2016 IL App (1st) 140625-U

No. 1-14-0625

Fourth Division
June 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 12 CR 20089
v.	)	Honorable Stanley Sacks, Judge Presiding.
STEVIE JACKSON,	)	
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's challenge to the State's closing rebuttal arguments is forfeited for lack of specificity; the State's closing rebuttal was invited response thus, no error occurred and no plain error review is warranted; the evidence at trial of defendant's guilt was overwhelming such that plaintiff cannot satisfy the prejudice prong of an ineffective assistance claim; defendant's sentence was not excessive; mittimus amended to reflect the proper conviction.

¶ 2 The instant appeal arises from a jury verdict finding defendant Stevie Jackson guilty of delivery of less than one gram of a controlled substance (720 ILCS 570/401(d) (West 2010)) after Chicago police officers observed defendant conduct a hand-to-hand narcotics transaction on

October 3, 2012. On appeal, defendant contends the trial court committed prejudicial error when it allowed the State to misstate the law during rebuttal closing argument by (1) urging the jury to rely on a hearsay inference and (2) improperly informing the jury that certain portions of a police officer's testimony were hearsay. In addition, defendant contends his Class X, eight-year sentence is excessive in light of applicable mitigating factors and that the mittimus incorrectly reflects the subsection of the Illinois Controlled Substances Act under which defendant was convicted. We affirm his conviction and sentence and direct the clerk of the circuit court to amend the mittimus.

¶ 3 FACTS

¶ 4 At trial, Chicago police officer Luis Vega testified that "sometime around 11:19 a.m." on October 3, 2012, he was conducting undercover surveillance near a residential area pursuant to "citizen complaints of chronic selling and use of narcotics in the vicinity." He was part of an investigatory team with four other officers, including Officers Mariano, Pozulp, Hardy and Bozek. Vega set up surveillance in a parking lot underneath the Chicago Transit Authority (CTA) Green Line train. He was in a covert vehicle and wearing civilian clothes and a construction vest. CTA personnel were also in the area performing construction on the train tracks at the time.

¶ 5 From his vehicle, Vega observed Michael Friend in a nearby alley pacing back and forth. Friend made several phone calls before walking to the end of the alley, when Vega observed defendant approaching from the south. Defendant and Friend approached each other standing "face-to-face." From a distance of approximately 20 feet, Vega observed Friend tender money to defendant, which defendant placed in his right pants pocket. Defendant then removed a "reddish/pinkish type [Z]iploc[] baggy" from his mouth and handed it to Friend. Friend placed

the baggy inside the lining of a baseball cap he was wearing. Based upon his experience, Vega surmised that he had witnessed a narcotics transaction. Vega then notified enforcement officers via radio of his observations and waited until they arrived on the scene. Vega observed Officers Pozulp and Bozek approach defendant and Friend, and witnessed Pozulp retrieve an item from Friend's baseball cap.

¶ 6 On cross-examination, Vega testified that the incident occurred at approximately 11:19 a.m. After refreshing his memory with a copy of the police report, he confirmed defendant was arrested at 11:25 a.m. It was later stipulated, that if called to testify, Patricia Thompson would state that she is an official court reporter and that her transcript of Vega's testimony from a prior proceeding read: "Question: What did Stevie Jackson do in return? Answer: Retrieved an item from his mouth, handed it over to Stevie Jackson. Stevie Jackson examined the item." On redirect examination, Vega testified that the enforcement officers arrived on the scene "within minutes" of the transaction.

¶ 7 Officer John Bozek testified that he and his team were conducting a narcotics investigation based upon "numerous complaints from citizens [and] local businesses about narcotics sales and narcotics use" within the area. On October 3, 2012, he and Pozulp were working as enforcement officers. They were wearing civilian clothes and driving an unmarked police vehicle positioned approximately a "block and-a-half" from Vega's location. When Vega radioed Bozek that he had witnessed a suspected narcotics transaction, Bozek drove his vehicle directly to the location indicated by Vega and arrived in approximately 15 seconds.

¶ 8 Bozek exited his vehicle, detained defendant and performed a protective pat-down search. He recovered two cell phones and $10 from the right front pocket of defendant's pants. Bozek then arrested defendant and transported him to the police station. At the police station,

Pozulp gave Bozek the baggy he had recovered from Friend so that it could be inventoried. Bozek did not inventory the money recovered, and instead returned it to defendant because it was against "department rules and regulations to seize money under $500." On cross-examination, Bozek confirmed that he arrested defendant and, after reviewing the police report, testified that he is listed as an "assisting arresting officer," and Officers Vega and Pozulp are listed first and second as arresting officers.

