youth and its attendant characteristics in reaching its sentencing decision. *Croft*, 2018 IL App (1st) 150043, ¶¶32-33. Importantly, the trial court is not required to make an express finding of permanent incorrigibility. *Id*. at ¶¶ 31-33.

¶ 135 Although *Buffer* dictates that defendant's sentence is now classified as a *de facto* life sentence, under *Holman* and *Lusby* a different sentencing result is not warranted because the defendant had the *opportunity* to present characteristics of his youth in mitigation, which he did not do, and the trial court "considered evidence and argument related to the *Miller* factors." *Id*. at ¶ 35. It makes no difference, as the majority posits, that the sentencing court had "no reason to view this sentence—which was far less than the maximum possible sentence—as a life sentence that could only be imposed after consideration of specific youth-related factors and in rare circumstances". The fact is that the trial court very carefully "considered evidence and argument related to the *Miller* factors" in this case, as shown in the record on appeal. The trial court was well

aware of defendant's age, his background, the nature of his offense, and his lack of remorse and rehabilitative potential when this sentence was imposed.

¶ 136 Additionally, the majority view that "the trial court here does not appear to have considered Mr. Brisco's age at the time of the offense in the context of his immaturity, impetuosity, or most importantly his failure to appreciate the consequences of his actions," (*Id*. ¶ 109) is a conclusion that finds no reasonable support in the record. The defendant did not present any mitigating evidence of *his* immaturity, impetuosity or *his* failure to appreciate the consequences of his actions. If such evidence existed his able trial counsel would have offered it. And the statement that defendant "appears to have played no role in his defense," (*Id*. ¶ 112) is nothing but pure speculation and adds nothing in support of defendant's claim.

¶ 137 *Holman* and *Lusby* instruct that where the trial court heard and considered evidence and argument related to the *Miller* factors, the juvenile defendant is not entitled to resentencing. And contrasting the facts in *Lusby* to the facts in this case is not a valid basis to ignore *Lusby's* directive to review the sentencing hearing to determine whether there was compliance with the directives of *Holman*. Here, the trial court unquestionably knew defendant was only four days short of his 18th birthday at the time of the offense. The trial court described defendant's behavior as a "callous indifference to human life" and declared that "[i]n considering this crime and [defendant's] prior record, I feel he cannot be restored to citizenship whatsoever useful citizenship that is." In doing so, the trial court unequivocally expressed its considered opinion of defendant's lack of rehabilitative potential. And any remaining doubt concerning whether the trial court considered defendant's rehabilitative prospects is demolished when the court stated that defendant had "earned being locked up forever." In this case, "[t]he trial court presided over the case from beginning to end and considered the defendant's youth and its attendant characteristics before

concluding that his future should be spent in prison." *Lusby*, 2020 IL 124046, ¶52. To grant a resentencing hearing in this case is nothing other than the majority substituting its view of what the sentence should be and deprives the trial court of the sentencing discretion that a court of review usually protects. The record in this case is, in many respects, stronger than the record in *Holman*, *Lusby* and *Croft*. The resolution of defendant's *Miller* claims should be the same as in those cases. I respectfully dissent. I would affirm the judgment of the circuit court is all respects.