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2014 IL App (3d) 120479-U

Order filed June 10, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0479
)	Circuit No. 10-CF-321
CEDRICK DOCKERY,)	
Defendant-Appellant.)	The Honorable Stephen Kouri, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* In a criminal drug case in which defendant was claiming, among other things, that he was denied a fair trial because of ineffective assistance of trial counsel, the appellate court agreed with defendant's claim, reversed defendant's conviction, vacated defendant's sentence, and remanded the case for a new trial.

¶ 2 After a jury trial, defendant, Cedrick Dockery, was convicted of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2010)) and was sentenced to 10 years' imprisonment. Defendant appeals, arguing that: (1) he was not proven guilty beyond a reasonable doubt; (2) he was denied a fair trial because of ineffective assistance

of trial counsel; and (3) he was entitled to a \$5-per-day credit against certain fines for the time he spent in custody during the proceedings in this case. We agree with defendant's second argument. Therefore, we reverse defendant's conviction, vacate defendant's sentence, and remand the case for a new trial.

¶ 3

FACTS

¶ 4

In April 2010, defendant was arrested and charged with one count of unlawful possession of a controlled substance with intent to deliver, a Class 1 felony (720 ILCS 570/401(c)(2) (West 2010)) and one count of unlawful possession of a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2010)). Both charges were based upon the same substance, about 1.3 grams of cocaine that was found in defendant's pocket after he had been stopped by the police during the execution of a search warrant. Defendant was unable to post bail and remained in custody throughout the entire proceedings in this case.

¶ 5

The case proceeded to a jury trial in June 2011. Although defendant had previously been convicted of murder, had served a lengthy prison sentence, and was on parole at the time of the instant offense, defense counsel did not file a motion *in limine* to exclude evidence of defendant's prior conviction at trial if defendant testified. About a week before trial, defense counsel filed a disclosure, notifying the prosecution that defendant was going to present a necessity defense and was going to claim that the drugs belonged to his mother and that he was stopped by the police while he was on his way to confront his mother about the drugs.

¶ 6

During the jury selection process, the jury pool was given the standard jury admonishments. When questioned by the trial court, the potential jurors indicated that they understood and accepted the four legal principles set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007): that defendant was presumed innocent of the charges against him, that the

State had to prove defendant guilty beyond a reasonable doubt, that the defendant was not required to offer any evidence on his own behalf, and that if defendant did not testify it could not be held against him. In addition, during the jury selection process, defense counsel asked several members of the jury pool whether it would impact their verdict if they were to learn that defendant had a prior conviction. During some of those instances, defense counsel informed the potential jurors that the prior conviction was not drug related, and during others, defense counsel informed the potential jurors that the prior conviction was for a serious crime.¹ Several of those potential jurors who were so questioned ended up being selected for defendant's jury.

¶ 7 In opening statement, defense counsel told the jury, among other things, that the evidence would show that defendant was a crack cocaine addict and not a crack cocaine dealer; that defendant was trying to rebuild his life after having served a long prison sentence for a serious crime; that defendant shared his residence with other crack addicts, including his mother; and that defendant made money by working hard at various odd jobs and not by selling crack cocaine. In addition, at nearly the end of his opening statement, defense counsel specifically told the jury that it would hear from defendant himself.

¶ 8 During the evidence portion of the trial, Peoria police officers Clint Rezac, Brett Lawrence, Corey Miller, and Matthew Lane all testified that on April 6, 2010, they took part in executing a search warrant on defendant and his residence in Peoria. Prior to executing the warrant, police officers saw defendant leaving the residence on a bicycle. When the officers told defendant to stop, he got off of the bicycle and fled on foot. The officers chased defendant,

¹ Toward the end of the jury selection process, to speed up the questioning, defense counsel merely asked potential jurors whether any of the questions that he had previously asked raised any concerns or "red flags" with them.

tackled him to the ground, and took him into custody. Upon searching defendant, the officers found five baggies, each containing a rock of suspected cocaine, in defendant's pocket.

Defendant was taken to the police station and a wallet was found in his pocket that had \$339 inside of it.

¶ 9 After defendant was arrested, defendant's residence was searched. Inside the house, the officers found a digital scale and a spoon containing white powdery residue. The spoon had some possible burn or scorch marks on the bottom of it. No additional drugs, cell phones, baggies, cutting agents, pipes, or other indications of drug dealing or drug use were found in defendant's residence. Officer Miller testified that spoons were often used when mixing powder cocaine with baking soda to make crack cocaine. According to Miller, drug dealers typically mixed cocaine with baking soda and water and cooked it in glass measuring cups, baby jars, bowls, or pans to convert the powder cocaine into crack cocaine. However, spoons were also used by crack cocaine users when they cooked or "freebased" cocaine. Such a procedure would cause burn marks on the bottom of the spoon.

