

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 100306-U

Filed 6/4/12

NO. 4-10-0306

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSEPH J. KELLY,)	No. 09CF21
Defendant-Appellant.)	
)	Honorable
)	Mark A. Fellheimer,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The State failed to prove defendant guilty as to one of seven counts of burglary where it failed to establish entry to the storage shed alleged to have been the subject of a break-in.
- (2) The trial court did not abuse its discretion in refusing to instruct the jury on the lesser-included offense of theft where evidence did not warrant such an instruction.
- (3) Evidence of other burglaries to which defendant had confessed occurring around the same time as the charged offenses were properly admitted as evidence establishing the course of the investigation.
- (4) The trial court did not abuse its discretion in denying defendant's motions for a mistrial when testimony defendant was on parole and had been involved in a prior incident involving a storage shed were inadvertently presented in view of defendant's confession to charged offenses and the corroborating evidence.
- ¶ 2 In January 2009, the State charged defendant, Joseph J. Kelly, with 11 counts of burglary to storage sheds in Livingston County. Following a jury trial, and after 4 of the 11

counts had been dismissed, defendant was convicted of 7 counts of burglary. The trial court sentenced defendant to serve concurrent 18-year terms of incarceration in the Illinois Department of Corrections. This sentence was later reduced to terms of 16 years each. Defendant appeals, arguing (1) the State failed to prove him guilty on one of the seven counts where the State failed to prove an entry occurred at that specific shed; (2) the trial court erred in refusing to tender a lesser-included theft instruction based on the exercise of control over property from the named victims' storage sheds with the intent to permanently deprive them of that property; (3) the trial court erred in admitting highly prejudicial other-crimes evidence without (a) first balancing the probative value of the evidence against its potential for prejudice and (b) informing the jury of the limited use it should make of the evidence; and (4) the trial court abused its discretion in failing to declare a mistrial when testimony informed the jury defendant was on parole and he had been in trouble in relation to other storage sheds in the past. We reverse as to the first issue raised by defendant, affirm as to the other three issues on the remaining six counts, and remand with directions.

¶ 3

I. BACKGROUND

¶ 4

On the evening of January 17, 2009, employees of Redwood Storage in Pontiac saw a truck at two different storage sheds and wrote down the license plate number. Several break-ins of storage sheds had occurred during December 2008 and January 2009. Employees discovered, in the area of the storage units where the truck was seen, cut locks on some sheds. The matter was reported to the police. The Livingston County sheriff's deputies learned David Przybyla of Ottawa owned the truck and sent information of this incident to authorities in Ottawa.

¶ 5 Przybyla and defendant were seen in the truck later that night at a storage facility in Ottawa. On January 27, 2009, a search of defendant's residence revealed items taken from the Redwood storage units. Defendant was arrested. During interrogation at the Ottawa police station, defendant eventually confessed to eight burglaries of storage sheds in Pontiac and other burglaries of storage sheds in Peru.

¶ 6 In July 2009, defendant filed a motion to suppress his statement to the police as involuntarily made. In October 2009, the trial court denied defendant's motion to suppress.

¶ 7 Later that month defendant's jury trial commenced. The owners of seven storage sheds at Redwood testified regarding learning on January 17, 2009, or shortly thereafter, of break-ins at their storage sheds. Six of those owners testified to going to their storage sheds and discovering the padlocks placed on their units had been removed. Five of the owners testified to specific items missing from their units. They later identified many of their missing items at defendant's house in Ottawa. The sixth owner, Eloy Muraida, testified his storage shed had been ransacked, but he could not identify anything missing.

¶ 8 Kristin Skeen, the seventh storage shed owner, testified she rented the storage unit for her daughter. Skeen stated normally a lock was on the unit but she had never been out to see it. When Redwood employees told Skeen there had been a break-in of her unit, Skeen notified her daughter. Skeen testified her daughter told her no lock was on the unit when she responded to the call. Defense counsel objected to this testimony as hearsay and the objection was sustained. Skeen presented no further testimony. Skeen's daughter did not testify.

¶ 9 Several Redwood employees testified at trial. They stated the seven named victims had rented storage units at Redwood between November 2008 and January 2009.

