2017 IL App (2d) 140776-U
No. 2-14-0776
Order filed February 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Ogle County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-213
JAY MOORE,	)	Honorable Robert T. Hanson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel was not ineffective for failing to impeach a State witness: because the witness's testimony was largely corroborated by other evidence, there was no reasonable probability that the impeachment of the witness would have affected the verdict; (2) defendant established plain error or ineffective assistance of counsel as to the trial court's consideration of factors inherent in defendant's offense as aggravating factors; thus, we vacated defendant's sentence and remanded for resentencing.

¶ 2 Defendant, Jay Moore, appeals from his convictions of delivery of heroin and resisting a peace officer and from the resulting sentence. He asserts that (1) counsel was ineffective for failing to discover and use impeachment evidence against one of two principal occurrence

witnesses, and (2) the court relied on factors inherent in the offense in sentencing him. Because we hold that defendant failed to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland v. Washington*, 466 U.S. 668, 694 (1984)), we reject defendant's claim that counsel was ineffective at trial and therefore affirm defendant's convictions. However, we agree with defendant that the court erred by considering sentencing factors inherent to the offense. Reviewing that error as second-prong plain error, we vacate his sentence and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 Defendant had a jury trial on two charges: (1) delivery in a public park of more than 1 but less than 15 grams of a substance containing heroin (720 ILCS 570/401(c) (West 2012)) and (2) resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)).

¶ 5 Defendant bases his claim of ineffective assistance of counsel at trial on counsel's handling of the State's first witness, an informant named Brian Swartz. The State disclosed that Swartz had been charged with possession of a controlled substance in Lee County but had received a disposition that allowed him to avoid a conviction. Swartz died of a heroin overdose not long after the trial, suggesting that he had been a heroin user at the time of trial. At issue is whether counsel was ineffective for failing to use the Lee County case to impeach Swartz and as a basis for an investigation that could have disclosed the impeaching fact that Swartz was a heroin user.

¶ 6 Swartz testified that he had been a paid informant for multiple law enforcement agencies, having cooperated in approximately 150 investigations. However, he had never testified at a trial before. He agreed that he had a 2009 felony conviction of financial exploitation. The State asked

him the terms on which the sheriff's department had paid him and whether he would lose any of the money if he failed to testify:

"[The State:] Were you working as a paid informant for the Ogle County Sheriff's office on [the day of the controlled purchase]?

[Swartz:] I was.

[The State:] How much money did you get paid working as an informant for the sheriff's office on that day?

[Swartz:] For that deal, 250, $250.

[The State:] Have you already been paid for that deal?

[Swartz:] Yes.

[The State:] Okay. Did you get any additional money for coming in here to court today to testify?

[Swartz:] No, sir.

[The State:] Okay. So if the Defendant's found guilty, you don't get extra money?

[Swartz:] No, sir.

[The State:] If the Defendant's found not guilty, you don't get any money taken away?

[Swartz:] No, sir. *I'm not in trouble fighting off any cases, nothing like that.* Nothing, I get nothing." (Emphasis added.)

¶ 7 On December 3, 2012, Swartz spoke to Shasta Alonzo in Rockford by phone. She asked him if he would "be interested in buying any heroin." He told her that he was in Ogle County, and she said that she was "in Byron a lot anyway." He spoke to her again on December 4 at 11

a.m., and they agreed to meet at a McDonald's at a Byron rest stop. He would buy 20 bags of heroin for $400 and would pay an additional $100 for the delivery.

¶ 8 Swartz went to the sheriff's office, where he reported the details of his agreement, was searched, and was given $500. "[A]fter receiving the money and the pat down, [Swartz and the officers] all went downstairs, locked and loaded, and headed out to the destinated (sic) site." That site was the parking lot of a roadside rest area. Swartz traveled with Rochelle police detective Brian Albers in an unmarked car. He expected a phone call from defendant or Alonzo, but he ended up calling Alonzo, who told him that she would be there in 10 minutes. About 20 minutes after he and Albers arrived in the parking lot, a gray Dodge Charger pulled in. A white male was driving, a black male—defendant—was in the front passenger seat, and Alonzo was in the passenger-side back seat.

