2025 IL App (4th) 231440-U

NO. 4-23-1440

FILED
February 13, 2025
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Hancock County
ANDREW JOEL DeHAVEN,	)	No. 20CF18
Defendant-Appellant.	)	
	)	Honorable
	)	Rodney G. Clark,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigman and Lannerd concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was not denied the effective assistance of counsel when counsel (a) failed to request a new fitness hearing, as there was no *bona fide* doubt about defendant's fitness to stand trial after he attained fitness, and (b) withdrew defendant's insanity defense, as defendant was adamant he did not suffer from a mental illness and withdrawing the insanity defense was defensible.

(2) No error arose at sentencing when the trial court considered and relied on the degree of harm caused to the victim, the victim's "physical disability," and defendant's lack of remorse.

¶ 2 Following a jury trial, defendant, Andrew Joel DeHaven, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2020)) and sentenced to 50 years' imprisonment. On appeal, he argues (1) his trial counsel was ineffective because counsel (a) failed to request a new fitness hearing and (b) withdrew his insanity defense and (2) error arose at sentencing when the trial court was presented with allegedly improper aggravating factors and relied on them. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 9, 2020, defendant, who was 35 years old at the time, used a sledgehammer to bludgeon his 67-year-old father, Michael DeHaven, to death. He was subsequently charged with three counts of first degree murder (*id.* § 9-1(a)(1), (a)(2)). During the proceedings that followed, including psychological exams prepared for a fitness hearing, defendant never denied killing Michael. Defendant acknowledges killing Michael and raises on appeal issues concerning his fitness, counsel's ineffectiveness, and his sentence.

¶ 5 A. Defendant's Fitness

¶ 6 1. *July 20, 2021, Fitness Hearing*

¶ 7 Defense counsel questioned defendant's sanity at the time he killed Michael and his fitness to stand trial. Reports from several doctors who evaluated defendant's fitness and sanity were prepared. Two of those doctors, Drs. Frank Forman and Terry Killian, came to different conclusions regarding defendant's fitness to stand trial.

¶ 8 Forman found defendant fit. After examining defendant during a 1-hour-and-45-minute evaluation, he diagnosed defendant with a personality disorder that fell within the range of histrionic, narcissistic, turbulent, and paranoid traits. In contrast, Killian, who evaluated defendant over Zoom for one day, did not find defendant fit to stand trial.

¶ 9 Thereafter, Forman reviewed Killian's report and advised the State "a visit to [a mental health facility] for assessment and stabilization could be highly useful" for defendant. Forman explained, "[Defendant] is likely suffering from a paranoid illness" but "[t]hat does NOT mean that he cannot understand the charges against him."

¶ 10 After the dueling fitness reports were presented to the trial court, the court found a *bona fide* doubt regarding defendant's fitness to stand trial and set the matter for a fitness

hearing. At a December 2020 hearing, the court found defendant unfit to stand trial, but it believed defendant could attain fitness in one year with treatment. Defendant underwent treatment in May, June, and July 2021.

¶ 11 At a fitness hearing held on July 20, 2021, the State admitted various documents attesting to defendant's fitness to stand trial, including a 90-day fitness-to-stand-trial progress report prepared by Dr. Aura Eberhardt and a psychological evaluation prepared by Dr. Linda Lanier. The State asked the trial court to find defendant restored to fitness. Defense counsel concurred. Based solely on the admitted documents, the court found, by a preponderance of the evidence, defendant had attained fitness.

¶ 12 After defendant was tried and sentenced, he appealed. We determined the July 20, 2021, fitness hearing was perfunctory, as the trial court failed to subject the issue of defendant's fitness to judicial scrutiny. *People v. DeHaven*, 2023 IL App (4th) 220840-U, ¶ 32. Accordingly, we remanded the case for a retrospective fitness hearing. *Id.* ¶ 36. We noted, depending on the outcome on remand, defendant could again raise the other issues he raised on appeal after the retrospective hearing was held. *Id.* ¶ 37. See *People v. Hill*, 2021 IL App (1st) 131973-B, ¶ 30 (stating the appellate court may retain subject matter jurisdiction after the case is remanded).

¶ 13 2. *Retrospective Fitness Hearing*

¶ 14 The retrospective fitness hearing was held on November 28, 2023. Drs. Eberhardt and Lanier testified at that hearing.

¶ 15 Eberhardt stated that on July 12, 2021, she prepared a 90-day fitness-to-stand-trial report concerning defendant. This report was prepared after observing defendant for two months and considering what Forman and Killian stated in their evaluations. She concluded defendant was not suffering from a psychotic illness or mood disorder and had attained fitness to stand

trial. As to his fitness, she asserted defendant understood the charges against him, knew he might be sentenced to life in prison, identified the roles of court personnel, understood the plea process, and was able to assist in his defense. In finding defendant fit, she noted one could have mental issues and still be fit to stand trial.

¶ 16 Lanier, who prepared a psychological evaluation after talking to defendant for 4 hours over a 2-day period and assisted in preparing the 90-day fitness report, also found defendant fit to stand trial. Lainer came to this conclusion after defendant was observed 24 hours a day and 7 days per week over a 2-month period. In doing so, she determined defendant, whom she interviewed, tested, and evaluated after his prescription drug treatment stopped, had a personality disorder and paranoia traits, which did not make him unfit to stand trial. Lanier ruled out a delusional disorder, which she said would prevent a finding of fitness. Lanier explained, "[Defendant is] attention seeking and grandiose and dramatic and he's also a little suspicious about some things." However, Lanier concluded defendant "didn't meet the full criteria for delusional disorder."

¶ 17 In explaining her observations, Lanier stated:

> "I don't know how seriously I would weight [*sic*] this, but when I was interviewing him just a month after he got here, I noticed some statements that strains credulity, you know. I don't know if they were delusional or not, but he had some fixations. However, a month later when I did the fitness [evaluation], he was very focused. He didn't go off onto these unusual sounding statements. So someone asked at some point was there any progression. There was a progression I saw that he—it seemed like he got more focused over time. So that was in there with me.

> If I had gone in to do the fitness [evaluation] in July [2021] and he was still really, really distracted by things that didn't make too much sense on the surface, I *might* have been more hesitant to agree [that he was fit], but he was very focused, and we had insightful discussions." (Emphasis added.)

Lanier also admitted a defendant's fitness could deteriorate, such that he could become unfit after having been found fit. However, Lanier classified such situations as "rather rare."