Several break-ins at the facility took place during December and January. Of those break-ins, one unit, which had been broken into in December, had a new lock placed on it after the old one was broken. When Przybyla's truck was spotted on January 17, 2009, one of the employees followed the truck out of the facility in her car for one block until the truck turned to go north. Due to the discovery of four break-ins on January 17, Redwood employees started calling renters to check the integrity of their units.

¶ 10 Livingston County Sheriff's Deputy David Netter responded to a call from Redwood employees' as to break-ins on January 17. He observed seven or eight sheds whose locks had been removed. Dust patterns in the sheds made it seem like the contents of a number of the sheds had been recently moved. Netter learned the truck belonged to Przybyla through the license plate number.

¶ 11 After learning Przybyla's truck was seen at a storage unit facility, and aware of similar burglaries having occurred in Peru, later on the night of January 17, 2009, Ottawa police officer Kevin O'Connor drove to an Ottawa storage business, U-Store-It. Officer O'Connor did not see evidence of tampering with any sheds. He did see a gray GMC pick-up truck with a topper matching the description of the truck seen in Livingston county earlier that evening. The truck pulled onto the U-Store-It property and then sped away. O'Connor followed the truck and at 11:30 p.m. initiated a traffic stop for a bad muffler. The license plate number matched the plate number of the truck seen in Livingston County. Przybyla was driving and defendant was the passenger.

¶ 12 Defendant told Officer O'Connor he had been home all evening and Przybyla had come to his house around 9:30 p.m. They were on their way to Handy Foods. O'Connor told

defendant he knew the grocery had closed for the evening. Defendant then stated they had changed their minds and were going to Wal-Mart and used the U-Store-It property to turn around. O'Connor responded the direction the truck was headed when stopped was not the direction of Wal-Mart. O'Connor told defendant his version of events was unbelievable and the truck had been seen in Streator earlier that evening. Defendant said his daughter lived in Streator. O'Connor asked if defendant had gone to his daughter's house in Streator and he said "no." O'Connor gave Przybyla a warning and let them go. Ottawa police officer Patrick Hardy joined O'Connor at the scene. He testified nothing illegal was found in the truck, nor was there much of anything in the back of the truck.

¶ 13 On cross-examination, defense counsel played a video of Officer O'Connor's traffic stop. While the video was playing, defense counsel asked O'Connor what he was doing in the video, and O'Connor responded he asked defendant "to exit the vehicle so they could speak to him and search him, due to him being on parole and he consented to a search." O'Connor also testified during the video defendant explained Przybyla had been at his home around 9:30 p.m. and they were coming from his home. O'Connor knew the location of defendant's home from previous contacts.

¶ 14 When the video ended, defense counsel made an oral motion for mistrial based on O'Connor's testimony defendant was on parole. The trial court denied the motion, ruling the mention of parole did not violate an *in limine* order, had been elicited by defense counsel, and was made inadvertently. At the request of the defense, the court instructed the jury to disregard any mention of "parole" and barred future witnesses from mentioning "parole."

¶ 15 Testimony was presented on January 26, 2009, law enforcement officers from

Ottawa, Livingston County, Princeton, LaSalle County, and Peru met in Ottawa regarding defendant as a suspect in burglaries of self-storage units. At the meeting, two parole officers (identified to the jury as "officers of the State of Illinois") were asked to view stolen items from the Redwood burglaries and look for them at defendant's house when they next visited him. The officers did so, identified several items, and thereafter obtained a search warrant for January 27, 2009.

¶ 16 Peru police officer Dennis Hocking testified he was part of the law enforcement meeting as he had been investigating a series of burglaries of storage sheds in Peru. Defendant objected to this testimony about other crimes on grounds of relevancy. The trial court overruled the objection finding the LaSalle County burglaries were relevant as to *modus operandi*, common design, common plan or common scheme. Hocking then testified the Peru burglaries occurred between November 2008 and January 2009. In those break-ins, the shed locks were cut off and a new lock was placed on the door. Items taken included fishing equipment, tools, and an antique beer can collection. Hocking was present for the execution of the search warrant at defendant's house, but no property from LaSalle County burglaries was found during the search.

¶ 17 Livingston County sheriff's detective Tony Childress testified he attended the meeting with officers from various law enforcement agencies held in Ottawa. He was also present for the execution of the search warrant at defendant's house. He described how several Redwood storage shed victims were also present and identified their property during the search. Detective Childress also observed items reported missing by another victim.