¶ 9 Swartz got into the back next to Alonzo. Alonzo, who was smoking a crack pipe, asked him if he wanted some, but he said that he just wanted "the dope." Defendant said that Swartz should give him the money, but Swartz said that he wanted the dope first. Defendant "gave [him] the dope," with some interference from Alonzo. Swartz handed the $500 to defendant, but Alonzo pulled out $100 from the bills. (The State showed him its exhibit, which he said was the 20 "doves" (corner baggies) of heroin that he got from defendant. The corner baggies were in a resealable sandwich bag.)

¶ 10 Swartz started to get out of the car, but, as he did so, the car started creeping forward and child locks on the doors were activated. He "rolled down" his window and opened the door—apparently, from the outside: "I did not want to go mobile, it's not something that we like to do."

> "I backed up away from the car, as soon as I *** saw that everything was clear, nobody was, you know, in the line of any kind of possible injury, I removed my hat,

which is a sign, a signal to let the rest of the guys know in the division that, that's my call for the calvary [*sic*], if you will.

[The State:] *** [W]ho do you mean by my guys?

[Swartz:] *** [T]he detectives in the narcotics division that I mentioned earlier.

[The State:] *** [I]s this something that you guys had agreed upon before?

[Swartz:] Yes, sir, it's commonly used in narcotics."

He then walked back to the unmarked car.

¶ 11 Officers from other vehicles surrounded the Charger; defendant (presumably in reaction) started "eating dope." Several officers tried to pull defendant from the Charger. Albers went over to assist. From the time Swartz received the drugs from defendant until the time Albers got back into the unmarked car, the drugs remained in Swartz's left hand. Swartz gave them to Albers as soon as Albers got back into the unmarked car.

¶ 12 On cross-examination, the defense asked Swartz about his use of the phrase "the division" and his apparent identification of himself as a part of it. The interchanges seem to have been hostile and, at times, sarcastic:

"[Swartz:] I've just worked with [the six officers] for, you·know, on and off for 16 years, it of [*sic*] habit that I do that. I'm sorry that I worded that wrong for you. No, I'm not a cop, not, I'm not employed, no, I don't collect taxes from them. I'm a snitch, I'm an informant, whatever you want to call me, sir, but at the end of the day, there's 20 more bags of heroin that's not coming in to our schools and our kids' hands.

[Defense counsel:] Are you done making your speech now?

[Swartz:] I'm done.

[Defense counsel:] Could you answer my question?

[Swartz:] I'm ready for your next one.

[Defense counsel:] So there's no division, is there?

[Swartz:] No."

* * *

[Defense counsel:] So, so when you're out there working undercover, you're buying narcotics from people, you deceive these people, don't you?

[Swartz:] I don't believe I do.

[Defense counsel:] Do you ever tell them that you're a paid informant and that you're setting them up for an arrest?

[Swartz:] No, I do not.

¶ 13 Defense counsel also questioned Swartz about his willingness to use deception and about his motives for working as an informant. The results were similar:

"[Defense counsel:] Your motive is to get paid, isn't it?

[Swartz:] I don't always get paid.

[Defense counsel:] You don't even have income—

[Swartz:] You're right, I don't get paid good, I wish I had a job, I wish there was a job that I could work 40 hours a week at, that would be great, sir, but I think what I'm doing now—

[Defense counsel:] Excuse me, there is no question pending, your Honor.

THE COURT: There is a question, he's answering the question.

[Swartz:] What I think I'm doing now is more beneficial to Ogle County.

THE COURT: You asked him what, what his motive was, he's answering.

> [Swartz:] And you know what, sir, and I like what I do. If I, if I can save one kid, one school, one, one needle from being stuck in some kid's arm, and, then I've done my job. So call it what you want, sir, with all due respect.
>
> [Defense counsel:] *Do you use heroin yourself*?
>
> [Swartz:] *No, I do not.*
>
> [Defense counsel:] *Did you ever use heroin yourself*?
>
> [Swartz:] *No, I have not*." (Emphases added.)

Defense counsel also pressed Swartz on the degree to which he had worked to move the deal location to the park, a point on which Swartz was evasive.

¶ 14 The State called Albers, a detective in the Rochelle police department and a narcotics and gang officer, immediately after Swartz, and his testimony was generally consistent with Swartz's. He explained that he had been part of the controlled purchase at the request of the Ogle County sheriff's department. He drove Swartz in an unmarked car to a small riverside park or rest area. Swartz made a call, and, some time later, a gray Dodge Charger with three occupants pulled into the parking lot. A white male was driving, a black male—defendant—was in the front passenger seat, and a white female was in a back seat.

