2021 IL App (4th) 190398-U

NO. 4-19-0398

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 10, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
THOMAS A. BOITNOTT,	)	No. 15CF850
Defendant-Appellant.	)	
	)	Honorable
	)	Jason M. Bohm,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's finding defendant was not insane at the time he committed the offenses was not against the manifest weight of the evidence, and the court did not err in sentencing defendant on attempt (first degree murder).

¶ 2 In June 2015, the State charged defendant, Thomas A. Boitnott, by information with one count of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2014)), one count of child abduction (720 ILCS 5/10-5(b)(3) (West 2014)), and one count of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)). After a January 2016 stipulated bench trial, the Champaign County circuit court found defendant guilty but mentally ill of attempt (first degree murder) and child abduction but found defendant not guilty of unlawful possession of a stolen vehicle. The court sentenced defendant to concurrent prison terms of 20 years for attempt (first degree murder) and 3 years for child abduction. Defendant appealed, and this court reversed defendant's convictions and remanded the cause to the trial court for a new

trial before a different trial judge. *People v. Boitnott*, 2018 IL App (4th) 160226-U, ¶ 37.

¶ 3 On remand, the trial court held defendant's second stipulated bench trial in February 2019. On March 7, 2019, the court entered a written order finding defendant guilty but mentally ill of both attempt (first degree murder) and child abduction. Defendant filed a motion for acquittal or, in the alternative, a new trial, which the court denied after an April 2019 hearing. In May 2019, the court sentenced defendant to concurrent prison terms of 18 years for attempt (first degree murder) and 3 years for child abduction. Defendant filed a motion to reconsider, which the court denied.

¶ 4 Defendant appeals, asserting (1) he proved by clear and convincing evidence he was not guilty by reason of insanity and (2) he is entitled to a new sentencing hearing because the trial court considered a factor inherent in the offense of attempt (first degree murder) and his sentence was arbitrarily based on when the victim would reach adulthood. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The charges in this case stem from defendant removing his daughter, K.B., a six-month-old infant, from her home at approximately 11 a.m. on June 11, 2015, without the permission of Kayla Reifsteck, K.B.'s mother, and leaving the home in a vehicle not owned by him. Defendant was initially found unfit to stand trial but later regained his fitness. After the first stipulated bench trial, the trial court found defendant guilty but mentally ill of attempt (first degree murder) and child abduction but not guilty of unlawful possession of a stolen vehicle. Thus, defendant's second stipulated bench trial, which is at issue in this appeal, was only on the charges of attempt (first degree murder) and child abduction. We note, on remand, a different trial judge presided over defendant's case in accordance with our order.

¶ 7 On February 20, 2019, the parties entered in the following stipulations for

defendant's second stipulated bench trial:

> "1. The parties agree and stipulate the Court may read and consider as admitted evidence the attached redacted police reports from the incident. Further, the parties stipulate the witnesses and persons identified therein, if called, would testify as set forth therein.
>
> 2. The parties agree and stipulate Dr. Lawrence Jeckel is a psychiatrist, qualified in the field of forensic psychiatry, and competent to testify to opinions within the field of psychiatry to a reasonable degree of professional certainty. Further the parties agree that the Court may read and consider the reports of Dr. Jeckel and may consider as evidence the attached reports with the opinions and information contained therein."

Attached to the stipulation was the following: (1) Officer Tracy Wagner's June 11, 2015, report; (2) a document showing the weather on June 12, 2015; (3) Officer Kerolos Gabra's June 17, 2015, report; (4) Officer Seth Herrig's June 18, 2015, report; (5) Officer Dwayne Roelfs's June 18, 2015, report; (6) Officer Dave Sherrick's June 18, 2015, report; (7) Officer Chad Beasley's June 20, 2015, report; (8) Dr. Jeckel's July 7, 2015, report; (9) the August 2015 report by the Department of Human Services (Department); (10) the Department's October 2015 report; and (11) Dr. Jeckel's December 15, 2015, report. At the stipulated bench trial, the court admonished defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 2012). After the parties made their arguments, the court took the matter under advisement.

¶ 8 The following is the relevant evidence contained in the stipulated documents. On June 11, 2015, defendant and Reifsteck had been in a dating relationship for four years, and they had been living together for a year. Defendant and Reifsteck had a daughter, K.B., and Reifsteck

was pregnant with defendant's child. According to Reifsteck, defendant had been acting crazy, delusional, paranoid, and verbally aggressive towards her the last couple of weeks before the incident. Reifsteck had called the police two nights before for a verbal domestic fight. On the night before the incident, defendant had revealed he was experimenting with being bisexual and was ashamed about it. Defendant spent that night at a male friend's home. Reifsteck also told the police defendant had recently been denouncing his name and was into conspiracies and etymology. Reifsteck stated defendant might have bipolar disorder but he had not sought medical treatment and was not on any type of medication.

