2017 IL App (3d) 130630-U

Order filed January 24, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-13-0630
	)	Circuit No. 11-CF-837
REGINALD GUICE,	)	
	)	The Honorable
	)	Steven Kouri,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) The evidence was sufficient to prove beyond a reasonable doubt that the defendant constructively possessed 168.9 grams of heroin found at his brother's residence with intent to deliver it; (2) the evidence was sufficient to prove beyond a reasonable doubt that the defendant engaged in a criminal drug conspiracy; (3) the warrant application and affidavit submitted by a police officer supplied probable cause for the issuance of a warrant to search the defendant's residence; (4) the trial court did not commit reversible plain error in allowing a police officer's hearsay testimony that a reliable confidential informant had told him that the defendant and his brother were selling heroin where the defendant introduced a written search warrant application

containing the same hearsay statement for his own strategic purposes and where the evidence in the case was not closely balanced; (5) the trial court did not abuse its discretion in allowing the State to impeach the defendant with his 17-year-old conviction for armed robbery where the defendant did not object based upon the age of the conviction and the evidence established that the defendant was "released from confinement" on the conviction fewer than 10 years prior to the trial in the instant matter; (6) the defendant was not entitled to a new trial based upon certain improper statements and arguments that the prosecutor made during closing argument; and (7) the trial court did not err in denying the defendant's request for a *Franks* hearing where the defendant presented no sworn, notarized affidavits supporting his denial of statements contained in the warrant application.

¶ 1 Following a trial by jury, the jury returned guilty verdicts finding defendant guilty of two offenses: (1) unlawful possession with intent to deliver 100 grams or more, but less than 400 grams, of a controlled substance (720 ILCS 570/401(a)(1)(B) (West 2010)); and (2) criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). The trial judge entered a judgment of conviction for the offense of unlawful possession with intent to deliver 100 grams or more, but less than 400 grams, of a controlled substance and sentenced defendant to serve a mandatory life sentence as a habitual criminal offender.

¶ 2 On appeal, defendant contends that the State's evidence did not prove either offense beyond a reasonable doubt and he challenges the trial court's ruling that the warrant complaint established probable cause to search defendant's residence. Defendant also claims he did not receive a fair trial due to certain evidentiary rulings made by the trial court and due to certain improper statements and arguments made by the prosecutor during closing argument.

¶ 3 FACTS

¶ 4 The indictment alleged that, on September 1, 2011, the defendant, Reginald Guice, and his brother, Larry Guice (Larry), knowingly and unlawfully possessed more than 100 or more grams but less than 400 grams of a substance containing heroin (count II), and that they did so with intent to deliver (count I). The State later added a charge of criminal drug conspiracy

(count III). That count alleged that, between August 1, 2011, and September 1, 2011, Reginald and Larry Guice agreed with each other and with Natalie Brady (Brady) to commit unlawful possession with intent to deliver a controlled substance, obtained more than 15 grams of a substance containing heroin, and processed and stored the heroin at 1708 North Wisconsin and 3309 W. Woodhill, Apt. F (Woodhill-F) in Peoria with the intent to deliver it.

¶ 5 During his arraignment, the defendant asked for and was and was granted leave to proceed *pro se.* His request for standby counsel was initially denied, but the trial court later reversed that ruling prior to trial and appointed standby counsel to assist the defendant with jury selection, trial objections, and jury instructions.

¶ 6 On November 4, 2011, prior to trial, the defendant filed a motion to suppress evidence seized during the execution of search warrants at 3315 W. Woodhill Apt. C (Woodhill-C), where the defendant resided with his mother, and Woodhill-F, where the defendant's brother Larry resided. The defendant alleged that the search warrant did not establish probable cause to believe that contraband would be found at the defendant's residence. The defendant also maintained that that false statements concerning controlled drug buys were made in the warrant complaint and requested a *Franks* hearing to address this issue. On February 10, 2012, the trial court denied both motions. However, the trial court subsequently vacated that ruling and directed the State to produce documents pertaining to the alleged confidential informant for in camera review. After reviewing the documents subsequently produced by the State, the trial court denied the defendant's motions to suppress and for a *Franks* hearing, and denied the defendant's motion to reconsider those rulings.

¶ 7 On June 26, 2012, the State disclosed that it would ask the court to sentence the defendant to natural life in prison as a habitual criminal pursuant to section 5-4.5-95(a) of the

Unified Code of Corrections (Code) (730 ILCS 5/5.4.5-95(a) (West 2012)) if the defendant were convicted of Count II or Count III.

¶ 8 During the trial, Peoria Police Officer Matthew Lane, a member of the Peoria Police Department's vice and narcotics unit, testified for the State. Lane testified that he began investigating the defendant in late August of 2011 and he conducted at least two controlled buys of cannabis from the defendant. Based upon Lane's investigation, the State obtained a warrant to search the defendant's person and his residence at Woodhill-C.

¶ 9 On September 1, 2011, while conducting surveillance outside the defendant's residence, Lane saw the defendant and "a female" exit Woodhill-C and drive away together in a silver van. Lane and other officers followed the van to Brady's house at 1708 N. Wisconsin (Wisconsin St.), where the defendant got out of the van and entered the house. A few minutes later, the defendant exited the residence and drove away in the van. The police followed the van to Woodhill-F, the defendant's brother Larry's residence, which was located across the sidewalk from the defendant's residence. The defendant and at least one female entered Larry's residence. Less than 30 minutes later, the defendant, another male, and two females came outside and drove away in the van.[1]

¶ 10 Police officers followed the van to the corner of University Street and Bradley Avenue, where another squad car stopped the van. Peoria Police Officer Cary Hightower, one of the police officers who stopped the van, testified that there were four persons in the van at the time of the stop: the defendant was driving, Brady was in the front passenger seat, and Larry and

[1] The defendant's departure from Larry's residence was observed by Officer Corey Miller, another Peoria vice squad officer, who had taken over the surveillance of the defendant during the 30 minutes that the defendant was inside Larry's residence.

Maddie Boyd were seated in the back seat. The defendant gave Hightower consent to search the van. No drugs or other contraband was found. Brady consented to a search of her person. Peoria Police Officer Brett Lawrence found what he suspected was heroin in Brady's pants pocket. Brady initially said that it did not belong to her but she later admitted it was hers. An Illinois Police forensic scientist later confirmed that the substance found on Brady contained heroin and weighed 1.2 grams.[2] The defendant was taken into custody pursuant to the warrant. He and the other three passengers were taken to the police station.

¶ 11 Later that day, Lane obtained a search warrant for Woodhill-F (Larry's residence). The warrant was issued based, in part, upon the fact that Lane had seen Brady exiting Woodhill-F shortly before she was found carrying heroin, and upon information Lane had received from a confidential informant who told Lane that the defendant and Larry were dealing heroin. The search warrant for Woodhill-F was executed at approximately 3:00 p.m. on September 1, 2011. Latasha Robinson, Larry's girlfriend and the leaseholder of Woodhill-F, signed a consent to search form. A videotape of the search was admitted into evidence and published to the jury. During the search of the master bedroom, police found mail addressed to Larry, Larry's social security and Illinois identification cards, and a pay stub made out to Larry. In that same bedroom, police found a small bag containing suspected heroin on the television stand, additional bags containing suspected heroin on top of the head board, a Ziploc bag containing suspected heroin in a man's basketball shoe in the closet, and two bags of suspected cannabis on top of the dresser. In the same dresser drawer where officers found Larry's social security and ID cards, officers found a Ziploc bag containing many smaller Ziploc bags. Officer Clint Rezac,

[2] Brady was later murdered in Chicago and was deceased at the time of the defendant's trial. Maddie Boyd was not called to testify.

the vice squad evidence officer for the search of Woodhill-F, testified that these bags are used for the packaging of illegal drugs.