¶ 15 Albers watched as Swartz walked from the unmarked car to the Charger and got in the rear. He could see that defendant turned and spoke to Swartz, but he could not see whether any money or package passed between them. Swartz exited and signaled success by taking off his hat; Albers then radioed for the other officers to come.

¶ 16 As the others were arriving, Albers noticed that defendant seemed to be eating something. In reaction, Albers jumped out of his car and ordered defendant to get out of the Charger. The other officers arrived and pulled defendant from the car, handcuffing him on the

ground as he struggled. Someone ordered defendant to spit out the heroin. When the officers sat defendant up after handcuffing him, one baggie, which Albers described as about the size of the nail on his little finger, fell from defendant. When the officers raised defendant to his feet, a second baggie fell to the ground.

¶ 17 Once defendant was handcuffed, Albers got back into the unmarked vehicle. He asked Swartz what he got, and Swartz handed him "a clear plastic baggy containing several more of those smaller, clear plastic baggies with brown powdery substance." He drove back to the Ogle County sheriff's department with that evidence in his hand.

¶ 18 Neil Minnis, a detective with the Ogle County sheriff's department and Swartz's primary contact in this investigation, testified after Albers. Swartz was a regular informant of his. At the start of the operation on December 4, 2012, he searched both Swartz and the unmarked car, finding nothing of consequence. While Swartz and Albers were in the rest-area parking lot, Minnis was in a vehicle parked across the road. Also stationed there were "Lieutenant Myers, Chief Schabacker, Detective Plumb, [and possibly] Detective Gallack." He could not observe the rest area from his position; the plan was to respond to a signal from Albers.

¶ 19 When Minnis arrived at the parking lot in response to the expected signal, the Charger's driver and the female passenger were in the control of other officers. Defendant was on the ground and was struggling with Albers, Myers, and Plumb. He was ignoring orders to allow the officers to handcuff him and was "trying to move something in his mouth." Minnis assisted in pulling defendant's arms behind his back. Minnis, like Albers, noticed two small bags as the officers moved defendant to a sitting position and then his feet.

¶ 20 On cross-examination, defense counsel asked Minnis about Swartz's drug use:

[Defense counsel:] *** Sir, do you know whether or not Brian Swartz is a drug user?

[Minnis:] I have never seen him use any drugs.

[Defense counsel:] So you don't know?

[Minnis:] No.

¶ 21 Defendant and the State stipulated to evidence tending to show that police had properly secured the suspected heroin and had sent it for testing to the Illinois State Police Crime Laboratory. Further, the forensic chemist tested 12 individually wrapped packages. The material in these contained heroin and had a net weight of 1.2 grams in total. They also stipulated that the parking lot in which defendant was arrested was a part of the Byron Forest Preserve.

¶ 22 Tyler Smith, the owner and driver of the Charger, also testified for the State; his testimony mirrored Swartz's. Smith was 25 years old and had been a heroin addict for 4 years. However, when he testified, he was in a recovery program and had not used heroin for 11 months. The State had charged him with possession of heroin with intent to deliver based on his arrest with defendant, but he was hoping to be sent to drug court based on, in part, his cooperation in this case.

¶ 23 At the time of his arrest, he was using heroin heavily and would typically start his day by calling dealers. On December 6, 2012, he initially failed to find anyone who would sell him heroin. Eventually, he got a call from someone he knew as "Turtle," whom he had met while driving for dealers. Turtle asked Smith to meet him and eventually arranged for him to drive defendant and Alonzo from a house in or near Rockford to Byron.

¶ 24 On the way to Byron, Alonzo made "15 [to] 20" calls on Smith's phone. He heard Alonzo switch the agreed location several times. Following Alonzo's directions, he arrived in a

lot where a few cars were parked, including a white car parked front out. Smith pulled up next to that car so that the drivers' doors were next to each other. A "[w]hite guy" with a goatee—this was Swartz—exited the white car from the passenger side and got into his car through the rear driver's side door. Defendant asked Swartz to show the money. Swartz handed money to defendant, but Alonzo counted it and kept some herself. Defendant gave the heroin to Swartz, who started counting the bags.