¶ 9 Officer Kerry Pozulp testified that he was a surveillance officer partnered with Bozek on the date of the incident. Vega directed Pozulp and Bozek to "start moving in," and informed them of the location where he had witnessed the narcotics transaction. Vega also gave them a description of the suspects involved. Pozulp detained Friend when they arrived on the scene. Based upon directions from Vega, Pozulp recovered a "reddish/pink tinted bag of white powder, suspect heroin" from the lining of Friend's baseball cap. He also found a cell phone in Friend's possession, but did not recover any money. Pozulp maintained the recovered baggy in his care custody and control until he reached the police station and gave it to Bozek.

¶ 10 Hasnain Hamayat testified that he is employed by the Illinois State Police Forensic Science Command. He was qualified as an expert in analyzing controlled substances and cannabis. Hamayat analyzed the contents of the baggy retrieved during the investigation. Based upon his expert opinion, he concluded it contained .3 grams of heroin. At the conclusion of the evidentiary phase, the trial court instructed the jury that the closing arguments it would hear were not to be considered evidence and that it should disregard any arguments by counsel it believes does not comport with the evidence.

¶ 11 During closing arguments, defense counsel argued that the State had not met its burden of proof and called into question the credibility of Vega's testimony. Counsel asserted, in relevant

part, that the evidence turned on Vega's testimony "because he [was] the only witness who *** presented evidence of this incident." He argued, however, that Vega's testimony lacked credibility because, *inter alia*, it was unbelievable that: (1) defendant remained for six minutes in a location where he had just conducted a narcotics transaction, (2) six minutes had passed from the time Vega witnessed the transaction until defendant was arrested although enforcement officers testified they were only a block and-a-half away, and (3) that the police report undermined Vega's testimony because it listed him as an arresting officer when he testified that he merely conducted surveillance. Defense counsel also argued that the officers were "looking to make a narcotics arrest *** because there were these complaints of the narcotics sales and use."

¶ 12 The State responded in its rebuttal closing argument that "six minutes comes from the police reports" which are not evidence and that "[t]he evidence here is what you heard from that stand. And what you heard from that stand was it was a matter of minutes between when that transaction took place and when those police officers, those enforcement officers came and arrested the defendant." The State further argued that "[defense counsel] keeps telling you about these complaints that caused the surveillance officer and the enforcement officers to be there at that location. So clearly, people in broad daylight are seeing sales of drugs at that location." The trial court overruled defendant's objections to each of these arguments.

¶ 13 Following closing arguments, the trial court instructed the jury, *inter alia*, that counsels' arguments were not to be considered evidence, that any evidence received for a limited purpose should not be considered for any other purpose, and that it was the province of the jury to determine a witness' credibility. The jury found defendant guilty of delivery of a controlled substance and the matter was set for post-trial motions and sentencing.

¶ 14 Defendant filed a *pro se* motion for new trial alleging ineffective assistance of counsel. Defense counsel also filed a post-trial motion for new trial alleging, *inter alia*, that the State made "prejudicial, inflammatory and erroneous statements in closing argument designed to arouse the prejudice and passions of the jury, thereby prejudicing the defendant's right to a fair trial." The trial court denied both motions after conducting a *Krankel* inquiry on defendant's *pro se* motion and a hearing on defense counsel's motion.

¶ 15 At the hearing, defense counsel argued defendant's conviction was against the manifest weight of the evidence, but did not mention the allegedly improper remarks made by the assistant state's attorney (ASA). In its ruling, the trial court indicated, in relevant part, that "[p]aragraph eight about the arguments by the state's attorney in closing argument, there weren't any as far as I recall, but the jurors were told, both before arguments and afterwards, that arguments are not evidence. If they hear it, don't consider it. I'm sure the jurors followed the law in that respect." The matter then proceeded to sentencing.

¶ 16 Based upon the presentence investigation report, the State argued in aggravation that defendant was Class X mandatory due to his criminal background which encompassed "two decades of consistent criminality; seven felony convictions and ten misdemeanor convictions in that 20-year time span, primarily for narcotics and property crimes, but also has convictions for escape, aggravated assault and battery." Based upon the State's characterization of defendant's "recidivist tendencies" and the length of his prior sentences, the State requested defendant be sentenced to 15 years' imprisonment.