¶ 9 On the morning of the incident, defendant returned home, and he and Reifsteck had a verbal dispute. Defendant had admitted he cheated on Reifsteck with the male friend, and Reifsteck became emotional and left the room. While she was out of the room, defendant left with K.B. around 11 a.m. in Reifsteck's mother's car. Reifsteck exercised sole physical custody of K.B., and she did not authorize defendant to use the vehicle to take K.B. from Reifsteck and K.B.'s home. Defendant did not have a driver's license due to an arrest for driving under the influence in November 2014. He also had lost his cell phone and did not have one with him. Reifsteck noted defendant had not made any threats to harm himself. When he left, defendant did not take a car seat for K.B. or her diaper bag. Reifsteck immediately reported the situation out of concern for K.B.'s welfare given defendant's recent paranoid behavior and her concerns about defendant's mental health. The police found Reifsteck's mother's vehicle abandoned on a country road about 4:30 p.m.

¶ 10 A little before 8 p.m., the police received a report of a suspicious male carrying a knife and walking in circles. When the police arrived, defendant was walking alone through a field and did not respond to an officer flashing his red and blue lights and honking his air horn.

As Officer Gabra approached defendant, defendant was looking in the officer's direction but did not seem to acknowledge the officer's presence. Officer Gabra gave defendant verbal commands to get to the ground, and defendant threw a large black hunting knife with a black sheath to the ground. Officer Sherrick asked defendant what his name was, and defendant stated he did not have a name. While Officer Gabra was searching the area, he said, " 'Hey Thomas,' " and defendant replied " 'yeah?' " According to Officer Gabra, defendant realized he replied to the name "Thomas" and quickly stated " 'What is that noise.' " The officer then asked defendant what he was referring to, and defendant stated, " 'that noise you called me by.' " The police officers began to ask defendant were K.B. was, and defendant refused to tell them. When asked what his daughter's name was, defendant stated he did not know. Officer Gabra observed the emotion defendant was "portraying" was that of indifference for his infant child's safety. The officers took defendant into custody and transported him to the sheriff's office.

¶ 11 At the sheriff's office, defendant was interviewed by several officers. When asked what his name was, defendant replied, " 'I am.' " Defendant also said, " 'I am' " when Officer Shaw stated he would like to call defendant "Thomas Boitnott" because he believed that was defendant's name. Defendant denied he was Thomas Boitnott and denied having a legal name. Defendant claimed he would be committing legal name fraud if he stated he had a legal name. He also denied having a girlfriend and a child and did not know anything about the missing infant. When shown a picture of the infant, he denied knowing the child and repeatedly avoided looking at the photograph. At one point, defendant grabbed the photograph from one of the officer's hands and crumpled it up. When an officer later placed the photograph in front of him, defendant told the officer " 'Get the fuck out of here dude,' " stood up, and threw the photograph in the trash can.

¶ 12 Defendant also denied having parents and indicated he did not know his own father, David Boitnott, who came to the station to talk to defendant to help find K.B. Defendant agreed to speak with his father but refused to acknowledge he knew who his father was. After speaking with defendant, David Boitnott told one of the police officers defendant inadvertently acknowledged David was his father on one occasion during their conversation.

¶ 13 Dr. Jeckel's December 2015 report indicates defendant asked to speak with an attorney at least twice during the police interviews.

¶ 14 Eventually, a public defender arrived to speak with defendant. Defendant provided his attorney with information about the child's possible location, including a hand drawn map. The attorney provided the information to the police. Shortly thereafter, the child was located in a flooded, muddy bean field at approximately 1:45 a.m. The child had been in the field for an extended period of time. K.B. was sunburnt and dehydrated but had no serious injuries. The high temperature on June 11 was 89 degrees.

¶ 15 The circuit court appointed Jeckel, a medical doctor specializing in psychiatry, to examine defendant. After speaking with defendant for 45 minutes on June 24, 2015, and 30 minutes on July 2, 2015, and interviewing David and Reifsteck, Jeckel prepared a report which he filed with the trial court on July 9, 2015. Jeckel diagnosed defendant with unspecified psychotic disorder. With regard to his fitness to stand trial, Jeckel offered the following opinion:

> "It is my professional opinion, to a reasonable degree of medical and psychiatric certainty, that [defendant] fulfills the criteria for the mental condition of Unspecified Psychotic Disorder in addition to a history of Alcohol Abuse and Attention-Deficit/Hyperactivity Disorder, and due to the psychotic disorder, his thinking is disorganized, he is paranoid and delusional and unable to fully

> understand the nature and purpose of the proceedings against him or assist his attorney in his defense. Therefore, it is my opinion that [defendant] is *UNFIT* to stand trial. I recommend that he be transferred to a secure psychiatric facility such as McFarland Mental Health Center where the psychosis can be intensively treated. It is furthermore my opinion that he can become fit within one calendar year." (Emphasis in original.)