¶ 25 Swartz got out of Smith's car and went back to the white car. Smith started to back out, but a van pulled in fast in a way that made Smith think that it was a police vehicle. He stopped his car, and the van pulled in behind him. Five or six men with "assault rifles and guns" got out of the van. Smith turned his car off and put his hands up. Defendant started putting heroin in his mouth. The officers shouted for defendant to put his hands up. Defendant did not comply, and the officers opened the car door and pulled him out. Defendant seemed to struggle "a bit" when he was on the ground and refused to comply with police commands.

¶ 26 On cross-examination, Smith admitted that he had continued using heroin while he was out on bond. He agreed that he was uncertain of details of the handover of money in his car, but he was certain that both Alonzo and defendant had taken some of Swartz's cash. Smith did not believe that he had formally agreed with the State that he would go to drug court in exchange for his testimony, but he said that his lawyer led him to understand that his testimony and his voluntary admission to inpatient drug treatment would make a resolution in drug court more likely.

¶ 27 Clint Myers, a detective lieutenant in the Ogle County sheriff's department, was the State's final witness; his testimony was similar to that of Minnis. He was positioned with Schabacker and Plumb in a minivan across the street from the unmarked car. He saw the Charger

pull up and watched as Swartz left the unmarked car, entered the Charger, got back out, and gave a prearranged signal. Myers drove the van across the street and stopped it so that it blocked the Charger in. As he got out of the van, he could see that defendant was trying to "consume an object." Defendant resisted being handcuffed, flailing his legs and fighting the officers as they positioned his hands. Defendant started to comply with the officers' orders only after they had completed handcuffing him.

¶ 28 On cross-examination, Myers said that he had found $80 in the rear passenger seat and $420 on the driver's side floor in the rear. The officers did not recover any packages that had been in defendant's mouth and they saw no signs that defendant had ingested heroin.

¶ 29 The State rested after Myers's testimony. Defendant moved for a directed verdict, arguing that the State's case had relied too heavily on the testimony of Smith and Swartz, both of whom he claimed had a personal interest in defendant's conviction. The court denied the motion, but granted defendant's motion for an instruction on the lesser included offense of possession of a controlled substance. After a break for jury instructions, the defense rested without presenting evidence. The jury found defendant guilty on both charged counts.

¶ 30 Defendant's sentencing was delayed while the court addressed his *pro se* motion for a new trial and for substitution of counsel.

¶ 31 At sentencing, the State's argument largely followed the order of the statutory factors in aggravation and mitigation. It emphasized that, with the instant convictions, defendant had 14 felony convictions. It argued vigorously that the court should consider the harm caused by the offense and defendant's receipt of compensation as factors in aggravation:

> "[Statutory factor] (a)(1), the Defendant's conduct caused or threatened serious harm. *I would ask the court to make the specific finding that factor number one applies in this*

case. *** I'm sure his Honor *** is well aware the side effects that are the result from the dealing of heroin in our community, particularly the result from heroin addiction in our community ***. ***

Statutory factor in aggravation number two, the Defendant received compensation for committing this offense. *This is a factor I would also ask the court to find.* I think the testimony was clear that the Defendant was handed $500 for this heroin deal that he did; he gave $100 to Shasta Alonzo and pocketed the other $400." (Emphases added.)

¶ 32 The State argued that statutory factor three, that defendant had an extensive history of prior delinquency and criminal activity, applied. It next argued that a significant sentence was necessary to deter similar actions. Finally, it emphasized that it saw no significant factors in mitigation.

¶ 33 Defense counsel argued that defendant's long history of drug use had made him a victim of drug use and that his addiction that had to be what drove him to sell drugs. He thus asked for a sentence toward the minimum and a recommendation that he receive treatment.

¶ 34 The court's discussion of factors in aggravation and mitigation paralleled the form of the State's, with the court noting its agreement or disagreement with the points the State raised:

"*In aggravation, I find that the Defendant's conduct caused or threatened serious harm; I find that the Defendant received compensation for committing the offense; find the Defendant has a history of prior delinquency and criminal activity, and I find that a sentence is necessary to deter others from committing the same crime.*

I disagree with the State, I think there are some mitigating factors here. I think the Defendant acted under a strong provocation; I tend to believe his statement of allocation [*sic*] that he'll do whatever it takes to get the drugs he needs, and if that includes going to

> another county to sell some heroin to be able to buy some crack cocaine, he'll do it, and he did; and also there's substantial grounds tending to excuse or justify his criminal conduct, he's an addict, I agree with that also." (Emphasis added.)

Moreover, it noted that his history was not really that of a dealer. Although the State asked for a 28-year sentence, the court imposed an 11-year sentence.