¶ 10 When defendant was questioned by Officer Lane after the arrest, he waived his rights and told Lane that he would generally buy a little over two grams of cocaine at a time for \$150 and that he would break the cocaine down into \$20 rocks or \$20 bags. According to Lane, a \$20 bag contained about two-tenths of a gram of cocaine, and was a common unit of sale used by street dealers. Lane testified further that a digital scale could be used by a drug dealer to break a larger amount of drugs down into a smaller amount, although Lane acknowledged that a person who was strictly a user of cocaine might also use a scale to make sure that he was not being shorted when he made a purchase. Lane also acknowledged that it was not uncommon for a crack cocaine addict to use more than one rock of cocaine a day. Although Lane initially testified that

defendant admitted selling cocaine and that defendant essentially explained to Lane his way of doing business, it became apparent on cross-examination that Lane had merely assumed that defendant was selling cocaine based upon defendant's statement that he would break larger quantities of cocaine down into \$20 bags. Lane acknowledged that defendant did not specifically tell him that he was selling the \$20 bags of cocaine. Lane implied in his testimony, however, that there was no other reason for a person to break a larger amount of cocaine down into smaller individual amounts.

¶ 11 The parties stipulated to the chain of custody for the substance and to the testimony of the forensic chemist, stating that the white rock-like substance that was recovered from defendant's pocket tested positive for cocaine and weighed 1.3 grams. The parties also stipulated to the foundation for the admission of a videotape, which was made by the police officers, of the execution of the search warrant. The videotape was played for the jury, and the State rested.

¶ 12 After the State rested, the defense made a motion for a directed verdict as to the possession with intent to deliver charge, arguing that the evidence was insufficient to establish that defendant had the intent to deliver. Upon hearing the arguments of the attorneys, the trial court denied the motion.

¶ 13 Outside the presence of the jury, the trial court admonished defendant that the decision as to whether defendant would testify in his own behalf was defendant's decision to make, that the decision did not belong to defendant's attorney, and that if defendant chose not to testify, it would not be held against him in any way. After discussing the matter further with defense counsel, defendant told the trial court that he had decided not to testify. The defense then rested without presenting any evidence of its own. At the close of all the evidence, the defense again

moved for a directed verdict on the possession with intent to deliver charge. The trial court denied the motion.

¶ 14 Prior to the start of closing arguments, the trial court again admonished the jury that the arguments of the attorneys were not evidence and should not be considered as such and that the jury should disregard any argument that was not based upon the evidence or upon reasonable inferences therefrom. In the State's closing argument, when the prosecutor asserted more than once that defense counsel admitted in opening statement that defendant was in possession of the substance, defense counsel objected and asserted that the prosecutor was attempting to use the defense's opening statement as evidence. The trial court again admonished the jurors that opening statements and closing arguments were not evidence. The prosecutor commented that he was not asserting that the opening statement was evidence, just that it was the defense's theory of the case.

¶ 15 Further on in his closing argument, the prosecutor commented that defense counsel had made several assertions in his opening statement about all of the people that lived in the residence with defendant, about defendant's addictions, and about defendant's struggles to turn his life around. The prosecutor started to point out to the jurors that they had not heard any evidence to that effect. Defense counsel objected, stating that defendant was not required to prove anything in the case. The prosecutor responded that he was not asserting that defendant had a burden, but that when defense counsel made comments to the jury in opening statement, there was a level of accountability. The trial court stopped the attorneys at that point and told the jurors that he wanted to remind them that opening statements and closing arguments were not evidence and that the State had the burden of proof and was required to prove the allegations against defendant beyond a reasonable doubt.

¶ 16 The prosecutor then continued with his closing argument, pointing out that there was no evidence that defendant had any sort of addiction, that there was anyone else living at the house, or that drugs were being used in the house or by the defendant. The prosecutor stated that he was not asserting that defendant was a "crime kingpin," just that defendant was a "low level street dealer." The prosecutor commented further that defendant had about \$399 in cash in his wallet and that there was no evidence that defendant had any type of occupation or employment.²

¶ 17 In his closing argument, defense counsel emphasized to the jury that defendant was not required to prove his innocence and stated that he knew that the jury "would have liked to have heard some things on the defense side." Defense counsel told the jury that it was not necessary for him to present the things that he had mentioned in opening statement because the State's evidence "never even got close to meeting their burden of proving [defendant] guilty of possession with intent to deliver beyond a reasonable doubt." Defense counsel argued to the jurors that the State's case as to the possession with intent charge was built on an assumption—that the only reason defendant would have broken the cocaine down into smaller quantities was because he was going to sell it.

