2016 IL App (1st) 141054-U

No. 1-14-1054

Fifth Division
September 30, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 12 CR 7512
	)	
TERRY PRICE,	)	The Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Justice Lampkin specially concurred.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion by admitting drug evidence, despite slight variations in the descriptions of the ziplock bags in which the drugs were sold, where the State demonstrated a sufficient chain of custody through reasonable protective measures, and matching identifiers, such as inventory numbers, number of bags, and heat-sealing; (2) the State's rebuttal did not contain any error; (3) the trial court's error in scheduling the jury instruction conference after closing arguments did not rise to the level of plain error; (4) defendant's counsel was not ineffective; and (5) defendant’s 12-year sentence was not an abuse of the discretion by the trial court.

¶ 2 Defendant, Terry Price, age 56, was convicted after a jury trial of one count of delivery of less than one gram of heroin to an undercover police officer and was sentenced to 12 years in the Illinois Department of Corrections (IDOC). On this appeal, defendant claims: (1) that the State's chain of custody for the controlled substance was not "intact"; (2) that he was denied a fair trial when the State made improper comments in closing arguments; (3) that he was denied a fair trial when the trial court held the jury instruction conference after closing arguments; (4) that he was denied effective assistance of counsel when his assistant public defender (APD) (a) introduced and elicited other crimes evidence, (b) failed to object to repeated improper arguments by the State during closing arguments, and (c) failed to preserve defendant's issues for appellate review; and (5) that his 12-year sentence is excessive. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Evidence at Trial

¶ 5 At trial, the evidence established that, on September 8, 2011, Chicago police officers on a narcotics team including officers Lazaro Altamirano and Donald Clark and Sergeant Andrew Dakuras, conducted an undercover heroin purchase from defendant in the area of Iowa Street and Harding Avenue in Chicago. Officer Clark acted as the surveillance officer, Officer Altamirano was the buy officer, and Sergeant Dakuras acted as an enforcement officer.

¶ 6 A. Police Officer Donald Clark

¶ 7 Officer Donald Clark testified that he has been a Chicago police officer for 19 years. On September 8, 2011, at 9:30 a.m., he drove to the area of Iowa Street and Harding Avenue and parked his vehicle on Harding Avenue. Officer Clark originally opined that he was 25 to 50 feet away from defendant, but agreed on cross-examination that his actual distance was 100

to 150 feet from where defendant was standing. From his parked vehicle, Officer Clark observed defendant shouting "rocks and blows" to vehicles that drove by. Clark testified that "rocks" is a street term meaning crack cocaine, and "blows" is a street term meaning heroin. Clark then reported what he observed by radio to the rest of the narcotics team and provided a physical description of defendant. Clark observed Officer Altamirano approach the intersection of Iowa Street and Harding Avenue on foot and engage defendant in a conversation, which Clark could not hear. Defendant and Altamirano then walked northbound on Harding Avenue, where, from a distance of about 20 feet, Officer Clark observed Altamirano and defendant engage in a hand-to-hand transaction. Clark could not observe what defendant handed to Altamirano, but he observed that Officer Altamirano handed defendant money. While the transaction was occurring, Officer Clark radioed back to his team concerning the transaction and defendant's location. After the exchange, Officer Clark testified that defendant walked back to the corner of Iowa Street and Harding Avenue, and Officer Altamirano left the area and radioed the rest of the team in order to report both a positive transaction for heroin and a physical description of defendant.

¶ 8 Officer Clark maintained surveillance of defendant until the enforcement team arrived. Officer Clark testified that he observed Sergeant Dakuras and Officer Chinchilla arrive in the area soon after he radioed and detain defendant, engage him in a brief conversation, and then let him go. Officer Clark testified that he did not take any photographs, videos, or audio transcriptions on that day, and does not recall preparing a contact card for the person the enforcement officers detained. Officer Clark testified that defendant was not arrested at that time because the buy was part of an ongoing investigation into the open-air drug market in that area, and arresting defendant would have compromised the operation.

¶ 9 B. Police Officer Lazaro Altamirano

¶ 10 Officer Lazaro Altamirano testified that he had been a Chicago police officer for over 10 years, and had been assigned to the narcotics unit for five years. When he approached, defendant asked him what he needed and Altamirano asked for "two blows." The money that Officer Altamirano handed defendant consisted of two $10 bills that were prerecorded 1505 funds provided to him by the Chicago police department (CPD). Defendant handed him two clear ziplock bags with a Superman logo on them. After the transaction, Altamirano returned to his vehicle and radioed the rest of the team. When Officer Altamirano received word that the enforcement officers had detained defendant, he returned to the intersection of Iowa Street and Harding Avenue to identify defendant as the individual who had sold him the ziplock bags.

¶ 11 Officer Altamirano then returned to Homan Square, a CPD facility, with the drugs and placed the two ziplock bags into a green CPD inventory narcotics bag. Officer Altamirano testified that Officer McNeela inventoried the two bags into the system. Officer Altamirano then brought the heat-sealed bag to the evidence safe in Homan Square. Officer Altamirano testified that the heat-sealed evidence was then transported to the Illinois State Police Crime Lab for testing and analysis. While at Homan Square, about an hour after the undercover buy occurred, Altamirano testified that he was shown a photo array by Officer McNeela and Sergeant Dakuras, in which he identified defendant as the individual who sold him the two ziplock bags that day.

¶ 12 At trial, Officer Altamirano described the ziplock bags as clear in the back with a red Superman logo on them. Upon cross-examination, Officer Altamirano conceded that the bags were clear on one side, and that the other side had a red Superman logo with a blue

background; he had not noted the blue background in his supplemental report. Officer Altamirano testified that DNA and fingerprint testing was not conducted on the bags that he gave to Officer McNeela.

¶ 13 C. Sergeant Andrew Dakuras

¶ 14 Sergeant Andrew Dakuras testified that he and Officer Chinchilla served as the enforcement officers for the narcotics team on September 8, 2011, and were in an unmarked police vehicle with an "M" plate, but no lights on top of the vehicle or markings on it. Dakuras and Chinchilla patrolled the area until Officer Altamirano made a positive buy and identified the individual. Sergeant Dakuras was then directed by Officer Clark to the corner of Iowa Street and Harding Avenue, where he observed an individual matching the description that he received from Officer Altamirano, who he identified in court as defendant. Sergeant Dakuras testified that, on the morning of September 8, 2011, Officer Altamirano informed him of the 1505 funds he planned to use in the buy and gave Dakuras the serial numbers of the two $10 bills, which Sergeant Dakuras wrote down on the palm of his hand. Once Sergeant Dakuras identified defendant, he exited his vehicle and called defendant over to him, where defendant provided his name and date of birth. Dakuras found two $10 bills in defendant’s pockets with serial numbers that matched the numbers on his hand, and then he returned the money and allowed defendant to leave. He did not recover a state ID or driver’s license, or fill out a contact card for defendant. Sergeant Dakuras explained that defendant was not arrested because it could prevent Officer Altamirano from later purchasing narcotics at that location, and so they waited for a period of time and arrested several individuals at the conclusion of the investigation. After defendant left the

location, Sergeant Dakuras returned to Homan Square and prepared the photo array for Officer Altamirano.

¶ 15 D. Kathy Regan

¶ 16 Kathy Regan, a forensic scientist in drug chemistry at the Illinois State Police Forensic Science Center, testified that she received the drugs on September 13, 2011. She recognized the bag by its case exhibit number "5" and label: “Lab Case 1138954.” The bag was heat-sealed when she received it. Regan concluded from her examination that the weight of the substance was 0.433 grams and the substance in both bags was heroin. The scale on which she weighed the powder had been tested and calibrated two days earlier. After conducting these tests, Regan resealed and repackaged the evidence, and marked it with the case exhibit number and the date that she sealed the inner package. She then placed it in the evidence bag which she marked with her initials and the date that she sealed the outer bag. In her report, Regan described the exhibit as “two clear plastic bags.” At trial, she identified the packages as “clear on one side and blue on the other.” Regan testified that her reports generally describe things loosely, stating that the bags were “clear as in you can see through it.”

¶ 17 After Kathy Regan’s testimony concluded, the State moved to enter the exhibit into evidence, which was admitted over defense’s objection. The court recessed, and, while out of the presence of the jury, the State asked the trial court’s permission to question the officers as to why defendant was not arrested and a warrant was not issued. The State informed the court that, if elicited, the officers would testify that defendant was not issued an arrest warrant because he was in the custody of the Cook County Jail, on March 12, 2012, on a different offense. The trial court allowed that line of testimony; defense counsel objected, but the objection was overruled.

¶ 18 E. Willie J. Curtis

¶ 19 Willie J. Curtis, an investigator for the Cook County Public Defender's Office, testified that he was assigned to investigate and take photographs and measurements of the intersection at Iowa Street and Harding Avenue on October 1, 2013. He testified that the distance from the southeast corner of Iowa Street and Harding Avenue to the area of 923 North Harding Avenue was approximately 323 feet. Further, he testified that his diagonal measurement from 923 North Harding Avenue to the southwest corner of Iowa Street was 370 feet. Curtis, however, did not write a report regarding what his investigation revealed.

¶ 20 II. Closing and Jury Instructions

¶ 21 The trial court informed the parties that they would hold the jury instructions conference after closing arguments because the trial court indicated that the assistant State's Attorney (ASA) was not prepared for the conference. The court stated: "Anything before the jury comes out, State? We have to do jury instructions[,] since you are not prepared with instructions[,] after argument." Neither the State nor the defense objected to the trial court's decision to postpone the conference until after argument.