¶ 18 Admitted at the hearing were the 90-day fitness report and Lanier's psychological evaluation. These documents revealed both Eberhardt and Lanier were aware of defendant's mental issues. For example, in Lanier's psychological report, she noted at least three of defendant's four brothers reported defendant's mental health had declined in 2018, when defendant began "verbalizing and messaging paranoid, 'crazy,' stories." Defendant's family confronted him about the veracity of these accounts. She noted, "[N]o family member had corroborated [defendant's] assertion that [Michael] had ever threatened him." Defendant also "[was] adamant that he ha[d] no mental problems, and that he was a longtime victim of the malevolence of others, particularly [Michael]."

¶ 19 Both Eberhardt and Lainer reviewed Killian's and Forman's reports in evaluating defendant. Killian's report revealed defendant told "strange stories" to his brothers, "many with the common theme of [defendant] and Chet[(one of defendant's brothers)] being kidnapped and/or brainwashed." Defendant told the police he killed Michael because Michael "would talk down to [defendant,] and *** [Michael] had told [defendant] that [defendant] should be Michael's slave." Defendant stated on Facebook " '[he] might end up getting killed by [Michael]' " on the night Michael was murdered because defendant failed to " 'get with' " a girl and defendant was " 'worried [Michael would] try to come after [Chet].' " Defendant relayed

Michael " 'had his favorites,' " which did not include him, and three of his brothers, as well as Michael, believed he had a mental illness. Defendant was " 'hurt[ ]' " his brothers believed he was mentally ill. Defendant also expressed he was upset none of his brothers believed or were bothered by Michael wanting to kill him. Like with Lanier, defendant emphatically stated during Killian's exam, " 'I don't have mental illness! I was in my right mind.' " Because Killian believed defendant could not cooperate with defense counsel, he concluded, in contrast to Forman, Eberhardt, and Lainer, defendant was not fit to stand trial. Specifically, Killian asserted:

> "Although [defendant] demonstrated an adequate understanding of the nature and purpose of the proceedings against him, he does not appear capable of rationally assisting [defense counsel] in his own defense because [defendant's] delusional thinking (and his adamant denial that he is mentally ill) would substantially interfere with his ability to realistically assess all of his legal options in this case."

¶ 20 Based on the evidence presented, the trial court exercised its judicial discretion and found defendant retrospectively fit to stand trial. In so finding, the court observed it was in a unique situation, as it observed defendant throughout the entire proceedings. The court "noted a specific change in [defendant]." Specifically, "[defendant] appeared to be clearer" and "more engaged in the process" after treatment.

¶ 21 B. Insanity Defense

¶ 22 On June 29, 2020, defense counsel filed a notice of the intent to raise an insanity defense and a motion to have defendant examined by a psychiatrist. Killian, the appointed psychiatrist, concluded after an exam:

> "It is my opinion, within a reasonable degree of psychiatric certainty, that at the time of the killing of [Michael] *** [defendant] was suffering from the effect of

his psychotic disorder to the extent that he would have been unable to appreciate the criminality of his alleged conduct at that time."

The psychiatric disorder to which Killian referred was a delusional disorder. Although Killian noted the disorder could be schizophrenia, he asserted that would be "unusual," given defendant's age.

¶ 23 In January 2022, defense counsel advised the trial court defendant intended to assert self-defense at trial. On April 28, 2022, defense counsel withdrew his intent to proceed with an insanity defense. A discussion about that proceeded as follows:

"[ASSISTANT STATE'S ATTORNEY]: Yes, Your Honor. We set the matter over for a status hearing so that [defense counsel] and I could discuss some of the filings in this case. On June 29th of 2020, the Defendant had filed a Notice of Intent to Raise the Affirmative Defense of Insanity and then on January 10th of 2020, the State received the discovery disclosures for the Defendant, which indicated that the Defendant intends to assert the affirmative defense of self-defense. So I wanted to make sure that it was clear for the record that [defense counsel] and I spoke prior to trial to alleviate the need of any expert testimony and to make sure that no one was unreasonably subpoenaed for this case. [Defense counsel] indicated that he's proceeding on the affirmative defense of self-defense and that he is withdrawing his affirmative defense of insanity.

THE COURT: Okay. [Defense counsel], is that all correct?

[DEFENSE COUNSEL]: That's correct, Your Honor. I've met with [defendant] numerous times, and he's directing me to withdraw my Notice of Intent to Raise the Affirmative Defense of Insanity, which we are doing at this

time, and we will instead assert the defense, which we have, of self-defense.

THE COURT: Is that correct, [defendant]?

THE DEFENDANT: Yes.

THE COURT: That's what you've asked your attorney to do?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very good. Did anybody force you—

THE DEFENDANT: No.

THE COURT: —in any way to have that happen that way?

THE DEFENDANT: No."

¶ 24 Defendant did not assert an insanity defense at trial.

¶ 25 C. Jury Trial

¶ 26 Defendant's jury trial, which was held over a period of four days, began on May 16, 2022. Evidence presented at trial revealed the family, including Michael and Chris, Chet, and Ronnie (three of defendant's four brothers), started becoming concerned about defendant's mental health beginning around 2017. Thus, the family rid the home of all firearms except for Michael's handgun. Around this same time, defendant sent strange and concerning messages to Chet and Chris, asserting Michael was going to kill him. Michael told Chris defendant threatened to kill him once a week and regularly threated to "kick [Michael's] a***."

¶ 27 Chris also stated Michael was undergoing dialysis for kidney failure when defendant killed him. Michael's autopsy revealed he had chronic kidney disease due to aging.

¶ 28 Kathleen Scott, a relative of the family, testified Michael would tell her he was worried about defendant hurting him or someone else. Because Michael feared defendant, he slept with a firearm under his pillow for protection.

¶ 29 At 4 a.m. on February 10, 2020, Ronnie, who lived in the family home with defendant and Michael, woke up when he heard a loud noise. He went to investigate and saw defendant by the front door. Defendant was "leaning over with his hands on the wall, just mumbling." Defendant swore, and Ronnie asked him what was wrong. Defendant replied, " 'Nothing, don't worry about it. It's none of your concern.' " Ronnie went back to sleep, awakening the next day when the police found him asleep in his room. At that time, Ronnie did not know Michael was dead.

¶ 30 Defendant, who said his relationship with Michael was rocky and acrimonious at times, testified their relationship worsened in 2019, when Michael talked down to him, pointed a gun at him, and threatened to kill him. Defendant clarified he and Michael never physically fought. Rather, Michael "taunted" him.