¶ 12 In the kitchen, police found: (1) ecstasy pills in a cabinet; (2) a pink bag filled with plastic bags containing a brown, rock-like substance in the refrigerator; (3) a digital pocket scale; (4) a large Ziploc bag holding numerous smaller Ziploc bags with Playboy bunny logos on them in a drawer; and (4) "Go-Phones" and empty cellphone boxes. A forensic scientist later determined that the rock-like substance found in the refrigerator contained 168.9 grams of heroin, and the plant-like material found in the bedroom contained 111.2 grams of cannabis.

¶ 13 The police simultaneously searched the defendant's residence (Woodhill-C).[3] A videotape of the search was admitted into evidence and published to the jury. At the defendant's residence, police found cannabis stems and a digital scale with suspected heroin residue on it in a kitchen cabinet. In a hallway closet, police found a black cosmetics or overnight bag containing a sifter and spoon, aluminum foil, Ziploc bags with the Playboy logo on them, a bag of pink pills, a white powdery substance that did not contain drugs, and a toothbrush. Peoria Police Officer Corey Miller (the vice squad officer who collected, bagged, and tagged all of the evidence recovered from Woodhill-C) testified that sifters and spoons are sometimes used in manufacturing drugs, aluminum foil and Ziploc bags are sometimes used to package drugs, and the pink pills might have been used to "cut" or "stretch" heroin. In the hallway closet, the police also found dinner plates and a grinder or blender, all of which contained some type of residue. A forensic scientist at the Illinois State crime lab later determined that the residue found on the plates and blender contained heroin. The defendant's fingerprints were found on the blender containing heroin residue and on one of the black ceramic plates containing heroin residue.

[3] Both Larry and the defendant testified that the defendant resided at Woodhill-C.

¶ 14 At 6:55 that evening, Peoria vice squad officer John Couve searched the Wisconsin St. residence after obtaining consent from Brady. Couve testified that he entered the residence with a key that had been found on the defendant's person at the police station. A videotape of the search was admitted evidence and published to the jury. The videotape shows that, on the kitchen counter, officers found a Magic Bullet mixer box, parts for the mixer, the mixer itself, mixing containers, a piece of aluminum foil, two galvanized pipe fittings, and Brady's driver's license. All items found on the counter had a brown, sticky residue on them. One container had a handle on it and was partially filled with a light brown powder. Tan powder was plainly visible on the kitchen counter, together with chunks of what the officers believed was heroin. The powder and chunks appeared to have the same color and consistency as the heroin found at Woodhill-F. Also on the counter was a ceramic dinner plate with a blackish brown, tar-like substance on it that was suspected to be black tar heroin.

¶ 15 Throughout the main floor were plastic baby bottle liners, some were unused, and some had a brownish residue inside them. Officers also found a C-clamp on the kitchen counter near the pipes and bottle liners. On the video, an officer described that a bottle liner would be placed into a section of pipe, loose heroin would be placed into the liner, and the clamp would be used to compress the heroin into the shape of the pipe. The officer on the video, and Officer Couve in his testimony, both stated that the heroin found at Woodhill-F was in cylinder-shaped blocks that matched the shape of the pipe and the blocks had markings matching the seams in the bottle liners.

¶ 16 On the kitchen counter were a box of latex gloves, a saw blade with black, sticky residue on it, and two galvanized pipe fittings that were coated on the interior with a brown, sticky residue. On the dining table, officers found the motor to a Magic Blender, which was coated

with the brown residue, and a box of bottle liners. The brown, sticky residue was found on much of the furniture on the main level of the house, and on objects in the rooms. In a drawer under the counter, Officer Rezac located a clear plastic bag containing suspected heroin. In the kitchen cabinets, officers found a bottle of Super Lactose 6270.

¶ 17 In the living room, officers found a Magic Bullet blender with the blade attached, Magic Bullet containers, a mirror, two spoons, and debit and Visa cards belonging to Brady. All were coated with a brown, sticky residue. On a footstool in front of the couch, officers found a brown-patterned cloth backpack that held an unloaded five-inch, model 686, Smith & Wesson .357 magnum revolver. In a main floor bedroom, officers found two rounds of .38 caliber ammunition on a TV stand.

¶ 18 Couve stated that, in his training and experience, lactose is used to cut heroin. Although Couve acknowledged that the majority of the items collected from Wisconsin St. have legitimate uses, he testified that, in his experience, they are also used to manufacture and package heroin. Couve opined that they appeared to have been used for that purpose in this case. He stated that the items from Wisconsin St. that were suspected of being heroin were submitted to the crime lab for testing.

¶ 19 Aaron Roemer, a forensic scientist with the crime lab, also testified for the State. Roemer tested the substances collected from Wisconsin St. Among the substances that Roemer tested was a rocky brown substance weighing 5.8 grams which tested positive for the presence of heroin and 1.1 grams of a brown residue that he scraped from the interior of a Magic Bullet container which was found to be heroin. An off-white powder weighing less than .10 gram also tested positive for heroin.

¶ 20 Loren Marion, III, a Peoria Police Officer who was assigned to the vice squad, was

accepted as an expert in the field of narcotics. Marion testified about drug dealer paraphernalia and the process by which heroin is manufactured and packaged for sale. Marion testified that: (1) scales are used to weigh drugs coming in from the suppliers and when packaging smaller quantities for sale; (2) grinders are typically used to grind heroin that comes in a solid, chunky form from the supplier; (3) cutting agents (usually the powder taken from "Sleepinal" or "Dorman" pills) are added to the heroin to make more of the product for little cost; (4) sifters are used to filter the heroin into a powder once it has been ground up; and (5) plastic bags and aluminum foil are used to package heroin.

¶ 21 Marion stated that the Hamilton Beach grinder found at Woodhill-C would be used in the manufacture and packaging of heroin. Based on the grinder, the heroin found on a black ceramic plate, and other items found at Woodhill-C, Marion opined that heroin was being manufactured and packaged at Woodhill-C. He testified that: (1) the Dorman pills would be used in the manufacture and packaging of heroin; (2) the sifter would be used to thin the ground heroin into a powder; (3) the toothbrush would be used to clean the sifter; (4) the aluminum foil and green, mini Ziploc bags with a Playboy logo on them would be used for packaging heroin; and (5) the scale would be used to weigh the drugs. However, Marion acknowledged that the amount of heroin residue found on the plate at Woodhill-C would be consistent with personal use.

¶ 22 Having reviewed the videotape of the search of Wisconsin St., and viewing at trial all the items collected from Wisconsin St., Marion also opined that an "assembly line" for the production and packaging of heroin had been set up at Wisconsin St. Marion opined that the 110 grams of white powder found at Wisconsin St. was a cutting agent, and that the 5.8 gram substance with trace amounts of heroin likely had been mixed with heroin. Marion further noted

that fact that heroin had been found at Wisconsin St. was consistent with his conclusion that a heroin processing facility was located there.

¶ 23 Marion testified that he had also reviewed the videotape of the search conducted at Woodhill-F and that he was familiar with the types of items collected there. According to Marion, the mini Ziploc bags with the Playboy logo on them were consistent with the packaging used for street level drug dealing in Peoria. The green mini Ziploc bags with the Playboy logo on them found at Woodhill-F looked to be identical to those found at Woodhill-C. Marion opined that the 168.9 grams of heroin found in Woodhill-F is a quantity that is consistent with distribution, not use, of heroin. (Marion stated that this amount of heroin was "way more than personal use amounts.") Marion calculated the street value of this weight of heroin in Peoria to be approximately $30,000. When asked about the "Go Phones" and empty cell phone boxes found in Woodhill-F, Officer Marion testified that these phones are often used in conducting drug transactions to avoid detection by wiretaps or other means.