¶ 22 The parties then proceeded with closing arguments. None of the statements made in the State's initial closing argument are contested on appeal—only those made in rebuttal. During its closing argument, the defense argued that the State's case lacked proof and that, although the chemist tested a sample and found it positive for heroin, "the rest of their case is story hour." In reference to Officer Clark's testimony, defense counsel stated that: "He is gilding the lilly [*sic*]. He is laying it on thick. He is exaggerating the situation." Counsel was referring to Clark's testimony about his distance from the transaction. Clark testified that a transaction occurred, although he could not see what defendant gave Altamirano, and that

defendant was yelling at passersby, although Clark later stated that there were no other pedestrians on the street. When defense counsel concluded, the trial court immediately reiterated the jury instruction that closing arguments were not evidence.

¶ 23 In rebuttal, the State argued that "the defense's argument may be summed up in one way: grasping at straws to take away from the fact that they can't get around that the defendant sold drugs to an undercover office. End of story."

¶ 24 The ASA continued, asserting; "[t]hey went out of their way to attack a chemist, who had nothing to do with this case. Keep in mind the chain of custody in this case has never been challenged. The chain of custody in this case is completely intact." The defense objected and was overruled. The ASA repeated the phrase "grasping at straws" multiple other times in his rebuttal. The trial court reminded the jury that any argument not based on the evidence should be disregarded. The ASA also commented that "[i]t is ridiculous to challenge the credibility of these officers. They honestly don't know who sold Officer Altamirano drugs on that day? Really?" Defense counsel objected and was overruled.

¶ 25 The prosecution concluded: "Now, we are here before you asking you to finish the job. Clean up that intersection of Iowa and Harding. Find the defendant guilty."

¶ 26 After closing arguments, the jury was dismissed and the trial court and counsel held the jury instruction conference. The parties disagreed only as to which of the two versions of Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.11) should be given. The State requested the abridged version which states:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement or acted in a manner that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may

be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

It is for you to determine [whether the witness made the earlier statement, and if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."[1]

¶ 27 Defense counsel requested the unabridged version of IPI Criminal 4th No. 3.11, which states:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement or acted in a manner that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when:

1. The statement was made under oath at a trial, hearing, or proceeding; or,

2. The statement narrates, describes, or explains an event or condition the witness had personal knowledge of; and

A. The statement was written or signed by the witness

[1] The trial court identified the version of IPI Criminal 4th No. 3.11 that only included two paragraphs, the first of which began, "[t]he believability of a witness," and the second of which began, "[i]t is for you to determine." The court asked the State if that was the version it requested, and the State replied that it was. The court did not read the entire instruction, so it is unclear whether the State requested that the bracketed material be included.

B. The witness acknowledged under oath that he made the statement; or

C. The statement was accurately recorded by a tape recorder, videotape recording, or a similar electronic means of sound recording.

It is for you to determine whether the witness made the earlier statement, and if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

¶ 28 The trial court chose the instruction the defense requested, over the State's objection. After the trial court delivered the instructions to the jury, the jury began deliberating at 11:20 a.m. At 1:48 p.m., the trial court received a note from the jurors stating: "What do we do if we can't come to unanimous verdict? No one has moved for over an hour." At 2:10 p.m. the jury delivered a verdict finding defendant guilty of delivering a controlled substance. The defense moved for judgment notwithstanding the verdict, which the trial court denied.

¶ 29 The defendant submitted a written posttrial motion on November 4, 2013. On February 25, 2014, the defense orally argued a supplemental posttrial motion for a new trial, which raised issues that were not included in the prior written motion. Defense counsel raised the issue of chain of custody at this time, and told the trial court she would file a written supplemental motion for a new trial that day. The trial court responded saying, "there were no errors in the trial. The motion for new trial is denied."

¶ 30 The sentencing hearing followed on that same day. Defendant was a Class X felon, which carries a minimum sentence of six years and a maximum sentence of 30 years. The State requested a sentence that was "more than the minimum" and the defense argued that the six-

year minimum was sufficient. The State emphasized defendant's nine prior incarcerations with IDOC, while defense counsel argued that the amount of narcotics was very small and the possibility of mistake was high. Defendant then spoke, reading from a letter, stating that he was offered a plea bargain of 10 years which he did not take, but would have if he had actually committed the crime. He also spoke of his struggle as a drug addict. The trial court sentenced defendant to 12 years' imprisonment as a Class X offender. On March 24, 2014, defense counsel filed a motion to reconsider defendant's sentence, which the trial court denied on March 27, 2014. Defendant also made a motion to file an amended notice of appeal to correct the judgment date of March 27, 2014, and reflect the correct sentence of 12 years, which this court granted.

¶ 31 ANALYSIS

¶ 32 On this direct appeal, defendant claims: (1) that the State's chain of custody for the controlled substance was not "intact"; (2) that he was denied a fair trial when the State made improper comments in closing arguments; (3) that he was denied a fair trial when the trial court held the jury instruction conference after closing arguments; (4) that he was denied effective assistance of counsel when his APD (a) introduced and elicited other crimes evidence, (b) failed to object to repeated improper arguments by the State during closing arguments, and (c) failed to preserve defendant's issues for appellate review; and (5) that his 12-year sentence is excessive. For the following reasons, we affirm his conviction and remand for resentencing.

¶ 33 I. Chain of Custody

¶ 34 First, defendant challenges the chain of custody of the two ziplock bags of heroin. He contends that the State's evidence failed to establish that the drugs which tested positive for

heroin at the crime lab were the same drugs which defendant allegedly sold to Officer Altamirano. Defendant attributes this break in the chain: (1) to a discrepancy in the witnesses' descriptions of the color and logo of the recovered bags, and (2) to the State's alleged failure to show reasonable protective measures during the time between when the drugs were inventoried by the police and examined by the chemist. Defendant argues that these circumstances show possible tampering, substitution, or alteration of the evidence.

¶ 35 A. Harmless Error

¶ 36 Defendant preserved this issue for our review. A "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski,* 225 Ill. 2d 551, 564 (2007). Failure to do so operates as a forfeiture of that issue on appeal. *People v. Ward,* 154 Ill. 2d 272, 293 (1992). Since defendant preserved this issue for our review, the State bears the burden of showing that any error was harmless beyond a reasonable doubt. *People v. Johnson,* 238 Ill. 2d 478, 488 (2010) (defendants "properly preserved their claims of error, thus requiring the State to show that the errors were non-prejudicial under a harmless-error analysis"). An error is harmless if it appears that the error at issue did not contribute to the verdict obtained. *People v. Spicer,* 379 Ill. App. 3d 441, 458 (2007). A reviewing court may find an error harmless if the remaining evidence is overwhelming or if the evidence at issue merely duplicates other properly admitted evidence. *People v. Becker,* 239 Ill. 2d 215, 240 (2010); *People v. Wright*, 2012 IL App (1st) 073106, ¶ 128.

¶ 37 B. Standard of Review

¶ 38 Before examining the substantive issue, we must ascertain the correct standard of review. Defendant concedes, and the State agrees, that his argument centers around the admissibility

of the evidence, which normally warrants an abuse of discretion standard of review. *People v. Chambers*, 2016 IL 117911, ¶ 75 (citing to *Becker*, 239 Ill. 2d at 234). In the alternative, defendant advances an insufficiency of the evidence argument, claiming that a complete breakdown in the chain of custody rendered the State unable to prove possession, an essential element of delivery of a controlled substance. *Woods*, 214 Ill. 2d at 472.

¶ 39 Typically, a chain of custody serves to lay a proper foundation for the admission of evidence; it does not address the existence, or lack, of an element of the crime of delivery. See *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). Evidentiary rulings regarding admissibility of evidence are within the distinct province of the trial court and will not be reversed unless the trial court abused its discretion. *People v. Purcell,* 364 Ill. App. 3d 283, 293 (2006). A trial court's decision is considered an abuse of discretion only when it is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Dunmore,* 389 Ill. App. 3d 1095, 1109 (2009).

¶ 40 Alternatively, when a defendant asserts the insufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution, and determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See *Woods*, 214 Ill. 2d at 470. If the court answers this inquiry in the negative, the defendant's conviction is reversed. *Woods*, 214 Ill. 2d at 470. However, a reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson,* 232 Ill. 2d 246, 281 (2009); *People v. Ross,* 229 Ill. 2d 255, 272 (2008).

¶ 41 Defendant cites *Woods*, a case which acknowledges that it is "rare" for a complete breakdown in the chain of custody to occur and to trigger a sufficiency of the evidence

analysis. *Woods*, 214 Ill. 2d at 457. The case at bar does not present this rare situation. Defendant's claim that there was a complete failure of proof is not persuasive. The record contains testimony confirming that the unique inventory number, the number of ziplock bags, and the heat-sealed condition of the evidence were identical at the police station and at the lab. There were only small dissimilarities in the color or logo descriptions of the ziplocks, which do not show a breakdown in the chain of custody. Whether we consider defendant's argument as an evidentiary claim or a sufficiency claim, the result is the same.

¶ 42 C. Sufficient Chain

¶ 43 When prosecuting a criminal defendant for delivery of a controlled substance, the State must prove that the drugs obtained from the defendant are, indeed, a controlled substance. *Woods*, 214 Ill. 2d at 466. When the State attempts to introduce the drugs into evidence, it must make a *prima facie* showing that the chain of custody was sufficiently complete. *Woods*, 214 Ill. 2d at 467. An unbroken custodial chain helps to ensure that the drugs linked to the defendant's sale are the same as those examined by the forensic chemist. *Woods*, 214 Ill. 2d at 467; *Alsup*, 241 Ill. 2d at 274. The State must demonstrate that the police took reasonable protective measures such that it is improbable that the evidence was altered, tampered with, or accidentally substituted. *Woods*, 214 Ill. 2d at 467. It is the duty of the trial court to determine if the State has met this burden, before admitting the evidence. *Alsup*, 241 Ill. 2d at 274.