¶ 31 Defendant described various incidents of Michael "taunting" him on February 9, 2020, including calling him a dog and telling him to be his slave. Defendant stated, that evening, Michael warned him, " 'When you go to sleep tonight, you're a dead man,' " and later, Michael patted his gun, saying, " 'soon.' "

¶ 32 At around 9 or 9:30 p.m., defendant went downstairs with the family's dog. The dog jumped on Michael's bed, which aggravated Michael. Michael told defendant he was frustrated because neither the dog nor defendant listened to him and defendant refused to be his slave. Because of this, Michael said he was going to have to "end [him]." Defendant believed this meant Michael was going to kill him. Michael then pointed at his gun, which was right next to his shoulder, and said, " 'F*** you. I'm going to kill you.' " When Michael reached for his gun, defendant grabbed a hammer, which was near Michael's bed. Defendant then hit Michael with the hammer before Michael could touch his gun.

¶ 33 Defendant stated, when he hit Michael, he could not remember everything, as "[s]ome of it [was] fuzzy." He said he had "bits and pieces as a memory." Although defendant's memory was "a little fuzzy" and he could "[n]ot really" remember any of what happened, he believed he hit Michael four or five times. Later, defendant testified he did not remember hitting Michael more than once. Defendant also stated his arm was tired from swinging the hammer.

¶ 34 Defendant testified what happened later was also "kind of fuzzy." He remembered thinking about what he was going to do now that Michael was dead, and he believed he had fallen asleep. Defendant said he did not feel good about what he had done.

¶ 35 In the morning, defendant told a neighbor he had killed Michael the night before in self-defense and asked the neighbor to call the police. When the police arrived, defendant gave them permission to search the home. He complied with the police officers' requests and was calm and polite.

¶ 36 The police searched the home and found Michael on the first floor, lying covered up on a bed. The bed was pushed up against the wall. Michael, who according to the pathologist did not move after the first blow, was on his right side, facing the wall. Next to Michael was a firearm covered by a paper towel. Since the towel had blood on it, the pathologist said the towel was covering the gun when Michael's head started bleeding from the blows. The thumb safety was on. Michael had sustained significant, blunt-force trauma to the left side of his head. The pathologist did not know how many times Michael was hit on the left side of his head, but he estimated Michael was hit at least four or five times.

¶ 37 Defendant told the police there was a hammer in the garbage can in the kitchen. The hammer had blood and human tissue on it. Blood-stained gloves were also found in the kitchen. Defendant told police the gloves were in the pocket of his coat when he killed Michael.

Blood stains were also found on a sweatshirt and pair of jeans. The blood on all the items was tested. Testing revealed the blood matched Michael's DNA profile.

¶ 38 Defendant told the police when he was arrested " '[he] did what [he] had to do.' " When the police questioned defendant, he told them he was tired of Michael treating him like a slave and talking down to him.

¶ 39 The jury found defendant guilty of first degree murder.

¶ 40 D. Sentencing

¶ 41 Defendant's sentencing hearing was held on August 16, 2022.

¶ 42 The presentence investigation report (PSI) was prepared on July 7, 2022, and admitted at the sentencing hearing without objections. The PSI reflected defendant was convicted of unlawful possession of drug paraphernalia in 1997 and 2002. Defendant reported to the examiner Michael " 'was a pedophile' " who liked " 'kiddie porn.' " Defendant said he told everyone in town this, including the police. The PSI also revealed defendant was employed somewhat steadily from 2003 to 2006 as a welder, siding applicator, and window installer. Defendant was unemployed from 2006 to 2018. In September 2018, he got a job as a painter but quit in November when he "walk[ed] out." Although defendant drank beer and bourbon only twice per week before he was arrested, he indicated he would drink to the point of blacking out. Defendant denied being an alcoholic. Also, while defendant asserted he was no longer using drugs, such as marijuana and methamphetamine, which he said he tried only once, he also stated "he was spending $100 per week on drugs" when he was arrested. Defendant never sought treatment for his drug use and denied being a drug addict. Defendant also denied being drunk or high on drugs when he killed Michael.

¶ 43 The State presented victim impact statements prepared by defendant's brothers,

Chris and Shawn. Chris expressed in his statement defendant, whom Chris loved, had always shown hatred toward him and Michael. Defendant's hatred of Chris was so bad Michael warned Chris not to come to the house. Thus, most of Chris's contact with Michael was over the phone. Chris was extremely sad to lose Michael, his last remaining parent, noting Michael's death left Ronnie not only grief-stricken and emotionally scarred but also homeless. After characterizing the murder as "heinous" and "graphic," Chris asserted, "[Defendant] has shown no remorse and no sense of responsibility in what horrifically killing [Michael] would mean for our family."

¶ 44 Shawn, who was incarcerated, wrote in his statement about defendant having various illnesses as a child and living in a home that was frequently flooded while growing up. Black mold spread in the house while the family was forced to live upstairs, away from the standing water. Shawn described Michael as cheap, lazy, mean, aggressive, abusive, and stubborn. Shawn described defendant as a pacifist, never yelling or getting mad at anyone. Given each man's demeanor, Shawn believed "[Michael] isn't innocent in this." Although Shawn recognized defendant needed to be punished, he asked for leniency, suggesting "[Michael might have] creep[ed] on [defendant], being a weirdo," which led defendant to kill him.

¶ 45 Defendant testified at the sentencing hearing. He stated he broke into a home when he was 14 years old and unlawfully possessed marijuana twice when he was a minor. Defendant dropped out of high school and took the pretest for a GED. Defendant never obtained a GED, opting instead to begin working. He also helped care for his mother until she passed away from kidney failure.

¶ 46 After the evidence was presented, the trial court asked the parties for recommendations. The State suggested, among other things, the court consider in aggravation Michael's kidney disease, which the State claimed was a physical disability (see 730 ILCS

5/5-5-3.2(a)(9) (West 2022)). Defense counsel, in asking for a sentence toward the minimum of the sentencing range, stressed defendant's minimal criminal history, complete lack of a violent criminal history, cooperation with the police, efforts to obtain a GED, and marketable job skills.

¶ 47 In allocution, defendant said:

> "I would like on the record I maintain my innocence. [Michael] was going to kill me. He was aware that I was talking to law enforcement about him and my older brother Chris.
>
> I didn't just talk to State Police, [the] Hancock County Police Department, [I also spoke to] all surrounding police departments, including the FBI. My father was a pedophile. My brother Chris is a serial murderer. I'm not making this up, because I know the Court can check those facts."