Jeckel explained his opinion was based on his two interviews of defendant and speaking with David and Reifsteck. During the first interview, defendant was guarded, paranoid, and suspicious. Defendant's thinking was disorganized, his speech was halting, and he nervously laughed in his paranoia. Defendant was more open and brighter during his second interview but looked frightened at times. Jeckel described defendant's psychosis as more florid than the first interview. Defendant reported having auditory hallucinations and seeing and hearing angels. David and Reifsteck described defendant "as becoming more paranoid and making accusations of fantastical sexual betrayal." Jeckel found defendant remained acutely psychotic with disorganized thinking, hallucinations, and poor concentration. In such a state, defendant's understanding of the legal process was severely limited, and Jeckel believed defendant could not work with his attorney in preparing his case. Jeckel recommended inpatient treatment of the psychosis. As to defendant's criminal responsibility, Jeckel stated:

> "Mr. Boitnott's present mental condition limits my ability to fully examine him regarding the issue of sanity at the time of the alleged crime. Therefore, I am unable to form an opinion at this time. On the issue of criminal responsibility, I would like the opportunity to further examine [defendant] regarding his mental state at the time of the alleged crime following restoration to fitness."

¶ 16 After a July 13, 2015, fitness hearing, the trial court found defendant unfit to stand trial and placed defendant in the custody of the Department. Defendant was admitted into the Department's Chester Mental Health Center on August 11, 2015. At the time of admission, the Department's psychiatrist opined defendant was unfit to stand trial. In an October 14, 2015, fitness evaluation, the Department psychiatrist found defendant fit to stand trial. The report noted defendant was mentally and physically stable and compliant with his recommended treatment, which included medication for psychosis and individual therapy. Defendant was not psychotic, depressed, or anxious and was willing to return to court. Defendant was also able to understand the nature of the court proceedings against him. Additionally, the report noted, at first defendant had to be restrained and medicated against his will, but he later consented to medication. In the beginning, he was also religiously preoccupied and his speech was dominated by his preoccupation. After defendant received treatment, he was no longer preoccupied with religion and could speak rationally about his arrest and admission into Chester Mental Health Center.

¶ 17 After defendant's return to Champaign County, Jeckel met with defendant for 60 minutes on November 20, 2015, and for 30 minutes on December 9, 2015. In a report dated December 15, 2015, Jeckel offered the following conclusions:

> "[Defendant] is a twenty-four year old single Caucasian father of two charged with Attempted First Degree Murder, Child Abduction and Unlawful Possession of a Stolen Vehicle on June 11, 2015. It is my opinion that during the commission of the instant offenses, [defendant] was suffering from a severe mental illness, a psychotic disorder, which is consistent with the observations of the mental health staff at the jail, my evaluations and the observations of the staff

at Chester Mental Health Center. He was so ill that his normal solicitousness for his infant daughter, which had been previously described as caring and perhaps even too intense, was transformed into a psychotic delusion of altruistic religious fervor, in that he told the staff at Chester Mental Health Center where he was sent after being found unfit, that he had been praying for the child's deliverance. In other words, he irrationally attempted to save her soul by abandoning her in the field and wishing to send her to heaven.

He was strange and evasive when he was interviewed by police. He refused to give them the location of his daughter or even admit that he had a child. He irrationally equivocated with the officers about his name, for example, denying that his real name was Thomas Boitnott; he denied knowing his father. This was consistent with a severe psychosis. I interviewed [defendant] twice for the fitness evaluation. In the first interview, I found him guarded, paranoid and suspicious. He was highly mistrustful of my role as an evaluator and as a physician. He inappropriately laughed while expressing paranoid ideas. In the second interview, he was more open and brighter, but the psychosis was more florid. He endorsed auditory hallucinations, in that he heard voices telling him that his manhood was being demeaned and that he was being threatened with rape. (These likely were psychotic ideas about being gay and unfaithful to his girlfriend. In my most recent interview, he did not recall having any thoughts about being gay and said he had never thought about being homosexual.) In the jail, he visually saw and heard angels who reassured him. He repeatedly read the Bible. At Chester, his thoughts were full of religious ideas with concerns about

God, evil and demons. He reported that he had been arrested in June and was 'in prison at Madology.' As noted above, he told the staff there that he did something to his little girl but what he did to her was, 'I was praying for her deliverance.'