¶ 17 In mitigation, defense counsel argued that the instant conviction involved a small amount of narcotics and that the conviction that made defendant Class X mandatory was 20 years earlier. In addition, counsel argued that defendant had an extensive history of mental illness and had

attempted suicide on more than 10 different occasions; thus, an extensive prison sentence would not be reformative as defendant needed "treatment." He finally argued that defendant's criminal history was not uncommon for individuals with mental illness and requested the minimum six-year sentence. In allocution, defendant argued he was 47 years old, "changed his life" and "got help" since his last prison sentence. He also stated that he was a veteran and requested sentencing under "veteran guidelines."

¶ 18 The trial court subsequently sentenced defendant to eight years' imprisonment. The court stated that although defendant delivered "a small amount" of narcotics, it was nonetheless illegal to do so and merely indicated that defendant was not a "big-time drug dealer." Defendant's motion to reconsider his sentence was subsequently denied. Defendant now appeals from his conviction and sentence.

¶ 19 ANALYSIS

¶ 20 A. Prosecutorial Misconduct

¶ 21 Defendant's claim of trial error rests upon a theory of prosecutorial misconduct based upon alleged improper comments made by the State during its rebuttal closing argument. Under this theory, to constitute reversible error, defendant must not only demonstrate that the prosecutor's remarks were improper, but also that the complained-of comments resulted in substantial prejudice such that absent those comments, the result at trial would have been different. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). In this appeal, defendant first contends that the trial court committed prejudicial error when it allowed the State to misstate the law during its rebuttal closing argument. He asserts that the ASA urged the jury to improperly rely on a hearsay inference when he referred to police officers' testimony that citizens reported illegal drug sales in the area. He claims that although such testimony was admissible to explain police

conduct, it was hearsay to infer Vega's testimony that defendant conducted an illegal drug transaction with an observer approximately 15 to 20 feet away was not improbable as "clearly, people in broad daylight are seeing sales of drugs at that location." Defendant also contends the ASA misstated the law when he directed the jury to disregard Vega's testimony that six minutes had passed between the transaction and defendant's arrest because it was hearsay derived from the police report. He argues that Vega's testimony was based upon his own recollection as refreshed by the police report, which does not implicate the hearsay rule.

¶ 22 1. Forfeiture

¶ 23 The parties dispute whether defendant has preserved this error on appeal. The State contends defendant has forfeited review of this claim because he failed to raise it with sufficient specificity in his written post-trial motion. It argues that the basis asserted in defendant's motion for new trial that the ASA made "prejudicial, inflammatory and erroneous statements in closing argument designed to arouse the prejudice and passions of the jury," is distinguishable from the issue now raised on appeal that the ASA misstated the law; therefore his claim is subject to forfeiture. Citing *People v. Mohr*, 228 Ill. 2d 53, 65 (2008), defendant counters that his written post-trial motion was sufficient because the post-trial motion claim need not be identical to the objection made at trial to preserve the error and the entirety of improper remarks during closing are preserved on appeal even if counsel objects to certain remarks and fails to object to others.

¶ 24 To preserve an error on appeal, defendant must object at trial and raise the issue in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Wright*, 2015 IL App (1st) 123496, ¶ 31. A post-trial motion must alert the trial court to the alleged error with sufficient specificity to give the court a reasonable opportunity to correct it. *People v. Brown*, 150 Ill. App. 3d 535, 540 (1986). Failure to set forth the alleged errors made by the trial court

and to specify the grounds for a new trial in a post-trial motion constitutes a procedural default of the issue on review in the absence of plain error. *People v. Naylor*, 229 Ill. 2d 584, 592-93 (2008).

