

No. 1-12-0515

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Appeal from the  
 ) Circuit Court of  
 Plaintiff-Appellee, ) Cook County  
 )  
 v. ) No. 11 CR 13036  
 )  
 ALEX GILBERT, ) Honorable  
 ) Mary Margaret Brosnahan,  
 Defendant-Appellee. ) Judge Presiding.

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Probable cause supported defendant's arrest for soliciting unlawful business where officers heard him yell "got them rocks," which the officers knew was slang for crack cocaine, while standing on a public street in a high narcotics area. The trial court's rulings on motions *in limine* did not prevent defendant from presenting a defense where the evidence admitted adequately enabled defendant to argue his theory of defense. Defendant's prior first-degree murder conviction was admissible for impeachment purposes because its probative value outweighed any potential prejudice. Total amount of fees, fines and costs corrected.
- ¶ 2 Following a jury trial, defendant Alex Gilbert was convicted of possession of a controlled

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substance and the trial court sentenced him to 30 months' imprisonment. On appeal, Gilbert claims that the trial court erred in denying his motion to quash arrest and suppress evidence because no probable cause existed for his warrantless arrest where the arresting officers heard him yell "got them rocks" on a public street in a high narcotics area. Gilbert also claims that the trial court erred in granting the State's motion *in limine* precluding him from introducing into evidence that: (1) a prior arrest by the same officers was dismissed; (2) the officers cursed at him, hit his car and forced his vehicle's window down during the prior arrest; and (3) the arresting officers said they would make the second arrest "stick." Gilbert further claims that the trial court erred in admitting into evidence his prior conviction for first-degree murder, but excluding the fact that his conviction was based on an accountability theory. Lastly, Gilbert claims that the total amount imposed as fees, fines and costs should be reduced by the: (1) \$5 per day presentencing credit; (2) \$200 DNA assessment fee and (3) \$5 electronic citation fee. For the reasons that follow, affirm in part, vacate in part, and correct the order assessing fines.

¶ 3

#### BACKGROUND

¶ 4 This case stems from a warrantless arrest of Gilbert on July 19, 2011, for solicitation of unlawful business. During a custodial search performed at the time of the arrest, three small knotted plastic bags of suspect crack cocaine were recovered from the pocket of Gilbert's short's. The bags tested positive for cocaine and Gilbert was charged with possession of .1 gram of cocaine. The parties stipulated that the contents of one of the bags tested positive for cocaine and weighed .1 gram. The total weight for the three bags was .3 gram.

¶ 5 On October 21, 2011, Gilbert filed a motion to quash arrest and suppress evidence

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asserting that the officers did not have an arrest warrant and lacked probable cause to arrest him. Gilbert also moved to suppress the three knotted plastic bags containing cocaine the officers removed from him during the custodial search.

¶ 6 On November 1, 2011, the trial court held a hearing on Gilbert's motion to quash arrest and suppress evidence. During the hearing, Gilbert testified that on July 19, 2011 at approximately 8:11 p.m., he was at 81st street and Racine standing outside and to the side of a liquor store talking to a woman named Linda about cigarettes. People were entering and leaving the liquor store at that same time. While he was talking to Linda, he saw an unmarked police vehicle drive down Racine, turn left onto 81st street and stop right in front of him. Gilbert recognized the officers in the vehicle from a previous arrest where they arrested him after they put a bag of "crack" on him. According to Gilbert, that case was dismissed.

¶ 7 Because Gilbert recognized the officers, he started to walk toward Racine, jumped on a bicycle leaning against the liquor store that belonged to a boy that he knew and started leisurely riding the bicycle down Racine. Gilbert left the area because the officers "put a bag on me the first time. I got into an altercation with these officers. I wasn't going to stick around and stand there and let them bother me again." Near the intersection of 81st and Racine, the officers' vehicle jumped the curb and cut him off. The officers exited the vehicle and one of them asked him "oh, did you get your car out the pound yet?" Gilbert recognized that officer as the one who arrested him in the prior case that was dismissed. According to Gilbert, the following conversation occurred between him and the officer:

"the [officer] asked if I got my car out the pound. I told him 'no, I haven't got my

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car out of the pound.' They said, 'what happened to that case?' \*\*\* I said, 'man, the case got dismissed.' He said, 'oh, that case got dismissed, huh, we gone make sure this one here don't.' "

One of the officers then waved a piece of paper in front of his face and said "we gone make sure this time it stick[s]." Gilbert disputed that he yelled "got them rocks" and that he was either selling or carrying narcotics.