At Chester, [defendant] was given a diagnosis of Delusional Disorder with Alcohol and Marijuana Abuse, In a Controlled Environment. His thinking cleared with the antipsychotic, olanzepine (Zyprexa), and he was eventually found fit. I gave [defendant] the diagnosis of Unspecified Psychotic Disorder which is similar to Delusional Disorder. However, it is my belief that the psychosis was more disorganized than what I usually think of with Delusional Disorder.

It is my opinion, therefore, that during the commission of the alleged offenses, [defendant] was in the throes of a severe psychotic episode, and his behavior was consistent with acting on delusions of religious grandeur and psychotic ideas of self-alienation. It is furthermore my opinion, that during the commission of the alleged offenses, [defendant] was unable to weigh and consider the meaning and consequences of his conduct, that he was in an altered psychotic state of mind. There was no evidence that he had any countervailing thoughts that would indicate that he was conscious of the consequences of his actions. In fact, he was so delusional that he could not express proper concern for the welfare of his child, something he had been able to do before. The delusion of sacrificing her and altruistically delivering her from evil was overarching. Only after he was hospitalized at Chester Mental Health Center and received psychotropic medication, did he come to admit that his actions were irrational. He could not

recall to me how ill he was at the time of the incident, but that is not unusual in certain individuals with a severe mental illness. I found no evidence that [defendant] was malingering mental illness at anytime during the episode."

Jeckel stated it was his professional opinion defendant lacked substantial capacity to appreciate the criminality of his conduct at the time of the offenses due to his psychosis.

¶ 18 On March 7, 2019, the trial court entered a written order finding defendant guilty but mentally ill of attempt (first degree murder) and child abduction. The court noted it was clear defendant committed the crimes of attempt (first degree murder) and child abduction but the dispute is whether defendant was insane at the time he committed the acts. In finding, defendant failed to prove by clear and convincing evidence he was insane at the time of the offense, the court noted defendant's attempt to conceal his name, his relationship to his father and daughter, and the whereabouts of his daughter demonstrated a consciousness of guilt. The court did find defendant was suffering from a mental illness at the time of the offense but was not convinced defendant failed to understand the wrongful nature of his conduct at the time of his actions.

¶ 19 In April 2016, defendant filed a timely posttrial motion, asserting the trial court erred by (1) declining to hold a conference under Illinois Supreme Court Rule 402 (eff. July 1, 2012); (2) rejecting the conclusion of the court-appointed psychiatrist; (3) drawing a different conclusion than Jeckel as to defendant's repeated denial of his name, his daughter, and his father; (4) deciding defendant's aforementioned actions were an act to conceal the crime or prevent detection; (5) considering certain statements were signs of defendant's lucidity; and (6) rejecting the evidence of defendant's religious ideations. Defendant also contended the court's finding of guilty but mentally ill was against the manifest weight of the evidence. After an April 15, 2019,

hearing, the court denied defendant's posttrial motion.

¶ 20 At a May 13, 2019, hearing, the trial court sentenced defendant to concurrent prison terms of 18 years for attempt (first degree murder) and 3 years for child abduction. In addressing aggravating factors, the court stated the following:

> "Obviously, this is a significant aggravating factor. Section 3.2(a)(l) provides that when the conduct threatens serious harm, there is reason to impose a more severe sentence. There was a threat of serious harm to [K.B.].
>
> On that score, let me just read the account of Chad Beasley on what happened at 2:00 a.m. in the morning on June the 12th. 'In the distance, I could see a large pool of standing water. As I started to walk towards the water, I heard a faint shriek, what I would describe as a kitten meow. I thought the sound was coming from an injured animal since I observed fresh coyote tracks throughout the bean field. The sounds came from the left of my location, and I shined my flashlight towards the direction of the sound. About 20 yards ahead of me, I observed [K.B.] laying prone on her stomach. She was wearing an orange shirt and a white diaper. As soon as my light hit her, she lifted her head and started crying.'
>
> You're fortunate that she lifted her head and started crying. You're fortunate that the coyotes didn't get her. You're fortunate that she didn't drown in that muddy field that night. And if those things had happened, you obviously would be looking at a more significant sentence than you are today. But it is certainly aggravating the threat of harm that you placed her in."

¶ 21 Further, in sentencing defendant, the court stated the following:

"Both counsel have hit on something that I think is appropriate. Consider—as I said, I think this case started because of your desire for control. I think it's appropriate to place the control back in your children's hands, to let them control if you're back in their life, and if so, under what circumstances.

I think it's appropriate to give [K.B.] that control. When she's 18 years old, she will have that control. She'll be old enough to decide if you're back in her life, and if so, under what circumstances. Until that time, until 18 years have passed, you'll have to wait.

It's going to be the judgment of the Court that you be imprisoned for a term of 18 years to be followed by three years of supervised release."

Defendant filed a motion to reconsider, which the court denied on June 18, 2019.