Scott Bowers, a police officer who worked with the Peoria Police Department's Crime Scene Unit, was accepted as a fingerprint expert. Bowers testified that he collected the defendant's fingerprints and compared them to latent prints found on various items of evidence seized from the three residences. Bowers determined that one of the defendant's fingerprints was found on each of the following items discovered at Wisconsin St.: (1) a "Magic Bullet box"; (2) a Magic Bullet plastic container in which police discovered 1.1 grams of heroin residue; (3) a Magic Bullet grinder blade; (4) a lactose bottle; and (5) a glass plate. Bowers stated that the defendant's fingerprints were also found on a plate and a Hamilton Beach Grinder found at Woodhill-C. Bowers testified that the fingerprints he identified could not be dated and acknowledged that they could have been deposited "some time ago," even one or two years

previously.

¶ 24 The defendant's brother Larry testified on the defendant's behalf. Larry testified that, on September 1, 2011, he lived at Woodhill-F with his girlfriend and two children. He had been smoking cannabis and taking Ecstasy that day, which negatively affected his memory of the day's events. Larry testified that the items found at Woodhill-F on September 1, 2011, including the heroin and other illegal drugs, belonged to him, and the defendant had nothing to do with them. Larry stated that he supplied Brady with heroin in exchange for the use of her house, where he processed heroin. He did not have a key to Brady's house. At Brady's house, Larry pressed the raw heroin that he got from Chicago into chunks and then broke the big chunks down and placed them in packages. To manufacture heroin, Larry used a sifter, a grinder, a press gun, various cylinders, and various cutting agents, including lactose. He used "Go Phones" to avoid being traced by police. He bought little baggies with the Playboy bunny logo on them in which he wrapped small amounts of heroin for sale on the street. He acknowledged that the packages found in the black travel kit in the defendant's residence were the same baggies with the bunnies on them. Larry stated that he placed the black travel kit and its contents in Woodhill-C, where he periodically went to visit his mother and brother.

¶ 25 During his trial testimony, Larry denied that the defendant was involved with Larry's sale of heroin or with his processing of heroin for sale at Brady's house. Larry stated that he alone had been selling the heroin, and that the defendant had nothing to do with the heroin or marijuana found at Woodhill-F. Larry testified that he went to Chicago with "a friend" to buy heroin and had sold the heroin himself. He claimed that he had no agreement with the defendant to sell heroin.

¶ 26 Larry acknowledged that, during a prior interview with the police conducted after his

arrest, he had told Peoria Police Officers Dixon and Lane that: (1) Larry and the defendant had been selling heroin for three or four months and that the defendant made all the arrangements with the dealers in Chicago; (2) Larry and the defendant traveled to Chicago together to buy heroin; (3) Larry and the defendant had purchased heroin in Chicago three or four days before their arrests on September 1, 2011 and brought it to Peoria; (4) the defendant participated in the processing of the heroin; and (5) the heroin discovered at Woodhill-F belonged to both Larry and the defendant. However, Larry stated that, that during the police interview, the officers told him that they had found drugs in his apartment and that they were trying to arrest the defendant for heroin and possibly marijuana. Larry testified that he incorrectly told the officers the drugs belonged to him and the defendant because he believed that, if he did not implicate his older brother, the officers would take Latasha to jail and Larry's children would be taken away. After Larry incriminated his brother, Latasha was not charged, and Larry's children remained with Latasha at the time of the trial.

¶ 27 The defendant testified that he was innocent of the charges. He had sold marijuana in the past, but not heroin. He never possessed heroin. The defendant stated that Brady was the mother of his cousin's three children. The defendant testified that had been to Brady's house several times and may have touched various items in her home that later might have been used to process heroin. However, he asserted that that he had nothing to do with manufacturing heroin and nothing to do with the heroin found at Brady's and Larry's residences.

¶ 28 Regarding his fingerprint on the grinder or blender found at Woodhill-C, the defendant testified that it was initially the family's blender and that he washed it with the dishes. He did not recall placing the black bag into the closet at Woodhill-C, but said he probably did so if Larry gave it to him. The defendant denied touching anything in the black bag.

¶ 29 The defendant testified that, on September 1, 2011, he drove his mother's van to pick up Brady at her house. He did not enter Brady's house (as Officer Lane had testified), but rather honked the horn. The defendant and Brady entered Woodhill-F and remained there for about 10 minutes, at which time the defendant, Brady, and Larry left together, and were later stopped and arrested.

¶ 30 The defendant testified that, although he lived at his mother's residence (Woodhill-C), he did not have a key to that residence. According to the defendant, his mother would leave the key to Woodhill-C at Larry's residence (Woodhill F). The defendant stated that Brady left her house key on his mother's key ring because Brady was "bubbly" and was always losing things. He testified that Brady's house key was not his, but he later testified, "her key is on my key ring."

¶ 31 Upon the State's motion, (and over the defendant's objection), the trial court admitted a certified copy of the defendant's 1995 conviction for armed robbery and instructed the jury that the conviction could be considered in evaluating the defendant's credibility (*i.e.*, for impeachment purposes). The court admonished the jury that it could not consider the conviction as to whether the defendant had committed any offense charged in the case before the jury.

¶ 32 Peoria Police Officer Brad Dixon testified in rebuttal that, when he and Officer Lane interviewed Larry at the police station on September 1, 2011, Larry incriminated the defendant. During the interview, Larry told Dixon and Lane that he and the defendant went to Chicago on numerous occasions to buy heroin for resale in Peoria. Larry told the officers that he and the defendant initially bought 10 grams of heroin and eventually worked their way up to purchasing quantities of heroin well in excess of 100 grams. According to Dixon, Larry was consistent in saying that he and the defendant purchased the heroin together, processed it, and then sold it on

the street. Larry told the officers that he and defendant had last been to Chicago on the Tuesday before his arrest on Thursday, September 1, 2011.

¶ 33 Dixon testified that neither he nor Lane told Larry during the interview that Latasha would be arrested if he did not implicate the defendant. The officers did not tell Larry his children would be taken if he did not implicate the defendant. LaTasha was handcuffed and taken to the police station, but she was released from police custody at some point during Larry's interview. Dixon believed that Larry's cooperation might have contributed to LaTasha's being released and never charged.

¶ 34 During closing arguments, the prosecutor stated that Larry told police that he and his brother brought heroin from Chicago to Peoria and were involved in drug dealing.

¶ 35 The jury found the defendant guilty of unlawful possession with intent to deliver 100 grams or more but less than 400 grams of a controlled substance and criminal drug conspiracy. The defendant filed a motion for a new trial and three amended motions for a new trial, which the trial court denied. The defendant then filed a motion to reconsider, which was also denied.

¶ 36 The State filed a verified statement that: (1) the defendant was convicted of armed robbery (a Class X felony) twice, once in 1992 and once in 1996; and (2) the defendant was convicted of possession with intent to deliver a controlled substance and criminal drug conspiracy (both Class X felonies) within 20 years of his first armed robbery conviction, excluding time spent in custody. The State later submitted certified copies of the defendant's armed robbery convictions and his records of his release from parole on those convictions. The trial court found that the defendant met the definition of a habitual criminal under section 5-4.5-95(a) of the Code and sentenced the defendant to mandatory natural life in prison pursuant to that statute. The court stated that it would not have sentenced the defendant to natural life in prison

but for the mandatory life sentence imposed by the statute. The defendant made an oral motion to reconsider the sentence which the trial court denied.

¶ 37 This appeal followed.

¶ 38 ANALYSIS

¶ 39 On appeal, the defendant argues that the evidence was insufficient to convict him of possession of a controlled substance with intent to deliver a controlled substance (720 ILCS 570/401(a)(1)(B) (West 2010)) because the evidence failed to establish that the defendant had actual or constructive possession of the heroin found in his brother's residence. The defendant also argues that the evidence was insufficient to convict him of criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). Accordingly, the defendant maintains that his convictions should be reversed outright.