¶ 48 The trial court began its determination, stating:

> "The court is going to consider the [PSI], the evidence presented here today, the statement of allocution, arguments of counsel, and all the statutory and nonstatutory factors in aggravation and mitigation, whether specifically mentioned or not, and the history and character of the Defendant, having due regard for the seriousness of the offense, and the objective of restoring the Defendant to useful citizenship."

The court then highlighted some of the factors on which it relied. Specifically, it asserted it considered (1) defendant's conduct caused or threatened serious harm; (2) his lack of violent criminal history; (3) his limited criminal history; (4) the imposition of a sentence to deter others, which the court found "definitely important"; (5) defendant's lack of remorse; (6) and the "brutality" of the "dramatic" incident, where Michael had to arm himself to protect himself from

his own son. The court sentenced defendant to 50 years' imprisonment.

¶ 49 Defense counsel neither objected to the trial court's consideration of these facts nor filed a postsentencing motion.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 On appeal, defendant argues defense counsel was ineffective because counsel (1) failed to request a new fitness hearing and (2) withdrew an insanity defense. Defendant also argues error arose at sentencing when the trial court was presented with allegedly improper aggravating factors and relied on them. We consider each issue in turn.

¶ 53 A. Ineffective Assistance of Counsel

¶ 54 Every defendant has a constitutional right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance are governed by the *Strickland* standard (*Strickland v. Washington*, 466 U.S. 668, 687 (1984)). See *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A defendant's failure to establish either prong of the test precludes a finding of ineffective assistance. *People v. Boots*, 2022 IL App (2d) 200640, ¶ 35. Because the facts are not in dispute, we review *de novo* whether counsel was ineffective. *People v. Edmondson*, 2018 IL App (1st)

151381, ¶ 34 ("Where the facts relevant to an ineffective-assistance claim are not in dispute, our review is *de novo*.").

¶ 55 With these principles in mind, we turn to the two ways in which defendant claims defense counsel was ineffective.

¶ 56 1. *Defense Counsel's Failure to Request a New Fitness Hearing*

¶ 57 Defendant argues counsel should have requested a new fitness hearing because Lanier recognized a defendant may lose fitness and "[defendant] *** began exhibiting paranoia and making grandiose statements which strained credulity" during the proceedings.

¶ 58 The due process clause of the fourteenth amendment of the United States Constitution bars the criminal prosecution of a defendant who is not competent to stand trial. U.S. Const., amend. XIV; *People v. Mitchell*, 189 Ill. 2d 312, 326 (2000). A defendant is presumed fit to stand trial (725 ILCS 5/104-10 (West 2022)), and, thus, a defendant is entitled to a fitness hearing "only when a *bona fide* doubt of his fitness to stand trial or be sentenced is raised." *People v. McCallister*, 193 Ill. 2d 63, 110 (2000). There is a *bona fide* doubt as to a defendant's fitness when there is a "real, substantial and legitimate doubt." *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991).

¶ 59 There are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Factors of fitness to consider are the defendant's irrational behavior, the defendant's demeanor at trial, and any medical opinion on the defendant's competence to stand trial. See *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 60 The defense, State, or trial court may challenge a defendant's fitness at any time

before, during, or after trial. 725 ILCS 5/104-11 (West 2022). "The finding that [a] defendant was unfit to stand trial does not entail the same kind of determination as a finding that a person is mentally ill and a danger to himself or others." *People v. Holt*, 2014 IL 116989, ¶ 46. "Fitness speaks only to a person's ability to function within the context of a trial; it does not refer to sanity or competence in other areas." *Id.* " 'The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense.' " *Id.* (quoting *People v. Easley*, 192 Ill. 2d 307, 323 (2000)). " 'If so, then, regardless of mental illness, [the] defendant will be deemed fit to stand trial.' " *Id.* (quoting *Easley*, 192 Ill. 2d at 323).

¶ 61 All of that said, "[t]he question of fitness may be fluid." *People v. Weeks*, 393 Ill. App. 3d 1004, 1010 (2009). For example, "[s]omeone who appeared to have difficulty understanding his plight [one year] may be rational [a year later]." *Id.* Thus, "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181. As a court of review, we recognize trial courts have "the best opportunity to observe [the] defendant's behavior and assess its level of propriety." *People v. Woodard*, 367 Ill. App. 3d 304, 320 (2006).

¶ 62 Here, we cannot say counsel was ineffective for failing to request a new fitness hearing. Although Lanier acknowledged a defendant could lose fitness as time passed, she also clarified such instances were "rather rare." Additionally, Lanier was well aware of defendant's " 'crazy' " stories and accusations; yet, despite them, she still found him fit, noting defendant's stories and accusations did not weigh heavily in her fitness finding, nor would they automatically sway her to find defendant unfit. Moreover, in addition to Lanier, Eberhardt and Forman also concluded defendant was fit to stand trial, and Eberhardt specifically noted defendant could be fit

and yet struggle with mental health issues.

¶ 63 In claiming counsel should have requested a new fitness hearing, defendant cites six statements defendant made during the proceedings. Those are: (1) "Michael called [defendant] a dog and a slave," (2) "Michael threatened to kill him," (3) "Michael had turned all his brothers against him," (4) "Michael was going to kill him and Chet," (5) "[Michael] was a pedophile," and (6) "Chris is a serial murderer." Most, if not all, of these accusations were made known to Forman, Killian, Lanier, and Eberhardt. While Killian may have used these statements as evidence of defendant's unfitness due to "delusional thinking," Forman, Lanier, and Eberhardt did not agree. More importantly, the conclusory statements in defendant's brief about how "[defendant] again began exhibiting paranoia and making grandiose statements which strained credulity" are appellate counsel's uneducated conclusion based solely on reading a cold transcript, with no expert input. The court and counsel, both defendant's and the State, were able to see and hear these statements while also seeing how defendant appeared and what else he said. The experts were aware of them at the time they concluded defendant was fit. Did he appear to suffer from a mental illness? Yes, but he met all the legal criteria for fitness, and the court found that to be true at the retrospective fitness hearing.

¶ 64 Additionally, the trial court found these statements did not raise a *bona fide* doubt of defendant's fitness. The court, which had the opportunity to observe defendant throughout the entire proceedings, specifically noted, after defendant had attained fitness, his fitness only improved. This improvement, which was referenced at the retrospective fitness hearing held more than one year after defendant was sentenced, was witnessed by the court during pretrial proceedings, defendant's jury trial, and the sentencing hearing. Considering all the above, we simply cannot conclude defendant's fitness was in doubt when he made these isolated

statements.