¶ 35 The procedural history of the case after defendant's sentencing is complicated. The details were before this court early in this appeal when defendant moved for this court to decide whether jurisdiction existed. Here, it is sufficient to note that the hearing on defense counsel's posttrial motion was long delayed, and that, during that delay, counsel learned of a "new fact" such that the court granted further delay so that counsel could file an amended posttrial motion.

¶ 36 When the hearing did occur, the court pointed out that a *pro se* postsentencing motion was also pending. Defense counsel agreed to go forward on that motion as well as his own posttrial motion. The court quickly denied defendant's motion for reduction of his sentence, ruling that it had sufficiently considered an ineffective-assistance-of-counsel claim and that it had given sufficient weight to defendant's being a drug addict.

¶ 37 The court then took up defendant's posttrial motion. The "new fact" for which the motion was delayed was Swartz's death about three months after the trial from a heroin overdose. Defendant argued that the natural inference was that Swartz was a heroin addict before the trial, an inference he supported with an affidavit of a cousin of Swartz's averring that Swartz's family had long been aware of his heroin addiction. Defendant thus argued that Swartz had perjured himself when he testified that he never had used heroin and was not then using heroin. He further argued that the State knew or should have known that Swartz was an addict.

¶ 38 Defense counsel noted that the discovery documents had disclosed that Swartz had been charged with possession of a controlled substance in Lee County, but that Swartz had been in a program—likely drug court—that allowed him to avoid conviction. Defense counsel stated that the absence of a conviction had meant that he could not use the Lee County case to impeach Swartz.

¶ 39 The assistant State's Attorney at the hearing was Josh Versluys, who was second chair at trial to Aaron Wiles (an attorney who had left the State's Attorney's office after the trial). Versluys represented that he personally did not know anything about Swartz or his history. He said that Wiles had been the attorney who dealt with the details of the case.

¶ 40 The court, relying on its recollection and notes of the trial, denied the posttrial motion. It ruled that the State had not withheld any evidence, but did not elaborate on this point. It further ruled that the new evidence was *not* of so conclusive a character that it probably would have changed the result of the trial:

> "Mr. Swartz was a key witness for the State. But he was not the only witness. There was also the driver of the vehicle who testified. That driver indicated that he did not have a deal with the State at the time he testified.
>
> * * *
>
> *** We've got two witnesses indicating that he's part of the exchange process with Mr. Swartz in the car with the money being exchanged, the money being divided, the drugs coming from [defendant] back to—and Shasta [Alonzo], Shasta was involved in splitting the money, too.
>
> And I believe that based upon all of that evidence that came in, the fact that if it would have been disclosed at the time of the trial that Mr. Swartz was a heroin user, I'm

> not sure that that would have affected the decision of the jury. I mean, I almost would think they would maybe expect that somebody who holds himself out to be a person, a paid drug informer, that that person probably at some point has used drugs."

¶ 41 Defendant filed his notice of appeal the same day the court denied the motions. After filing that notice, defendant filed his motion to establish whether this court had jurisdiction, a motion that he supported with detailed references to the record and citations to authority. The State opposed the motion, and responded in similar detail. A motions panel issued a minute order stating that we had jurisdiction, albeit without prejudice to the State's ability to contest the issue at the merits stage.

¶ 42 II. ANALYSIS

¶ 43 Initially, we note that the State has not further disputed this court's jurisdiction in this case. We have again considered our jurisdiction of this appeal, and have concluded that we see no reason to reject the reasoning of the motion panel. We thus hold that we have jurisdiction.

¶ 44 Defendant raises two claims on appeal. First, he asserts that counsel was ineffective for failing to discover and use impeachment evidence against Swartz, specifically, the open status of his probation in Lee County and his heroin use. Second, he asserts that the court used factors inherent in the offense in sentencing him. He concedes that he did not preserve this issue for review, but argues that the use of these factors amounted to second-prong plain error. Alternatively, he argues that counsel was ineffective when he failed to bring the error to the court's attention. We conclude that defendant was not prejudiced by the lack of further impeachment of Swartz. We further conclude that the court gave some weight to sentencing factors inherent in the offence. We address first the claim of ineffective assistance of counsel at trial and then the claim of sentencing error.