¶ 44 " 'Once the State has established the probability that the evidence was not compromised, and unless the defendant shows actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence.' " *Woods,* 214 Ill. 2d at 467 (quoting *People v. Bynum,* 257 Ill. App. 3d 502, 510 (1994)). The burden then shifts to

the defendant to show actual tampering, alteration or substitution. *Woods,* 214 Ill. 2d at 468. In the absence of such evidence, the chain of custody is sufficiently intact—every participant in the chain need not testify, and the State need not exclude every possibility of tampering. *Woods*, 214 Ill. 2d at 467. The State must establish only that its reasonable protective measures post-seizure made it unlikely that any tampering occurred. *People v. Britton*, 2012 IL App (1st) 102322, ¶ 18 (citing *People v. Lundy*, 334 Ill. App. 3d 819, 826 (2002)). However, if the defendant presents evidence of actual tampering, the burden once again shifts to the State to rebut the claim. *Woods*, 214 Ill. 2d at 467.

¶ 45 In *Woods*, our supreme court found that the State satisfactorily made its *prima facie* case when (1) the number of drug packets and the inventory number assigned to the drugs were consistent at the times of both the police inventory and the chemist's examination; (2) the police followed standard inventory procedure; and (3) the testimony at trial corroborated that the condition in which the lab received the drugs matched the condition in which they were initially seized. *Woods*, 214 Ill. 2d at 467. Similarly, the supreme court in *Alsup* held that it was "undisputed" that the police used reasonable protective measures when (1) an officer maintained the seized drugs under his care, custody, and control en route to the police station; (2) followed standard inventorying protocol; (3) heat-sealed the inventory bag; and (4) recorded the appropriate identifying information on the bag. *Alsup*, 241 Ill. 2d at 278. Collectively, these procedures established the State's *prima facie* case and effectively refuted the probability of evidence tampering. *Alsup*, 241 Ill. 2d at 279.

¶ 46 In the case at bar, defendant claims that the officer's and chemist's descriptions of the ziplock bags do not align, thus breaking the chain in custody. However, Illinois courts have viewed the chain of custody, in regards to matching evidence descriptions, with a degree of

leniency. In a recent case, a defendant appealed his conviction of possession of heroin with intent to deliver based on an insufficient chain of custody. *Britton*, 2012 IL App (1st) 102322, ¶ 16. This court affirmed his conviction, finding no abuse of the trial court's discretion in admitting the drug evidence where the State had sufficiently established a custodial chain, despite varying descriptions of the drugs. *Britton*, 2012 IL App (1st) 102322, ¶ 20. In *Britton*, the police officers had identified *four clear* ziplock bags in their inventory report, although one of the officers later testified at trial that, at the time of seizure, he "believed" the bags to be "green and white" but he "did not indicate any markings on the report at all." *Britton*, 2012 IL App (1st) 102322, ¶ 14. In contrast, the forensic scientist in *Britton* testified that she had counted *five* bags and described them as *clear* in her report. *Britton*, 2012 IL App (1st) 102322, ¶ 15. This court held in *Britton* that the miscounting of one bag was insufficient to break the chain of custody or to warrant a finding of abuse of discretion, given the ample testimony of safekeeping the State adduced at trial.[2] *Britton*, 2012 IL App (1st) 102322, ¶ 19. This court also deemed the chain sufficient despite the officer's failure to make an inventory report which identified the precise bag-color that he perceived. *Britton*, 2012 IL App (1st) 102322, ¶ 19.

¶ 47 Analogous to the case law above, Officer Altamirano satisfied the State's burden by detailing the protective procedures the CPD employed to safeguard the evidence obtained from defendant. As in *Alsup* and *Britton*, Officer Altamirano testified that he kept the ziplock bags in his care, custody, and control in his covert vehicle: they remained on his person until

[2] Specifically, the officers testified that the "narcotics were in [Sergeant] Blas' constant care, custody, and control from the time he recovered them *** to the time he gave them to [Officer] Mata," who labeled the inventory bag as heroin, described the drugs' appearance, assigned a unique inventory number, and heat-sealed the evidence. *Britton*, 2012 IL App (1st) 102322, ¶ 13. Moreover, the scientist testified that she received the evidence in a heat-sealed condition under the same inventory number. *Britton*, 2012 IL App (1st) 102322, ¶ 20.

he relocated back to the police facility at Homan Square. When he arrived, he placed the evidence in a standard, green CPD drug inventory bag. While Officer Altamirano was present, fellow officer McNeela assigned the bag a unique inventory number, 12414135, and entered it into the CPD CLEAR database. Thereafter, just as in *Woods*, *Alsup*, and *Britton*, Officer Altamirano placed his signature on the top of the bag, heat-sealed it, and brought it to the evidence safe, pursuant to CPD procedure. Next, Officer Altamirano testified that the evidence traveled to the Illinois State Police crime lab for testing and analysis. Given the extensive testimony detailing reasonable protective measures, the trial court did not abuse its discretion.

¶ 48 Next, defendant alludes to an "unexplored five-day gap in the custody chain between the evidence's placement in the safe and its receipt by the forensic chemist at the crime lab." However, courts have admitted drug evidence despite a gap in the custodial timeline. *People v. Blankenship*, 406 Ill. App. 3d 578, 590 (2010). Specifically, Illinois law permits the State to rectify a missing link in the chain of custody with evidence of "one unique identifier" showing that the drugs sent from the police station and the drugs received at the lab were one and the same. *Blankenship*, 406 Ill. App. 3d at 589 (quoting *People v. Howard,* 387 Ill. App. 3d 997, 1004 (2009)). For example, evidence that the drugs left one facility in a sealed condition, and arrived at their testing destination in the same sealed condition, or that the inventory number on the bag sent matches the number on the bag received, are two acceptable ways to show that the police took reasonable protective measures and remedied the missing link. *Blankenship*, 406 Ill. App. 3d at 589; *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 46.

¶ 49 Similar to *Blankenship*, in the case at bar, when forensic scientist Kathy Regan received the bag of evidence, it was heat-sealed with a matching inventory number. Regan testified that she kept the bag in her desk until the time of examination, weighed the sample at 0.433 grams on calibrated equipment, and completed two tests generally accepted in the scientific community confirming the substances as heroin. Finally, she resealed and repackaged the drugs. Given the matching inventory numbers and sealed conditions, which satisfy the unique identifier test, it is inconsequential that the CPD did not make a report on the days in between the evidence's placement in the safe and its receipt by the forensic chemist, especially in light of the protective measures in the evidence. See *Blankenship*, 406 Ill. App. 3d at 589.

¶ 50 Next, while defendant takes issue with the way in which the ziplock bags were variously described, the differences are not significant. Officer Altamirano testified that defendant sold him white powder in two small ziplock bags, clear in the back with a Superman logo on them. Upon cross-examination, Officer Altamirano refined his description to indicate that the bags were clear on one side with a red Superman logo and a blue background on the other, although he had not noted the blue background previously in his supplemental report. In Regan's notes, she described "two clear plastic bags." However, she later clarified in her trial testimony that the bags were clear on one side, and blue on the other, but by "clear" she meant "see-through." Her description of "clear" at the time of testing is thus reconcilable with Officer Altamirano's description of "clear" with a Superman logo upon inventorying. The chemist's description in her report was merely incomplete, not contradictory. Such a deficiency is curable by a thorough discussion of safeguarding procedures, vividly present in this case. Thus, the trial court did not abuse its discretion by admitting the drug evidence.

¶ 51 In support of his claim of a complete breakdown in the chain of custody, defendant argues that the following two cases are similar to his: *People v. Terry,* 211 Ill. App. 3d 968 (1991), and *People v. Gibson*, 287 Ill. App. 3d 878 (1997). In the former, the police reported 32 packets of white powder with a total estimated weight of eight grams at the time of seizure. *Terry*, 211 Ill. App. 3d at 971. However, upon subsequent examination, the chemist identified 42 packets of a powder, saturated in a yellow substance, totaling 12 grams. *Terry*, 211 Ill. App. 3d at 978. The appellate court reversed the defendant's conviction for an insufficient chain of custody, despite matching inventory numbers, because of the substantial divergence in the drugs' descriptions[3] and a dearth of testimony regarding the safekeeping of the evidence. *Terry*, 211 Ill. App. 3d at 974.

¶ 52 In *Gibson*, the police reported 19 packets of drugs weighing a total of two grams at seizure, but the chemist later reported 20 packets weighing a total of 9.3 grams—a roughly five-fold increase in quantity. *Gibson*, 287 Ill. App. 3d at 882. This court held that the State failed to prove a sufficient custodial chain, despite corresponding inventory numbers, due to this weight disparity and a failure to provide proof of the inventory officer's safekeeping of the evidence. *Gibson*, 287 Ill. App. 3d at 882.

¶ 53 Neither *Terry* nor *Gibson* bolster defendant's case. First, the case at bar reveals no evidence of discrepancies in substance, weight, or number of packets. The CPD inventoried two ziplock bags suspected to contain heroin, and the forensic chemist tested these same two bags positive for heroin. The sole inconsistency is in the description of the tint and logo of the ziplock bags. The court in *Gibson* attributed great weight to the discrepancy in the quantity of drugs because the State did not call anyone to testify and explain the difference.

[3] The officer's and chemist's descriptions differed by 10 packets, four grams, and color. *Terry,* 211 Ill. App. 3d at 968.