¶ 18 Defense counsel went on in closing argument to turn some of the State's assertions against the State, saying that the State never established how many people lived in the residence, who in the residence was using the scale and the spoon, or whether defendant was employed. Defense counsel commented further that no evidence was found, such as additional sandwich bags or other items, to establish that drugs were being produced or packaged in the residence.

² The evidence was actually that defendant had \$339 in cash in his wallet. It is unclear if this was a misstatement by the prosecutor or a typographical error in the transcript.

Defense counsel suggested to the jury that the reason the police did not find any type of a drug-use pipe in the residence was because they did not search the residence that thoroughly.

¶ 19 Defense counsel asserted further that the State's case was built on speculation, assumption, and ambiguous evidence and again pointed out to the jury that defendant did not have to prove anything, especially given the weakness of the State's case. Defense counsel commented that the State could not merely present its assumptions and speculations and then turn around and call upon defendant to disprove them. Relying on the testimony of one of the officers that the substance was crumbly, defense counsel suggested that reason to the jury as one possible reason why a user of cocaine might break a larger quantity down and put the smaller quantities into separate baggies. Defense counsel conceded that defendant was guilty of the simple possession charge but cautioned the jury not to go "overboard" and not to make the "leap of faith" that the State wanted the jury to make regarding the possession with intent to deliver charge.

¶ 20 After closing arguments were completed, the trial court instructed the jury on the law. As part of those instructions, the trial court told the jury, among other things, that: (1) opening statements and closing arguments were not evidence; (2) any statement or argument made by the attorneys which was not based on the evidence should be disregarded; (3) defendant was presumed to be innocent of the charges against him; (4) the presumption of innocence remained with defendant throughout every stage of the trial and during the jury's deliberations on the verdict and was not overcome unless from all of the evidence in the case, the jury was convinced beyond a reasonable doubt that defendant was guilty; (5) the state had the burden of proving the guilt of defendant beyond a reasonable doubt, and that the burden remained on the State

throughout the case; (6) defendant was not required to prove his innocence; and (7) the fact that defendant did not testify must not be considered by the jury in any way in arriving at its verdict.

¶ 21 Following deliberations, the jury found defendant guilty of both charges. The following day, defense counsel filed a motion for new trial, alleging numerous claims of error. After a hearing, that motion was denied. When the trial court denied the motion, defendant asked the court about a *pro se* posttrial motion that he had filed. That motion alleged, among other things, ineffective assistance of counsel. The case was continued for defense counsel to review the *pro se* motion, and defense counsel subsequently requested that a *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)) be held on the motion. Out of "an abundance of caution," the trial court appointed another public defender to represent defendant on the motion, and that attorney filed an amended motion. With regard to the ineffective assistance claim, the amended motion alleged that trial counsel was ineffective in that: (1) he failed to investigate and locate evidence that would have contributed to defendant's motion to quash the search warrant and suppress the evidence; (2) he alluded in opening statement to evidence concerning defendant's addiction to drugs but failed to introduce any such evidence at trial; (3) he failed to adequately impeach Officer Lane with his grand jury testimony; (4) he failed to object to, and improperly stipulated to, the videotape; and (5) he improperly discouraged defendant from exercising his constitutional right to testify at trial. The failure to file a motion *in limine* to exclude evidence of defendant's prior murder conviction was not alleged in the amended motion as a basis for ineffective assistance of trial counsel.

¶ 22 A full evidentiary hearing was held on the motion in March and April 2012. Relevant to the issues raised in this appeal, at the hearing on the posttrial motion, defendant's previous trial counsel, attorney Loeffel, testified that he was assigned as a public defender to represent

defendant in the instant case. Loeffel was the second public defender to represent defendant on the case. The previous public defender, attorney Bailey, was replaced at defendant's request. According to Loeffel, up until almost the day of trial, defendant had maintained that the drugs had been planted in his house and that he had been set up for a police raid by his mother, who was a vindictive person. Based upon that representation from defendant, Loeffel filed an affirmative defense of necessity and disclosed to the prosecution as part of that defense that defendant was on his way to confront his mother about the drugs when he was stopped by the police. The prior attorney, Bailey, had also disclosed that same information to the prosecution.