¶ 45 To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 668, 694; *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "In demonstrating, under the first Strickland prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). If the reviewing court "concludes that [the] defendant did not suffer prejudice, [it] need not decide whether counsel's performance was constitutionally deficient." *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 46 We conclude that defendant has failed to show that he suffered prejudice. Defendant argues that, although counsel's strategy focused heavily on discrediting Swartz, and despite counsel's awareness through discovery that Swartz was charged in a Lee County possession case, he failed to impeach him with his involvement in that case. He points out that Swartz's court dates were available on line. He recognizes that Swartz did not have a conviction in the Lee County case, so that that case was not proper impeachment material under *People v. Montgomery*, 47 Ill. 2d 510 (1971) (and therefore Illinois Rule of Evidence 609 (eff. Jan. 1, 2011)). However, he contends that Swartz opened the door to non-*Montgomery* impeachment when he volunteered, "I'm not in trouble fighting off any cases, nothing like that," when the State asked him about any compensation for his testimony. See *People v. Valentine*, 299 Ill. App. 3d 1, 4 (1998) (a witness opens the door for impeachment not otherwise permissible under *Montgomery* when he or she testifies about aspects of his or her record that would not otherwise

be admissible). He further argues that, when counsel obtained the affidavit of Swartz's cousin for the motion for a new trial, he demonstrated his ability to obtain "significant evidence to impeach Swartz"; he argues that counsel should have anticipated the need to impeach Swartz should he deny heroin use. He further cites *People v. Strother*, 53 Ill. 2d 95, 99 (1972), for the proposition that a witness's drug use may be raised for impeachment regardless of whether that matter has arisen in the witness's testimony.

¶ 47 The State responds that the evidence was cumulative. We deem that the State has the better of this argument. Although we might take issue with the State's characterization of the potential impeachment evidence as cumulative, it nevertheless would not have been of a character to sway the jury's verdict.

¶ 48 We give defendant the benefit of two assumptions: (1) that defense counsel would have been able to show that the Lee County case's pendency gave Swartz reason to try to please the authorities; and (2) that counsel would have been able to develop evidence that Swartz lied to the jury about his drug use. Our assumptions lead us to expect that a full impeachment of Swartz would have effectively negated any *independent* credibility that his testimony had. However, it would not change the fact that that testimony matched Smith's closely, despite those two having no ties beyond the moment of the transaction. In other words, even if the jury would have seen neither Swartz nor Smith as credible on his own, the fact that they independently described very similar events lent credibility to both. Further, what Albers, Minnis, and Myers saw was largely consistent with the testimony of Swartz and Smith. Although none saw defendant handing over the heroin or taking the cash, Albers saw an interaction in the car consistent with what Swartz and Smith described, and Albers, Minnis, and Myers corroborated Smith's and Swartz's testimony on the matter of defendant trying to swallow something in his possession. Thus,

although the State's evidence was not truly overwhelming, it was not particularly dependent on Swartz's personal credibility. In any event, Swartz's credibility cannot have been high to begin with. Swartz's self-aggrandizement was both obvious and transparently untrustworthy. The trial court, with its firsthand knowledge of the evidence, reached a similar conclusion when it ruled that the "new fact" of Swartz's drug use probably would not have altered the trial's outcome. Given all this, no reasonable probability exists that the jury would have reached a different verdict had it learned more to discredit Swartz.

¶ 49 We now turn to defendant's claim concerning sentencing. He argues (1) that the court committed second-prong plain error by considering as aggravating a factor inherent in the offense, or, (2) alternatively, that counsel was ineffective for failing to raise that consideration in a posttrial motion. He argues that the statutory factors in aggravation that the defendant's conduct caused or threatened serious harm and that the defendant received compensation for committing the offense are inherent in any offense of delivery of heroin. He further argues that the court showed that it was giving significant weight to these factors when it indicated its agreement with the State's argument on them.

¶ 50 The State in response concedes that neither harm to the community nor receipt of compensation was a proper aggravating factor here; it argues instead that remand is unnecessary because the court gave no weight to either. It argues that the court's mention of both factors was merely in passing and suggests that the court's discussion of the harm of heroin was simply a response defendant's argument that he was as much a victim of drugs as a perpetrator.