¶ 18 Ottawa police officer Dave Gualandri was also present during the search and testified he thought defendant had been drinking beer immediately prior to the search.

¶ 19 At the conclusion of the search of his house, defendant was arrested and taken to the Ottawa police station. Police also arrested defendant's son, Joe Kelly, Jr. (Joe Jr.), after finding drugs in his pants pocket. At the police station, Detective Childress asked defendant about the Redwood break-ins and Officer Hocking questioned him about events in LaSalle County. Defendant waived his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and denied any knowledge of any of the break-ins for about 45 minutes. He then changed his version of events. Defendant admitted burglarizing storage sheds in Peru by breaking the locks and, afterward, replacing them with locks he bought at Menards. He admitted selling the antique beer can collection. Defendant then supplied certain details unknown to the police. Childress testified defendant also admitted he broke into the Redwood storage sheds in Livingston County with Przybyla. Defendant eventually stated he rode in Przybyla's truck to the Redwood storage facility four times within the past several months and burgled eight sheds there. The two men used bolt cutters to break the locks. The burglaries had been their joint idea.

¶ 20 Officer Hocking testified during his interrogation, defendant asked several times about his son and while defendant was giving details of the burglaries, he would return to "wondering and hoping Joe would not be charged with anything." Detective Childress stated defendant told the police the drugs found on Joe Jr. were his alone. Hocking told defendant they would relay all information regarding the drug find to the Ottawa police and it was the Ottawa police department's decision whether to charge Joe Jr. Near the end of the interrogation, Officer Gualandri brought Joe Jr. to defendant's interview room where defendant and Joe Jr. hugged and spoke briefly before Joe Jr. was released from custody.

¶ 21 After defendant's meeting with Joe Jr., defendant wrote out a summary of his oral

admissions of both the Peru and Redwood burglaries. Over a continuing defense objection, Detective Childress testified defendant confessed to committing five burglaries in Peru. Defense counsel argued Childress's testimony was irrelevant and involved uncharged offenses. The trial court overruled the objection, stating "[I]t's part of the admission." Defendant admitted the items found in his house were the items he and Przybyla had stolen from the storage sheds in Pontiac during the eight burglaries. Childress and Officer Hocking admitted defendant's admissions were more free-flowing after he saw his son.

¶ 22 Defendant's wife, Kathryn Kelly, testified (1) many of the items found in her and defendant's home and identified as stolen were either hers, bought at yard sales and flea markets, or brought into the home by Przybyla and (2) she was unaware they were stolen. Kathryn stated she would come home and find additional items in the house. Kathryn further testified on January 17, 2009, she was babysitting at her son Daniel's house from around 3 p.m. to 2 a.m. Defendant was at home babysitting their daughter's children. Kathryn stated Daniel lives near the U-Store-It facility in Ottawa and one need not drive by that facility to reach either Handy Foods or Daniel's house from her house. Kathryn also stated defendant drank beer rapidly during the execution of the search warrant.

¶ 23 During cross-examination of Kathryn, the prosecutor questioned her as to whether she ever knew defendant to go out to storage units. Kathryn replied, "There was an incident a long time ago." The following exchange ensued:

"Q. What kind of incident?

A. With his sister's storage shed.

Q. Was it broken into?

A. I actually don't recall everything that happened at that time.

But he did get into some trouble. But he has already paid for those crimes."

¶ 24 Defense counsel moved for mistrial and objected to the testimony based on relevancy. The trial court denied the motion for mistrial and instructed the jury to disregard any testimony defendant had past problems at storage sheds.

¶ 25 Joe Jr. testified he was arrested at the same time as defendant after drugs were found in his pants pocket. He was held at the Ottawa police station for a few hours, taken to see his father, and then released from custody. Joe Jr. also identified photographs of items from defendant's house, where he also lived, as having belonged to his parents for several months up to several years. He further stated Przybyla brought items into the house.

¶ 26 Two of defendant's other adult children also testified as to their father's whereabouts on January 17, 2009. Rachel Kelly testified defendant was babysitting her children at his house beginning at 3:30 or 4 p.m. Defendant called her between 9:30 and 10 p.m. to ask permission to buy pizza for the children. Rachel stated she could hear her mother's voice in the background. When she picked up her children around 11:30 p.m., she thought her mother was home. Rachel denied talking to her brother Dan or her father about the time she dropped off the children and Dan did not suggest the date and time to her.