¶ 22 On June 17, 2019, defendant filed a premature notice of appeal. On June 18, 2019, defendant filed a notice of appeal, listing an incorrect judgment date. On July 10, 2019, defendant filed an amended notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). Thus, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 23 II. ANALYSIS

¶ 24 A. Insanity Defense

¶ 25 Defendant first argues the trial court erred when it found defendant failed to prove by clear and convincing evidence he was not guilty by reason of insanity. The State disagrees.

¶ 26 1. *Standard of Review*

¶ 27 Generally, a reviewing court will not disturb a trial court's determination with regard to a defendant's sanity unless the court's decision is contrary to the manifest weight of the

evidence. *People v. McCullum*, 386 Ill. App. 3d 495, 504, 897 N.E.2d 787, 796 (2008). A trial court's finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the court's decision is unreasonable, arbitrary, or not based on the evidence presented. *People v. Deleon*, 227 Ill. 2d 322, 332, 882 N.E.2d 999, 1005 (2008). However, during oral arguments, the general standard of review was questioned because this case involved a stipulated bench trial. Afterwards, defendant sought leave to file a supplemental brief. This court allowed defendant to file a supplemental brief and the State to file a responsive brief. The parties did so.

¶ 28 Defendant contends this courts should use the *de novo* standard of review where the only evidence presented was by stipulation and consisted only of written reports and documents. He notes our supreme court has applied the *de novo* standard of review when the lower court was not in a superior position than the reviewing court in evaluating the evidence and cites some appellate court cases that reached the same conclusion. In support of his argument, he cites the following decisions: (1) *People v. Radojcic*, 2013 IL 114197, ¶ 36, 998 N.E.2d 1212 (interlocutory appeal from the trial court's denial of the State's request to apply the crime-fraud exception to the attorney-client privilege and have the defendant's former attorney testify at his criminal trial); (2) *People v. Chambers*, 2016 IL 117911, ¶ 79, 47 N.E.3d 545 (review of the trial court's denial of the defendant's requests for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978)); (3) *In re Zion M.*, 2015 IL App (1st) 151119, ¶ 28, 47 N.E.3d 252 (review of a neglect finding); (4) *People v. Chapman*, 194 Ill. 2d 186, 208, 743 N.E.2d 48, 63 (2000) (reviewing a trial court's motion to suppress where the issue involved the trial court's application of the law to uncontested facts); (5) *People v. F.J.*, 315 Ill. App. 3d 1053, 1056, 734 N.E.2d 1007, 1009 (2000) (reviewing the legal determination of whether suppression of the

evidence was warranted under the facts of the case); (6) *In re Ryan B.*, 212 Ill. 2d 226, 231, 817 N.E.2d 495, 497-98 (2004) (reviewing a delinquency finding where the respondent's challenge to the sufficiency of the evidence against him did not question the credibility of the witnesses but instead questioned whether the uncontested facts were sufficient to prove the elements of the charged offense); (7) *DeStefano v. Farmers Automobile Insurance Ass'n*, 2016 IL App (5th) 150325, ¶ 6, 55 N.E.3d 677 (reviewing a legal conclusion drawn from a given set of facts where witness credibility was not at issue); and (8) *MQ Construction Co. v. Intercargo Insurance Co.*, 318 Ill. App. 3d 673, 679, 742 N.E.2d 820, 824 (2000) (reviewing a trial court's finding where no witnesses testified at trial, the parties stipulated to the evidence, and the court made a legal conclusion based on those facts). None of the cases defendant cited involved a stipulated bench trial in a criminal case.

¶ 29 Citing our prior decision in this case and our decision in *People v. Harris*, 2015 IL App (4th) 140696, 32 N.E.3d 211, the State asserts the manifest weight of the evidence standard applies. In *Harris*, 2015 IL App (4th) 140696, ¶ 40, this court addressed the sufficiency of stipulated evidence in a criminal bench trial. There, we applied the familiar standard of review and asked whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Harris*, 2015 IL App (4th) 140696, ¶ 40. This court did not deviate from the deferential standard of review and proceed with *de novo* review even though all the evidence was presented by stipulation, and we are not persuaded we should do so here.

¶ 30 The parties agreed to a stipulated bench trial and thus agreed the circuit court was the trier of fact. This court has recognized, "[e]ven when the parties have stipulated to the facts, 'if the evidence presented is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *People v. Jackson*, 2020 IL App (4th) 170036, ¶ 30, 165 N.E.3d

523 (quoting People v. *Lattimore*, 2011 IL App (1st) 093238, ¶ 35, 955 N.E.2d 1244). Our supreme court has explained an "inference" as follows:

> "An inference is a factual conclusion that can rationally be drawn by considering other facts. Thus, an inference is merely a deduction that the fact finder may draw in its discretion, but is not required to draw as a matter of law. [Citations.] The fact finder is free to accept or reject the suggested inference; no burden is placed on the defendant. [Citations.] Inferences are by their nature permissive, not mandatory. [Citation.]" (Internal quotation marks omitted.) *People v. Funches*, 212 Ill. 2d 334, 340-41, 818 N.E.2d 342, 346-47 (2004).