¶ 40 In the alternative, the defendant argues that his convictions should be reversed and the matter should be remanded for a new trial because: (1) the police officers' application for a search warrant failed to establish probable cause for the ensuing search of the defendant's residence, which uncovered inculpatory evidence; (2) the defendant was denied a fair trial when the trial judge overruled his objection to unresponsive and damaging hearsay testimony that he and his brother were selling heroin; (3) the defendant's credibility was improperly impeached at trial with an armed robbery conviction that was more than 10 years old and the prosecution failed to prove how much of the intervening time the defendant spent in custody; and (4) the prosecutor acted improperly during closing argument by repeatedly misstating the evidence, using evidence admitted solely for impeachment as substantive evidence, and attempting to shift the burden of proof to the defendant. The defendant also argues that, regardless of whether this court grants him a new trial, the case should be remanded for a *Franks* hearing based on the defendant's

detailed affidavit denying the search warrant affiant's claim that the defendant had recently sold cannabis.

¶ 41 We will address these issues in turn.

¶ 42 1. Sufficiency of the Evidence – Possession with Intent to Deliver a Controlled Substance

¶ 43 The defendant argues that the State failed to prove him guilty of possession with intent to deliver a controlled substance beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, a reviewing court should not retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* We will not reverse a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the guilt of the defendant." *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000).

¶ 44 In order to prove a defendant guilty of possession of a controlled substance, the State must establish beyond a reasonable doubt that: (1) the defendant had knowledge of the presence of narcotics; and (2) the narcotics were in his immediate and exclusive control. *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). The State must establish that the defendant had possession of the narcotics themselves. The possession may be joint, and it may be proven by circumstantial evidence. *People v. Walton*, 221 Ill. App. 3d 782, 786 (1991). In cases involving joint control of an area, courts generally look for corroborating evidence connecting the defendant to the contraband found. *Id.* at 787.

¶ 45 The possession may be actual or constructive. *People v. Adams*, 161 Ill. 2d 333, 344–45 (1994); *People v. Valdez*, 230 Ill. App. 3d 975, 981 (1992). "Constructive possession exists where there is no actual personal present dominion over the contraband, but defendant has an

intent and a capability to maintain control and dominion over the contraband." *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). Mere proximity to the narcotics is not sufficient to establish the requisite control for constructive possession. *People v. Ray*, 232 Ill. App. 3d 459, 462 (1992). Proof that the defendant has control over the premises where the narcotics are found can lead to the inference that the defendant maintained control and dominion over the narcotics. *Valdez*, 230 Ill. App. 3d at 981. However, such proof is not required to establish constructive possession. *Adams*, 161 Ill. 2d at 345; *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998). "Where the other circumstantial evidence is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of contraband will support a finding of guilt on charges of possession." *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996).

¶ 46 "Constructive possession may exist even where an individual is no longer in physical control of the drugs, provided that he once had physical control of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession." *Adams*, 161 Ill. 2d at 345. Indicia of control that courts have found sufficient to uphold a conviction include the defendant's possession of a key to the locked apartment where narcotics were found (*People v. Lawton*, 253 Ill. App. 3d 144, 148 (1993); *Valdez*, 230 Ill. App. 3d at 981)), the discovery of the defendant's fingerprints on plastic bags containing narcotics (*Adams*, 161 Ill.2d at 340)), and evidence that defendant had visited the premises where narcotics were found on multiple occasions (*People v. Butler*, 242 Ill. App. 3d 731, 733 (1993)).

¶ 47 In this case, the evidence supported a reasonable inference that the defendant was connected to the heroin manufacturing operation at Brady's residence and to the heroin produced there, including the 168.9 grams of heroin found at Woodhill-F. Larry testified that he

manufactured and packaged heroin at Brady's residence for sale, including all of the heroin found at Woodhill-F. The defendant had a key to Brady's residence on his key chain when he was arrested. The defendant's fingerprints were found on some of the items at Brady's residence that Larry testified he used in manufacturing the heroin. For example, the defendant's fingerprints were found on a bottle of lactose, which Larry testified he used as a cutting agent in the manufacture of heroin for sale, and on a grinder blade.[4] The defendant's fingerprints were also found on a Magic Bullet container found at Brady's residence which contained 1.1. grams of heroin residue. In addition, the defendant's fingerprints were found on a plate and a grinder blade discovered in his own residence (Woodhill-C), both of which contained heroin residue. These items were found near a black travel kit containing items that officer Miller testified are used in the manufacture, packaging, and sale of heroin (including sifters, spoons, aluminum foil, and pills). The baggies found in the kit matched the baggies that Larry testified he bought and used for the sale of heroin; both sets of baggies had the "Playboy Bunny" logo on them.

¶ 48 Moreover, the defendant was seen visiting Woodhill-F and Brady's residence on the day 168.9 grams of heroin that was manufactured at Brady's residence was discovered at Woodhill-F. Further, at the time he was arrested, Larry told police that the defendant drove to Chicago with him to buy heroin and that he and the defendant had been selling heroin together for the past three months. Although Larry and the defendant each denied that the defendant was involved in Larry's manufacture and sale of heroin at Brady's residence, the jury could have reasonably found their denials to be less than credible, particularly in light of Officer Dixon's rebuttal testimony.

[4] Larry testified that he used a grinder to manufacture heroin for sale.

¶ 49 Taken together, this evidence suggests that the defendant jointly possessed the heroin produced at Brady's residence with Larry and Brady, including the heroin found at Woodhill-F, and that the defendant had the intent and capacity to maintain control and dominion over the heroin. Considering the evidence in the light most favorable to the prosecution, as we must, there is sufficient circumstantial evidence of the defendant's involvement in the heroin manufacturing operation that produced the 168.9 grams found at Larry's residence to support a reasonable inference that the defendant constructively possessed that heroin with intent to deliver it.

¶ 50 2. Sufficiency of the Evidence – Criminal Drug Conspiracy

¶ 51 The defendant argues that the State failed to prove him guilty of a criminal drug conspiracy beyond a reasonable doubt. A person commits criminal drug conspiracy when, "with the intent that an offense set forth in Section 401, Section 402, or Section 407 of this Act be committed, he agrees with another to the commission of that offense." 720 ILCS 570/405.1 (West 2010). "No person may be convicted of conspiracy to commit such an offense unless and act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator. *Id.*

¶ 52 The State alleged that the defendant committed the offense of criminal drug conspiracy with Larry and Brady where they, with the intent to commit the offense of unlawful possession with the intent to deliver a controlled substance in violation of 720 ILCS 570/401, agreed with each other to commit that offense.[5] The charging instrument alleged that the defendant, Larry,

[5] Section 401 makes it unlawful to "knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance other than methamphetamine, a counterfeit substance, or a controlled substance analog." 720 ILCS 570/401 (West 2010).

and Brady "obtained more than 15.0 grams of a substance containing *** heroin, and processed and stored said heroin at [Wisconsin St. and Woodhill-F] with the intent to deliver said heroin to others ***." To obtain a conviction in this case, the State was required to prove beyond a reasonable doubt that: (1) the defendant agreed with Larry and Brady to possess heroin with intent to deliver in violation of section 401; and (2) the defendant, Larry, or Brady performed an act in furtherance of that agreement.

¶ 53 In this case, Larry admitted he had an agreement with Brady to provide her with heroin in exchange for the use of her house to manufacture the heroin. He also admitted that he performed overt acts in furtherance of that agreement by processing and packaging 168.9 grams of heroin at Brady's house and storing the processed heroin at Woodhill-F. Thus, evidence established that a criminal drug conspiracy existed between Larry and Brady. The only issue is whether the State proved that the defendant was part of Larry and Brady's criminal agreement to obtain and manufacture heroin for purposes of possession and sale.