See *People v. Fox*, 337 Ill. App. 3d 477, 483-84 (2003). In contrast, in the case at hand, the State called Kathy Regan, who testified that her description of "clear" bags addressed opacity rather than color. Thus, the trial court did not abuse its discretion in finding as negligible the inconsistencies in the description of the bags.

¶ 54 Significantly, there was no evidence of actual tampering, substitution, or contamination. Once the chain of custody is presumed valid after evidence of the police's reasonable protective measures, Illinois law requires the defendant to rebut the presumption with specific evidence. Such evidence is entirely lacking here.

¶ 55 As the State fulfilled its obligation to make a *prima facie* case, providing sufficient links between the drugs recovered and those tested, and defendant failed to furnish evidence of actual tampering, we find that the trial court did not abuse its discretion in finding the State's drug evidence admissible.

¶ 56 II. Prosecutorial Misconduct

¶ 57 Defendant's second claim on appeal is that the State's misconduct in closing arguments denied him a fair trial, where (1) the State improperly claimed that the chain of custody was "intact" and that the defendant had not challenged it; (2) the State denigrated the defense for challenging the officers' credibility; (3) the State made arguments that were not based on evidence; and (4) the State improperly told the jury it was its job to convict.

¶ 58 A. Standard of Review

¶ 59 It is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion. We have previously made this same observation in several cases, including *People v. Alvidrez,* 2014 IL App (1st) 121740, ¶ 26; *People v. Land,* 2011 IL App (1st) 101048, ¶¶ 149–51; and *People v. Phillips,* 392 Ill. App. 3d 243, 274–75 (2009). The

Second District Appellate Court has agreed with our observation that the standard of review for closing remarks is an unsettled issue. *People v. Burman,* 2013 IL App (2d) 110807, ¶ 26; *People v. Robinson,* 391 Ill. App. 3d 822, 839–40 (2009).

¶ 60 Our supreme court has held: "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *People v. Wheeler,* 226 Ill. 2d 92, 121 (2007). However the supreme court in *Wheeler* cited with approval *People v. Blue,* 189 Ill. 2d 99 (2000), in which the supreme court had previously applied an abuse of discretion standard. *Wheeler,* 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing argument is within the trial court's discretion, and will not be reversed absent an abuse of discretion. *Blue,* 189 Ill. 2d at 132 ("we conclude that the trial court abused its discretion" by permitting certain prosecutorial remarks in closing); *People v. Caffey,* 205 Ill. 2d 52, 128 (2001); *People v. Williams,* 192 Ill. 2d 548, 583 (2000); *People v. Armstrong,* 183 Ill. 2d 130, 145 (1998); *People v. Byron,* 164 Ill .2d 279, 295 (1995). Our supreme court has reasoned: "Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing argument is within the trial court's discretion." *People v. Hudson,* 157 Ill. 2d 401, 441 (1993). Following *Blue* and other supreme court cases like it, this court had consistently applied an abuse of discretion standard. *People v. Tolliver,* 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia,* 328 Ill. App. 3d 669, 671 (2001).

¶ 61 Since *Wheeler,* appellate courts have been divided regarding the appropriate standard of review. *Alvidrez,* 2014 IL App (1st) 121740, ¶ 26 (noting that the issue remains divided). The first and third divisions of the First District have applied an abuse of discretion standard,

while the Third and Fourth Districts and the fifth division of the First District have applied a *de novo* standard of review. Compare *People v. Love*, 377 Ill. App. 3d 306, 316 (1st Dist. 1st Div. 2007) and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (1st Dist. 3d Div. 2008) with *People v. McCoy,* 378 Ill. App. 3d 954, 964 (3d Dist. 2008), *People v. Palmer,* 382 Ill. App. 3d 1151, 1160 (4th Dist. 2008), and *People v. Ramos,* 396 Ill. App. 3d 869, 874 (1st Dist. 5th Div. 2009). However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard.

¶ 62 B. Harmless Error, Forfeiture, and Plain Error

¶ 63 On appeal, defendant claims reversible error due to four instances of prosecutorial misconduct. The first claim, regarding the State's chain-of-custody comments, was preserved for appeal and will be subjected to a harmless error analysis. See Issue I, *supra* ¶ 36, for a discussion of harmless error analysis. The remaining three claims were not preserved for appeal. However, even when a defendant has forfeited a closing-argument claim by failing to object at trial, closing arguments must still be viewed in their entirety, and any "challenged remarks must be viewed in context." *Wheeler*, 266 Ill. 2d at 122. The "fact that defendant did not properly object to a statement does not render that statement as if it never existed. Indeed, all statements must be considered as part of the entirety of a prosecutor's closing argument, and even statements not properly objected to may add to the context of a remark properly objected to." *Wheeler,* 226 Ill. 2d at 123.

¶ 64 Defendant also asks that his forfeited claims be analyzed for plain error. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened

to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565. However, before we reach the issue of plain error, we must first determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 2d 277, 294 (2009). To decide if there was error, we must conduct a substantive review of each issue defendant claims. *People v. Johnson*, 208 Ill. 2d 53, 64 (2004).

¶ 65 For the court to find first-prong error, the defendant must establish that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The second prong of the plain error doctrine addresses errors that are also referred to as structural errors, which are so serious that they necessarily render a criminal trial fundamentally unfair. *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). The United States Supreme Court has recognized an error as structural only in a very limited class of cases including "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609. However, the Illinois Supreme Court has made clear that it does not restrict plain error to those six types of structural error recognized by the United States Supreme Court. *People v. Clark*, 2016 IL 118845, ¶ 46.

¶ 66 C. Comments on Chain of Custody by State

¶ 67 First, we find that the State did not prejudice defendant by stating in closing that the chain of custody was intact and had not been challenged. This claim on appeal was preserved

because defense counsel objected to it at trial, and raised the issue in her posttrial motion. Therefore, it will be subjected to harmless error analysis. Prosecutors are generally afforded a great deal of latitude in closing arguments, and may comment on the evidence and all inferences reasonably yielded by the evidence. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 38 (citing *People v. Glasper,* 234 Ill. 2d 173, 204 (2009)).

¶ 68 Additionally, "[c]losing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *People v. Blue*, 189 Ill. 2d 99, 128 (2000). It is true that "misstating the law in closing argument can be grounds for reversal." *People v. Clarke*, 245 Ill. App. 3d 99, 106 (1993). However, this is not what occurred here.

¶ 69 Defendant objects to the ASA's following comment: "Keep in mind the chain of custody in this evidence has never been challenged. The chain of custody in this case is completely intact." The ASA followed this statement with an argument that the chain of custody was "intact" because, when the chemist described the bag as clear, she did so because she could see through it, not because it lacked any other markings. Defendant claims that the ASA misstated the law and confused the jury to prejudice defendant. However, when taken in its entirety, the State was not misstating the law, but asserting an argument about the quality of the evidence. The prosecution is entitled to comment on the sufficiency of the evidence in closing arguments, and it was reasonable to infer that the description by the chemist was "loose" as she claimed, and as is the custom in her profession, and not contradictory to the police report.

¶ 70 The defense asserts that these comments improperly vouched for the chain of custody and discouraged the jury from considering any arguments challenging it. Defendant cites *People v. Clarke*, 245 Ill. App. 3d at 105, to claim that this argument is reversible error. In *Clarke*,

the trial court had determined that the victim's prior violent incidents were admissible evidence for the purpose of assessing the credibility of the witnesses and determining who the aggressor was in the incident. *Clarke*, 245 Ill. App. 3d at 106. Despite this, the prosecutor in closing referred to the evidence of the victim's violent conduct as an "irrelevant incident." *Clarke*, 245 Ill. App. 3d at 105. The appellate court found that the statements were improper. However, when considered in the context of the entire record and argument, it held that the defendant did not incur substantial prejudice by these improper comments alone. *Clarke*, 245 Ill. App. 3d at 106. In the case at bar, the ASA's comment was in the context of an argument that the defense had not adequately discredited the evidence, and that it proved defendant's guilt. We find that the State's remarks about the chain of custody did not constitute error.

¶ 71 D. The State's Alleged Denigration of the Defense

¶ 72 Second, we find that the State's comments in rebuttal closing did not constitute error. This claim was not preserved on appeal, and so we conduct a plain error analysis. Before we determine if there was plain error, we must first find that an error occurred. *Walker*, 392 Ill. App. 3d at 294. It is well settled that it is improper for the State to suggest that defense counsel fabricated a defense theory, used trickery or deception, or suborned perjury. *People v. Kirchner,* 194 Ill. 2d 502, 549 (2000). However, it is not error for the State to challenge a defendant's credibility or the credibility of his theory of defense when evidence exists to support the challenge. *People v. Glasper*, 234 Ill. 2d 173, 207 (2009); *Kirchner*, 194 Ill. 2d at 549.

¶ 73 Defendant claims the State committed reversible error by remarking that "the defense's argument may be summed up in one way: grasping at straws to take away from the fact that they can't get around that the defendant sold drugs to an undercover office. End of story."

The defense did not object to this statement. The ASA repeated the phrase "grasping at straws" multiple other times in his rebuttal, in similar contexts. Defendant also argues error where the State said: "It is ridiculous to challenge the credibility of these officers. They honestly don't know who sold Officer Altamirano drugs on that day? Really?" Defendant objected here, but was overruled and did not bring up the statement in his posttrial motion.