¶ 51 We cannot agree with the State that the record establishes that the court gave *no* weight to the two factors. *Any* weight given to a factor in aggravation inherent in the offense produces an impermissible double enhancement. See, *e.g.*, *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992)

("There is a general prohibition against the use of a single factor both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed" (emphasis in original)). This is because we presume that the legislature takes into account any factor inherent in an offense when it sets the applicable penalty range. *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993) (citing *People v. White*, 114 Ill. 2d 61, 65-66, 101 (1986)). Illinois courts have regularly held that "compensation for delivery of a controlled substance or cannabis cannot be used as an aggravating factor for the offense of delivering those substances." *People v. Atwood*, 193 Ill. App. 3d 580, 592 (1990) (reviewing cases). Further, we have held that, if a sentencing court intends to consider the societal harm a defendant's sale of drugs threatened to cause as an aggravating factor, "the record must demonstrate that the conduct of the defendant had a greater propensity to cause harm than that which is merely inherent in the offense itself." *McCain*, 248 Ill. App. 3d at 852.

¶ 52 That said, even when an error is properly preserved, "every reference by the sentencing court to a factor implicit in the offense does not constitute reversible error." *People v. Burge*, 254 Ill. App. 3d 85, 91 (1993). In a preserved-error analysis, a "sentence based on improper factors [should] not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008); see also *People v. Bourke*, 96 Ill. 2d 327, 332 (1983) (stating the same standard). In considering whether reversible error occurred, a reviewing court should not focus on a few words or statements of the trial court, but should make its decision based on the record as a whole. *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004).

¶ 53 Defendant concedes that he did not contemporaneously object to the trial court's discussion of the improper aggravating factors or raise the issue in a postsentencing motion. Therefore, under standard principles of appellate review, he forfeited this argument on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (to preserve a claim of sentencing error, a defendant must object at the sentencing hearing and in a postsentencing motion). However, he argues that his claim is susceptible to review under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Hillier*, 237 Ill. 2d at 545. In particular, he asserts that this was second-prong plain error, that is, "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 557, 565 (2007). "In the sentencing context, a defendant must [show that] the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. Illinois courts have often held that, where the court clearly gave weight to an inherent factor, that consideration *is* unfair. *E.g.*, *Atwood*, 193 Ill. App. 3d at 593.

¶ 54 Considering the record as a whole, it is apparent that the court gave as much weight to these factors as any other factors in aggravation. The State argues that the references were merely in passing. That is so if the standard is the mere number of words the court used, but it is equally so of all the factors in aggravation that the court mentioned. Indeed, the court simply mirrored the State in going one by one through the statutory factors. One indication that the court placed significant weight on a specific aggravating factor is a mirroring by the court of the factors that the State argued in aggravation. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 11-12, 14. Here, the court departed from its mirroring only when it elaborated on points on

which it disagreed with the State. In other words, where it mentioned a factor "in passing," it did so because it agreed with the State, not because it was minimizing the significance of a factor.

¶ 55 We further hold that the court's comments were not a general comment on the "significant harm inflicted upon society by drug trafficking"; we approved such comments in *McCain* as a means to "encourage[ ] rehabilitation by providing a context in which a defendant may develop feelings of remorse." *McCain*, 248 Ill. App. 3d at 852. Here, the brevity of the court's comments works against such an interpretation. Whereas the State expounded on the harms of the drug trade, the court straightforwardly included "Defendant's conduct caused or threatened serious harm" as one of a list of aggravating factors.

¶ 56 The State suggests that defendant's sentence was relatively lenient and that we may thus conclude that the court gave no significant weight to the improper factors. We do not agree. We agree that the sentence was lenient, but we take that to be largely a result of the weight the court gave to the factors in mitigation. We can accept the general premise that the sentence could not be much more lenient, yet still conclude that excluding the improper factors could make some difference. A change does not have to be large to matter to defendant.

¶ 57 Moreover, we agree with defendant's alternative argument that counsel was ineffective in his handling of this sentencing issue. First, we see no strategic benefit of counsel's failure to point out that the factors were improper. Moreover, counsel failed to file even a *pro forma* postsentencing motion, and instead adopted defendant's *pro se* motion, a procedure we do not deem advisable. Second, for the same reasons we held that the record fails to show that the court's consideration of the factors had no effect on the sentence, we also must conclude that a reasonable probability exists that, but for the improper consideration, the court would have

imposed a lower sentence. This result, like the result of the second-prong plain-error analysis, requires us to remand for resentencing.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm defendant's convictions but vacate his sentence and remand for resentencing without consideration of factors inherent in the offense. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 60 Affirmed in part and vacated in part; cause remanded.