¶ 65 Given the doctors' awareness of defendant's past stories and accusations, Lanier's intimation that these would neither weigh heavily in her fitness evaluation nor automatically render defendant unfit, and the trial court's conclusion defendant never lost fitness after he attained it, we cannot conclude counsel acted unreasonably when he did not ask for a new fitness hearing. Because counsel did not act unreasonably, we do not address whether defendant was prejudiced. See *Boots*, 2022 IL App (2d) 200640, ¶ 35 (noting an ineffective assistance of counsel claim can be disposed of based on a conclusion counsel did not act unreasonably).

¶ 66 2. *Defense Counsel's Withdrawal of the Insanity Defense*

¶ 67 Defense counsel's duties include the duty to investigate any possible defenses. *People v. Domagala*, 2013 IL 113688, ¶ 38. Affirmative defenses counsel may raise at trial include an insanity defense. 720 ILCS 5/6-4 (West 2022). A defendant is insane and "not criminally responsible for [his] conduct if at the time of such conduct, as a result of mental disease or mental defect, he lack[ed the] substantial capacity to appreciate the criminality of his conduct." *Id.* § 6-2(a).

¶ 68 All defendants are presumed sane. *People v. Hill*, 297 Ill. App. 3d 500, 517 (1998). It is the burden of the defendant to prove, by clear and convincing evidence, he is not guilty by reason of insanity. See 720 ILCS 5/6-2(e) (West 2022). If the record establishes defense counsel, from an objective standpoint, had reason to know an insanity defense was available to the defendant, counsel's failure to investigate the defense fully and, if warranted, present the defense can amount to ineffective assistance of counsel. *Domagala*, 2013 IL 113688, ¶ 38.

¶ 69 Here, while there was evidence, based on Killian's report, indicating defendant

was possibly insane when he killed Michael, defense counsel, who wanted to assert an insanity defense, was faced with the unenviable task of asserting that defense over defendant's repeated and vehement objections. In opposition, the State had available three experts intimating defendant did not suffer from a mental disease or defect which would prevent defendant from appreciating the criminality of his conduct.

¶ 70 Instead, defense counsel at least had defendant's cooperation in asserting self-defense, with some circumstantial corroborating evidence upon which to rely. Defendant's statements to family and the police about Michael's continuous and repeated threats, the proximity of the gun, and defendant's statements afterwards about doing "what he had to do" at least gave counsel a basis upon which to argue self-defense to the jury. Otherwise, he had a defendant who three experts found to be fit and was totally uncooperative with the idea of an insanity defense. If defendant wished to testify, as it appeared he did, counsel would then have had to confront the very real possibility defendant, at trial, would protest his sanity as he had both to counsel and the experts before, sabotaging the asserted insanity defense and claiming instead he acted in self-defense. Absent a record clearly evincing defendant's mental incapacity to make this choice, we will not place trial counsel in the position of forcing his client to assert an insanity defense over his protestations. When we consider this claim comes from several isolated remarks taken out-of-context from a transcript only, we cannot conclude counsel was ineffective for withdrawing defendant's insanity defense.

¶ 71 We find helpful here a case from the Court of Appeals of Mississippi, *Shabazz v. State,* 96-KA-00473-COA (Miss. 1998), 729 So. 2d 813. There, the defendant befriended Riva Brown, a woman with whom he worked. *Id.* ¶ 3. Thereafter, he met a man named Noray at a fast-food restaurant and, for unknown reasons, elicited his help in shooting Brown's car. *Id.* ¶ 6.

Although both Brown and a fellow employee identified the defendant as the man who shot at Brown, the defendant testified Noray, who he claimed had been hiding in the passenger seat of the car the defendant was driving, approached Brown and shot at her. *Id.* After Brown was shot, the defendant panicked and drove off, and, according to the defendant, Noray fled on foot. *Id.* Evidence of the crime, including a shot gun and ammunition, was found in the car the defendant was driving. *Id.* ¶ 7.

¶ 72 Defense counsel filed a notice of the intent to assert an insanity defense. *Id.* ¶ 11. The day before the trial was set to begin, the defendant withdrew the insanity defense. *Id.* At a hearing, "[defense counsel] made it exceedingly clear that he had counseled [the defendant] not to give up the insanity defense, but [the defendant] insisted on withdrawing it." *Id.* Defense counsel asserted "that while he already had two experts to testify in support of the insanity defense, he nonetheless admitted that the expert opinions of [two of three doctors] finding [the defendant] competent to stand trial supported [the defendant's] decision to withdraw the insanity defense." *Id.* ¶ 12. When asked, the defendant confirmed "he did desire withdrawing the insanity defense." *Id.* Based on reports from psychiatric experts, the trial court found the defendant sane at the time he shot at Brown. *Id.* ¶ 11. Subsequently, the defendant was convicted of aggravated assault and sentenced. *Id.* ¶ 1.

¶ 73 On appeal, the defendant contended, in part, defense counsel was ineffective for withdrawing the insanity defense. See *id.* ¶ 22. The appellate court disagreed. *Id.* ¶¶ 23-24. In doing so, the court asserted:

> "It was at [the competency hearing the day before the trial] that [the defendant] insisted that his insanity defense be withdrawn. His counsel argued very strongly against withdrawing the insanity defense. In fact, [defense] counsel

went to great lengths to explain to the trial court the thorough investigatory job he did to find a way to keep the insanity defense for his client. However, it was [the defendant's] decision to make, and he did so against the express advice of his attorney. We fail to see how [defense] counsel was deficient, or how the result of his trial would have been different. ***

*** [Defense] counsel chose not to present [defendant's expert's] testimony in light of [the defendant's] insistence on withdrawing the insanity defense. *** Counsel explained at the hearing that he had planned on calling [the defendant's expert] and another expert to testify at trial if [the defendant] had stuck with his insanity defense. However, [the defendant] insisted that he was competent, and the State's experts all concluded that he was competent to confer with his attorney and stand trial. In matters of strategy, '[a]ttorneys are permitted wide latitude.' [Defense] counsel's hands were tied because of [the defendant's] insistence on withdrawing the insanity defense and proceeding as a competent defendant. Counsel for [the defendant] admitted that the State's experts agreed that [the defendant] was competent, but we are unconvinced that such agreement on the part of [defense] counsel was error amounting to ineffective assistance. After reviewing the entire record and in light of the total circumstances, we fail to see any instance where [defense] counsel was anything but a zealous advocate on [the defendant's] behalf. [The defendant] has failed to prove any error or that any error was so prejudicial as to deprive him of a fair trial." (Internal quotation marks omitted.) *Id.*

¶ 74 Here, presuming defendant alone, not defense counsel, made the decision to

withdraw the insanity defense, we cannot conclude counsel was ineffective. Although, in Illinois, what defense to present lies with defense counsel, not the defendant (*People v. Ramey*, 152 Ill. 2d 41, 53 (1992)), defendant here, like the defendant in *Shabazz*, left counsel with an unwinnable predicament. That is, counsel here could have asserted an insanity defense against defendant's wishes—in a case where defendant was adamant he had no mental illness and was not insane—or he could, as he did, acquiesce to defendant's wishes and withdraw the insanity defense.