¶ 74 In support of these claims, the defense cites *People v. Emerson*, 87 Ill. 2d 487, 497 (1983), which found error where the State suggested that the defense fabricated a theory or attempted to use deception. This case is distinguishable because, in *Emerson*, the objectionable comment was that the defense was "composed of lies and misrepresentations and innuendos," a clear implication that the defense was being deceptive. *Emerson*, 97 Ill. 2d at 497. However, in the case at bar, the State does not suggest that the defense is lying, but rather that the argument is unconvincing. The State cites a case in which the Illinois Appellate Court used the phrase "grasping at straws" to characterize the defendant's cross-examination, which indicates that the phrase is not so offensive that it cannot be used. *People v. Schnurr*, 206 Ill. App. 3d 522, 529 (1990).

¶ 75 The next statement defendant alleges as error is where the ASA stated that it was "ridiculous" to question the officers' credibility as witnesses. Defendant analogizes the ASA's statements to those of the prosecutor in *People v. Monroe*, 66 Ill. 2d 317, 323 (1977). In *Monroe*, the prosecutor said: "That is a preposterous defense. I have never heard of a weaker defense in five years of practicing in criminal law" (*Monroe*, 66 Ill. 2d at 323) and later called the closing argument "fraudulent." *Monroe*, 66 Ill. 2d at 323. The court in *Monroe* found that the comments were improper because the prosecutor was "express[ing] his own opinion of the defendant's guilt." *Monroe*, 66 Ill. 2d at 324. It also concluded that

accusations of fraud could serve only to arouse the antagonism of the jury. *Monroe*, 66 Ill. 2d at 324. By contrast, in the case at bar, the ASA did not speak about his personal feelings about defendant's guilt, but defended the credibility of his witness without making accusations of fraud or trickery.

¶ 76 Defendant's claim that these comments constituted error is even weaker considering that the comments were made in rebuttal, in response to the defense's argument challenging the credibility of the State's witnesses. Prosecutors are permitted to include some degree of both sarcasm and invective to express their points in a rebuttal. *People v. Banks*, 237 Ill. 2d 154, 183 (2010). Additionally, the record reflects defense counsel's use of similarly sharp language in her closing argument when she called the State's case "story hour" and stated that the witness was "gilding the lilly [*sic*]" and "laying it on thick"—all comments which invited a more aggressive rebuttal. Since these comments by the State were not error, we need not proceed further with a plain error analysis.

¶ 77 E. Arguments Not Based on the Evidence at Trial

¶ 78 The defense also claims that the State made arguments that were not based on the evidence at trial. Defense counsel objected to this argument at trial, but failed to include it in her posttrial motion. This claim was not properly preserved for our review, and so we must apply a plain error analysis, and first determine whether any error occurred. *Walker*, 392 Ill. App. 3d at 294.

¶ 79 It is well established that it is proper for a prosecutor to draw reasonable inferences from the evidence in a closing argument. *E.g.*, *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43; *People v. Edgeston*, 157 Ill. 2d 201, 219 (1993). However, statements made in closing

argument that serve no purpose except to inflame the jury constitute error. *People v. Carter*, 297 Ill. App. 3d 1028, 1034 (1998).

¶ 80 In his closing, the ASA stated: "[b]y the way, ask yourself this. In this residential neighborhood back on September 8th of 2011 on that corner of Iowa and Harding where the defendant was peddling his trade, ask your Honor why these baggies have Superman logos on them. Why is that. Who is that appealing to? Who is the demographic audience that is appealing to?" The ASA also said that defendant's "job was selling drugs" and that he did not have a "regular job." Defendant asserts that the former statement implied that defendant sold drugs to children, that the latter depicted defendant as a full-time drug dealer, and that neither of these arguments were based on the evidence.

¶ 81 Defendant cites *People v. Carter*, 297 Ill. App. 3d at 1032, where the prosecutor's comments explicitly linking the defendant's drug sale to elementary school students were found improper. The court found that the prosecutor's remarks served only to inflame the jury because "[t]here was no evidence in this case that this defendant possessed or sold drugs anywhere in the vicinity of children. Nor was there any evidence that he was part of a band of drug dealers plying their trade in the neighborhood." *Carter*, 297 Ill. App. 3d at 1034. The defendant was arrested for selling drugs within 1,000 feet of a school at 8:30 at night. *Carter*, 297 Ill. App. 3d at 1032. The court in *Carter* found the prosecutor's comments to be especially inflammatory because they were a persistent theme throughout the argument. *Carter*, 297 Ill. App. 3d at 1034.

¶ 82 Unlike in *Carter*, the ASA's comments did not explicitly link defendant's drug sales to children. The fact that the bag had a Superman logo on one side by itself does not necessarily imply that children were the target for his drug sales, but it is not an unreasonable inference

given the evidence presented. The area was residential, and the logo on the bags would be appealing to children, although there is no evidence proving that as the logo's purpose. It was also early in the morning on a weekday when defendant made the sale to Officer Altamirano, as compared to the defendant in *Carter* who was selling at night when students would not be at school. In the case at bar, the pre-packaged product that defendant was advertising also warrants the inference that this was not an isolated sale. The remark does not prejudice defendant such that there is error because it was not clear to whom the prosecution was referring. We find no error in the State's comment under this narrow set of facts.

¶ 83 F. State Telling the Jury to "Finish the Job"

¶ 84 Next, defendant claims that the State improperly told the jury that its job was to convict the defendant. It is within the bounds of proper closing arguments for prosecutors to urge the jury to "fearlessly administer justice." *People v. Johnson*, 208 Ill. 2d 53, 76 (2004). However, such language cannot be used to inflame the passions of the jurors, or tell them to "send a message" to society. *Johnson*, 208 Ill. 2d at 84.

¶ 85 The ASA told the jury in rebuttal closing: "Now, we are here before you asking you to finish the job. Clean up that intersection of Iowa and Harding. Find the Defendant guilty." Defendant failed to object or raise this issue in a posttrial motion, and so it is forfeited unless it constitutes plain error. Defendant relies on *People v. Hayes,* 353 Ill. App. 3d 578, 586 (2004), to support his contention that the ASA's remarks were improper. Again, we must determine if this statement constitutes error. The appellate court in *Hayes* concluded that, "[a]lthough plain error did not result in this case, we nevertheless take this opportunity to caution prosecutors to refrain from making comments such as *** 'Send him a message.' *** [S]ending messages, whether to the defendant, to the police or to society, is not the jury's

job. It is wrong to imply that the guilty verdict form may be used for any purpose other than a finding that all elements of the offense were proved beyond a reasonable doubt." *Hayes*, 353 Ill. App. 3d at 585-86. The prosecutor's comments in *Hayes* were stronger than the State's comments here. Nevertheless, urging the jury to "clean up" the streets is similar to urging the jury to send a message, because it implies a duty to combat the war on drugs as a whole rather than to evaluate the circumstances of this defendant based on the evidence. Having found error, we next must determine if it rises to the level of plain error.

¶ 86 G. First-Prong Plain Error

¶ 87 For the ASA's comment to warrant reversal, it must fall under the first or second prong of plain error analysis. Under the first prong, an error is reversible if "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Piatkowski*, 225 Ill. 2d at 565. In determining whether the evidence is closely balanced, we must make a "commonsense assessment" of the evidence (*People v. White,* 2011 IL 109689, ¶ 139) within the context of the circumstances of the individual case. *People v. Adams*, 2012 IL 111168, ¶ 22.

¶ 88 In *Adams*, the defendant could not meet the first prong of plain error because the story he asked the court to accept was highly improbable, and did not suggest closely balanced evidence. *Adams*, 2012 IL 111168, ¶¶ 22-23. Defendant cites *People v. Ehlert*, 274 Ill. App. 3d 1026, 1035 (1995) in which the jury's difficulty in reaching a verdict supported the conclusion that the evidence was closely balanced. However, as the State noted, the jury's difficulty in *Ehlert* was substantially greater than that of the jury deciding defendant's case. In *Ehlert*, the jury deliberated for three days before coming to a unanimous guilty verdict, and the court noted that the "[p]rosecutors virtually conceded in closing argument their

inability to prove beyond a reasonable doubt the actual charge." *Ehlert*, 274 Ill. App. 3d at 1035. In the case at bar, the jury was at an impasse for only one hour, which is very distinguishable from *Elhert* and does not indicate that the evidence was closely balanced.

¶ 89 Defendant also points to inconsistencies in the State's arguments to suggest that the evidence is closely balanced. These inconsistencies are exaggerated by the defense, and upon further examination of the record we find that the alleged weaknesses do not undermine the State's evidence. The defense counsel attacks the State's claim that defendant stood on the corner yelling "rocks, blows" to passersby, although there were no other pedestrians on the street. The defense raises the question: who was defendant yelling at? However, the record clearly states that he was yelling to vehicles driving by. Defendant's other arguments to weaken the State's case and yield closely balanced evidence have been addressed, *supra* ¶¶ 69, 72, 75, 78, 84. We cannot find that the evidence here was closely balanced because defendant made a sale of drugs to a police officer that was witnessed.

¶ 90 H. Second-Prong Plain Error

¶ 91 Next, defendant argues that improper closing arguments may also be reviewed as second prong plain error because the objected-to comments were serious enough to have "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565. Defendant cites *People v. Blue*, 189 Ill. 2d 99 (2000), and *People v. Marshall*, 2013 IL App (5th) 110430, to illustrate that prosecutorial misconduct can result in plain error.