¶ 31 As evidenced by his written order, the circuit court drew many inferences from the stipulated evidence in finding defendant guilty as opposed to not guilty by reason of insanity. Those inferences are entitled to deference. Accordingly, we will determine whether the trial court's finding defendant failed to prove by clear and convincing evidence he was insane at the time of the offense was against the manifest weight of the evidence.

¶ 32 2. *Merits*

¶ 33 Section 6-2 of the Criminal Code of 2012 (720 ILCS 5/6-2 (West 2014)) states in pertinent part:

> "(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct.
>
> ***
>
> (c) A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal

responsibility for his conduct and may be found guilty but mentally ill.

(d) For purposes of this Section, 'mental illness' or 'mentally ill' means a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior.

(e) When the defense of insanity has been presented during the trial, the burden of proof is on the defendant to prove by clear and convincing evidence that the defendant is not guilty by reason of insanity. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of each of the offenses charged, and, in a jury trial where the insanity defense has been presented, the jury must be instructed that it may not consider whether the defendant has met his burden of proving that he is not guilty by reason of insanity until and unless it has first determined that the State has proven the defendant guilty beyond a reasonable doubt of the offense with which he is charged."

¶ 34 Defendant concedes the State was not required to present expert testimony to rebut defendant's expert's testimony on the issue of sanity. Instead, the trier of fact can rely on facts in evidence and inferences drawn from those facts. *McCullum*, 386 Ill. App. 3d at 504, 897 N.E.2d at 796. "Expert testimony may be entirely rejected by the trier of fact if he or she concludes a defendant was sane based on factors such as: whether lay testimony is based on observations made shortly before or after the crime; the existence of a plan for the crime; and methods undertaken by the defendant to prevent detection." *McCullum*, 386 Ill. App. 3d at

504-05, 897 N.E.2d at 796. However, the court in *McCullum* also stated the weight the trier of fact determines to give an expert's opinion on a defendant's sanity should be based on "the reasons given and the facts supporting the opinion." *McCullum*, 386 Ill. App. 3d at 504, 897 N.E.2d at 796. Moreover, "while it is within the province of the trier of fact as the judge of the witness' credibility to reject or give little weight to *** expert psychiatric testimony, this power is not an unbridled one, [citation] and a trial court may not simply draw different conclusions from the testimony of an otherwise credible and unimpeached expert witness [citation]." (Internal quotation marks omitted.) *People v. Kando*, 397 Ill. App. 3d 165, 196, 921 N.E.2d 1166, 1190 (2009).

¶ 35 In *Kando*, 397 Ill. App. 3d at 208, 921 N.E.2d at 1199, the reviewing court concluded the trial court's "conclusion the defendant was capable of appreciating the nature of his conduct was grossly unwarranted." The reviewing court set forth a multitude of reasons for its determination. The reviewing court noted, contrary to the trial court's conclusion, "the testimony of the two experts was firmly entrenched and provided clear and convincing evidence that as a result of his delusion, defendant would not have been able to comprehend the criminality of his conduct at the time of the offense." *Kando*, 397 Ill. App. 3d at 203, 921 N.E.2d at 1196. The court also rejected the State's argument the lay witnesses rebutted the two experts' testimony, finding "the lay testimony relied on by the court to counteract the undisputed testimony of the two expert witnesses was insufficient to overcome the clear and convincing evidence offered by the experts, and in fact, in many respects actually supported defendant's contention that he was insane at the time of the commission of the offense." *Kando*, 397 Ill. App. 3d at 203-04, 921 N.E.2d at 1196. There, the four lay witnesses supported the description of the experts the defendant was suffering from a hyper-religious delusion immediately before,

during, and after the commission of the crime. *Kando*, 397 Ill. App. 3d at 204, 921 N.E.2d at 1196. Additionally, the lay witnesses contradicted the notion the defendant had attempted to hide the discovery of what he had done. *Kando*, 397 Ill. App. 3d at 204, 921 N.E.2d at 1196. Moreover, the defendant's statement upon his arrest corroborated the experts' opinion the defendant was acting under a psychotic delusion, a delusion he was fulfilling a commandment from God. *Kando*, 397 Ill. App. 3d at 204, 921 N.E.2d at 1196.