¶ 75 Like in *Shabazz*, we find acquiescing to defendant's demands was not indefensible. Killian provided the only expert opinion about defendant's sanity when Michael was killed. He opined defendant's delusional disorder made him insane at the time the crime occurred. However, the reports from Forman, Eberhardt, and Lanier—all of whom concluded defendant was competent to stand trial—never indicated defendant suffered from a delusional or psychotic disorder or any "mental disease or mental defect" preventing him from having the "substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2022). Indeed, Forman concluded defendant had a personality disorder; Eberhardt found defendant was not suffering from a psychotic illness; and Lanier, in direct contrast to Killian, determined defendant did not have a delusional disorder. Lainer and Eberhardt's conclusions were formed over months of observations, whereas Killian made his assessment after a one-day Zoom call. After reviewing the entire record and in light of all the circumstances—including the wide latitude attorneys are given in matters of trial strategy, defendant's insistence on withdrawing the insanity defense, and three doctors' opinions concerning defendant's competence and the mental illness from which defendant suffered—we, like the court in *Shabazz*, "fail to see any instance where [defense] counsel was anything but a zealous advocate on [defendant's] behalf." *Shabazz*, 96-KA-00473-COA, ¶ 24. Accordingly, we conclude counsel

did not act unreasonably in withdrawing the insanity defense. As a result, counsel was not ineffective for doing so. See *Boots*, 2022 IL App (2d) 200640, ¶ 35.

¶ 76 B. Sentencing

¶ 77 The Illinois Constitution requires "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. If a sentence is within the statutory limits, a court of review will not alter the sentence unless the trial court abused its discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). "A court has abused its discretion when the record shows the sentence is excessive and not justified under any reasonable view of the record." *People v. Pippen*, 324 Ill. App. 3d 649, 651-52 (2001).

¶ 78 A trial court's sentencing decision is given "substantial deference" because the sentencing court, "having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. Our supreme court has warned, "[i]n considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Id.*

¶ 79 Here, defendant was convicted of first degree murder. A defendant convicted of first degree murder faces a prison term between 20 and 60 years. 730 ILCS 5/5-4.5-20(a) (West 2022). Defendant's 50-year sentence fell 10 years above the middle of this range.

¶ 80 Defendant recognizes his sentence fell within the permissible range. He argues we

must vacate his sentence and remand for a new sentencing hearing because three improper aggravating factors were presented to and relied on by the trial court in fashioning his sentence. Those factors are: (1) defendant's conduct caused or threatened serious harm, (2) defendant committed the offense against a person with a physical disability, and (3) defendant lacked remorse. Whether the court relied on improper sentencing factors presents a question of law we review *de novo*. *People v. Mauricio*, 2014 IL App (2d) 121340, ¶ 15.

¶ 81 In making his argument, defendant acknowledges he forfeited review of his claims because he never (1) objected to consideration of the alleged improper factors or (2) raised the issue in a postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). Defendant seeks to bypass forfeiture and have us consider his claims under either the second prong of the plain error rule or, alternatively, the theory defense counsel was ineffective for failing to preserve his claims. See *People v. Miller*, 2014 IL App (2d) 120873, ¶ 16.

¶ 82 In this case, plain error review is not appropriate, as our supreme court has recently resolved a conflict in the appellate courts and determined second prong plain error review is no longer viable in cases like this one. In *People v. Johnson*, 2024 IL 130191, ¶ 38, our supreme court considered "whether the forfeited error of the [trial] court's consideration of an improper factor in aggravation at sentencing is subject to plain error review under the second prong of the plain error rule." In resolving that issue, the court observed review under the second prong of the plain error rule, where prejudice is presumed, is "rare," applying only " 'in those exceptional circumstances where, despite the absence of objection, application of the rule is necessary to preserve the integrity and reputation of the judicial process.' " *Id.* ¶¶ 53-55 (quoting

People v. Herret, 137 Ill. 2d 195, 214 (1990)). Second prong plain error arises in the sentencing context only when the errors impact the framework in which sentencing proceeds, rather than mere errors in the sentencing itself. *Id.* ¶ 59. Because consideration of an improper aggravating factor is a mere error in sentencing itself, where prejudice is not presumed, the court concluded second prong plain error was inapplicable. *Id.* ¶¶ 90-93.

¶ 83 Given *Johnson*, we find defendant's request for review under the second prong of the plain error rule unavailing. Therefore, we consider defendant's sentencing claims only under the theory of whether counsel was ineffective for failing to object to the trial court's consideration of allegedly improper aggravating factors.

¶ 84 Whether counsel was ineffective for failing to object depends on whether "[(1)] counsel's performance fell below an objective standard of reasonableness and that [(2)] 'but for counsel's incompetence, the defendant stood a reasonable chance of achieving a better result.' " *People v. Billups*, 2016 IL App (1st) 134006, ¶ 14 (quoting *People v. Burnett*, 385 Ill. App. 3d 610, 614 (2008)). As we did above, we review *de novo* whether counsel was ineffective for failing to preserve defendant's sentencing claims, as the facts regarding defense counsel's conduct are not in dispute. See *Edmondson*, 2018 IL App (1st) 151381, ¶ 34.

¶ 85 In doing so, we note "[t]he burden is on the defendant to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Id.* "[T]here is a strong presumption that the trial court based its sentencing determination on proper legal reasoning." *Id.* at 942-43.

¶ 86 With these principles in mind, we turn to the three allegedly improper aggravating factors the trial court considered.