¶ 23 The weekend before the jury trial, defendant told Loeffel that his prior statement was false and that the cocaine was in his possession because he was a drug user. Defendant maintained, however, that he was not a drug dealer. At that point, Loeffel abandoned the necessity defense and his trial strategy changed to attacking the weakness of the State's case regarding the intent to deliver. Following that new strategy, during his opening statement, Loeffel characterized defendant as a drug addict and told the jury that there was no evidence of intent to deliver. Loeffel also told the jury that defendant was trying to rebuild his life and was trying to move to get away from bad influences.

¶ 24 Prior to trial, Loeffel had reviewed the discovery, including the police report and grand jury testimony of the State's main witness, Officer Lane. Based upon the police report, Loeffel expected Lane to testify that defendant had told Lane that he would break an eight-ball of cocaine down into \$20 bags or \$20 rocks. In Loeffel's opinion, defendant's statement, at least as it was described in the police report, did not indicate that defendant was actually selling cocaine. At trial, however, and contrary to the police report, Lane testified that defendant told him that he broke the cocaine down into \$20 rocks and sold them. That testimony was more similar to

Lane's grand jury testimony wherein Lane stated that defendant told him he would break the cocaine down and sell it to anyone who wanted it. As a matter of trial strategy, Loeffel elected not to confront Lane with the conflicting statements because of the risk that Lane would adopt the more damaging grand jury testimony as being the accurate version of what defendant had told him and because in Loeffel's opinion, the conflicting statements would not serve to impeach Lane's credibility, since none of the conflicting statements were consistent with a theory of innocence.

¶ 25 Loeffel admitted during his testimony that although the police videotape of the search warrant being executed was available for him to review, he may not have reviewed the tape prior to trial or prior to his stipulation as to the foundation for the admission of the videotape into evidence. Loeffel could not specifically recall whether he had reviewed the videotape in this particular instance. Loeffel stated that he did not always watch the videotape of the search warrant execution in preparing for trial because in his experience, the videotape generally did not show anything that was decisive or important to the case or that was different from what had been described or shown in the police report, the photographs, or the search warrant inventory.

¶ 26 According to Loeffel, when he told the jury in opening statement about defendant's drug addiction and bad influences, the strategy at that point was to keep defendant's options open because a decision had not yet been made as to whether defendant would testify. With that in mind, Loeffel did not specifically tell the jury that defendant would testify.³ Rather, based upon their trial strategy, the defense took a wait-and-see approach in which a decision as to whether

³ Loeffel indicated during his testimony at the hearing on the motion that he had not had an opportunity to review the trial transcript. Unfortunately, although Loeffel's statement—that he had not told the jury that defendant would testify—was directly contrary to the trial transcript, no one confronted Loeffel with that inconsistency and we are, therefore, left without an explanation.

defendant would testify would be made after the defense had evaluated the strength of the actual case the State had presented. In this particular case, Loeffel felt that the case presented by the State at trial was not very strong.

¶ 27 Loeffel had a lengthy discussion with defendant about the strength and weaknesses of defendant testifying. Loeffel described some of the weaknesses of defendant testifying as being the prior murder conviction and the prior assertion of a necessity defense. Loeffel felt that defendant would have opened himself up to cross-examination by the prosecution as to the specific allegation of the necessity defense—that defendant was going to blame the whole thing on his mother and claim that his mother had set him up. Loeffel emphasized to defendant that their current theory was completely inconsistent with what defendant had told Loeffel and Bailey (his previous attorney) all along and that he would be subjecting himself to vigorous cross-examination by the State. Loeffel acknowledged that he did not think that Bailey could be called as a witness to rebut defendant's proposed trial testimony and stated that he never told defendant that Bailey could be called as a witness. Loeffel was not happy with defendant at the time and explained to defendant that the former defense that defendant had insisted on presenting amounted to perpetrating a fraud and created some ethical dilemmas for a defense attorney. Loeffel also felt that there was a risk that the jury would not like defendant. Loeffel acknowledged that without putting defendant on the stand, he lost the ability to present innocent explanations for some of the items that were on the videotape and said that the decision came down to an evaluation of how strong the case presented by the State was as to the possession with intent to deliver charge. Because of the small quantity of cocaine involved, Loeffel did not feel that it was crucial for defendant to explain why the cocaine rocks were individually

packaged and felt that he could make a very convincing argument that the amount of cocaine was consistent with personal use. Loeffel, therefore, advised defendant not to testify.