¶ 8 According to Officer Ceasar Candelario, he and his partner, Officer John Grib, were patrolling the vicinity of 81st and South Racine in an unmarked police vehicle at approximately 8:10 p.m. on July 19, 2011. The particular area the officers were patrolling was known as a high narcotics area. Officer Grib drove the vehicle and Officer Candelario sat in the passenger seat. The officers were dressed in plain clothes, but their vests and stars were exposed. While at a stop light at 81st and Racine with the vehicle's windows rolled down, Officer Candelario observed Gilbert riding a bicycle in the middle of the street and heard him clearly yell from a distance of 30 to 50 feet "got some rocks, got them rocks." Gilbert was riding eastbound on 81st street facing the police vehicle that was traveling north bound on Racine. Because Gilbert was facing the vehicle, Officer Candelario also saw his mouth form the words "got them rocks." Based on his experience on the job, Officer Candelario knew "rocks" was a street term for crack. Officer Candelario saw two unknown African American males standing on the sidewalk near a gas station in the same area where he heard Gilbert yell "got them rocks." The officers observed Gilbert cut through the gas station's parking lot and proceed southbound on the sidewalk. The vehicle made a u-turn, followed Gilbert and stopped him near 82nd street. After the officers

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exited the vehicle, Officer Candelario immediately placed Gilbert in handcuffs and Officer Grib performed a custodial search. Officer Grib recovered three knotted plastic bags containing a white rock-like substance, suspect crack cocaine, from Gilbert's front left shorts pocket. Officer Candelario only recognized Gilbert from the prior arrest after Gilbert told him who he was and that Gilbert recognized Officer Candelario. Regarding the prior arrest, Officer Candelario recalled that Gilbert exited the vehicle right after the officers requested him to do so. The trial court asked Officer Candelario whether he knew on July 19th if the prior case had proceeded to a preliminary hearing or indictment, and he responded that he did not remember, but believed that the prior case was dismissed after the probable cause hearing.<sup>1</sup>

¶ 9 At the end of the hearing, the trial court concluded that Officer Candelario's testimony was more credible than Gilbert's testimony. The trial court denied Gilbert's motion to quash arrest and suppress evidence finding that there was probable cause for the arrest.

¶ 10 Prior to trial, Gilbert filed a motion *in limine* to preclude the State's use of his prior first-degree murder conviction for impeachment purposes at trial claiming that the unfair prejudice outweighed the probative value of the prior conviction. Gilbert was convicted on November 10, 1993, when he was 14 years old and he was sentenced to 30 years' imprisonment. After serving his sentence, Gilbert was released on February 26, 2010. In response to Gilbert's motion, the State argued that impeaching Gilbert's credibility was critical because his trial testimony would vastly differ from the arresting officers' testimony. The trial court reserved ruling on this issue.

¶ 11 The State also filed a motion *in limine* seeking, in part, to: (1) introduce into evidence

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<sup>1</sup> In fact, the prior case was *nolled* when the arresting officers did not appear in court.

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Gilbert's prior murder conviction and 30 year sentence if Gilbert testified; (2) preclude Gilbert from introducing at trial that the same officers arrested him for possession of a controlled substance on June 16, 2011; (3) preclude Gilbert from introducing at trial the disposition of the June 16th arrest; and (4) preclude Gilbert from introducing at trial any hearsay statements the arresting officers allegedly made to Gilbert in connection with the current arrest.

¶ 12 The trial court denied the State's request to preclude Gilbert from discussing the June 16, 2011 arrest because that information related to the officers' possible bias. The following colloquy occurred regarding the disposition of June 16, 2011 arrest:

"MR. FINN [Defense counsel]: Our theory of our defense is that Officer Grib did not recover these narcotics from my client, and one of the reasons why he said that my client was in possession has to do with his previous incident where there was a lot of conflict between him and Officer Grib and becomes aware of, oh, that case did not proceed, that case was dismissed. We are going to make sure that this one doesn't, and that's really what we are saying in this case. And so I think \*\*\* that [it] is kind of important that the first case is dismissed. We want to be able to talk about that.

THE COURT: At this point I'm not going to allow the disposition to come in because I think it could be unfairly argued that there was some kind of Court ruling that it was a bad arrest, *et cetera*, and the State is proffering that it was simply a *nolle*, the officers were not in court, [ ] and that would give an unfair impression to the jury that some trier of fact had made a ruling on the merits, and therefore that that was a bad case, so to speak. If something changes with respect [ ] to their testimony and you feel that

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based on the direct or even your cross that it has become relevant somehow, I'm going to ask that you ask me for a sidebar and I'll listen to any additional argument that you might have. But right now I don't feel that the disposition of the case is relevant. You can still have your client, should he chose to testify, testify what the officers allegedly said to him, *et cetera*. So I am not taking that away from you, of course, but the actual disposition itself, I think we would be getting into a mini trial within a tr[ia]l to have officers testify as to why the Stated *nolled* the case. So I'm not going to let that in."

¶ 13 Regarding the admissibility of the prior murder conviction, the record reflects that the trial court engaged in a balancing test. As part of that balancing, the trial court acknowledged that the serious nature of Gilbert's prior first-degree murder conviction weighs heavily toward potential prejudice against Gilbert by the jury, but also recognized the importance of informing the jury of Gilbert's recent release from prison on February 10, 2010. The trial court stated that the case would hinge on the credibility of the witnesses and it would be Gilbert's word against the arresting officers' words. The trial court ruled that the prejudicial effect of this evidence did not outweigh the probative value of the prior conviction and held that the prior conviction was admissible if Gilbert testified. The trial court also denied Gilbert's request to admit into evidence that he was convicted of first-degree murder based on an accountability theory because such evidence would entail the jury's consideration of the circumstances of Gilbert's murder conviction - evidence not relevant to any issue in the current prosecution. The trial court reasoned that if Gilbert informed the jury that he was convicted via accountability, then the door would be open for the State to inform the jury that Gilbert pointed the victim out to a friend who

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then shot the victim in the head three times. The trial court reiterated that the purpose for admitting a prior conviction into evidence was for impeachment purposes and only the fact of Gilbert's prior murder conviction would be admissible.