¶ 54 "An agreement may be implied from the conduct of the parties although they acted separately or by different means and did not come together or enter into an express agreement." Illinois Pattern Jury Instructions, Criminal, No. 17.13A (4th ed. 2011); see also *People v. Beeftink*, 21 Ill. 2d 282 (1961); *People v. Melgoza*, 231 Ill. App. 3d 510 (1992). In this case, the defendant had a key to Brady's house on his key ring at the time he was arrested,[6] and the defendant's fingerprints were found on various items found in Brady's house which Larry

[6] Larry testified that he did not have a key to Brady's house. At the time Larry, Brady, and the defendant were arrested, the defendant was the only one who had a key to Brady's house in his possession. The defendant denied that the key belonged to him, but the jury was not required to credit that denial.

testified he used to manufacture the heroin. The defendant's fingerprints were also found on items containing heroin residue found at Brady's house. The police also recovered items that could be used to manufacture heroin from Woodhill-C, where the defendant resided. One of these items (a grinder blade) contained heroin residue and the defendant's fingerprint. Police also found baggies with the Playboy logo on them (which Larry testified he bought and used for the sale of heroin) at the defendant's residence. Moreover, the defendant was seen visiting Woodhill-F and Brady's residence on the day 168.9 grams of heroin that was manufactured at Brady's residence was discovered at Woodhill-F. Although the defendant denied any involvement in the crimes and Larry testified that he was the only one that possessed and processed the heroin at Brady's house, the jury was not required to credit this testimony, especially in light of the evidence of the defendant's involvement in the manufacture of heroin at Brady's house and Larry's prior implication of the defendant to the police. The conduct of the parties and the physical evidence strongly suggested that the defendant agreed with Larry and Brady to commit the charged narcotics offense.

¶ 55 "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Viewing the evidence in the light most favorable to the State, as we must (*Collins*, 106 Ill. 2d at 261), we conclude that there was ample evidence supporting the jury's verdict that the defendant committed the offense of criminal drug conspiracy.

¶ 56 3. Probable Cause for the Search

¶ 57 The defendant argues that the trial court erroneously denied his motion to suppress the evidence found at Woodhill-C because the complaint for the search warrant failed to establish

probable cause that contraband would be found at Woodhill-C. He argues that the trial court's error entitles him to a new trial.

¶ 58 In determining whether a warrant complaint and its supporting affidavit established probable cause, the reviewing court analyzes the issuing judge's initial determination of probable cause under a deferential standard. *People v. Bryant*, 389 Ill. App. 3d 500, 513 (2009); see also *Sutherland*, 223 Ill. 2d at 219; *People v. McCarty*, 223 Ill. 2d 109, 153 (2006). A reviewing court must not substitute its judgment for that of the magistrate in construing an affidavit for a search warrant; rather, "the court must merely decide whether the magistrate had "a substantial basis *** for concluding that probable cause existed." *McCarty*, 223 Ill. 2d at 153 (citations and internal quotation marks omitted); see also *Sutherland*, 223 Ill. 2d at 219. Probable cause for a search warrant exists where "given all the circumstances set forth in the affidavit *** there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Sutherland*, 223 Ill. 2d at 219 (citations and internal quotation marks omitted).

¶ 59 The standard for probable cause concerns the probability of evidence of criminal activity, not a showing of proof beyond a reasonable doubt. *People v. Brown*, 2014 IL App (2d) 121167, ¶ 22 (citing *People v. Stewart*, 104 Ill. 2d 463, 475–76 (1984)). The affidavits or evidence presented in support of a search warrant must not be tested and interpreted in a legal, hypertechnical manner, but instead in a common sense and realistic manner. *People v. Phillips*, 336 Ill. App. 3d 1033, 1035 (2003) (citing *People v. Lipscomb*, 215 Ill. App. 3d 413, 428 (1991)); see also *People v. Hickey*, 178 Ill. 2d 256, 285 (1997) ("The principles of common sense govern the determination of whether probable cause exists to support the issuance of a search warrant.").

¶ 60 In the sworn warrant complaint at issue in this case, Officer Lane requested a search warrant for Woodhill-C. In support of the warrant complaint, Lane submitted a sworn affidavit stating that he had received information from a reliable confidential informant who had given reliable information to him in the past that the informant could purchase cannabis from a black male named "Reg." The informant provided a description of "Reg" to Lane and said that "Reg" routinely drove a silver van.

¶ 61 Acting on this information, Officer Couve observed a black male who matched the description given by the informant exit from a silver van and enter Woodhill-C. Officer Barisch questioned the apartment complex manager and found that Woodhill-C was leased to a Marie Guice. Officer Lane ran the registration of the silver van and found that it was registered to a Marie Guice at the Woodhill-C address.

¶ 62 The informant indicated that "Reg" had recently moved to Peoria from Chicago. Officer Lane checked the Secretary of State database and located a "Reginald D. Guice, D.O.B. 12-17-70." This individual had been issued a citation and listed his address as Woodhill-C. Lane stated in the complaint that Reginald D. Guice matched the description given to Lane by the informant. Later, Lane observed the silver van parked in a local business parking lot, and, using the Illinois driver's license photo of Reginald D. Guice, he positively identified the defendant as the person who subsequently entered the van.

¶ 63 Lane showed the informant the defendant's driver's license photo. The informant positively identified defendant as "Reg," the individual who routinely delivered cannabis to the informant.

¶ 64 In the warrant affidavit, Lane also swore that he had surveillance conducted on Woodhill-C on two separate occasions, the most recent occurring within 72 hours of the filing of the

complaint. Moreover, Lane swore that he set up two controlled drug buys. On each occasion, the informant was provided with funds and the informant contacted the defendant to order a quantity of cannabis to be delivered to a predetermined location. "A few minutes after the contact," police officers conducting surveillance on the defendant's residence saw the defendant leave Woodhill-C and go to the predetermined locations, where he sold cannabis to the informant. Immediately thereafter, the informant returned directly to Lane and handed him a quantity of material that field-tested positive for cannabis. The informant told Lane that the defendant was the individual he had previously described to Lane.

¶ 65 Lane also described his training and experience as a narcotics officer. Based on his training and experience, Lane believed that the cannabis the defendant was selling on a routine basis was being stored at the defendant's residence because "it is more common for mid-level drug dealers to conduct their drug business in this fashion to avoid the constant foot traffic normally associated with smaller level dealers selling from a particular house or apartment."

¶ 66 Lane further swore that, on two occasions within the previous thirty days, he had used the same informant to conduct controlled buys from the defendant of an off-white substance that field tested positive for cocaine.

¶ 67 We hold that the warrant complaint and affidavit submitted by Lane established probable cause for the issuance of a warrant to search Woodhill-C. The complaint and affidavit sworn to by Lane specifically identified the defendant and indicated that Lane had verified the defendant's identity through independent means and confirmed that identification through a reliable confidential informant. In the complaint, Lane also swore that: (1) he had verified through the Secretary of State's records that defendant lived at Woodhill-C; (2) police officers had observed the defendant leave Woodhill-C to conduct multiple controlled drug transactions; and (3) during

those controlled drug transactions, the defendant had sold cannabis to the informant. Based on his observations of the controlled drug transactions and his training and experience as a narcotics officer, Lane opined that the defendant had stored the cannabis he was selling at Woodhill-C.

¶ 68 In sum, the affidavit for search warrant contained detailed information provided by the informant and much of that information was corroborated by the officer's independent review of information maintained by the Secretary of State, and by multiple officers' observations of the defendant. In addition, Lane swore that the informant had provided reliable information and had participated in controlled buys of cannabis from defendant in the recent past. Thus, based on the information provided in the affidavit, there was a "fair probability" that contraband or evidence of a crime would be found at Woodhill-C, and the trial court had a substantial basis for concluding that probable cause for a search warrant existed.