¶ 87 1. *Defendant's Conduct Caused or Threatened Serious Harm*

¶ 88 "[I]t is well established that a factor inherent in the offense should not be considered as a factor in aggravation at sentencing." *Id.* at 942. However,

> "[i]n determining the exact length of a particular sentence within the sentencing range for a given crime, the trial court may consider as an aggravating factor the *degree* of harm caused to a victim, even where serious bodily harm is arguably implicit in the offense of which the defendant is convicted." (Emphasis in original.) *Id.*

"The trial court may also consider the manner in which the victim's death was brought about, as well as the seriousness, nature, and circumstances of the offense, including the nature and extent of each element of the offense." *Id.* That said, "the trial court may not consider the end result, *i.e.*, the victim's death, as a factor in aggravation where death is implicit in the offense." *Id.*

¶ 89 Here, in sentencing defendant, the trial court stated:

> "No. 1, the Defendant's conduct caused or threatened serious harm. The Court sat through the trial. It was very evident that death resulted from the use of force by the Defendant."

Thereafter, the court asserted:

> "When I look at this case, and I know what transpired in that house and I know that [Michael] was scared for his own safety to an extent where he himself had armed himself trying to protect himself from his own son. The brutality of the incident, it was dramatic."

Reading the court's entire ruling as a whole, which we must do, we conclude the court considered the degree of harm inflicted on Michael, rather than the mere fact Michael was killed, in fashioning defendant's sentence. Nothing about that was improper. *Id.*

¶ 90 Because it was not error for the trial court to consider the degree of harm defendant caused in fashioning defendant's sentence for first degree murder, defense counsel necessarily cannot be ineffective for failing to object. See *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) ("[C]ounsel cannot be deficient if he fails to object to remarks which are not improper.").

¶ 91 2. *Offense Committed Against a Person With a Physical Disability*

¶ 92 Section 5-5-3.2(a)(9) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(a)(9) (West 2022)), provides, as a factor in aggravation, the trial court must consider whether "the defendant committed the offense against a person who has a physical disability or such person's property." Defendant argues the court erred in considering this factor, citing only section 2-15a of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/2-15a (West 2022)), which defines "physical disability." The State argues defendant forfeited review of the issue by "[m]erely citing the statute without any other authority." See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (noting the appellant's brief shall contain an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *People v. Aljohani*, 2022 IL 127037, ¶ 61.

¶ 93 In conducting our own research, we discovered there is a dearth of cases addressing this aggravating factor, and none of the cases we found defined what a "physical disability" is. Accordingly, we do not find the issue forfeited.

¶ 94 In considering whether the trial court improperly considered a "physical disability" in aggravation, three issues arise. First, we must determine to what physical disability

the court was referring. Defendant contends the court considered Michael's kidney disease a physical disability. The State claims the court did not do so, noting, "Absent from the factors in aggravation found and considered [by the court] was the aggravating factor that defendant committed an offense against a person with a disability."

¶ 95 In its argument, the State asserted:

> "Aggravating Factor No. 9, the Defendant committed the offense against a person who has a physical disability or such person's property. Michael in this case was suffering from kidney failure. He was going to dialysis multiple times a week. That was presented throughout the trial in this case."

¶ 96 In fashioning defendant's 50-year sentence, the trial court stated, after addressing Michael's age:

> "[A]nd [Michael] had a physical disability, Factor No. 9."

This is the only time the court mentioned a physical disability.

¶ 97 Given this and the parties' positions, we determine the physical disability to which the trial court referred was Michael's kidney disease. We find meritless the State's claim the court did not consider any physical disability in fashioning defendant's 50-year sentence.

¶ 98 Second, we address whether kidney disease is a physical disability. As noted, defendant cites section 2-15a of the Criminal Code as support. It provides:

> " 'Person with a physical disability' means a person who suffers from a permanent and disabling physical characteristic, resulting from disease, injury, functional disorder, or congenital condition." 720 ILCS 5/2-15a (West 2022).

¶ 99 In construing section 2-15a of the Criminal Code to determine whether kidney disease is a physical disability, we are guided by the well settled rules of statutory construction.

See *People v. Green*, 2024 IL App (2d) 220328, ¶ 17. " 'The fundamental goal of statutory construction is to ascertain and give effect to the legislature's intent, [which is] best indicated by the plain and ordinary meaning of the statutory language.' " *Id.* (quoting *People v. Palmer*, 2021 IL 125621, ¶ 53). "We cannot depart from the plain language and ordinary meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express." *Id.* "Further, in interpreting [this] provision, we presume 'that the legislature did not intend absurd, inconvenient, or unjust results.' " *Id.* (quoting *Palmer*, 2021 IL 125621, ¶ 53). We review *de novo* the construction of a statute. *Id.* ¶ 16.

¶ 100 Giving the statutory language its plain and ordinary meaning, we determine a "physical disability" is one which manifests itself in some permanent and disabling physical, *i.e.*, visually apparent, way. Michael's kidney disease is not a physical disability because nothing in the record indicates it manifested itself in some permanent, disabling, and physically apparent way. While there may be circumstances in which one who is suffering from kidney disease will exhibit "permanent and disabling physical characteristic[s]," nothing in the record indicates Michael did.

¶ 101 The State asserts, "Even if [a] visibility requirement applied (presumably to deny knowledge of the victim's physical disability), in the instant case, defendant lived with [Michael] for lengthy periods during which [Michael] had kidney disease." The State continues, "An obvious and reasonable inference is [defendant] knew [Michael] had a physical disability," and, thus, consideration of a physical disability was proper.

¶ 102 The State's argument misses the mark. Although section 5-5-3.2(a)(9) of the Code *may* require a defendant to have knowledge of the victim's physical disability, section 2-15a of the Criminal Code simply defines what a physical disability is. The former does not apply unless

the disability falls within the parameters of the latter. Because Michael's kidney disease does not qualify as a physical disability under section 2-15a of the Criminal Code, whether defendant had knowledge of Michael's kidney disease is a nonissue here.

¶ 103 Third, having found the trial court was referring to Michael's kidney disease when it mentioned a physical disability and Michael's kidney disease is not a physical disability, we next consider what weight the court placed on Michael's "physical disability." In the court's 3-page, 12-paragraph oral ruling, it mentioned Michael's disability only once. It stated simply Michael "had a physical disability, Factor No. 9." In our view, this fleeting remark did not weigh heavily in fashioning defendant's 50-year sentence. See *People v. Bourke*, 96 Ill. 2d 327, 333 (1983) (The trial court's consideration of an improper aggravating factor was not error because "the record adequately demonstrate[d] that the weight placed on the improperly considered aggravating factor was so insignificant that it did not result in a greater sentence."). Thus, in light of all the proper aggravating factors the court considered and gave weight to, such as the need to deter others, the severity of the crime, and the fact Michael was almost 68 years old when he was killed, we conclude its consideration of a "physical disability" was harmless. See *People v. Catron*, 285 Ill. App. 3d 36, 39 (1996) ("Even if we considered the reference [of risk of harm inherent in the offense] to be improper, it is harmless in light of [the] defendant's substantial adult and juvenile criminal records in addition to the other aggravating factors present."); *People v. Verser*, 200 Ill. App. 3d 613, 622 (1990) ("A trial court's improper consideration of the proceeds of a robbery as an aggravating factor is harmless error where the trial court considered other factors in aggravation and the weight accorded to the improper factor was insignificant.").