¶ 14 During trial, Officer Candelario's testimony was substantially consistent with his testimony during the hearing on Gilbert's motion to quash arrest and suppress evidence. Also, Officer Grib's trial testimony corroborated Officer Candelario's testimony. The officers reiterated that based on their experiences on the job, as soon as they heard the phrase "Got them rocks," they knew that the crime of solicitation of unlawful business on a public way occurred. During the custodial search, Officer Grib also recovered \$10 in addition to the suspect cocaine inside the three knotted plastic bags.

¶ 15 The officers also elaborated on how they recognized Gilbert during the second arrest. While Officer Grib was conducting the custodial search, he asked Gilbert for identification. Gilbert responded that Officer Grib knew him and after looking at his identification and face, Officer Grib recognized him. Officer Candelario only recognized Gilbert after he told him that they "grabbed" him before. The officers were familiar with Gilbert because on June 16, 2011, they approached his vehicle, which was pulled over in an alley, following a call of disturbance involving an individual matching Gilbert's description. After approaching the vehicle, the officers asked Gilbert to step out of the vehicle and he complied by exiting out of the driver's side door. On that occasion, the officers arrested Gilbert for possession of a controlled substance.

¶ 16 Gilbert's trial testimony was substantially consistent with his testimony during the hearing on the motion to quash arrest and suppress evidence. Gilbert elaborated that on July 19, 2011, at

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approximately 8 or 8:05 p.m., he was leaving the gas station at 81st and Racine to meet a woman named Linda across the street because they pooled their money to buy a pack of cigarettes.

When Gilbert was with her, she started shouting "here come the police; here come the police." In response, Gilbert looked around and saw an unmarked police vehicle. He continued his conversation with Linda, but then saw the unmarked police vehicle make a left turn and stop right in front of him. Because Gilbert recognized the officers as the ones who arrested him in June, he began to walk on the sidewalk east toward 81st and Racine. Gilbert saw a bicycle leaning against the side of the liquor store and recognized that it belonged to a young boy that he knew from the neighborhood. Because he knew the boy, Gilbert jumped on the bicycle and started riding it on the sidewalk still eastbound on 81st and then southbound on Racine. Gilbert wanted to get away from the officers because "they had lied on me once I am not fixing to stick around and wait on them to lie on me again. I am just not going to do that." When Gilbert got to the middle of Racine, he looked back and saw the unmarked police vehicle exit the gas station. Gilbert thought the officers were gone so he kept riding the bicycle down Racine planning to go around the block to return the bicycle. He was not riding the bicycle very fast; in fact, an individual walking could have kept up with him. Gilbert was not trying to flee because he did not have anything on him.

¶ 17 The police vehicle slowly drove right behind Gilbert and followed him to 82nd street where the vehicle jumped the curb and stopped him. According to Gilbert, the officers got out of the vehicle and asked him "did you get your car out of the pound yet?" The trial court sustained the State's objection to Gilbert's statement.

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¶ 18 Gilbert continued by stating that the officers questioned him about the prior arrest.

According to Gilbert, Officer Candelario asked him "what happened to your case?" Following the State's objection, the trial court held a sidebar during which it reiterated its ruling that Gilbert would be permitted to testify to statements made by the officers during the July 19 arrest, but not statements made during the June 16 arrest. With respect to the June 16 arrest, the following colloquy occurred:

"MR. FINN: It was my intention to ask [Gilbert] questions about that incident.

Again our theory relies on the fact that he defied the authority of the police officers and in exchange for doing that they put drugs on him.

THE COURT: I understand your theory. You can talk about the fact that he was arrested and *et cetera*. I don't want you to get into conversations that the police officers said to him in June and do a play by play. He wants to explain he was in the car he wouldn't get out. He was in there for 25 minutes. You can have him testify to that. As I said, I don't want him saying in June officer Grib[ ] said this to him, and Cand[e]lario said this, and get into a second trial of the June incident. So you can layout what happened in June without going into all the conversations of June.

MR. FINN: But he can say he was ordered a certain thing. He was ordered to do something. He can't say what they said.

THE COURT: Right."

After the sidebar, defense counsel resumed questioning Gilbert, who testified that when the conversation with the officers ended during the July arrest, they arrested him, but they did not

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search him.