¶ 27 Daniel Kelly identified fishing poles Przybyla left at his house during the time Przybyla was living out of his truck at defendant's house. Daniel later learned the poles were stolen. Daniel testified he had spoken with defendant at the jail about dates but denied telling Rachel what date to testify she dropped her children off at defendant's house. The State played

an audio recording of defendant's telephone call from jail to Daniel in which defendant told Daniel to tell Rachel the date. Daniel denied relaying that message to Rachel.

¶ 28 The State called Przybyla in rebuttal. He testified he knew about Redwood storage because he had been charged with a case there and pleaded guilty. When he was high on crack cocaine, he drove to Redwood and burglarized sheds by himself. Przybyla stated "[I]f [defendant] was there, what would I want to pay all this restitution myself?" He took items for his own personal profit. He admitted giving a confession implicating both himself and defendant to get out of jail to buy more drugs. Przybyla testified, despite his written statement to the contrary, defendant never asked for help in taking stolen items to be sold. Because he was homeless and staying with defendant, Przybyla stated he tried to give defendant some of the items he stole to pay rent. But he also stated defendant "didn't know that stuff was there."

¶ 29 Przybyla explained the police stop on January 17, 2009. He stated defendant was with him in his truck and he was turning around in the U-Store-It parking lot. They had been at Przybyla's junkyard which was nearby. They were heading back to Wal-Mart from the VFW, where they had been since about 4 p.m.

¶ 30 During the jury instruction conference, the trial court refused the defense-tendered jury instruction on theft as a lesser-included offense of burglary. The jury found defendant guilty of seven counts of burglary.

¶ 31 On January 12, 2010, the trial court heard and denied defendant's posttrial motion and then sentenced him to 7 concurrent 18-year terms of incarceration. At the March 15, 2010, continued sentencing hearing to determine restitution, the court *sua sponte* reduced the terms of incarceration to 16 years each. The court heard and denied defense counsel's motion to recon-

sider sentence. Thereafter, the court awarded sentence credit and ordered \$25,156.20 restitution, jointly and severally with that ordered for Przybyla. This appeal followed.

¶ 32

II. ANALYSIS

¶ 33

A. Failure To Prove Guilt Beyond Reasonable Doubt

¶ 34

Defendant argues the State failed to prove him guilty beyond a reasonable doubt as to one of the seven counts of burglary where it failed to establish an entry to the storage shed owned by Kristina Skeen alleged to have been the subject of a break-in. The standard for reviewing a guilty finding is after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8-9, 944 N.E.2d 319, 322 (2011). The standard is the same whether the evidence is direct or circumstantial. *People v. Campbell*, 146 Ill. 2d 363, 375, 586 N.E.2d 1261, 1266 (1992). A fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E.2d 304, 308 (2004).

¶ 35

A person commits burglary when, without authority, he knowingly enters or remains within a building or any part thereof, with intent therein to commit a felony. 720 ILCS 5/19-1(a) (West 2008); *Beauchamp*, 241 Ill. 2d at 8, 944 N.E.2d at 323. A burglary is complete upon entering with requisite intent, irrespective of whether the intended felony or theft is accomplished. *Beauchamp*, 241 Ill. 2d at 8, 944 N.E.2d at 323. Entry must be proved. *People v. Soznowski*, 22 Ill. 2d 540, 543, 177 N.E.2d 146, 147 (1961).

¶ 36

Defendant argues the evidence showed only that Skeen rented a storage unit for her daughter's belongings. In January 2009, Skeen received a message of a possible break-in and

informed her daughter. She then testified her daughter told her the lock was missing. This testimony was stricken from the record as hearsay after a defense objection. As defendant admits, an entry for purposes of a burglary conviction may be proved simply by "breaking the close," i.e., crossing the plane enclosing the protected space (See *People v. Parham*, 377 Ill. App. 3d 721, 730, 879 N.E.2d 1024, 1031 (2007)). However, the evidence presented here did not establish the close was broken or entry occurred to Skeen's shed.