¶ 25 In his post-trial motion defendant alleged, without more, that the State made "prejudicial, inflammatory and erroneous statements in closing argument designed to arouse the prejudice and passions of the jury, thereby prejudicing the defendant's right to a fair trial." On more than one occasion, we have stated that a defendant's failure to raise a prosecutor's alleged improper remarks with specificity in his post-trial motion will result in forfeiture. *People v. Sutherland*, 317 Ill. App. 3d 1117, 1127-28 (2000); *People v. Bell*, 217 Ill. App. 3d 985, 1000 (1991); *People v. Moman*, 201 Ill. App. 3d 293, 318 (1990). A defendant cannot merely allege ambiguously in boilerplate language that a prosecutor made inflammatory or prejudicial remarks to the jury. *People v. Smith*, 139 Ill. App. 3d 21, 27 (1985). In *People v. Johnson*, 220 Ill. App. 3d 550, 561 (1991), where a defendant's motion for new trial referred only to "prejudicial and erroneous statements * * * designed to arouse the prejudices and passions of the jury," without specifying what the remarks were or in what manner they prejudiced him, this court deemed the issue forfeited. But see *People v. Barnes*, 117 Ill. App. 3d 965 (1983) (issue properly preserved where the defendant argued that certain of the prosecutor's comments were designed solely to inflame the passions and prejudices of the jury. Specifically, that the defendant considered the case to be a big joke and that he would not be smiling at the police or the prosecutor if the jury found him guilty of voluntary manslaughter).

¶ 26 The rule is not without reason. It is important to raise objections to a prosecutor's remarks with sufficient specificity in a post-trial motion because that is the only point at which the judge has an opportunity to realistically assess the cumulative effect of errors which might

have occurred at trial. *Smith*, 139 Ill. App. 3d at 27. In this case, at the hearing on defendant's post-trial motion, the court, in response to defendant's general written objection to the prosecutor's alleged prejudicial and inflammatory remarks, commented that it did not recall that there had been any such remarks. Defendant offered nothing in reply to the judge's comment, effectively leaving the court without any opportunity to assess the propriety of the State's rebuttal argument for the reasons asserted by defendant either then, or now in this appeal.

¶ 27 Further, defendant cannot take refuge in *Mohr*, 228 Ill. 2d 53. There, defendant voiced objection at trial to the giving of a particular jury instruction asserting that the instruction was improper because once the jurors heard the information alleging that defendant was provoked, the State was required to "back that up." *Id.* at 64. In his post-trial motion and on appeal, defendant argued that there was no evidence of provocation, thus there was no evidentiary basis to give the challenged instruction. *Id.* On appeal to our supreme court, the State argued that because the basis of defendant's objection at trial differed from those asserted in his post-trial motion and on appeal, any claim of error regarding the instruction was forfeited. *Id*. In rejecting the State's forfeiture argument, the court held that the phrasing in the challenges need not be exact; finding that in that case, the basis for defendant's objection to the instruction was consistent in the trial court and on appeal. *Id.* at 65. Such is not the case here. In this case, defendant's challenge to the State's remarks as set forth in his post-trial motion fail for lack of specificity, and in fact, unlike in *Mohr*, the basis for his non-specific post-trial objections differ from those specified here on appeal.

¶ 28 Although defendant objected at trial, he failed to specifically set forth his claimed error in his post-trial motion. Having presented merely boilerplate objections to the prosecutor's statements in rebuttal argument, without specifying the substance of those statements, defendant

has forfeited review of this issue on appeal. See *People v. Morgan*, 142 Ill. 2d 410, 454-55 (1991).

¶ 29 2. Plain Error

¶ 30 Defendant asserts that even if the error was not properly preserved, we may nonetheless review it under the closely-balanced prong of the plain error doctrine. The closely-balanced-evidence prong of the plain error doctrine requires defendant to prove prejudicial error by demonstrating the evidence was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence.[1] *People v. Herron*, 215 Ill. 2d 167, 178, 184 (2005). The first step in a plain error analysis is to determine whether any error occurred at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id*. Accordingly, we first review defendant's claims for error.

¶ 31 The standard of review for remarks made by the State during closing argument remains unsettled. Our supreme court in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), commented that review of closing argument is *de novo*. However, in an earlier case, *People v. Caffey*, 205 Ill. 2d 52, 128 (2001), cited approvingly in *Wheeler*, the suggested standard of review was abuse of discretion. The various districts of our appellate court have since been divided on the appropriate standard of review. See *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (noting the absence of consensus on the standard of review). In any case, here, under either standard, the same result would yield.