¶ 19 Defense counsel again questioned Gilbert about the June 16th arrest. Gilbert stated that the same two officers arrested him on that day after they pulled him over and ordered him to exit his vehicle. He refused to, though, informing the officers that they needed a warrant to search his vehicle. The officers then started beating and banging on his vehicle asking him who he was to tell them how to do their job. Gilbert was in his vehicle for approximately 25 minutes and the officers "were out there beating and banging telling me to get the F. out of the car and all that stuff there." The State objected to Gilbert's last remark and the trial court sustained the objection instructing defense counsel to "pose leading questions as we discussed at the sidebar." Defense counsel then elicited the following testimony:

"MR. FINN: Without saying what anybody said, what happened. How did they get you out of the car?"

A. They came to my car. See I had expired stickers on my plates. So they came to my car and was like here's your ticket for your expired sticker.

MS. RIVERA [Assistant State's Attorney]: Objection.

MR. FINN: You can't say what they said.

A. They came to my car and was like handing me a piece of paper.

\*\*\*

A. They came to the passenger side.

MR. FINN: Then what happened?

A. I cracked my window a little bit about this much so they could slide the paper

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in there. Candelario, the bald head guy, he put his hands in my window, and put all his weight down on my window, and forced my window down, reached in, opened the door, opened the door and said get the f\*\*\* out of the car.

MR. REYNA: Objection.

THE COURT: Sustained."

Returning to the July 19th arrest, Gilbert insisted that he did not have narcotics in his possession and that the officers did not search him. Gilbert also stated that in 1992 when he was 14 years old, he was arrested for first degree murder and was convicted for that offense in 1993.

¶ 20 After the close of evidence, but before closing arguments, defense counsel made an offer of proof that Gilbert would have testified that Officer Candelario told him during the July arrest that "[W]e're going to make sure that this case sticks, or this one sticks." Following deliberations, the jury found Gilbert guilty of possession of a controlled substance.

¶ 21 On January 17, 2012, Gilbert filed a motion for a new trial asserting that the trial court did not allow him to present a defense because he was precluded from: (1) presenting evidence that the officers planted the narcotics on him in retaliation for his disrespect toward them during the June 16th arrest; (2) introducing into evidence that his prior first-degree murder conviction was based on an accountability theory; and (3) introducing into evidence that his prior and recent arrests were by the same officers and that his prior arrest was dismissed at preliminary stages. On January 27, 2012, the trial court denied Gilbert's motion and sentenced him to 30 months' imprisonment. Gilbert timely appealed.

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¶ 22

ANALYSIS

¶ 23 Gilbert claims that the trial court erred in denying his motion to quash arrest and suppress evidence because the officers lacked probable cause to arrest him for soliciting unlawful business under Chicago Municipal Code § 10-8-515 (added April 1, 1998). The Code provides in relevant part:

"(a) No person may: (I) stand upon, use or occupy the public way to solicit any unlawful business \*\*\*.

(b) As used in this section, 'unlawful business' means any exchange of goods or services for money or anything of value, where the nature of the goods or services, or the exchange thereof, is unlawful. Unlawful business includes, but is not limited to, prostitution or the illegal sale of narcotics. For purposes of this section, 'soliciting' may be by words, gestures, symbols or any similar means."

Chicago Municipal Code § 10-8-515(a), (b) (added April 1, 1998).

Gilbert asserts that hearing someone yell "got them rocks" in a high narcotics area where other individuals were present was insufficient to establish probable cause for his arrest. Because his arrest was illegal, Gilbert claims that the cocaine found on his person following a custodial search must be suppressed requiring reversal of his conviction for possession of a controlled substance.

¶ 24 An arrest without a warrant is proper only if it was supported by probable cause. *People v. Jackson*, 232 Ill. 2d 246, 274-75 (2009). Officers have probable cause to effectuate an arrest where "the facts known to the officer at the time of the arrest are sufficient to lead a reasonably

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cautious person to believe that the arrestee has committed a crime." *Id.* at 275. The existence of probable cause is determined based on the totality of the circumstances at the time of the arrest.

*Id.* Assessing whether probable cause exists involves commonsense considerations, and determining the probability of criminal activity rather than proof beyond a reasonable doubt of such criminal activity. *People v. Grant*, 2013 IL 112734, ¶ 11; *Jackson*, 232 Ill. 2d at 275. An officer's knowledge based on his law enforcement experience is a relevant consideration in a probable cause analysis. *Grant*, 2013 IL 112734, ¶ 11.

¶ 25 This court applies a two-part standard of review relating to a trial court's ruling on a motion to quash arrest and suppress evidence because mixed questions of fact and law are presented. *Grant*, 2013 IL 112734, ¶ 12. Great deference is given to the trial court's findings of historical facts, and we will reverse those findings only if they are against the manifest weight of the evidence. *Id.* The trial court's ultimate ruling on a motion to suppress involving probable cause is reviewed *de novo*. *Id.*

¶ 26 As a preliminary matter, the State claims that Gilbert forfeited review of this issue because the claim was not included in his posttrial motion and he failed to argue review under plain error. Gilbert concedes that he failed to include his claim that no probable cause existed for his arrest in the posttrial motion, but asserts that filing the pre-trial motion to quash arrest and suppress evidence along with the hearing on that motion was sufficient to preserve review of the error. The law is well-established that to preserve an issue for review, the party must object at trial and include the claim of error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Because Gilbert failed to include the error in the posttrial motion, he forfeited our review

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of the error. *People v. Hudson*, 157 Ill. 2d 401, 434-35 (1994).