¶ 69 Having upheld the issuance of the search warrant for Woodhill-C, we need not consider the defendant's alternative argument that the "good-faith" exception to the exclusionary rule does not apply in this case.

¶ 70 4. The Trial Court's Rejection of the Defendant's Hearsay Objection

¶ 71 The defendant argues that he was denied a fair trial when the trial court overruled his objection to Officer Lane's testimony that a confidential informant told him that the defendant and Larry were selling heroin. The defendant argues that this testimony was "unresponsive and damaging hearsay" that should have been excluded.

¶ 72 The testimony at issue occurred during the defendant's cross-examination of Officer Lane. During direct examination, Lane testified for the prosecution about his investigation of the defendant and his obtaining search warrants for the defendant and Larry's residences. On cross-examination, the defendant (who was representing himself) elicited testimony from Lane that:

(1) the warrant Lane obtained for the defendant's residence was for cannabis, not heroin; and (2) Lane oversaw controlled buys involving the defendant for cannabis, not for heroin. The defendant then asked Lane when he "found out about heroin." Lane responded that it was "at the same time [he] found out about [the defendant] and Larry." The defendant then stated, "[s]ame time you found out about me and Larry." Lane responded: "Yeah. I had information from a reliable confidential informant who related to me that yourself and your brother were selling heroin." The defendant objected that he had not asked Lane "all that." The trial court overruled the defendant's objection, saying: "You asked the question. He gave you an answer. You didn't like the answer."

¶ 73 The admission of evidence lies within the sound discretion of the trial court, and we will not reverse the trial court's evidentiary rulings absent a clear abuse its discretion. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 850 (2009). A trial court abuses its discretion "only where the ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Purcell*, 364 Ill. App.3d 283, 293 (2006); see also *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). A party is not entitled to reversal based upon evidentiary rulings "unless the error was substantially prejudicial and affected the outcome of the case." *Taluzek v. Illinois Central Gulf R.R. Co*., 255 Ill. App. 3d 72, 83 (1993); see also *Lorenz v. Pledge*, 2014 IL App (3d) 130137, ¶ 18.

¶ 74 On appeal, the defendant argues that the trial court committed reversible error by admitting Lane's testimony about what the informant told him because that testimony was "not made in response to a question asked by the defendant and was inadmissible hearsay" which "denied [the defendant] a fair trial." The defendant did not raise this issue in a post-trial motion. Accordingly, he acknowledges that he has forfeited the issue. See *People v. Enoch*, 122 Ill. 2d

176, 186 (1988) (to preserve an issue for review, a defendant must both object at trial and raise the matter in a written posttrial motion).[7] However, the defendant argues that the trial court's error is reversible under the plain error doctrine.

¶ 75 In addressing claims of error under the plain error doctrine, we employ a two-part analysis. The first step in the analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564–65, 565 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious." ' *Id.* at 565 n. 2. If we determine that the trial court committed a clear or obvious (or "plain") error, we then proceed to a second step, which is to determine whether the error is reversible. Our supreme court has made it clear that plain errors are reversible only when (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the error is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 76 In this case, the parties agree that the testimony at issue was hearsay. Nevertheless, it is not clear that the trial court erred by admitting the evidence. As noted above, the defendant did not object to the testimony on hearsay grounds. Moreover, shortly after Lane presented the testimony at issue, the defendant moved to admit two written search warrant complaints into evidence, one of which stated that a confidential informant had told Lane that the defendant and his brother Larry were selling cannabis and heroin. The complaints were admitted over the State's objection. After introducing these warrant complaints, the defendant attempted to

[7] Although the defendant objected to the testimony at issue during the trial, he did not object on hearsay grounds.

discredit them (and Lane) by highlighting various inconsistencies between the sworn statements made in each complaint. Having affirmatively introduced the informant's alleged statement to Lane for his own strategic purposes, the defendant cannot plausibly argue that the admission of the same hearsay statement during Lane's cross-examination was reversible error. See, *e.g.*, *People v. Robinson*, 20 Ill. App. 3d 777, 783 (1974) (trial court's admission of hearsay testimony was not cognizable as plain error where "[i]t was evidently part of the trial strategy of defendant's counsel to use this testimony to attempt to weaken the State's case rather than object to its admission").

¶ 77 Regardless, even assuming *arguendo* that the trial court erred in admitting the testimony, the error was not reversible under the pain error doctrine because the evidence in the case was not closely balanced.[8] The defendant's fingerprints were found on various items used to process heroin at Brady's residence. The defendant had a key to Brady's residence, and police officers observed him entering both that residence and Woodhill-F (Larry's residence) on the day that police discovered 168.9 grams of heroin at Woodhill-F. Larry testified that the 168.9 grams of heroin found in his residence was processed at Brady's residence before it was stored at his residence. Moreover, various items used to process heroin were found in the defendant's hall closet with heroin residue and the defendant's fingerprints on them, and baggies found in the defendant's hall closet had the same bunny logo as the baggies Larry testified he bought and used for the sale of heroin. Further, at the time he was arrested, Larry told police that the defendant drove to Chicago with him to buy heroin and that he and the defendant had been

[8] The defendant does not argue that the trial court's error in admitting the evidence was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence.

selling heroin together for the past three months (although he subsequently tried to disclaim and minimize this statement). Contrary to the defendant's argument, the evidence supporting his convictions for criminal drug conspiracy and unlawful possession with intent to deliver 100 grams or more but less than 400 grams of a controlled substance was overwhelming and was not closely balanced. Accordingly, the trial court's admission of the hearsay testimony at issue was not reversible plain error.

5. The Impeachment of the Defendant with his 1995 Conviction

¶ 78 The defendant also argues that he should be granted a new trial because he was improperly impeached with a conviction that was more than ten years old and "the prosecution failed to prove how much of the intervening time was spent in custody." We will not disturb a trial court's decision to allow the impeachment of a witness with a prior conviction absent an abuse of discretion. *People v. Harris*, 375 Ill. App. 3d 398, 405 (2007).

¶ 79 Illinois Rule of Evidence 609(b) provides that evidence of a conviction is not admissible to impeach a witness "if a period of more than 10 years has elapsed since the date of conviction *or the release of the witness from confinement*," whichever is later. (Emphasis added). Ill. R. Evid. 609(b) (eff. Jan. 1, 2011). Where a defendant is imprisoned for an offense after violating parole, the date of the "release of the witness from confinement" on the offense is the date the witness is released from prison after the parole violation. *People v. Owens*, 58 Ill. App. 3d 37, 39 (1978). The party seeking to impeach a witness's testimony with a prior conviction "has the responsibility of presenting proper evidence of an impeaching conviction" (*People v. Yost*, 78 Ill. 2d 292, 297 (1980)), including evidence of the date the witness was released from confinement if the conviction is more than 10 years old (*People v. Naylor*, 372 Ill. App. 3d 1, 8-9 (2007); *People v. Thompson*, 155 Ill. App. 3d 871, 874 (1987); *People v. Strange*, 125 Ill. App. 3d 43, 46

(1984)).

¶ 80 Here, the State requested to impeach defendant with a 17-year-old armed robbery conviction in Cook County case No. 93-CR-1234301. The prosecutor informed the trial court that defendant had been released from prison on that charge in 2002, rearrested for a parole violation in 2004, and then released again in 2006. The defendant did not dispute these dates of incarceration. The defendant's trial took place from June 27 to July 2, 2012.