¶ 28 In the hearing on the motion, Loeffel stated further that he and defendant had talked prior to trial about other witnesses that Loeffel could call to testify that defendant was not selling cocaine or that defendant was only a user of cocaine. Each possible witness that they discussed, however, was also a person who was using drugs. In addition, testimony from those witnesses that defendant was using drugs would not exclude the possibility that defendant was selling drugs as well.

¶ 29 Defendant testified at the hearing on the motion that the first theory that he was going to present—that he had been setup by his mother—changed at least 10 or more days before trial. Defendant stated that he struggled in the beginning with attorney Bailey because Bailey did not return his phone calls or come to see him at the jail to discuss his case. Bailey told defendant that the best thing that she could do for him was to come up with a theory for his defense. When defendant told Bailey that he never stated he sold drugs, Bailey told defendant that she would see what she could do. Defendant panicked and made up the story about his mother setting him up. However, defendant's position that he did not sell drugs remained the same.

¶ 30 During Loeffel's representation of defendant, defendant wrote Loeffel a letter, telling Loeffel what was going on in his life at the time of the raid and admitting to Loeffel that he was a user of crack cocaine. Loeffel went to the jail and spoke to defendant about what his defense would be at trial. Loeffel felt that defendant being a drug user was a stronger defense to present to the jury than what defendant had been contemplating before. Defendant's understanding was that he was going to have to get on the witness stand and tell the truth. Defendant was going to explain to the jury his life situation after being in prison so long and having the stress of being an

adult without knowing how to deal with adult problems. In addition, defendant gave Loeffel the names and phone numbers of witnesses who could testify at trial for the defense. Defendant believed that Loeffel was contacting the witnesses and was preparing for defendant's testimony at trial.

¶ 31 Defendant would have testified at trial that he lived at the residence in Peoria with his girlfriend, his mother, his cousin, and his cousin's husband. Defendant's mother was a crack cocaine addict and she and defendant had a rocky relationship. Defendant made money by selling food and by working for a contractor. Although defendant, his girlfriend, and the other occupants had an agreement as to how they were going to pay the bills, the other occupants did not live up to their end of the agreement.

¶ 32 Defendant's girlfriend was pregnant with defendant's child at the time and her pregnancy was considered to be high risk. In addition to the pregnancy, defendant's girlfriend was diabetic and hypertensive and was on a special diet. Defendant would prepare all of his girlfriend's meals based upon her doctor's directions using the scale, which was later recovered by the police, to measure out the appropriate amounts. Eventually defendant's girlfriend left him and moved to Minnesota because of the situation at the house with defendant's mother and his other roommates.

¶ 33 In the middle of February 2010, defendant left Illinois and went to Minnesota to be with, and take care of, his pregnant girlfriend, who was bedridden. Defendant stayed in Minnesota until early March 2010, when he was called back to Illinois by his parole officer. Defendant's mother had told the parole officer that defendant had left the state. Defendant admitted to his parole officer that he had left the state and that he could not pass a drug test.

¶ 34 When defendant returned from Minnesota and saw what shape the house in Peoria was in, he told his mother, his cousin, and his cousin's husband that they could no longer live at the residence. Defendant informed the landlord that he and the other occupants would be moving out. Defendant's plan was to go back to Minnesota to be with his girlfriend as soon as the move was approved by his parole officer. From early March 2010, when defendant returned to Illinois, until April 6, 2010, when defendant was arrested, defendant was in the process of closing up the house, trying to get his parole switched to Minnesota, dealing with the city (defendant was trying to get the house condemned), and trying to find a new place to live in Peoria until he could get his parole switched. At the time the search warrant was executed, all of the items that were leaving the house were packed up in crates or suitcases.

¶ 35 Defendant also would have testified about his crack cocaine use and about why the cocaine had been broken down into individually packaged smaller amounts. According to defendant, every crack cocaine addict had his or her own special way of doing things when he was getting high. Defendant's "thing" was to separate the drugs into smaller individually-packaged piles so that it would seem like he had more drugs than he actually had.