¶ 27 Gilbert, though, asserts in his reply brief that the error may be reviewed under the plain error doctrine. Gilbert is correct that reviewing courts may consider unpreserved errors, even when a party first raises plain error in a reply brief (*People v. Ramsey*, 239 Ill. 2d 342, 412 (2010)), where: "(1) 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) the 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. Herron*, 215 Ill. 2d 167, 186-87 (2009). However, the first step in a plain error analysis is to determine whether an error occurred at all because without error there can be no plain error. *People v. Wade*, 131 Ill. 2d 370, 376 (1989). Here, even if we were to relax the forfeiture rule on the basis that Gilbert raised his contention during the trial proceedings, but not in his posttrial motion, the result would be the same because we find no error.

¶ 28 Our supreme court's recent decision in *People v. Grant* (2013 IL 112734) is dispositive. In *Grant*, the court held that an officer observing the defendant on a street corner yelling "dro, dro" to a passing vehicle in an area known as a "highly used narcotics sales spot" amounted to sufficient probable cause to arrest the defendant for solicitation of unlawful business in violation of section 10-8-515 of the Chicago Municipal Code. *Id.* at ¶¶ 4, 15. The court reasoned that traditional indicia of drug possession or sales is not required; instead, all that is required are facts sufficient to lead a reasonably cautious person to believe that the arrestee solicited unlawful business in violation of the code. *Id.* at ¶ 22.

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¶ 29 Relying on *Grant*, we find that the officers had probable cause to arrest Gilbert based on the totality of the circumstances at the time of arrest. The record reveals that Officers Candelario and Grib heard Gilbert yell "got them rocks" while he was on a public street. Both officers were experienced in narcotics transactions and based on their experiences, they knew that "rocks" was the street term for cocaine. Further, the officers heard Gilbert shout that from a distance of approximately 30-50 feet in an area known for high narcotics. Similar to *Grant*, there is nothing in the officers' testimony to support a finding that they acted unreasonably under the circumstances; rather, the facts at the time of Gilbert's arrest would have led a reasonably cautious person to believe that he committed the offense of soliciting unlawful business. The fact, as Gilbert argues, that he was not directing his solicitation to a particular person or persons is irrelevant. Applying the analysis of *Grant* where the defendant's arrest involved a factual scenario similar to this case and both defendants were arrested for committing the same offense, we conclude that the facts surrounding Gilbert's arrest are sufficient to support a finding of probable cause for his arrest. Consequently, the trial court did not err in denying Gilbert's motion to quash arrest and suppress evidence.

¶ 30 B. Right to Present a Defense

¶ 31 Gilbert contends that the trial court's rulings denied him the right to present his defense that the officers planted the drugs on him in retaliation for his defiant behavior during a prior arrest. Specifically, Gilbert claims that by granting the State's motion *in limine*, the trial erred in excluding the following evidence: (1) that the charges relating to the June arrest were dismissed; (2) that the officers cursed at him, hit his car and forced his vehicle's window down during the

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June arrest; and (3) that the officers said that they would make this arrest "stick" when they arrested him in July. Gilbert maintains that this evidence was relevant and crucial to his defense.

¶ 32 Although the parties agree that Gilbert raised this claim in his posttrial motion, the State contends that Gilbert forfeited our review of his claim of error because he failed to raise the issue during trial. Regardless of whether a motion *in limine* is granted or denied, the filing of that motion alone fails to preserve an issue for our review. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 471 (2001). Waiver, instead, results where a party fails to make an adequate offer of proof regarding the excluded evidence in the trial court. *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003); *Sinclair*, 325 Ill. App. 3d at 471; *Goad v. Evans*, 191 Ill. App. 3d 283, 298 (1989). An adequate offer of proof requires counsel to inform the trial court of the substance of a witness' anticipated answer. *Snelson*, 204 Ill. 2d at 23.

¶ 33 Here, a review of the record reveals that defense counsel made an adequate offer of proof regarding the excluded testimony in the trial court. At trial, defense counsel acknowledged that he should have made an offer of proof earlier in the proceedings and not after the close of evidence, but the trial court, nonetheless, allowed him to make the offer of proof. Defense counsel offered that Gilbert would have testified that Officer Candelario or Grib stated that they were "going to make sure that this case sticks, or this one sticks" during the July 19th arrest. The trial court made the offer of proof part of the record. Although counsel did not separately state that he was specifically seeking to admit into evidence the dismissal of the prior case, it is apparent from the offered testimony that the prior case was dismissed and the trial court knew the nature of that evidence. By making this offer of proof, Gilbert revisited the trial court's earlier

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ruling excluding the evidence. Thus, counsel made a sufficient offer of proof and the issue was not forfeited.