¶ 92 In *Marshall*, the court found plain error and remanded for a new trial where the prosecutor repeatedly made offensive remarks about the defendant's race. *People v. Marshall*, 2013 IL App (5th) 110430, ¶ 14. The court determined that these prejudicial

comments created a reasonable probability that the defendant was denied a fair trial, concluding that "[w]e cannot say that the jury did not consider these improper and inflammatory remarks when reaching its verdict. This error was substantial, and we have found plain error for less-flagrant remarks from a prosecutor." *People v. Marshall*, 2013 IL App (5th) 110430, ¶ 14. Defendant uses this case to support the contention that even one improper comment may amount to plain error. However, the court in *Marshall* stated that a single remark in that case would have been sufficient due to the racial prejudice of the comment. *Marshall*, 2013 IL App (5th) 110430, ¶ 17. None of the State's comments in the case at bar served to inflame racial bias, and did not deny defendant a fair trial.

¶ 93 The only comment by the ASA which constitutes error is his statement to the jury to "clean up the intersection of Iowa and Harding." While the comment was improper, it did not rise to the level of plain error because it did not undermine the fairness of defendant's trial.

¶ 94 III. Closing Arguments Prior to Jury Instruction Conference

¶ 95 Next, defendant claims that he was prejudiced when the trial court held the jury instruction conference after closing arguments, when Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) states that section 2-1107(c) of the Code of Civil Procedure (Code) calls for it to be held beforehand in criminal cases. Ill. S. Ct. R. 451 (eff. July 1, 2006) (citing 735 ILCS 5/2-1107) (West 2006). The rule states: "The court shall hold a conference with counsel to settle the instructions and shall inform counsel of the court's proposed action thereon *prior* to the arguments to the jury." (Emphasis added.) Ill. S. Ct. R. 451 (eff. July 1, 2006). Defendant maintains he was denied a fair trial, implicating his constitutional right to a closing argument, because the *post hoc* timing of the conference allegedly denied the APD the ability to customize his closing argument to one of the disputed Illinois Pattern Jury

Instructions. Specifically, the parties agreed that some of the State's witnesses had been impeached with prior inconsistent statements, but they differed on which version of the "prior inconsistent statements" instruction to give the jury. IPI Criminal 4th No. 3.11. The State requested the version that would allow the CPD officers' statements to be used solely as impeachment.[4] However, the defense asked for the unabridged IPI Criminal 4th No. 3.11 instruction wherein witness testimony would also serve as substantive evidence.[5]

¶ 96 Defendant asks that we apply an abuse of discretion standard of review. Customarily, we apply an abuse-of-discretion standard of review when an appeal concerns jury instructions that a trial court neglected to give. *Snyder v. Curran Township,* 281 Ill. App. 3d 56, 65 (1996) (rulings on jury instructions will be reversed only if the record shows abuse of the trial court's discretion); *DeBow v. City of East St. Louis*, 158 Ill. App. 3d 27, 33-34 (1987);

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[4] The State requested the following instruction: "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. It is for you to determine [whether the witness made the earlier statement and if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." IPI Criminal 4th No. 3.11.

[5] Defendant requested the following instruction, and the judge granted the request: "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. However, you may consider a witness' earlier inconsistent statement as evidence without this limitation when: 1. The statement was made under oath at a trial, hearing, or proceeding; or, 2. The statement narrates, describes, or explains an event or condition the witnesses had personal knowledge of and; A. the statement was written or signed by the witness; or B. the witness acknowledged under oath that he made the statement; or C. the statement was accurately recorded by a tape recorder, videotape recording, or a similar electronic means of sound recording. It is for you to determine whether the witness made the earlier statement, and, if so, what weight should be given to that earlier statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." IPI Criminal 4th No. 3.11.

McKinney v. Coca Cola Bottling Co. of Chicago, 170 Ill. App. 3d 362, 363 (1988). However, this is not the issue before the court. We are faced with the task of interpreting what a supreme court rule requires. While Illinois Supreme Court Rules are not statutes, they have " 'the force of law, and the presumption must be that they will be obeyed and enforced as written.' " *Robidoux v. Oliphant,* 201 Ill. 2d 324, 332 (2002) (quoting *Bright v. Dicke,* 166 Ill. 2d 204, 210 (1995)). When we review issues concerning the application of an Illinois Supreme Court Rule, we apply a *de novo* standard of review. *People v. Reed,* 376 Ill. App. 3d 121, 125 (2007). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP,* 408 Ill. App. 3d 564, 578 (2011). However, no matter which standard we applied, the result would be the same.

¶ 97 As a preliminary matter, the State notes that this issue was not preserved for our review. The Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods,* 214 Ill. 2d 455, 470 (2005); see also *Piatkowski,* 225 Ill. 2d at 564. Defendant neither objected at trial nor included the issue in a posttrial motion. However, defendant requests that we review the forfeited error under both prongs of the plain error doctrine. We may consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or "(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski,* 225 Ill. 2d at 565; Ill. S. Ct. R. 615(a) (formerly Ill. Rev. Stat. 1991, ch. 110A, ¶ 615) ("Plain errors or defects affecting substantial rights may be noticed

although they were not brought to the attention of the trial court"). Under the second prong, the defendant must show prejudice, and, "it is the defendant who bears the burden of persuasion with respect to prejudice." *Woods,* 214 Ill. 2d at 471.

¶ 98 First and foremost, we must determine if any error occurred at all. *Walker,* 392 Ill. App. 3d at 294 ("[i]n a plain[-]error analysis, 'the first step' for a reviewing court is to determine whether any error at all occurred"). An error occurred because it is statutory law in Illinois, under section 2-1107(c) of the Code, for the jury instruction conference to precede closing arguments in the chronology of a trial. 735 ILCS 5/2-1107(c) (West 2010); *DeBow*, 158 Ill. App. 3d at 33-34 (the "conference may be held at any time during the trial within the reasonable discretion of the trial court, provided counsel are informed of the court's action on tendered instructions prior to closing arguments") (citing *Ondersin v. Elgin, Joliet & Eastern Ry. Co.*, 20 Ill. App. 2d 73, 77 (1959)). This order of events serves the important function of affording both parties' counsel an opportunity to tailor their arguments to the jury instructions, and the APDs the chance to defend against the theory under which the State is prosecuting the defendant. *People v. Millsap*, 189 Ill. 2d 155, 163-64 (2000). While we do not condone the trial court's departure from the rule, and agree with defendant that it was error to do so, we nevertheless find that the error does not rise to the level of plain error. See *Piatkowski*, 225 Ill. 2d at 566; see also *City of Danville v. Frazier*, 108 Ill. App. 2d 477, 480 (1969). The State argues that, even if there was error, that is not sufficient to merit a new trial, and we agree.

¶ 99 First, defense counsel did not object to the trial court's suggestion to have the instruction conference after closing arguments to accommodate the ASA who was not ready for the conference. Secondly, and importantly, the trial court ultimately chose to give the jury the

very version of IPI Criminal 4th No. 3.11 requested by the defense, who now brings this issue on appeal. The chief purpose of the conference is to guard against errors in the jury instructions. *DeBow*, 158 Ill. App. 3d at 33. Not only did the trial court not err in the substance of its instructions, but it also granted the instruction which the defense sought. Although the APD did not know at the time of closing arguments that the trial court would grant his proposed version of IPI Criminal 4th No. 3.11, the record reveals that he shaped his argument to conform to the instruction. In closing, the APD argued, "I am going to discuss with you the disconnections and how the dots do not connect" and "why you should not believe [the State's] story." He remarked that the State exhibited "many inconsistencies" and "did not dot the I's and cross the T's, they did not do what they were suppose [*sic*] to do to make the connection." He went on to argue how Officer Altamirano "gave over something that was clear and blue, and [Regan] [tested] something that she says is clear. There is no connection."

¶ 100 Defendant insists that, had his counsel known which version of IPI Criminal 4th No. 3.11 the trial court would select, the APD could have told the jury that it could consider Regan's and Officer Altamirano's varying descriptions of the ziplock bags as substantive evidence. Again in his reply brief, defendant claims that, had the conference been held first, the APD could have conducted his argument to "emphasize that point." Although counsel lacked knowledge of the exact IPI Criminal 4th No. 3.11 instruction which the trial court would give, he thoroughly argued his position that the way in which the CPD officer and the forensic chemist described the bags shattered the State's chain of custody. To the extent that the proposed versions of IPI Criminal 4th No. 3.11 varied, this difference did not deter the

APD from arguing the substantive discrepancy between witnesses in closing. Thus, this issue is a "matter of semantics rather than substance." *City of Danville*, 108 Ill. App. 2d at 481.

¶ 101 As one Illinois court wrote more broadly, "[w]e do not want to be understood as indicating that, standing alone, the failure to hold the conference will be sufficient for reversal" (*Hammer v. Slive*, 27 Ill. App. 2d 196, 204 (1960)) but "where *** such failure contributed in whole or in part to deprive a party of a fair trial *** then reversal and remandment seems the natural consequence." *Hammer*, 27 Ill. App. 2d at 204. In the present case, the conference was not eliminated; it was simply postponed. Echoing the rationale in *Hammer*, defendant was not denied a fair trial, in whole or in part, and we find the trial court's error in the reversed order of procedure insufficient to rise to the level of plain error in this case.

¶ 102 IV. Prior Crimes Testimony

¶ 103 Fourth, defendant argues that he was denied effective assistance of trial counsel when his APD introduced and elicited other crimes evidence on cross-examination. The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504, 585 (1984) (adopting *Strickland*)). Under *Strickland,* a defendant must prove both: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004); *Strickland*, 466 U.S. at 687.

¶ 104 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing

professional norms." *Colon*, 225 Ill. 2d at 135. Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135.

¶ 105 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A reviewing court will not second guess a counsel's trial strategy simply because the defendant was convicted. *Johnson*, 385 Ill. App. 3d at 602. Moreover, the court gives a great amount of deference to counsel's judgment, and indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689.