¶ 36 As for the videotape, defendant had not reviewed it before trial and did not even know that it existed. Loeffel told defendant about the videotape at trial and asked defendant to point out to him anything on the videotape that would be interesting for the jury to know. Defendant had seen the videotape again at some point after the trial and noticed that in the footage of the kitchen, beer cans were visible in the sink and a green piece of paper from the doctor was on the cabinet near the scale with notes as to weights and measurements of specific food portions that defendant's girlfriend was supposed to be eating. Defendant stated the beer cans in the sink were important because at the time of his arrest, he was intoxicated and fell off his bicycle and did not

try to run away from the police officers, contrary to their testimony. Defendant stated further that he was a cook and that the video could have been used to show that the pantries were full of pots and pans, which did not have drug residue on them, that defendant used when he was preparing meals. In addition, the videotape could have been used to show that in defendant's bedroom, he had taped to the back of the bedroom door about nine or ten prescriptions from his girlfriend's doctor with directions as to each prescription.

¶ 37 According to defendant, on the day of trial, after the State had presented its evidence, Loeffel discussed with defendant for about 15 minutes whether defendant would testify. Loeffel told defendant that the State did not put on a case and that the State's case was weak. Defendant reminded Loeffel that the reason they had allowed certain jury members to be selected for the jury was so that defendant could testify and be given a fair chance to be heard. The questions that were asked of those jury members during jury selection were based upon defendant's proposed testimony. Defendant told Loeffel that he had "pretty much fed the jury a bunch of crap" if he did not let defendant testify about being a drug user and not a drug seller. Loeffel told defendant that if he got on the witness stand, they were going to call attorney Bailey as a witness to contradict defendant's testimony. Defendant eventually "caved in" to Loeffel and agreed not to testify.

¶ 38 After the testimony had been presented at the hearing on the motion and the attorneys had made their arguments, the trial court took the motion under advisement. The trial court later denied the motion in a written order. The trial court found in general that all of defendant's claims, except for the one regarding the videotape, were meritless as they related almost entirely to matters of trial strategy. Specifically, regarding the claim that trial counsel had improperly advised or otherwise prevented defendant from testifying, the trial court found that the claim was

without merit because: (1) defendant had a murder conviction on his record; (2) defendant at various times asserted apparent inconsistent or false defense theories; and (3) defendant was admonished by the trial court at trial that the decision to testify was solely defendant's decision to make. As for the claim regarding the videotape, the trial court found that trial counsel's performance was deficient when he failed to review the videotape with defendant prior to trial but that the error was not prejudicial to defendant under the circumstances because defendant's ailing girlfriend, to whom the doctor's note and the use of the scale allegedly applied, had moved out of the house over a month before the search warrant was executed and the absence of that possible innocent explanation for the scale did not cause the court to question the reliability of the outcome of the case.

¶ 39 A sentencing hearing was held and defendant was initially sentenced to 13 years' imprisonment for possession of a controlled substance with intent to deliver. Based on one-act, one-crime principles, no sentence was imposed on the simple possession charge. Defendant's term of imprisonment, however, was later reduced to 10 years, upon reconsideration by the trial court. Defendant was given credit for the more than two years of time that he had spent in custody during the proceedings in this case. In addition, the trial court ordered defendant to pay certain fines, fees, and costs, including a \$2,000 mandatory drug assessment fee and a \$100 trauma fund fee. Defendant appealed both his conviction and his sentence.

¶ 40

ANALYSIS

¶ 41 On appeal, defendant argues first that he was not proven guilty beyond a reasonable doubt of possession of a controlled substance with the intent to deliver. Defendant asserts that the evidence was insufficient to establish that he had the intent to deliver the cocaine. Defendant asks, therefore, that we reverse his conviction and vacate his sentence as to the possession with

intent charge, that we reinstate his conviction as to the simple possession charge, and that we remand the case to the trial court to impose sentence upon defendant for the simple possession charge. The State argues that the evidence was sufficient to prove that defendant had the intent to deliver the cocaine and asks, therefore, that we affirm defendant's conviction and sentence.

¶ 42 Pursuant to the *Collins* standard (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)), a reviewing court faced with a challenge to the sufficiency of the evidence must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). Under that standard, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Bush*, 214 Ill. 2d 318, 326 (2005). The reviewing court will not retry the defendant. *People v. Austin M.*, 2012 IL 111194, ¶ 107. Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989). Thus, the *Collins* standard of review gives "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 232 Ill. 2d at 281 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This same standard of review is applied by the reviewing court regardless of whether the evidence is direct or circumstantial, or whether defendant received a bench or a jury trial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *Jackson*, 232 Ill. 2d at 281; *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000). In applying the *Collins* standard, a reviewing court will not reverse a conviction unless the evidence is so

improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt. *Austin M.*, 2012 IL 111194, ¶ 107.