¶ 34 A defendant has the right to present the details of his theory of a defense to the jury to enable it to make an informed judgment. *People v. Makiel*, 358 Ill. App. 3d 102, 114-15 (2005). Limiting a defendant's cross-examination of a witness' potential bias, motive or interest may violate a defendant's constitutional right to confront the witnesses against him guaranteed by both the federal and state constitutions. *Id.* at 115, citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. A defendant, though, does not have absolute rights under the confrontation clause; rather, a defendant has the opportunity for effective cross-examination, but not to a cross-examination that is effective in whatever way, and to whatever extent, that the defense may desire. *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). The relevant analysis in assessing the constitutional sufficiency of a cross-examination is to determine what the defendant was allowed to do and not what he was prohibited from doing. *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999). A defendant's rights are not violated where the record demonstrates that the jury was made aware of adequate factors concerning the relevant areas of impeachment of a witness, but the defendant was prohibited from pursuing other areas of inquiry. *Id.*

¶ 35 Gilbert urges us to review this issue *de novo* because deprivation of the right to present a defense amounts to a constitutional error. The crux of Gilbert's issue on appeal, though, is that the trial court erred in granting the State's motion *in limine* barring admission of testimony and evidence. Because evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion, we will not reverse a trial court's evidentiary ruling absent an abuse of discretion.

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*People v. Harvey*, 211 Ill. 2d 368, 392 (2004). A trial court abuses its discretion "where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citation]." *People v. Becker*, 239 Ill. 2d 215, 234 (2010). However, we note that the outcome of this case would be the same even if we were to apply the more strict *de novo* review.

¶ 36 In this case, the trial court's rulings did not erroneously limit Gilbert's ability to present a defense. Gilbert relies heavily on this court's decision in *People v. Averhart* (311 Ill. App. 3d 492, 494 (1999)) where the trial court granted the State's motion *in limine* to limit cross-examination of the arresting officer relating to a prior arrest. In that case, the defendant filed a complaint with the office of professional standards (OPS) of the Chicago police department against an officer claiming that the officer physically abused him, verbally abused him and falsely arrested him. *Id.* at 494. The trial court allowed the defendant to refer to the prior arrest only as an "encounter" and prohibited the defense from disclosing the facts underlying the OPS complaint, but allowed the defense to indicate that "serious charges" were brought against the officer. *Id.* The trial court also precluded the defendant from introducing evidence that he was found not guilty of possession of a controlled substance from the prior arrest. *Id.* at 495. The defendant's theory at trial for the second arrest was that the filing of the OPS complaint and what transpired during the first arrest were relevant to establish the officer's bias in the second case. *Id.* at 496. This court concluded that the jury was unaware of adequate factors concerning relevant areas of impeachment to determine the officer's credibility, such as the violent nature of the previous encounter between defendant and the officer, and were, instead, left to speculate

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about what transpired during the prior arrest. *Id.* at 498. This court held that limiting cross-examination of the officer that may have revealed potential bias and raised credibility issues was for all practical purposes an evisceration of defendant's theory of the case. *Id.* at 499.

¶ 37 Gilbert's reliance on *Averhart* is misplaced. Unlike this case where Gilbert's prior arrest was *nolle prossed*, the defendant in *Averhart* was found not guilty of the possession charge. *Id.* at 494. Thus, the charges against the defendant in *Averhart* were dismissed after trial, and the prior disposition was thus relevant to assess the officer's potential bias. The defendant in *Averhart* also filed a complaint with the police department relating to the officer's alleged abuse and the investigation could be reopened at any time. *Id.* at 494, 498. The defense in *Averhart* argued that the officer was motivated to plant narcotics on the defendant to discredit him and preclude any further investigation into the OPS complaint. *Id.* at 498.

¶ 38 In contrast, in this case, Gilbert's theory was that the officers planted the narcotics on him because of his defiant behavior during the prior arrest. Thus, the actual disposition of the prior arrest is irrelevant to Gilbert's theory of the case or whether he possessed narcotics on July 19th, particularly in light of the fact that the charges were dropped because the officers did not appear in court. Also, unlike *Averhart* where the defendant was not even permitted to discuss the officer's conduct during the prior arrest, Gilbert did, in fact, describe the officers' conduct and was permitted to tell the jury his version of events with respect to both the June 16th and July 19th arrests. For these reasons, we are not persuaded by Gilbert's reliance on *Averhart*.

¶ 39 Here, the record also rebuts Gilbert's claim that the trial court precluded him from presenting a defense. During the hearing on the motion to quash and suppress evidence, the trial

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court informed defense counsel that the disposition of the prior arrest would not be allowed into evidence because the case was *nolled*, which could have created the incorrect impression that the dismissal was based on the circumstances of Gilbert's prior arrest. Contrary to Gilbert's assertion, the prior case was not dismissed after a hearing on the merits, but was dismissed because the officers did not appear in court. Because there was no actual disposition on the merits relating to the prior arrest, we agree with the trial court that the outcome of the prior arrest was irrelevant and evidence regarding the prior disposition would have invited inquiry into collateral matters. Further, because Gilbert was allowed to present evidence regarding the prior confrontation, the trial court's ruling did not preclude Gilbert from arguing that the officers planted the drugs in retaliation for his earlier defiance.