¶ 32 We note at the outset that prosecutors have a great deal of latitude in making closing arguments. *Morgan*, 142 Ill. 2d at 452-53. In order for a remark to be deemed reversible error,

[1] The plain error doctrine allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *Herron*, 215 Ill. 2d at 178. Defendant, however, argues only plain error based upon the closeness of the evidence at trial.

the complained of remark must have been so prejudicial that real justice was denied (*People v. Perry*, 224 Ill. 2d 312, 347 (2007)), or the verdict was the result of the error. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). "In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in the proper context." *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). Even improper remarks will not result in reversal of a defendant's conviction unless they represent a material factor in that conviction. *People v. Camden*, 219 Ill. App. 3d 124, 138 (1991). Further, a defendant cannot be heard to complain of statements made in rebuttal closing argument by the prosecutor which were invited by remarks made by defense counsel. *Barnes*, 117 Ill. App. 3d at 976.

¶ 33 In this case, we believe that each of defendant's claimed errors regarding the State's rebuttal closing argument were invited by defendant himself. In closing argument, defendant argued that the State failed to meet its burden of proof, commenting that the evidence turned on Vega's testimony. He argued that the veracity of Vega's testimony was undermined by the police report which listed him as an arresting officer as he testified that he merely conducted surveillance. Further, defendant argued that it was not believable that defendant remained for six minutes at the scene of the offense or that six minutes had elapsed from the time Vega witnessed the transaction until defendant's arrest, although officers testified that they were only a block and-a-half away.

¶ 34 In rebuttal, the State responded that the "six minutes comes from the police reports" which are not evidence and that the "evidence here is what you heard from the stand." It explained that "[i]n fact, if police reports were important, as the defendant's attorney is suggesting to you, we wouldn't have had to inconvenience *** the jury" by requesting that it

appear in court. The State further argued that "[o]ur system of justice *** [is] dependent upon live testimony, being-cross examined by an adversarial attorney, being able to ask the jury to observe the demeanor of the witnesses, observe the credibility, all of the circumstances, [and] compare the testimony of witnesses ***."

¶ 35 Defendant contends that the State crossed the bounds of proper argument in directing the jury to disregard Vega's testimony concerning the time that had elapsed between the commission of the offense and the arrest because it was hearsay derived from the police report. Defendant maintains that Vega's testimony was based on his recollection as refreshed by the police report, which does not implicate the hearsay rule.

¶ 36 Clearly, the State's rebuttal argument was invited by defense counsel's attempt to discredit Vega's testimony by referencing discrepancies between Vega's testimony and the police report. Further, the State's argument that police reports were not evidence is accurate. See *People v. Johnson*, 110 Ill. App. 3d 965, 969 (1982) (general rule is that police reports are not admissible as substantive evidence but may be relied upon to refresh the recollection of a witness). Defendant's argument suggested that Vega's testimony was incredible based upon the discrepancy between his oral testimony and the police report. Though defendant argues here that Vega's testimony was not based upon the police report, the record reveals that the report was used to refresh Vega's recollection with respect to the time of the arrest. We fail to see, and defendant has not set forth, how he was prejudiced by the State's response.

¶ 37 Defendant also claims error in the State's rebuttal argument concerning citizens' reports regarding illegal drug activity in the area. In closing, defendant argued that the officers were "looking to make a narcotics arrest * * * because there were these complaints of the narcotics sales and use." In its rebuttal, the State argued that "[defense counsel] keeps telling you about

these complaints that caused the surveillance officer and the enforcement officers to be there at that location. So clearly, people in broad daylight are seeing sales of drugs at that location. *** They're seeing it enough to complain about it[,] *** to call the Chicago Police Department to complain to particular officers who set up this particular surveillance. So why is it surprising that *** a surveillance officer in a covert capacity observes that same location, he sees the same thing." Viewed in context, we disagree with defendant's characterization of the State's rebuttal argument. Clear to us, the State was not taking the position that the reports equated to proof of illegal activity. Here again, the State was merely responding to defendant's argument concerning law enforcement's reason for being in the area.

¶ 38 Having viewed the State's rebuttal argument in context, we are hard-pressed to find error, particularly in light of the fact that the State's rebuttal argument was invited by the defendant's closing. As such, even if improper, they cannot be relied upon as error on appeal. *People v. Nieves*, 193 Ill. 2d 513, 534 (2000). Accordingly, we find no plain error.