¶ 106 In the case at bar, defendant asserts that his trial counsel was ineffective when she emphasized the fact that the CPD had not issued an arrest warrant for defendant before the grand jury convened on April 12, 2012. Defense counsel began this line of questioning in an attempt to challenge the credibility of the officers; however, it opened the door for the State to elicit a statement from Officer McNeela that defendant was already in custody at that time, and had been as of March 2012. Defendant also contends that this error was aggravated when trial counsel then asked McNeela if defendant was in custody in March for this offense, to which McNeela replied that he was incarcerated for an unrelated offense. Defendant

contends that this line of questioning introduced other crimes evidence and prejudiced defendant.

¶ 107 Before determining if trial counsel's assistance fell below a reasonable level, we will first evaluate if defendant was prejudiced, in light of the Supreme Court's instruction that, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice *** that course should be followed." *Strickland*, 466 U.S. at 697. The State argues that, in light of the strong evidence against the defendant—consisting of three police identifications and testimony from the forensic chemist that the substance he sold the officer was heroin—defendant cannot establish that the outcome of his trial would have been different had this evidence not been introduced. We agree.

¶ 108 Defendant relies on *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002), to argue that trial counsel was unreasonable when she elicited that defendant had been in custody prior to this case. However, there is a notable distinction between *Fletcher* and the case at bar regarding whether trial counsel's actions prejudiced defendant. When the appellate court in *Fletcher* determined that the defendant was prejudiced by trial counsel's actions, it noted specifically that "[a]lmost all of the State's evidence of guilt was evidence that needed to be viewed with great caution." *Fletcher*, 355 Ill. App. 3d at 455. The only testimony in that case was offered by accomplices who were not charged despite having been caught in possession of stolen merchandise, and the appellate court noted that "each of the State's three witnesses had a powerful motive to lie." *Fletcher*, 355 Ill. App. 3d at 456. In light of this weakness, any jury bias that trial counsel may have caused rendered the trial fundamentally unfair. *Fletcher*, 355 Ill .App. 3d at 456.

¶ 109 In the case at bar, there is no suspicious testimony and the witnesses have no motive to lie. While it is true that officer testimony should not be evaluated with greater weight or credibility than that of any other witness (*People v. Adams*, 2012 IL 111168, ¶ 20), the State's witnesses are not tainted by pleas or culpable behavior like the witnesses in *Fletcher*.

¶ 110 Due to the credible testimony the State presented and the strong case against him, defendant cannot show that he was was prejudiced by his trial counsel's introduction of prior crimes testimony. Thus, defendant's claim of ineffective assistance of counsel must fail.

¶ 111 V. Failure to Preserve Errors

¶ 112 Defendant's fifth claim on appeal is that defendant was denied effective assistance of trial counsel due to: (1) his trial counsel's failure to object to improper closing arguments, and ensure that defendant's issues were preserved for appellate review; and (2) his trial counsel's failure to file a timely supplemental posttrial motion.

¶ 113 We again apply the two-prong test from *Strickland* to determine if defendant's trial counsel fell below the reasonable standard and caused prejudice to defendant. *Supra* ¶¶ 102-104.

¶ 114 The statements which were not properly preserved did not amount to error, or rise to the level of plain error. *Supra* ¶¶ 64-65 (discussion of plain error). Therefore, defendant cannot show that, but for counsel's failure to object to those statements, there is a reasonable probability that the outcome of the case would have been different. Thus, defendant cannot show prejudice, which is the second prong of the *Strickland* test.

¶ 115 Defendant also asserts that he was denied effective assistance of counsel due to defense counsel's failure to file a timely supplemental motion for a new trial, as she said she would do. However, after defense counsel orally argued her supplemental claims, the trial court held

that there were no errors and denied the motion for new trial at that time. Therefore, it was not unreasonable for the counselor not to submit a written motion that had little to no chance of succeeding. *People v. Peoples*, 377 Ill. App. 3d 978, 989 (2007) (defense counsel was not deficient because counsel is not required to perform a useless act when the objection would be overruled). Thus, defendant was not prejudiced by the alleged ineffective assistance of trial counsel.

¶ 116 VI. Excessive Sentencing

¶ 117 Lastly, defendant claims that his 12-year sentence is excessive. A jury found defendant, aged 56, guilty of delivery of 0.4 grams of heroin—an amount that, standing alone, could “reasonably be viewed as being for personal consumption.” *People v. Robinson*, 167 Ill. 2d 397, 413 (1995). Delivery of less than one gram of heroin is a Class 2 felony that ordinarily carries a range of three to seven years’ imprisonment. 730 ILCS 5/5–8–1(a)(5) (West 2010); *People v. Lewis*, 361 Ill. App. 3d 1006, 1020 (2005). However, defendant concedes that under section 5-4.5-25 of the Unified Code of Corrections, his history of prior felony convictions made him eligible for Class X sentencing in the range of six to 30 years. See 730 ILCS 5/5-4.5-95(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Although the prosecution requested a sentence only “in excess of the minimum” of six years for this conviction, defendant received 12 years with IDOC—double the minimum sentence. Defendant filed a motion to reduce or reconsider sentence, which was denied. Now on appeal, he argues that his 12-year sentence is excessive in that it is disproportionate to his offense.

¶ 118 A. Standard of Review

¶ 119 We turn first to the standard of review. Illinois law is clear that "a trial judge's sentencing decisions are entitled to great deference" and will not be disturbed absent an abuse of discretion. *People v. Spicer*, 379 Ill. App. 3d 441, 465 (2008). "A circuit court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23. "Within [the] statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant. [Citation.] The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding. [Citation.]' " *People v. Lewis*, 361 Ill. App. 3d 1006, 1019-20 (2005) (quoting *People v. Fern,* 189 Ill. 2d 48, 55 (1999)). A sentence, albeit within the statutorily mandated range, is deemed excessive and an abuse of discretion only if it " 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)); *People v. Jackson,* 375 Ill. App. 3d 796, 800 (2007).

¶ 120 Importantly, it is a constitutional requirement in Illinois that all penalties be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; 730 ILCS 5/1-1-2 (West 2010); *People v. Brown*, 2015 IL App (1st) 130048, ¶ 41. Balancing these retributive and rehabilitative purposes of punishment "requires careful consideration of all factors in aggravation and mitigation, including, *inter alia,* the defendant's age, demeanor, habits,

mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 87 (citing *People v. Center,* 198 Ill. App. 3d 1025, 1033 (1990)). The mere fact that a reviewing court might have weighed the factors differently than the trial court does not justify an altered sentence. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 28 (citing *People v. Streit,* 142 Ill. 2d 13, 19 (1991)).

¶ 121 Nevertheless, the sentencing judge's discretion is not completely " 'unbridled.' " *Brown*, 2015 IL App (1st) 130048, ¶ 42 (quoting *Streit*, 142 Ill. 2d at 19). The trial court may not ignore mitigating factors, nor consider improper aggravating factors. *People v. Higgins*, 2016 IL App (3d) 140112, ¶ 29 (citing *People v. Roberts,* 338 Ill. App. 3d 245, 251 (2003)). The "mere fact that the trial court has a superior opportunity to make a determination concerning final disposition and punishment of a defendant does not imply that a particular sentence imposed is always just and equitable." *People v. Jones*, 168 Ill. 2d 367, 376 (1995) (citing *People v. O'Neal*, 125 Ill. 2d 291, 298 (1988)). As a safeguard, the reviewing court has authority pursuant to Illinois Supreme Court Rule 615(b)(4) (formerly Ill. Rev. Stat. 1991, ch. 110A, ¶ 615) to "reduce the punishment imposed by the trial court."

¶ 122 B. Sentencing

¶ 123 In the case at bar, defendant claims that his sentence was disproportionately excessive in light of multiple mitigating factors, including: (1) the small amount (0.4 grams) of drugs recovered; (2) defendant's drug addiction; and (3) the nonviolent nature of his crime. We discuss these three points in turn.

¶ 124 First, defendant cites First District case law which holds that the "seriousness of the defendant's offense is the most important factor" in sentence determination. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). Defendant urges that 12 years' imprisonment is disproportionate to the crime of selling less than half of a gram of heroin. As we already observed, the jury found defendant guilty of delivery of 0.4 grams of heroin, which is an amount that, standing alone, could "reasonably be viewed as being for personal consumption." *People v. Robinson*, 167 Ill. 2d 397, 413 (1995). Delivery of less than one gram of heroin is a Class 2 felony that ordinarily carries a range of only three to seven years' imprisonment. 730 ILCS 5/5–8–1(a)(5) (West 2010); *People v. Lewis*, 361 Ill. App. 3d 1006, 1020 (2005). In the case at bar, the prosecution requested a sentence only "in excess of the minimum" of six years, and defendant received 12 years—double the minimum sentence.

¶ 125 Next, the trial court emphasized the defendant's criminal history in sentencing defendant to twice the minimum sentence. However, defendant argues that the judge did not give due consideration to his drug dependency. While it is not statutorily mandated for a sentencing court to give weight to a defendant's drug dependency, "in some circumstances it is appropriate" to consider it as a factor in mitigation. *People v. Young*, 250 Ill. App. 3d 55, 65 (1993) (defendant suffered from alcoholism). For instance, one reviewing court deemed it necessary to "look beyond the [lower] court's findings" in sentencing, and found the defendant's "drug and alcohol problem since the age of 14" a factor in mitigation for reducing his sentence. *People v. Treadway*, 138 Ill. App. 3d 899, 905 (1985).