¶ 40 The questioning during Gilbert's trial testimony similarly fails to support his claim. The record reveals that the trial court did not preclude Gilbert from testifying to either the events that occurred during the June arrest or his conversations with the officers during the July arrest. Although the trial court originally sustained an objection to Gilbert's testimony regarding statements made by the officers during the July 19th arrest, after a sidebar the court overruled the State's objection. Yet defense counsel did not resume questioning Gilbert about statements he claimed the officers made during the July 19th arrest.

¶ 41 Furthermore, the substance of Gilbert's defense - that the officers were motivated to fabricate the current charge based on his earlier defiance of their authority - was clearly placed before the jury. Gilbert testified during cross-examination that the officers planted drugs on him during the June arrest and that he considered the officers to be "dirty cops." Gilbert further

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testified that during the July arrest, he recognized the same "dirty cops" as the officers who planted drugs on him. Gilbert explained that during the June incident, the officers ordered him to exit his vehicle, but he refused to do so telling the officers that they needed a warrant to search his vehicle. Gilbert also testified that the officers then "started beating and banging on my car, telling me who am I to tell them how to do their job." The record is clear that Gilbert was allowed to testify regarding his version of the events that transpired during the June arrest, which included his defiant behavior that formed the basis of his defense to the July arrest. Gilbert's further claim that he should have been allowed to testify that during the July 19th arrest, one of the officers told him they were going to make this charge "stick," even if correct, would not have made a difference in the outcome here. Given that Gilbert was permitted to testify to events that, if believed by the jury, would have supported his defense that the current charge was fabricated, the preclusion of this evidence, if error at all, was clearly harmless. Thus, the trial court did not erroneously restrict Gilbert from developing his defense through his testimony at trial.

¶ 42

#### C. Prior Conviction

¶ 43 Gilbert claims that the trial court erred in admitting into evidence his prior first-degree murder conviction, while precluding him from disclosing that his conviction was based on an accountability theory. Gilbert claims that the probative value of the prior conviction was not substantially outweighed by the risk of unfair prejudice. He contends that the nature of his prior offense was highly prejudicial and likely to influence the jury to find that he committed this offense. Gilbert further claims that the probative value was minimal because the murder occurred when he was 14 years old and it happened 18 years prior to his current prosecution.

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¶ 44 The State again contends that Gilbert forfeited review of this claim because it was not included in his posttrial motion. The State, however, does not dispute that Gilbert raised his concerns about the serious nature and remoteness of the prior conviction in the trial court. We note that Gilbert's motion for a new trial asserts that he was erroneously precluded from admitting into evidence the fact that his prior murder conviction was based on an accountability theory. Although Gilbert did not explicitly specify in his motion for a new trial that the trial court erred in admitting the prior conviction because it was more prejudicial than probative, he nonetheless referenced the prior conviction in the motion and raised an error regarding its admission. In this case, the trial court was presented with the opportunity to consider the admissibility of the prior conviction not only when ruling on the motion *in limine*, but also when ruling on the motion for a new trial. Regardless, even if we were to adopt a strict application of the forfeiture rule, Gilbert again asserted review of the error under the plain error doctrine in his reply brief. As previously mentioned, application of review under a plain error analysis requires the existence of an error. *Wade*, 131 Ill. 2d at 376. Here, for the reasons stated below, we find there was no error and thus it is unnecessary to engage in a plain error analysis.

¶ 45 When a defendant testifies on his own behalf, prior convictions are admissible for the sole purpose of discrediting him as a witness and not to determine his guilt or innocence in the pending case. *People v. Naylor*, 229 Ill. 2d 584, 594 (2008). In *People v. Montgomery* (47 Ill. 2d 510 (1971)), our supreme court set forth the test that must be used to determine whether a witness's prior conviction should be admitted for purposes of attacking his credibility. *People v. Patrick*, 233 Ill. 2d 62, 69 (2009), citing *Montgomery*, 47 Ill. 2d at 519. Under the "*Montgomery*

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Rule," prior convictions may be admitted if: "(1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Mullins*, 242 Ill. 2d 1, 14 (2011), citing *Montgomery*, 47 Ill. 2d at 516. The last prong of the test requires the trial court to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice. *Mullins*, 242 Ill. 2d at 14. When performing the balancing test, the trial court should consider "the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged." *Id.* at 15-16. Thus, a prior conviction has probative value if it may potentially impair the defendant's credibility. *People v. Clay*, 379 Ill. App. 3d 470, 476 (2008), citing *People v. McKibbins*, 96 Ill. 2d 176, 188 (1983). The trial court's ruling regarding the admissibility of a prior conviction for impeachment purposes is within its sound discretion. *Id.*

¶ 46 The trial court did not abuse its discretion when it admitted into evidence Gilbert's prior murder conviction. The trial court specifically articulated and applied the *Montgomery* test when ruling on the admissibility of the prior conviction. Gilbert concedes that the first two prongs of the *Montgomery* test were satisfied and instead bases his claim of error on the balancing test of the third prong. During the hearing on the motion *in limine*, the trial court explicitly recognized the serious nature of the prior conviction and the potential prejudicial impact resulting from