¶ 81 On appeal, the defendant argues that he was improperly impeached with a conviction that was more than 10 years old because the State failed to present evidence showing that he was released from custody on that conviction within 10 years of the trial in the instant matter. This argument cannot succeed. As an initial matter, the defendant failed to raise the argument before the trial court, and has therefore forfeited the argument. "[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) (citing *Enoch*, 122 Ill. 2d at 186)). Although the defendant objected at trial to the prosecutor's use of the conviction for impeachment purposes, he objected only on the basis of relevance; he raised no objection regarding the age of the conviction. In his pretrial motion *in limine*, the defendant moved to exclude evidence of his prior convictions under Evidence Rule 609(a) on the ground that the probative value of such evidence was outweighed by its tendency to cause unfair prejudice. Ill. R. Evid. 609(a) (eff. Jan. 1, 2011). He raised no objection to the age of the conviction at issue in this appeal. Although the defendant filed a posttrial motion challenging the denial of his motion *in limine*, he did not argue in his posttrial motion that the conviction should not have been admitted due to its age. Nor did the defendant ever argue before the trial court that the State had failed to prove that he was released from confinement on the prior conviction within 10 years of

trial in the instant matter. Accordingly, the defendant has forfeited these arguments on appeal. See, *e.g.*, *Enoch*, 122 Ill. 2d at 186; *Woods*, 214 Ill. 2d at 470; see also *People v. Appelt*, 2013 IL App (4th) 120394, ¶ 88 ("When an objection is made on a particular ground, all other, unexpressed grounds of objection are forfeited.").

¶ 82 Relying upon *Yost* and *Thompson*, the defendant asks us to find that his argument based on the age of his 1995 armed robbery conviction was not forfeited. In *Thompson*, the prosecutor sought to impeach the defendant with a conviction that was more than 10 years old without presenting any evidence suggesting that the claimant was imprisoned following the conviction or establishing the date he was released from confinement. *Thompson*, 155 Ill. 2d at 871-72. Although the defendant objected to the admission of the conviction, he did not do so based on the age of the conviction, and he "failed to point out to the court the proper time limit for admission of a prior conviction into evidence." *Id.* at 871. (The trial judge, the prosecutor, and defense counsel all erroneously believed that the 10-year time period should be measured from the date of the defendant's release from *probation*, not confinement.) *Id.* at 871-72. Relying upon *Yost*, our appellate court ruled that the State had failed to discharge its responsibility to present proper evidence of an impeaching conviction, and rejected the State's argument that the defendant had waived the issue by failing to make a proper objection trial. *Id.* at 872-73. *Thompson* is distinguishable from the case at bar. Here, by contrast, the trial judge and the prosecutor were aware of and properly applied the 10-year rule. Moreover, unlike the prosecutor in *Thompson*, the prosecutor in the instant case stated that the defendant was released from confinement on the prior conviction fewer than 10 years before the defendant's trial. The defendant did not dispute the release date provided by the prosecutor, either before the trial court or during this appeal. Nor did he argue before the trial court that the State was required to

provide documentary proof of his release date. Moreover, the PSI submitted in this case confirms that the defendant was released from confinement on the prior conviction within 10 years of the defendant's trial in the instant matter. Under these circumstances, we find that the defendant forfeited any argument based upon the age of the 1995 armed robbery conviction.[9]

¶ 83 Even if we were to address the defendant's argument, however, we would reject it. "We review the trial court's judgment rather than its reasoning, and we may affirm on any basis supported by the record." *People v. Olsson*, 2015 IL App (2d) 140955, ¶ 17 (citing *In re Commitment of Tittelbach*, 2015 IL App (2d) 140392, ¶ 23)). The PSI states that the defendant was convicted of armed robbery in 1995, he began his sentence on June 19, 1998, and he was paroled on October 11, 2002. The defendant was reincarcerated on July 26, 2004, for a parole

[9] *Yost* does not require a contrary conclusion. *Yost* held that the party seeking to impeach the witness has the responsibility to introduce evidence that the impeaching conviction is properly admissible. *Yost*, 78 Ill. 2d at 297. Accordingly, where the State seeks to introduce a conviction that is more than 10 years old, and the defendant objects based upon the age of the conviction or contests the release date alleged by the State, the conviction may not be admitted unless the State presents evidence establishing that the defendant was released from confinement within 10 years of the trial. *Id.* In the absence of such evidence, a court may not merely presume confinement or a particular date of release from confinement. *Id.*; see also *Strange*, 125 Ill. App. 3d at 45-46; *People v. Musial*, 90 Ill. App. 3d 930, 932, 934 (1980). However, *Yost* does not suggest that a defendant cannot forfeit an objection based upon the age of the impeaching conviction, where, as here, the prosecutor informs the court that the defendant was released from confinement within 10 years of trial, and the defense counsel fails to dispute the prosecutor's assertion before the trial court or to otherwise object based on the age of the conviction.

violation, and he was released following completion of his sentence on "May 1, 2007." The defendant's trial in the instant matter took place from June 27, 2012, through July 2, 2012. Thus, under Rule of Evidence 609(b) and *Owens*, the defendant's conviction was admissible for impeachment purposes, whether he was released in 2006, as the State informed the trial court, or in 2007, as was stated in the PSI. In either event, the record establishes that the defendant was "released from confinement" fewer than 10 years prior to the trial in this case. Therefore, the trial court properly allowed the jury to consider defendant's 1995 conviction for purposes of impeachment.

¶ 84 In the alternative, the defendant argues that the trial court's admission of the defendant's 1995 armed robbery conviction is reversible under the plain error doctrine. We do not find this argument persuasive. First, the trial court committed no "clear or obvious" error in allowing the State to impeach the defendant with the 1995 conviction because the record establishes that he was "released from confinement" on that conviction fewer than 10 years prior to trial. Moreover, as noted above, the evidence in this case was not closely balanced. Thus, even assuming *arguendo* that the trial court erred, such error would not be reversible under the plain error doctrine.

¶ 85 6. Alleged Prosecutorial Misconduct Closing Argument

¶ 86 The defendant argues that he is entitled to a new trial based upon certain improper statements and arguments that the prosecutor made during closing argument. Specifically, the defendant maintains that, during closing, the prosecutor improperly treated Larry's pretrial statements that the defendant bought heroin with him in Chicago as substantive evidence of the defendant's guilt, even though those statements were admissible only to impeach Larry's credibility. In addition, the defendant contends that the prosecutor misstated the evidence during

her closing argument by stating that: (1) Larry admitted conspiring with Brady; (2) Larry testified that he got a ride from "a family member" to Chicago to buy drugs[10]; (3) the defendant and Brady went from the defendant's residence to Brady's residence to Larry's residence on the date of their arrest;[11] and (4) the defendant offered no explanation for how his fingerprint got on a plate with heroin residue on it found at his residence.[12] Moreover, the defendant argues that the prosecutor improperly shifted the burden of proof onto the defendant by arguing that the defendant had no explanation for how his fingerprints got on the plate containing heroin residue.

¶ 87 Improper remarks made during closing arguments will not merit reversal unless they result in "substantial prejudice to the [defendant], such that absent those remarks the verdict would have been different." *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987); see also *People v. Williams*, 192 Ill. 2d 548, 573 (2000). Moreover, "[e]ven prejudicial statements by the prosecutor may be cured by the trial court's proper instructions of law." *People v. Dat Tan Ngo*, 388 Ill. App.3d 1048, 1055 (2008); see also *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 52

[10] The prosecutor argued that the jury should infer that the "family member" Larry referred to was the defendant. However, Larry actually testified that he rode with "a friend" to Chicago and denied that the defendant had anything to do with buying drugs.

[11] The prosecutor argued that this evidence supported the inference of a conspiracy between the defendant, Brady, and Larry. Contrary to the prosecutor's statement, however, Officer Lane merely testified that the defendant went to all three residences with "some female"; he did not identify the "female" as Brady.