¶ 36 Unlike in *Kando*, the trial court expressly found Jeckel's "opinion d[id] not draw significant support from the evidence of what happened on June 11, 2015." That conclusion is supported by stipulated evidence. Jeckel opined that, during the commission of the alleged offenses, defendant was in the "throes of a severe psychotic episode" and defendant's "behavior was consistent with acting on delusions of religious grandeur and psychotic ideas of self-alienation." However, as the trial court found, the police reports, which contain the officer's observations of defendant shortly after the crime, do not memorialize any religious references by defendant suggesting he was attempting to save K.B.'s soul. They indicate defendant continuously denied having a daughter. Jeckel's report first notes religious references occurred on July 2, 2015, which was three weeks after the incident. Jeckel also pointed out defendant's statements at the Chester Mental Health Center, which were even more removed from the incident. We disagree with defendant his referral to himself as "I am" and the use of the term "oasis" in describing where he left K.B. were religious references. In determining a defendant's sanity, observations by lay witnesses made *shortly before or after the crime* was committed are of particular relevance. *People v. Dwight*, 368 Ill. App. 3d 873, 880, 859 N.E.2d 189, 195 (2006). Contrary to Jeckel's finding, no observations of defendant near the time of the incident and contained in the stipulated evidence indicate defendant was irrationally attempting to save

K.B.'s soul by abandoning her in the field and wishing to send her to heaven.

¶ 37 Jeckel also found defendant's refusal to admit he had a child, give his name to officers, or acknowledge his father were consistent with severe psychosis. However, that finding overlooks the notes in the police reports defendant responded to his name on two occasions, and David Boitnott told the police defendant acknowledged him as his father even though he claimed not to know who he was or who his father was. Additionally, defendant provided his attorney information that led to K.B. being found even though defendant had told the police officers he had no knowledge of either the infant or the infant's whereabouts. Jeckel's report also noted defendant requested counsel on at least two occasions while talking to the police. In rendering his opinion, Jeckel did not address or explain the aforementioned actions by defendant. Thus, defendant's actions at the police station undermine Jeckel's finding and, as found by the trial court, demonstrate defendant's consciousness of guilt.

¶ 38 Moreover, the police reports support the trial court's finding defendant was trying to avoid what he had done while being interviewed by the police. On several occasions, the police presented defendant with a photograph of K.B., and defendant avoided looking at the photograph. Defendant went so far as to crumple up the photograph and throw it in the trash can. Defendant also became agitated when presented with the photograph.

¶ 39 Further, the stipulated evidence does support Jeckel's and the court's finding defendant was suffering from a mental illness at the time of the offense. However, "[a] defendant's unusual behavior or bizarre or delusional statements do not compel a finding of insanity, and a defendant may suffer from a mental illness without being legally insane." *Dwight*, 368 Ill. App. 3d at 880, 859 N.E.2d at 195. As such, the fact defendant suffered from a mental illness does not require a finding defendant was insane at the time he committed the

offense.

¶ 40 Last, we are not persuaded the trial court's (1) questioning the propriety of Jeckel's inclusion of recommendations in his report and (2) highlighting Jeckel's comment he did not believe one of defendant's statements undermine the trial court's rejection of Jeckel's expert opinion. Defendant cites no authority Jeckel's recommendation section was proper. Moreover, defendant mischaracterizes the court's comment about Jeckel's credibility finding. Jeckel indicated he believed defendant was incorrect in stating Reifsteck was the one who had concerns about defendant being gay. The trial court was referencing that belief (albeit the court could have been a little clearer) in finding defendant's representations were not reliable. The court was not commenting on defendant's struggles with his sexuality.

¶ 41 Here, the stipulated evidence contained sufficient facts for the trial court to reject Jeckel's expert opinion and find defendant had capacity to appreciate the criminality of his conduct. As such, we find the court's determination defendant was not insane at the time he committed the offenses in this case was not against the manifest weight of the evidence.

¶ 42 B. Attempt Sentence

¶ 43 Defendant also argues he is entitled to a new sentencing hearing because the trial court considered a factor inherent in the offense of attempt (first degree murder) and based his sentence on an arbitrary reason. The State asserts defendant has forfeited these issues because he did not raise them in his motion to reconsider his sentence. Defendant contends we should review the issues under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 44 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that

the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 45 We begin a plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059. Here, defendant contends his claim is cognizable under the first prong.

¶ 46 The errors defendant raises are essentially claims the trial court imposed an excessive sentence. See *People v. Johnson*, 2019 IL 122956, ¶ 39, 129 N.E.3d 1239 (noting the defendant raised an excessive sentencing argument when the defendant argued he would have received a lower sentence if the court had not erred in its application of the statute and, thus, erroneously considered statutory factors). With excessive sentence claims, this court has explained appellate review of a defendant's sentence as follows:

"A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and

> circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)); see also *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010).