¶ 104 All of that said, we comment on the fact the trial court was allowed to consider Michael's kidney disease in sentencing defendant. Section 5-4.5-50(c) of the Code specifically

grants the court the option of considering "any other mitigating or aggravating factors that the judge sets forth on the record that are consistent with the purposes and principles of sentencing set out in this Code." 730 ILCS 5/5-4.5-50(c) (West 2022). Although the court, based on the State's argument, improperly characterized Michael's kidney disease as a physical disability, consideration of Michael's kidney disease was nonetheless proper.

¶ 105 Instructive on this point is *People v. Helm*, 282 Ill. App. 3d 32 (1996). There, the defendant was convicted of vehicular invasion and armed robbery. *Id.* at 33. In sentencing the defendant to an aggregate term of 30 years' imprisonment, the trial court considered the fact the victim was female. *Id.* at 33-34. The defendant argued on appeal this was an improper aggravating factor. *Id.* at 34. We disagreed. *Id.* We determined "[t]he gender of the victim is part of the nature and circumstances of the offense." *Id.* Thus, while gender was not an aggravating factor enumerated in the Code (see 730 ILCS 5/5-5-3.2(a) (West 2022)), we concluded gender was a proper aggravating factor for the court to consider, as "[t]he vulnerability of the victim is a factor in assessing the heinous nature of the crime and the rehabilitative potential of the defendant." *Helm*, 282 Ill. App. 3d at 35.

¶ 106 Here, Michael's kidney disease, for which he sought treatment, certainly affected Michael's ability to fight defendant off when he was attacked. Thus, like in *Helm*, it was not improper for the trial court to consider Michael's kidney disease in fashioning defendant's sentence.

¶ 107 In sum, it was improper for the trial court to label Michael's kidney disease as a "physical disability." While that label was improper, consideration of the disease was not. Because consideration of Michael's kidney disease was not improper, we cannot conclude counsel acted unreasonably in failing to object. See *People v. Bradford*, 2019 IL App (4th)

170148, ¶ 14 (holding defense counsel will not be found ineffective for failing to assert a meritless objection). Moreover, because the trial court's reliance on the disease was minimal, we cannot conclude defendant was prejudiced. See *Verser*, 200 Ill. App. 3d at 622. Accordingly, we find meritless defendant's claim counsel was ineffective.

¶ 108 3. *Lack of Remorse*

¶ 109 "[L]ack of remorse and the defendant's failure to show a penitent spirit may properly be considered in determining sentences." *People v. Ward*, 113 Ill. 2d 516, 529 (1986). "The defendant's continued protestation of innocence and his lack of remorse following a determination of guilt, however, must not be automatically and arbitrarily applied as aggravating factors." *Id.* "Rather, the attitude of the defendant in this regard must be evaluated in light of all the other information the court has about the defendant, and in light of all the other facts of the case in determining what relevant meaning the defendant's attitude displays with respect to his prospect for rehabilitation and restoration to a useful place in society." *Id.* Because the trial court is in the best position to assess a defendant's remorsefulness, we must defer to the trial court's assessment of the defendant's remorse. See *People v. Holt*, 2020 IL App (1st) 182072-U, ¶ 67.

¶ 110 Here, the trial court found simply, "[Defendant] has not shown any remorse for his actions in this case." The record supports this conclusion. In his victim impact statement, Chris, who has known defendant all his life and loves him, asserted defendant had not shown any remorse for how his actions affected his family. In allocution, defendant did not express any remorse and, instead, called Michael a pedophile, which he also did in the PSI. Only Shawn, who appeared not to get along with Michael, even suggested defendant's accusations were true, despite defendant's claim he alerted the authorities of his suspicions. This is insightful because, instead of expressing remorse at sentencing when given an opportunity, defendant chose to

tarnish Michael's reputation posthumously, which certainly suggests defendant was not remorseful.

¶ 111 Defendant argues, if we consider the record as a whole, it is apparent he repeatedly expressed remorse throughout the proceedings. In making this argument, defendant cites his (1) saying " 'I don't feel good about what I did,' " (2) turning himself in to the police, (3) admitting to his neighbor " 'he was ready to take the consequences that he done [*sic*] for killing [Michael],' " and (4) cooperating with the police. To us, this is not an expression of remorse, but more defendant taking responsibility for his actions, which are not necessarily the same. *People v. Lewis*, 334 Ill. App. 3d 993, 1005 (2002).

¶ 112 "Remorse" is "a gnawing distress arising from a sense of guilt for past wrongs." Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/remorse (last visited Dec. 19, 2024). Here, defendant took responsibility for killing Michael, but he claimed he acted in self-defense, *i.e.*, he was justified in what he did because Michael was going to kill him. That is not remorse. Although defendant asserted at trial, as noted, he " 'didn't feel good about what [he] did,' " this one possible expression of remorse is not, alone, sufficient in light of all the other evidence.

¶ 113 That said, even if defendant's statements made during trial are construed as expressions of remorse, the trial court certainly could credit the lack of remorse defendant showed at sentencing, after he was convicted of first degree murder and did not need to present himself favorably to the jury, over expressions of remorse made during trial. Moreover, the court's consideration of defendant's lack of remorse was limited to one isolated statement. Because consideration of defendant's lack of remorse was a fleeting remark, any consideration of defendant's lack of remorse, if improper, was harmless, given the other proper aggravating

factors the court considered. See *Bourke*, 96 Ill. 2d at 333 (noting no error when insignificant weight was placed on an improper aggravating factor); *Catron*, 285 Ill. App. 3d 36, 39 (1996) (providing any error in considering an improper aggravating factor was harmless when considered in light of other proper aggravating factors); *Verser*, 200 Ill. App. 3d at 622 (same).

¶ 114 Because we determine no error arose when the trial court considered defendant's lack of remorse in sentencing him, counsel necessarily cannot be ineffective for failing to challenge the court's consideration of lack of remorse. See *Johnson*, 218 Ill. 2d at 139.

¶ 115 III. CONCLUSION

¶ 116 For the reasons stated, we affirm the trial court's judgment.

¶ 117 Affirmed.