[12] Contrary to the prosecutor's assertion, the defendant testified that he often washed dishes at his residence and, therefore, it would not be surprising if his fingerprints were found on any of the dishes.

(ruling that a trial court may cure any errors made in a party's closing argument by "giving the jury proper instructions on the law to be applied, informing the jury that arguments are not

¶ 88 evidence, or sustaining the defendant's objections and instructing the jury to disregard the

¶ 89 inappropriate remark").

¶ 90 During the trial in this case, the defendant objected to the prosecutor's statement that the defendant had not offered an explanation for his fingerprint on the plate containing heroin residue, arguing that the prosecutor was improperly attempting to shift the burden of proof to the defendant. The trial court agreed and admonished the jury that "[t]he State has the burden of proof" and "[t]he defendant doesn't have to prove anything." Thus, we conclude that this error was cured by the trial court's ruling and admonishment to the jurors.

¶ 91 The other statements and arguments by the prosecutor that the defendant challenges on appeal either were not objected to at trial or were not raised in a posttrial motion. Accordingly, as the defendant concedes, his arguments on these issues were forfeited. *Enoch*, 122 Ill. 2d at 176. The defendant asks us to review these alleged errors under the plain error doctrine and argues that he is entitled to a new trial because the evidence was closely balanced. As noted above, however, we do not find the evidence in this case to be closely balanced. For that reason alone, any error committed by the prosecutor during closing argument is not reversible plain error.

¶ 92 In any event, even if we were to disregard the defendant's forfeiture, we would reject the defendant's arguments on this issue because he cannot demonstrate that any improper statement or argument made by the prosecutor substantially prejudiced him. The jury was properly instructed that prior inconsistent statements could only be considered as to a witness's credibility, that the attorney's arguments during closing argument were not evidence, and that the jury should

disregard any statement made by an attorney during closing argument that was not based on the evidence. The prosecutor reinforced the latter point during her closing by telling the jury, "[i]f either I or the defendant say anything that's not supported by the evidence or misstate the evidence, you go with what your collective recollection was." Absent evidence to the contrary, it is presumed that jurors follow the jury instructions given to them. *People v. Taylor*, 166 Ill. 2d 414 (1995). Thus, the alleged misstatements and improper arguments made by the prosecutor in this case (considered either individually or cumulatively) do not rise to the level of reversible error.

¶ 93 7. *Franks* Hearing

¶ 94 The defendant also argues that the trial court abused its discretion in denying his motion for a *Franks* hearing. The defendant asserts that he submitted a detailed affidavit revealing that Officer Lane made false assertions in his complaint for search warrant. Specifically, in his affidavit, the defendant denied Lane's sworn allegation that he had sold cannabis. Accordingly, regardless of whether we decide to grant him a new trial, the defendant urges us to remand the matter to the trial court for a *Franks* hearing.

¶ 95 In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that the Fourth Amendment provides a limited right to challenge the veracity of the affidavit supporting a facially valid warrant. A defendant is entitled to a *Franks* hearing to challenge the veracity of a warrant when he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that "the allegedly false statement [was] necessary to the finding of probable cause." *Franks*, 438 U.S. at 155–56. The Supreme Court noted that, to obtain an evidentiary hearing:

"the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." (Emphasis added.) *Id.* at 171.

¶ 96 "There is a presumption of validity with respect to the affidavit supporting the search warrant." *Id.* Thus, as our supreme court has observed, "Franks demands something *** more than a defendant's unsubstantiated denial." *People v. Lucente*, 116 Ill. 2d 133, 151 (1987). To obtain a hearing, Franks requires a defendant to show something less than proof by a preponderance of the evidence but something more than a mere unsubstantiated challenge of the police officer's veracity. *Lucente*, 116 Ill. 2d at 151-52; see also *id.* at 155 (Simon, J., specially concurring). Sworn affidavits by other witnesses corroborating the defendant's denial of the warrant affiant's statements elevate the defendant's showing above the level of a "mere denial." *Id.* at 154. Accordingly, to obtain an evidentiary hearing, a defendant must support his allegations of deliberate falsehood or reckless disregard for the truth with affidavits or sworn or otherwise reliable statements of witnesses, or satisfactorily explain the absence of a sworn affidavit or other reliable statement. *Franks*, 438 U.S. at 171.

¶ 97 In addressing a defendant's motion for a *Franks* hearing, "the trial judge must keep in mind the presumption of validity of the search warrant and the limited nature of the exception to that presumption created by *Franks*." *Lucente*, 116 Ill. 2d at 153. We review the trial court's

determination as to whether a defendant made the necessary showing to warrant a *Franks* hearing *de novo*. *People v. Chambers*, 2016 IL 117911, ¶ 79.

¶ 98 Here, the trial court did not err in denying the defendant's request for a *Franks* hearing. The defendant submitted an unsworn written "affidavit" detailing his whereabouts on August 26-29, 2011, and asserting that he did not sell cannabis to anyone on those dates. This assertion contradicted Officer Lane's statement in the warrant affidavit that the defendant had sold cannabis to a confidential informant within 72 hours of August 29, 2011. However, the defendant's purported "affidavit" was not sworn and notarized, and the defendant did not explain the absence of a sworn affidavit or other reliable statement. In his motion to quash the warrant and to suppress evidence, the defendant asserted that Lane had lied about the alleged "controlled buys" and had created a "mythical confidential informant." However, once again, the defendant did not submit a sworn affidavit under penalty of perjury or explain the absence of such an affidavit, as required by *Franks*. Nor did the defendant present any sworn affidavits of other witnesses corroborating his claims. Accordingly, the trial court did not err in finding that the defendant failed to make a "substantial preliminary showing" of a false statement in the warrant affidavit. *People v. Coss*, 246 Ill. App. 3d 1041, 1045-46 (1993).[13]

¶ 99 We therefore affirm the trial court's denial of defendant's request for a *Franks* hearing.

¶ 100 CONCLUSION

¶ 101 For the foregoing reasons, we affirm the judgement of the circuit court of Peoria County.

¶ 102 Affirmed.

¶ 103 JUSTICE WRIGHT, concurring in part and dissenting in part.

[13] Contrary to the defendant's argument, the affidavit requirement announced in *Franks* provides no exception for *pro se* litigants like the defendant in this case.

¶ 104 I agree with the majority's resolution of all issues with the exception of the first issue concerning defendant's conviction for possession of a controlled substance with intent to deliver. 720 ILCS 570/401(a)(1)(B) (West 2010). Unlike the majority, I conclude the State's evidence, when viewed in the light most favorable to the State, did not establish defendant had constructive possession of the heroin found in his brother's residence at Woodhill-F.

¶ 105 I agree with the majority's conclusion that the State's evidence was sufficient to establish defendant's involvement in the previous manufacturing process of the 168.9 grams of heroin at the Wisconsin address. I also agree the State's evidence was sufficient to show defendant's involvement in the manufacturing phase at the Wisconsin address and proved his intent and knowledge that the product would be delivered to someone other than defendant. The unanswered question in this case is whether defendant had immediate and exclusive control of the contraband after it left the Wisconsin address and was delivered to the occupants of Woodhill-F.

¶ 106 Defendant did not have a key to Woodhill-F, resided elsewhere, and was not present as a guest at Woodhill F when law enforcement seized the heroin. I acknowledge that defendant may have visited his brother at Woodhill-F shortly before the seizure. Yet, defendant's status as an invitee does not circumstantially establish both elements necessary to support the State's theory of constructive possession by defendant.

¶ 107 I conclude the State's evidence fails to establish constructive possession after the manufacturing process ended and the contraband was delivered to another location by an unknown person. On this basis, I would reluctantly reverse defendant's conviction for unlawful possession with intent to deliver a controlled substance.