¶ 39 In addition, even assuming *arguendo* that the prosecutor's remarks were improper, we would not find reversible error because the evidence of defendant's guilt was not closely balanced such that we fail to see how he could have suffered any real prejudice. The State presented a strong case consisting of eyewitness testimony and the corroborating testimony of two police officers. Vega testified that he observed defendant exchange a pink- or red-tinted Ziploc bag to Friend for money. Defendant then put the money in his right front pants pocket and Friend concealed the bag within the lining of his baseball cap. Vega's observation was made during daylight hours and from a relatively short distance of approximately 20 feet. Following his observation, Vega notified enforcement officers of the description and location of the alleged transaction and maintained his surveillance until enforcement officers arrived on the scene

minutes later. Bozek and Pozulp testified that Vega's instructions led them directly to defendant and Friend. Following a search of each individual, the officers found money and heroin in the exact location relayed to them by Vega. In addition, all three officers positively identified defendant in court and the officers' version of events was substantially consistent. Finally, a forensic scientist testified that he analyzed the substance from the Ziploc bag and concluded it contained heroin. Further, defendant did not offer an alternate version of events.

¶ 40 Defendant asserts, however, that Vega's testimony was wrought with "significant internal inconsistency" and was highly improbable. Specifically, defendant argues it is highly improbable that he would be cautious enough to conceal the baggy of heroin in his mouth given the risks of doing so, but simultaneously fail to take simpler steps to avoid detection such as remaining in the same location several minutes after concluding the transaction or conducting the transaction in the plain view of construction workers when less conspicuous places were available in the immediate vicinity. Defendant further argues that the officers' testimony suggested the investigation was conducted carelessly because no proceeds were recovered, there was no recording of the incident, and because Vega inconsistently testified at a preliminary hearing that defendant pulled the drugs out of his mouth and gave them to himself. He claims the State's case hung on the credibility of Vega's account due to the lack of additional eyewitness testimony or physical evidence. Thus, given the inconsistencies and improbability of Vega's version of events, there was a significant probability that the jury would have concluded Vega's testimony was insufficient to sustain a conviction beyond a reasonable doubt absent the ASA's misstatement of the law which bolstered the State's "weak" eyewitness testimony. We disagree.

¶ 41 Although Vega was the single eyewitness, neither physical evidence nor additional eyewitness testimony was required to sustain defendant's conviction. See *People v. Smith*, 185

Ill. 2d 532, 541 (1999) (testimony of a single witness is sufficient to convict if the witness is credible and the accused is viewed under circumstances which would permit a positive identification); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23 (State not required to present corroborating physical evidence). Further, Vega's version of events is not so incredible as to be beyond the realm of human belief despite defendant's argument that, in hindsight, there were simpler precautions he could have taken to avoid detection. We also disagree that the investigation was conducted carelessly as there is no indication in the record that the officers failed to follow protocol.

¶ 42 As previously stated, Vega's testimony was corroborated by Pozulp and Bozek. Based upon Vega's communication, Pozulp and Bozek detained defendant and Friend within minutes. The proceeds of the narcotics transaction were found in the exact location relayed to them by Vega. We are therefore unconvinced that the minor inconsistencies or misstatements defendant highlights destroyed Vega's credibility. Moreover, the trial court instructed the jury that only it could determine the credibility of witnesses. Thus, even if, as defendant suggests, the ASA misstated the law during his rebuttal closing argument in order to bolster Vega's testimony, it was not reversible error nor did it rise to the level of plain error as defendant has not established he was prejudiced by such comments or that the evidence was closely balanced given the strength of Vega's eyewitness account and the totality of the evidence against him.

¶ 43 Moreover, we observe that trial court twice admonished the jury that closing argument was not evidence. Thus, even if the prosecutor's comments could be deemed improper, and we do not find them to have been so, the trial court's admonishments to the jury had sufficiently curative effect.

¶ 44 3. Ineffective Assistance of Counsel

¶ 45 In his final attempt to void procedural default of his prosecutorial misconduct claims, defendant asserts that counsel was ineffective to properly preserve the issue on appeal. To sustain a claim for ineffective assistance of counsel a defendant must be able to demonstrate prejudice. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999) (to prevail on a claim of ineffective assistance, defendant must establish that defense counsel rendered performance that fell below an objective standard of reasonableness, and that defendant was prejudiced because of this deficient performance). Prejudice means a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). If the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 46 To establish prejudice, defendant must demonstrate a reasonable probability that the outcome on appeal would have been different had his trial counsel properly preserved the issue on appeal. See *Colon*, 225 Ill. 2d at 135. Given our previous discussion of the overwhelming evidence of defendant's guilt, defendant cannot prove he was prejudiced by counsel's alleged failure to preserve the issue of prosecutorial misconduct on appeal. He has therefore failed to establish his trial counsel rendered ineffective assistance.