¶ 37 The State did not present evidence defendant entered the interior of Skeen's shed. Likewise, the State failed to establish the condition of the shed either before or after the supposed break-in. The testimony did not establish this particular shed was entered or had been disturbed in any way.

¶ 38 The State argues evidence showed a lock was missing from Skeen's shed. However, no one specifically referenced Skeen's shed. Although Skeen testified the shed had a lock, she also stated she had never been to see the shed since she rented it. The State contends Detective Childress was asked by the State, "Now, you were questioned about the locks that were cut off that were Skeens' [*sic*] I think. You had, you showed one to us earlier?" and Childress answered "Yes." This is inaccurate. Childress never stated any lock he showed in court came from Skeen's storage shed.

¶ 39 The testimony presented did not establish Skeen observed the break-in at the shed, that Redwood employees observed evidence of a break-in as to that particular shed, or the police observed evidence of a break-in at that particular shed. Skeen's daughter did not testify. Overall, no evidence was presented from which a rational trier of fact could have found defendant guilty of burglarizing Skeen's storage shed. Defendant's conviction for burglary of Skeen's storage shed

is reversed.

¶ 40 B. Refusal To Tender Lesser-Included Theft Instruction

¶ 41 Whether a charged offense encompasses another as a lesser-included offense is a question of law requiring *de novo* review. *People v. Kolton*, 219 Ill. 2d 353, 361, 848 N.E.2d 950, 955 (2006). The giving of a lesser-included offense instruction to a jury is a matter resting within the sound discretion of the trial court. *People v. Castillo*, 188 Ill. 2d 536, 540, 723 N.E.2d 274, 276 (1999). Abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person could take the view adopted by the court. *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004).

¶ 42 A defendant is entitled to jury instructions on a lesser-included offense if the following two requirements are met: (1) the lesser offense is encompassed within the greater offense using the "charging instrument approach" and (2) the evidence at trial would permit a rational jury to both find the defendant guilty of the lesser offense and not guilty of the greater. *People v. Hamilton*, 179 Ill. 2d 319, 323-24, 688 N.E.2d 1166, 1169 (1997). Courts determine whether the lesser offense is described in the charging instrument. *Hamilton*, 179 Ill. 2d at 324, 688 N.E.2d at 1169. Theft is a lesser-included offense of burglary where, as here, the State charges a defendant with unauthorized entry with intent to commit a theft therein. A lesser-included offense is defined as "an offense which *** [i]s established by proof of the same or less than all of the facts *** than that which is required to establish the commission of the offense charged[.]" 720 ILCS 5/2-9(a) (West 2008).

¶ 43 Defendant bases his argument for a lesser-included instruction on the fact many stolen items were found at his house. Thus, he is guilty of theft by reason of exercising control

over property in the named victims' sheds with the intent to permanently deprive them of that property. See 720 ILCS 5/16-1(a)(1) (West 2008). Defendant argues this evidence is clear while evidence of whether he actually broke into the six storage sheds at the Redwood facility is disputed.

¶ 44 Defendant conveniently ignores his confession to the break-ins. Defendant attempted at trial to imply his confession was unreliable because he might have been drunk when he made that confession and he only did it in exchange for Joe Jr.'s release from custody. Defendant raised these arguments at the motion to suppress the confession prior to trial, and the trial court denied them. Defendant does not contest that decision here. His admission stands as evidence against him. This evidence was not really put into question despite Przybyla's testimony he committed the break-ins alone. Przybyla was impeached by evidence he previously made a confession not only implicating himself in the break-ins but also defendant. Defendant's evidence of an alibi was contradicted. Witnesses stated defendant was home babysitting and his wife was there also, while defendant's wife testified she was not home but was away from the house babysitting elsewhere. In addition, defendant and Przybyla's testimony differed as to their whereabouts prior to being stopped in Przybyla's truck on the evening of January 17, 2009.

¶ 45 While theft was clearly a lesser-included offense of the charged offense of burglary, it was not an abuse of discretion for the trial court to refuse to instruct the jury they could convict defendant of theft in this case. With defendant's admission to the burglaries, the jury could not have reasonably found him guilty of theft but not burglary.