¶ 43 The determination of whether the evidence presented at trial was sufficient to prove that the defendant had the intent to deliver a particular controlled substance must be made on a case-by-case basis, considering all of the relevant facts and circumstances involved. See *People v. Robinson*, 167 Ill. 2d 397, 412-13 (1995). There are too many different types of controlled substances and too many different possible factual situations for a bright-line test to apply. See *id.* at 414. Because direct evidence of intent to deliver rarely exists, it is usually proven by circumstantial evidence. *Id.* at 408. Some of the factors that Illinois courts have considered to be probative of intent to deliver include whether the quantity of the controlled substance in defendant's possession is too large to be viewed as being for personal consumption; the high purity of the controlled substance confiscated, the possession of weapons; the possession of large amounts of cash; the possession of police scanners, beepers, or cellular telephones; the possession of drug paraphernalia; and the manner in which the controlled substance is packaged. *Id.* Although the quantity of a controlled substance or the manner of packaging alone may be sufficient to prove the intent to deliver beyond a reasonable doubt, when the amount of the substance or the manner of packaging is consistent with personal use, courts have required additional evidence of intent to deliver to support a conviction. See *id.* at 410-14.

¶ 44 In the present case, viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to establish that defendant possessed the cocaine with the intent to deliver it. Defendant possessed numerous baggies of cocaine and a large amount of cash on his person, a small scale was found in his house, and defendant allegedly told police that he buys the cocaine in larger amounts and breaks it down into smaller amounts. Defendant described

those smaller amounts in terms of dollar value. In addition, one of the police officers testified that the units in which the cocaine was broken down into were common units used by street dealers of cocaine. Although the total amount of cocaine in defendant's possession was relatively small, we cannot say as a matter of law that it was solely for personal use. The determination of whether defendant had the intent to deliver the cocaine in this case was a decision for the jury to make after considering all of the unique facts and circumstances of this particular case. The evidence of intent to deliver in this case was not so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt. See *Austin M.*, 2012 IL 111194, ¶ 107. We must reject, therefore, defendant's challenge to the sufficiency of the evidence.

¶ 45 Defendant argues second on appeal that he was denied effective assistance of counsel at trial. Defendant asserts that trial counsel made numerous trial errors that served to deprive defendant of a fair trial, the most notable of which were informing the jury pool that defendant had been previously convicted of a serious offense and telling the jury in opening statement that defendant would testify when that decision had not yet been made and when it turned out that defendant in fact did not testify. The State argues that the trial court's ruling, denying defendant's claim of ineffective assistance of trial counsel, was proper and should be upheld. The State asserts that after a full evidentiary hearing on the matter, the trial court correctly determined that all of the claimed errors, except for one (the failure to review the videotape with defendant prior to trial) were matters of trial strategy and that the one error that was made was not prejudicial to defendant. The State asks, therefore, that we reject defendant's argument on this issue.

¶ 46 An issue of ineffective assistance of counsel presents the reviewing court with a mixed question of fact and law. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). To the extent that the trial court's findings of fact bear upon the determination of whether counsel was ineffective, those findings must be given deference on appeal and will not be reversed unless they are against the manifest weight of the evidence. See *id.* However, the ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal. See *id.*

¶ 47 A claim of ineffective assistance of counsel is analyzed under the two-pronged, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant to the extent that he was deprived of a fair proceeding. *Id.* A defendant's failure to satisfy either prong of the *Strickland* test prevents a finding of ineffective assistance of counsel. *Id.* In reviewing a claim of ineffective assistance of counsel, a court must consider defense counsel's performance as a whole and not merely focus upon isolated incidents of conduct. See *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1987). A strong presumption exists that defense counsel's conduct was within the wide range of reasonable professional assistance and that all decisions were made in the exercise of reasonable professional judgment. *Cloyd*, 152 Ill. App. 3d at 56-57; *People v. Martin*, 236 Ill. App. 3d 112, 121 (1992). In addition, matters of trial strategy will generally not support a claim of ineffective assistance of counsel, even if defense counsel made a mistake in trial strategy or tactics or made an error in judgment. *Patterson*, 217 Ill. 2d at 441; *People v. Perry*, 224 Ill. 2d 312, 355 (2007). "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful

adversarial testing of the State's case will ineffective assistance of counsel be found." *Perry*, 224 Ill. 2d at 355-56.