¶ 47 B. Excessive Sentencing

¶ 48 Defendant next contends the trial court abused its discretion when fashioning his Class X, eight-year prison sentence in light of the applicable aggravating and mitigating factors including (1) the minimal amount of drugs sold, (2) his history of mental illness, and (3) the cost of imprisonment. He also argues his contributions to society would be better preserved by a

minimum sentence. Notably, defendant does not dispute that he is subject to Class X sentencing guidelines, nor does he argue the trial court failed to consider certain factors and/or improperly considered others. Here, he argues only that the trial court improperly balanced the mitigating and aggravating evidence during sentencing. The State contends defendant's sentence was appropriate and argues this court should not find an abuse of discretion merely because we would have weighed these factors differently.

¶ 49 The trial court has broad discretion in sentencing and a reviewing court may only alter a defendant's sentence if the trial court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). In order to prove an abuse of discretion, a defendant must show that the sentence was based upon improper considerations or was otherwise erroneous, either because the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977); *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). If the trial court's sentence is within statutory guidelines, there is a rebuttable presumption that the sentence is appropriate, and the reviewing court will not interfere with the sentence unless the record reflects the sentence is excessive or unjustifiable. *People v. Hill*, 2012 IL App (5th) 100536, ¶ 26; *People v. Smith*, 214 Ill. App. 3d 327, 338 (1991).

¶ 50 All sentences should reflect the seriousness of the crime and the objective of returning the offender to useful citizenship. *People v. Null*, 2013 IL App (2d) 110189, ¶ 55. Although careful consideration must be given to all mitigating and aggravating factors, a reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *Alexander*, 239 Ill. 2d at 213. While a court cannot ignore applicable mitigating evidence, it may determine the weight to attribute to such evidence. *People v. Powell*, 2013 IL App (1st) 111654, ¶ 35.When mitigating factors are presented to the

trial court, it is presumed these factors were considered, absent some contrary indication other than the sentence itself. *People v. Benford,* 349 Ill. App. 3d 721, 735 (2004). The trial court is also presumed to have considered the financial costs of incarceration, absent some contrary indication. *People v. Acevedo*, 275 Ill. App. 3d 720 (1995).

¶ 51 There is nothing in the record here to suggest the trial court abused its discretion in sentencing defendant to eight years' imprisonment. The mitigating evidence defendant highlights on appeal was presented to the court during sentencing. Defendant has failed to provide this court with support from the record that this evidence was not considered in the court's sentence. The State requested defendant be sentenced to 15 years' imprisonment. Defendant requested the minimum six-year sentence. See 730 ILCS 5/5-4.5-25(a) (West 2010) (Class X sentencing guidelines mandate a term of imprisonment between 6 to 30 years'). The court determined a lengthier sentence was inappropriate given the applicable mitigating factors and imposed a sentence two years above the minimum. However, defendant also had a lengthy history of criminal activity spanning approximately two decades. His criminal background contained multiple drug-related offenses in addition to the instant offense and convictions for escape and other violent crimes. Thus, although we acknowledge the mitigating factors present, we do not find the trial court abused its discretion when it sentenced defendant to eight years in prison.

¶ 52 C. Mittimus

¶ 53 Defendant finally requests we amend the mittimus to reflect the correct conviction. The State concedes the mittimus is incorrect and agrees this court should exercise its authority to amend it. See Ill. S. Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"). We accept the State's concession. The mittimus incorrectly displays a conviction for Class 1 delivery of between 1 to

15 grams of a controlled substance under section 401(c)(1) of the Illinois Controlled Substances Act (Act). 720 ILCS 570/401(c)(1) (West 2010). Defendant was convicted of Class 2 delivery under section 401(d) of the Act for possession of .3 grams of heroin. See 720 ILCS 570/401(d). We therefore direct the circuit court to amend the mittimus accordingly. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections").

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, we affirm defendant's conviction and sentence and direct the clerk of the circuit court to amend the mittimus to appropriately reflect defendant's conviction.

¶ 56 Affirmed; mittimus amended.