¶ 126 Similarly, in the case at bar, the presentencing investigation report (PSI) reveals that defendant, the seventh of fifteen children, began drinking alcohol at age 12. By the time defendant reached his mid-twenties, he developed a dependency on drugs. The PSI states that

he was "under the influence of drugs at the time of his arrest." At that time, he had also been homeless for over 10 years, living out of a Salvation Army shelter. Prior to his arrest, defendant had attended "Gateway Treatment" in an effort to become clean, and had received positive feedback on his progress. Additionally, in 2007, defendant was diagnosed with depression and was prescribed a psychotropic medication. Overall, defendant's circumstances, especially his addiction, support the same conclusion that the court in *Treadway* reached: "a lower sentence will allow defendant at least the possibility of being restored to a meaningful, productive life, and at the same time will be adequate retribution for his offenses, provide protection for society[,] and serve as a deterrent." 138 Ill. App. 3d at 905.

¶ 127 Finally, defendant asks this court to take into consideration the nonviolent nature of his offense. In *People v. Kliner*, 185 Ill. 2d 81, 172 (1998), the Illinois Supreme Court wrote that a CPD "rap sheet" is relevant to sentencing "because it provides an insight into the defendant's character." In the case at bar, defendant has a criminal history, but it is almost completely for nonviolent offenses. In its brief, the State stresses defendant's nine trips to IDOC; however, it omits the fact that, but for one 27-year-old aggravated battery conviction, defendant's convictions were all nonviolent. The remainder of his criminal history, including retail theft and drug-related offenses, could reasonably be viewed as acts in furtherance of his addiction. See *Carter*, 165 Ill. App. 3d at 175 (defendant had a habit "which he had always supported by crime" and "the court failed to recognize the link between the defendant's drug use and his continuing pattern of thefts"). The nonviolent nature of defendant's criminal history does not support a 12-year sentence.

¶ 128 After closely examining the transcript of the trial, the sentencing hearing, and the PSI, a 12-year sentence may be disproportionate to the nature of the crime. While we do not condone defendant's conduct, it may not be grave enough to warrant a sentence double the minimum term of years. Ill. Const. 1970, art. I, § 11 (duty under the Illinois Constitution to adjust the sentence to reflect the crime's "seriousness.") However, we have to determine if the trial court abused its discretion in sentencing defendant to the 12-year term. Abuse of discretion means that the trial court's evaluation was "arbitrary, fanciful or unreasonable" or that "no reasonable man would take the view adopted by the trial court." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). My panel members have determined that the trial court did not abuse its discretion and if the two of them so agree, I cannot say that no reasonable person would take the view adopted by the trial court.

¶ 129 Justice Lampkin's special concurrence notes that defendant was not charged with possession; however, nowhere do we state that he was charged with possession Even the State asked only for a sentence in excess of the six-year minimum. It never asked for 12 years.

¶ 130 The concurrence does not change the basic question of whether it was an abuse of discretion to sentence a 56-year-old addict to 12 years in prison for the sale of less than a half a gram of heroin, where his prior convictions were all nonviolent and apparently related to the support of his addiction, except for one 27-year-old aggravated battery conviction. Much has been written recently about whether the mass incarceration of black men for minor drug offenses through lengthy sentences is an abuse of the justice system's discretion. See *e.g. Debating Mass Incarceration*, The Atlantic (Oct. 2015) (www.theatlantic.com/notes/all/2015/09/debating-mass-incarceration/405694/) (last visited Sept. 20,

2016). I believe that it is. However, as noted above, I cannot say that no reasonable person would take the view adopted by the trial court when both my colleagues, whom I esteem and respect, take that view. Thus, this court affirms his sentence.

¶ 131 CONCLUSION

¶ 132 For the foregoing reasons, we affirm. First, we find that the trial court did not abuse its discretion by admitting the drug evidence, despite slight variations in color and logo descriptions of the ziplock bags, in light of the inventory numbers, the number of packets, and the sealed conditions at the time of police inventory and forensic examination. Second, we find that defendant was not denied a fair trial, where the State's comments in rebuttal closing were not error. Third, we find that defendant was not denied a fair trial when the trial court held the jury instruction conference after closing arguments, because this order of procedures did not rise to the level of plain error. Fourth, defendant was not denied effective assistance of counsel when council elicited that he had been in custody for another offense, because the evidence was overwhelming. Fifth, defendant was not denied effective assistance of counsel. Sixth, the trial court's 12-year sentence was not an abuse of discretion.

¶ 133 Affirmed.

¶ 134 JUSTICE LAMPKIN, specially concurring.

¶ 135 I write separately regarding defendant's claim that his 12 year prison sentence was excessive because the order does not accurately reflect my view of the facts or the law.

¶ 136 The order states that the jury found 56-year-old defendant Price guilty of delivery of 0.4 grams of heroin, and then opines, citing *Robinson*, 167 Ill. 2d at 413, that this amount, standing alone, could "reasonably be viewed as being for personal consumption." *Supra* ¶ 117. Defendant, however, was not charged with possession; he was charged and convicted of

delivery. The fact that the amount involved could have been considered consistent with personal consumption is, therefore, irrelevant. Further, the order mischaracterizes the prosecutor's sentencing recommendation. The order claims defendant's 12 year sentence, which is "double the minimum sentence," was imposed even though "the prosecution requested a sentence only 'in excess of the minimum' of six years." *Id.* According to the record, however, the prosecutor at the sentencing hearing actually said, "because he's been down [to the penitentiary] on nine separate occasions, Judge, we would be asking for a sentence in excess of the minimum which would be six years IDOC."

¶ 137 After correctly stating the deferential standard of review, *supra* ¶¶ 119-121, the order reiterates the irrelevant opinion that the amount of 0.4 grams of heroin could "reasonably be viewed as being for personal consumption," and repeats its mischaracterization of the prosecutor's sentencing recommendation. *Supra* ¶ 124.

¶ 138 The order states that "in some circumstances it is appropriate" to consider defendant's drug dependency as a factor in mitigation. *Supra* ¶ 125. However, what the order does not say, and cannot say, is that the learned trial judge failed to consider defendant's drug dependency in fashioning the appropriate sentence. The order's discussion of the information contained in defendant's PSI omits relevant facts that the trial court considered in fashioning defendant's sentence. Although the order states defendant was the 7th of 15 children, the order fails to mention that defendant and his siblings lived in a household with both his parents and that he was raised in a "fun and loving home." The order also omits the fact that there was no family history of physical, sexual or emotional abuse and, of defendant's eight sisters and six brothers, *none* of them have a history of substance abuse nor have any of them had contact with the criminal justice system. Furthermore, contrary to the order, defendant

never stated that he had attended Gateway Treatment prior to his arrest. Rather, a review of the PSI and the entire record reveals that prior to trial, the same trial judge who would eventually sentence defendant allowed him to have Gateway Treatment while in jail awaiting trial.

¶ 139 The PSI contains very relevant information that is omitted in the order's sentencing discussion. The trial judge stated he reviewed the PSI prior to sentencing and again at the motion to reconsider sentence. The PSI established that defendant did not suffer from a learning or behavioral disorder; dropped out of high school; has one son but has had no contract with him in six years; and joined the Cicero Insane Vice Lords street gang at age 36 while he was incarcerated in the penitentiary. Furthermore, during his 56 years of life, defendant has been gainfully employed for a total of less than 9 years. Specifically, he was employed for 7 years from 1985 to 1992, for about 1 year in 2000, and for about 5 months in 2009. Nevertheless, defendant somehow managed to support his daily $70 cocaine habit prior to his last use on May 28, 2013. Defendant also stated that in 2007, for the first time, he saw a mental health professional because of emotional stress. The PSI also established that defendant had the following felony convictions: 1994 aggravated battery, 3 years IDOC; 1994 possession of a controlled substance with intent to deliver, 3 years IDOC; 1996 another narcotics conviction, 2 years IDOC; 1999 possession of a controlled substance, 3 years IDOC; 2001 possession of a controlled substance, 2 years IDOC; 2003 possession of a controlled substance, probation, violation of probation, recommitted to probation; 2006 delivery of a controlled substance, probation terminated unsatisfactory; 2007 felony retail theft, 2 years IDOC; 2008 possession of a controlled substance, 4 years IDOC; 2009 felony

retail theft, 2 years IDOC; and a number of other misdemeanor retail thefts and attempt possession of a controlled substance convictions.

¶ 140 Additionally, I do not agree with the order's statement that "defendant's circumstances, especially his addiction, support the *** conclusion that the court in *Treadway* reached: 'a lower sentence will allow defendant at least the possibility of being restored to a meaningful, productive life ***.' " *Supra* ¶ 126.

¶ 141 The order states that the "non-violent nature of defendant's criminal history does not support a 12-year sentence," and opines that after "closely examining the transcript of the trial, the sentencing hearing, and the PSI, a 12-year sentence may be disproportionate to the nature of the crime." *Supra* ¶¶ 127-28. I could not disagree more.

¶ 142 The learned trial judge in this case has presided over felony cases for many years. He was in the best position to fashion the appropriate sentence for this defendant. At the sentencing hearing, the trial judge stated that he had considered all statutorily mandated factors in aggravation and mitigation, the PSI, the arguments of counsel, and defendant's statement in allocution. The trial judge noted that defendant had a long history of thievery and involvement in drugs, incarceration had not changed him and he apparently had gotten worse. In imposing the 12 year sentence, the trial judge observed that the longer defendant is away "the better off the community and the people in the community will be."

¶ 143 Finally, although the order repeatedly mentions that defendant's 12 year sentence is twice the minimum sentence of 6 years, the order fails to acknowledge that defendant's sentence is 18 years *less* than the maximum allowable sentence of 30 years. The record establishes there was absolutely no abuse of discretion in the trial court's determination of defendant's sentence.