In this case, the sentencing range for the Class X felony of attempt (first degree murder) (720 ILCS 5/8-4(c)(1) (West 2014)) is 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2014)). Thus, defendant's 18-year sentence was within the proper statutory range.

¶ 47 C. Inherent Factor

¶ 48 Defendant contends the trial court improperly considered the fact defendant's conduct threatened serious harm to K.B. in sentencing him for attempt (first degree murder). The State argues the degree of the threat of harm is an appropriate factor to consider in aggravation. It further alleges, even if the court erred, the error was harmless.

¶ 49 Regarding aggravating factors, the trial court must not consider an element that is inherent in the offense as an aggravating factor when sentencing a defendant. *People v. Brown*, 2019 IL App (5th) 160329, ¶ 18, 145 N.E.3d 486. "Nevertheless, the trial judge 'need not unrealistically avoid any mention of such inherent factors, treating them as if they did not

exist.' " *Brown*, 2019 IL App (5th) 160329, ¶ 18 (quoting *People v. O'Toole*, 226 Ill. App. 3d 974, 992, 590 N.E.2d 950, 962 (1992)). When reviewing a sentence for an alleged error based upon the consideration of an improper factor in aggravation, the reviewing court considers the record as a whole and does not focus merely on a few words or statements by the trial judge. *Brown*, 2019 IL App (5th) 160329, ¶ 18. We note "[a]n isolated remark made in passing, even though improper, does not necessarily require that [the] defendant be resentenced." (Internal quotation marks omitted.) *Brown*, 2019 IL App (5th) 160329, ¶ 18 (quoting *People v. Reed*, 376 Ill. App. 3d 121, 128, 875 N.E.2d 167, 174 (2007)). To receive a new sentencing hearing, the defendant must show more than the mere mentioning of the improper factor in aggravation; rather, the defendant must demonstrate the trial judge relied upon the improper factor in fashioning the defendant's sentence. *Brown*, 2019 IL App (5th) 160329, ¶ 18.

¶ 50 In this case, the trial court found the aggravating factor "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2014). Citing the statutes for the offense, defendant contends the threat of serious harm is inherent in the offense of attempt (first degree murder). The State notes our supreme court's decision in *People v. Saldivar*, 113 Ill. 2d 256, 271, 497 N.E.2d 1138, 1144 (1986), which held, in sentencing a defendant on a conviction for voluntary manslaughter, it is permissible for the trial court to consider the force employed and the physical manner in which the victim's death was brought about in applying the statutory aggravating factor the defendant's conduct caused serious harm to the victim. In reaching that conclusion, the supreme court stated the following:

> "Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even

> though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.) *Saldivar*, 113 Ill. 2d at 269, 497 N.E.2d at 1143.

On the facts of that case, the supreme court concluded the trial court erred because its finding in aggravation was not directed at the degree or gravity of the defendant's conduct but instead focused on the end result of the defendant's conduct, the victim's death. *Saldivar*, 113 Ill. 2d at 271-72, 497 N.E.2d at 1144. There, the trial court had stated the following: " 'The number one factor in aggravation—there are some that come to a lesser degree, but the one that is probably the most serious is the terrible harm that was caused to the victim. And the victim is dead today.' " *Saldivar*, 113 Ill. 2d at 272, 497 N.E.2d at 1144. Additionally, we note the supreme court defined the degree or gravity of the defendant's conduct as "the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." *Saldivar*, 113 Ill. 2d at 271-72, 497 N.E.2d at 1144.

¶ 51 Unlike in *Saldivar*, the trial court in this case was commenting on the quantum of

harm K.B. was exposed to by defendant's specific actions and not the mere fact his conduct was a substantial step towards K.B.'s death. Defendant's conduct in this case exposed K.B. to more harm than if defendant had left her, for example, in a city park. Thus, we disagree with defendant the court improperly considered a factor inherent in the offense of attempt (first degree murder).

¶ 52 D. Arbitrary Consideration

¶ 53 Defendant also contends the trial court erred when it relied on the arbitrary reason the victim will be an adult in 18 years in sentencing defendant. The State argues the court's comment about the victims age was a mere observational comment.

¶ 54 The State argued it would not be in K.B.'s best interest to have defendant in her life, and defense counsel argued defendant should be made available if K.B. wanted him back in her life. Given the nature of the offense and the parties' argument, we do not find the court's comment about K.B. having control of her life when she turned 18 years old and shortly thereafter imposing an 18-year sentence was an arbitrary basis for the court's ruling. Moreover, the 18-year sentence is consistent with the nature of the offense, and we do not find it excessive.

¶ 55 Accordingly, we find defendant has failed to show the court committed error in sentencing him on attempt (first degree murder).

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the Champaign County circuit court's judgment.

¶ 58 Affirmed.