¶ 48 After having reviewed the record in the instant case, we disagree with the trial court's determination regarding ineffective assistance of defense counsel, attorney Loeffel. At the hearing on the posttrial motion, Loeffel himself testified that his strategy at the beginning of the trial was to keep defendant's options open because it had not yet been decided whether defendant would testify. Contrary to that strategy, however, Loeffel informed many of the potential jurors during the jury selection process that defendant had previously been convicted of a crime that was not drug related or that defendant had previously been convicted of a serious crime. We see no valid strategic reason for Loeffel to provide potential jurors with that information when it had not yet been decided if defendant would testify. In further contradiction to Loeffel's trial strategy, the trial transcripts reveal that Loeffel specifically told the jury in his opening statement that it would hear from defendant. Again, we can find no valid strategic reason for Loeffel to make that representation to the jury when it was unknown at the time whether defendant would testify. Failing to call defendant after promising the jury in opening statement that defendant would testify was very damaging to the defense, even more so in this particular case because Loeffel had already told several of the jurors in jury selection about defendant's prior criminal history, presumably to weaken the impeachment value of the prior conviction when defendant testified at trial. See *People v. Chandler*, 129 Ill. 2d 233, 249 (1989) (defense counsel's performance was deficient when he, among other things, failed to call defendant to testify after he promised the jury in opening statement that he would do so); *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004) (defense counsel set the defense up to be discredited by promising the jury that the defendant would testify to the truth and then inexplicably failing to call the defendant to

testify). Although the case that the prosecution actually presented at trial might have been slightly weaker than what Loeffel had anticipated, we do not find that any alleged discrepancy would have justified Loeffel persuading or advising defendant not to testify after what had already occurred. Indeed, it appears that Loeffel's advice in that regard was largely motivated by his erroneous legal belief that the facts of the previously filed necessity defense could be used by the prosecution to contradict defendant's testimony at trial. See *People v. McFarland*, 93 Ill. App. 3d 136, 143 (1981) (theories disclosed by defense in discovery are not admissions of the defendant and may be not be considered as affecting the defendant's credibility).

¶ 49 It is possible in this case that there is an explanation for why Loeffel's actions at trial appear to be inconsistent with the strategy to which he testified. In fact, when Loeffel was questioned about his trial strategy at the hearing on the posttrial motion, he specifically stated that he did not tell the jury in his opening statement that defendant would testify because that decision had not yet been made and he wanted to keep defendant's options open. However, prior to testifying at the hearing on the posttrial motion, Loeffel had not reviewed the trial transcripts and during his testimony at the hearing, he was never confronted with the transcript from his opening statement at trial in which he represented to the jury that defendant would testify. Thus, in this case, Loeffel, was never given an opportunity to reconcile the representation he made in opening statement to the jury with the testimony he provided at the hearing on the posttrial motion.

¶ 50 Under the current state of the record in this case, we are left with a factual situation in which defense counsel's actions during jury selection and during opening statement were contrary to his alleged trial strategy. That deficiency in performance was prejudicial to defendant under the unique facts of this particular case because the evidence of defendant's intent

to deliver the cocaine was not overwhelming and the jury could have reasonably concluded that defendant was only guilty of simple possession of a controlled substance. See *People v. West*, 187 Ill. 2d 418, 432 (1999) (prejudice exists for purposes of the *Strickland* test when there is a substantial probability that the result of the trial or proceeding would have been different, absent defense counsel's deficient performance). Although that prejudice was somewhat lessened by the trial court's repeated instructions that opening statements and closing arguments were not evidence, that defendant was not required to present evidence, and that the jury could not hold it against defendant if he chose not to testify, we do not believe in this particular case that the prejudice was eliminated completely. We conclude, therefore, that defendant has satisfied the *Strickland* test and has shown that he was denied a fair trial because of ineffective assistance of trial counsel. The trial court's conclusion to the contrary was erroneous. Therefore, we reverse defendant's conviction, vacate his sentence, and remand this case for a new trial.

¶ 51 Having reached that conclusion, we need not address defendant's remaining argument—that he was entitled to have a \$5 per day credit applied against his mandatory drug assessment fee and his trauma fund fee for the time he spent his custody during the proceedings in this case. We note that the State had conceded that issue on appeal, and we assume that the State will determine and apply the appropriate credit if defendant is again convicted after a retrial in this case.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we reverse defendant's conviction for possession of a controlled substance with intent to deliver, we vacate defendant's sentence, and remand this case for the defendant to be given a new trial on both the possession with intent charge and the simple possession charge, if the State decides to go forward with both charges.

¶ 54

Reversed and remanded.