¶ 46 C. Admission of Other-Crimes Evidence

¶ 47 Defendant's trial was replete with references to burglaries occurring in LaSalle

County while the burglaries charged occurred in Livingston County. Defendant argues the only purpose of the evidence of the LaSalle County burglaries was to show his propensity to commit burglary. Even assuming this other-crimes evidence was relevant to legitimate issues at trial, defendant argues nothing in the record suggests the trial court balanced the probative value of it against the prejudice from its admission. Further, the court did not instruct the jury, either orally or by written jury instruction, as to the limited purpose for which the other-crimes evidence was admitted. Defendant claims this is plain error.

¶ 48 Defendant objected to this evidence at trial, but failed to raise any claim of error in regard to the admission of other-crimes evidence in his posttrial motion. He has forfeited this claim of error. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). This is also true of his claim regarding a limiting instruction. *People v. Gonzalez*, 379 Ill. App. 3d 941, 953, 884 N.E.2d 228, 238 (2008).

¶ 49 Defendant argues the admission of other-crimes evidence is plain error, and this issue requires appellate review. However, where a defendant's claim is clearly forfeited, plain error review is not required unless "(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. Johnson*, 238 Ill. 2d 478, 484, 939 N.E.2d 475, 479 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

¶ 50 A defendant seeking plain error review has the burden of persuasion to show the

underlying forfeiture should be excused. *Johnson*, 238 Ill. 2d at 485, 939 N.E.2d at 480. The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law reviewed *de novo*. *Id.*

¶ 51 In support of his proposition admission of other-crimes evidence requires reversal of his convictions by this court, defendant argues the evidence is closely balanced. He contends the erroneous admission of other-crimes evidence carries a "high risk of prejudice" and, therefore, requires reversal unless the record shows no prejudice occurred. *People v. Lindgren*, 79 Ill. 2d 129, 140-41, 402 N.E.2d 238, 244 (1980). Even if a legitimate reason existed for the State to introduce other-crimes evidence, the inference of criminal propensity necessarily accompanying its use required weighing of its probative value against the potential for prejudice. *People v. Heard*, 187 Ill. 2d 36, 58, 718 N.E.2d 58, 71 (1999).

¶ 52 We acknowledge the risk of prejudice with the admission of other crimes evidence. In this case we do not see any issue that requires our review let alone a reversal of defendant's convictions.

¶ 53 The evidence in this case is not closely balanced and the other crimes evidence was legitimately admitted for purposes of showing the trajectory of the law enforcement officers' investigation of the crimes charged and how it led them to defendant. As noted earlier, defendant confessed to the charged crimes. At trial he intimated his confession was not quite entered freely. However, the confession remained as his attempts to discredit it failed. In addition, his evidence of an alibi was internally contradictory.

¶ 54 The defendant's confession, in addition to the State's evidence, combined to make the total evidence far from closely balanced. We see no reason to consider the issue presented

regarding admission of other crimes evidence where it has been forfeited.

¶ 55 D. Failure To Declare a Mistrial

¶ 56 Defendant contends error occurred when the jury heard several times about defendant's prior police contacts. Defendant twice sought a mistrial: first, when the jury learned defendant was on parole at the time of the charged offenses; and second, when defendant's wife mentioned defendant's prior involvement with crimes involving storage sheds. Defendant contends it was an abuse of discretion on the part of the trial court to not grant a mistrial.

¶ 57 A trial court's refusal to grant a mistrial is reviewed for abuse of discretion. *People v. Sims*, 167 Ill. 2d 483, 505, 658 N.E.2d 413, 423 (1995). The court's decision will not be disturbed unless it is clearly an abuse of discretion (*People v. Bishop*, 218 Ill. 2d 232, 251, 843 N.E.2d 365, 376 (2006)) and an abuse of discretion occurs only when the court's decision is arbitrary, fanciful, or unreasonable. *People v. Britt*, 265 Ill. App. 3d 129, 147, 638 N.E.2d 282, 295 (1994).

¶ 58 Officer O'Connor testified he stopped Przybyla's truck on the night of January 17, 2009. As the video of his traffic stop played in court, O'Connor testified, in response to defense counsel's question as to what he was doing in the video, he asked defendant "to exit the vehicle so they could speak to him and search him, due to him being on parole and he consented to a search." There was no motion *in limine* preventing O'Connor from mentioning parole and he appears to have done so inadvertently in explaining his actions. As the trial court noted, the jury was watching the video closely and not focusing on O'Connor at the time he made his statement. After denying defendant's motion for a mistrial, and at the request of defense counsel, the court gave a curative instruction to the jury to disregard all mention of parole and, out of the presence

of the jury, barred future witnesses from mentioning parole.