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admission of that conviction, but similarly recognized that the case would be decided strictly on the witnesses' credibility. Indeed, Gilbert's own testimony formed the basis of his entire defense and the jury was required to determine the credibility of his testimony against the testimony of the arresting officers. Consequently, Gilbert's credibility was a crucial issue in this case and his prior conviction was relevant to that issue. *People v. Atkinson*, 186 Ill. 2d 450, 462 (1999). The trial court also appropriately weighed the serious nature of the prior conviction against Gilbert's recent release from prison the year before in February of 2010. Moreover, following our supreme court's decision in *People v. Atkinson* (186 Ill. 2d 450, 458 (1999)) the nature of a prior conviction must be disclosed to the jury and merely disclosing that he previously committed a felony without revealing the nature of the offense is insufficient. Accordingly, the trial court did not abuse its discretion in denying Gilbert's motion *in limine* to exclude admission of his prior felony into evidence.

¶ 47 Similarly, the trial court did not abuse its discretion by precluding Gilbert from testifying that he was convicted for first-degree murder under an accountability theory. The trial court cautioned that providing the requested additional details regarding the conviction opened the door for the State to also provide facts in rebuttal, which created the potential for a trial within a trial. Given that Gilbert's accountability was based on his conduct in pointing out the victim so that his co-defendant could shoot him, the fact that Gilbert's murder conviction was based on an accountability theory would not necessarily have worked in his favor.

¶ 48 Furthermore, the trial court reiterated that admitting a prior felony into evidence was for impeachment purposes only. The record reveals that during closing arguments, both parties

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mentioned the prior conviction and informed the jury that the conviction could not be considered as evidence of Gilbert's guilt of the current offense. The State further explained that the jury may consider the prior conviction only to assess Gilbert's believability as a witness. The trial court reinforced the parties' arguments regarding use of the prior conviction when it tendered to the jury a limiting instruction that evidence of prior convictions may be considered for credibility purposes, but not as evidence of guilt of the offense currently charged against Gilbert. We find, therefore, that the trial court properly exercised its discretion when it denied Gilbert's request to disclose that he was convicted under an accountability theory.

¶ 49

#### D. Fines

¶ 50 Gilbert claims, and the State concedes, that the trial court erred in imposing \$1,360 in fines, fees and costs because the total amount due should be reduced by \$860, which is comprised of the following: (1) the \$5-per-day presentence credit totaling \$655; (2) vacating the \$200 DNA assessment fee; and (3) vacating the \$5 electronic citation fee. We agree with the parties that Gilbert is entitled to a \$5 credit for each day of presentencing detention (725 ILCS 5/110-14(a) (West 2010)) totaling \$655 that may be used to offset the following fines:

- (1) \$10 Mental Health Court Fine (55 ILCS 5/5-1101(d-5) (West 2010) (*People v. Price*, 375 Ill. App. 3d 684, 701-02 (2007));
- (2) \$5 Youth Diversion/Peer Court Fine (55 ILCS 5/5-1101(e)) (West 2010) (*Price*, 375 Ill. App. 3d at 701-02);
- (3) \$5 Drug Court Fine (55 ILCS 5/5-1101(f)) (West 2010) (*People v. Unander*, 404 Ill. App. 3d 884, 886 (2010));

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- (4) \$30 Children's Advocacy Center Fine (55 ILCS 5/5-1101(f-5)) (West 2010) (*People v. Butler*, 2013 IL App (5th) 110282, ¶7);
- (5) \$500 Controlled Substances Fine (720 ILCS 570/411.2(a)) (West 2010) (*People v. Jones*, 223 Ill. 2d 569, 592 (2006)); and
- (6) \$100 Trauma Center Fund Fine (730 ILCS 5/5-9-1.1(b)) (West 2010) (*Jones*, 223 Ill. 2d at 595).

Because statutory authority expressly excludes the \$5 Spinal Cord Injury Paralysis Cure Research Trust Fund Fine (730 ILCS 5/5-9-1.1(c) (West 2010)) as a fine eligible for the reduction in fines for time served either before or after sentencing, the \$5 a day credit for pre-sentencing detention may not be used to offset this fine. Therefore, Gilbert's \$655 pre-sentence detention credit may be applied toward the \$650 in fines specified above.

¶ 51 We also agree with the parties that the \$200 DNA assessment fee should be vacated because Gilbert's DNA was previously registered in the database in connection with his prior murder conviction. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Lastly, we agree that the \$5 Electronic Citation Fee must be vacated due to inapplicability because that "fee shall be paid by the defendant in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2011).

¶ 52 Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999)), we order the clerk of the circuit court to correct the fines and fees order to: (1) reflect \$650 in credit for fines subject to the \$5 a day pre-sentencing detention credit; (2) vacate the \$200 DNA analysis fee; and (3) vacate the \$5 Electronic Citation fee. We affirm the judgment of the trial

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court in all other aspects.

¶ 53

#### CONCLUSION

¶ 54 For the reasons stated herein, we affirm in part and vacate in part the judgment of the circuit court and correct the order assessing fines.

¶ 55 Affirmed in part, vacated in part, and order corrected.