¶ 59 Additional mention of past involvement with the law occurred when defendant's wife, Kathryn, testified for the defense. During cross-examination by the State, the State asked Kathryn if she ever knew defendant to go out to storage units, and she stated, "There was an incident a long time ago." The prosecutor then asked, "What kind of incident?" Kathryn answered, "With his sister's storage shed." When the prosecutor asked, "Was it broken into?" Kathryn replied, "I actually don't recall everything that happened at that time. But he did get into some trouble. But he has already paid for those crimes."

¶ 60 Outside the presence of the jury, defendant asked for a mistrial. When the motion was denied, defendant objected to the testimony as being beyond the scope of his direct examination of the witness. The State argued its intention was to ask Kathryn about defendant's being "caught in January at another storage facility, if he had any reason to be out there." The prosecutor expressed as much surprise as defense counsel in reaction to Kathryn's testimony. The trial court admonished Kathryn not to mention defendant's prior convictions. The court instructed the jury to disregard any past problems of defendant at storage sheds.

¶ 61 Defendant contends the damaging nature of O'Connor's and Kathryn's testimony in light of the large amount of other-crimes evidence made the trial court's remedial action insufficient to cure resulting prejudice. Thus, the court abused its discretion by denying a mistrial.

¶ 62 We do not agree. Once a jury has heard prejudicial and improper evidence or comments, a trial court cannot "unring the bell" (*People v. Dresher*, 364 Ill. App. 3d 847, 860, 847 N.E.2d 662, 673 (2006)), and situations exist where improper questions are so damaging a

court cannot cure the prejudicial effect (*People v. Hall*, 194 Ill. 2d 305, 342, 743 N.E.2d 521, 542 (2000)). However, in this case, the trial court did not abuse its discretion in not granting a mistrial.

¶ 63 A mistrial should be declared only as a result of an occurrence at trial of such character and magnitude the party seeking it is deprived of his right to a fair trial and it appears the jury was so influenced and prejudiced it could not have been fair and impartial and the damaging effect could not be cured by admonitions and instructions. *People v. Buress*, 259 Ill. App. 3d 217, 224, 630 N.E.2d 1143, 1147 (1994). As the trial court noted, O'Connor's testimony was made while the jury was watching a video and not concentrating on him. The court responded by admonishing the jury to disregard any comment concerning "parole," using language suggested by defendant. At the end of all the evidence, the court instructed the jury it should disregard any testimony the court refused or struck. The jury is presumed to have followed these instructions. See *People v. Taylor*, 166 Ill. 2d 414, 438, 655 N.E.2d 901, 913 (1995).

¶ 64 Kathryn's testimony came as a surprise to both the State and defendant. The prosecutor did not deliberately seek out this testimony. While the trial court denied defendant's request for a mistrial, it also instructed Kathryn to make no further reference to prior crimes. The court then instructed the jury "to disregard the responses to the last questions regarding past problems of the defendant at certain sheds in the past. You are not to consider this evidence in determining the facts of this case." This handling of the surprise testimony does not represent an abuse of discretion. Further, Kathryn's reference to "paid for those crimes" does not necessarily refer to a criminal conviction but could refer to reimbursement or defendant paying his sister for

any damage. Normally, a cautionary instruction eliminates any prejudice. See *Buress*, 259 Ill. App. 3d at 224, 630 N.E.2d at 1147-48.

¶ 65 Finally, as noted previously, the evidence in this case was not closely balanced. Defendant confessed to the charged crimes and other evidence supported his confession. The two isolated comments of O'Connor and Kathryn, given defendant's confession, could not have unfairly influenced and prejudiced the jury so as to have kept it from fairly and impartially making a decision in this case.

¶ 66 III. CONCLUSION

¶ 67 We affirm in part and reverse in part the trial court's judgment against defendant. We reverse defendant's conviction on count VII for the burglary of the storage shed owned by Kristina Skeen. We affirm his convictions on the remaining six counts. We remand with directions to issue an amended sentencing judgment deleting conviction and sentence on count VII. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 68 Affirmed in part, reversed in part, and cause remanded with direction.