2018 IL App (1st) 152816-U

FOURTH DIVISION
June 21, 2018

No. 1-15-2816

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 5282
	)	
CHRISTOPHER MUENCH,	)	Honorable
	)	Lauren Edidin and
Defendant-Appellant.	)	Timothy J. Chambers,
	)	Judges Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's motion to quash arrest and suppress evidence was properly denied when the officers had a reasonable suspicion that defendant had committed a traffic violation to engage in a *Terry* stop and defendant's furtive movements gave the officers a reasonable suspicion that defendant may have been armed and performed a limited patdown; and (2) defendant did not receive ineffective assistance of trial counsel.

¶ 2 Following a jury trial, defendant Christopher Muench was convicted of two counts of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a

felon (UUWF). The trial court subsequently sentenced defendant to five years in the Illinois Department of Corrections.

¶ 3 Defendant appeals, arguing that (1) the trial court erred in denying his motion to quash arrest and suppress evidence because the police officers violated his fourth amendment rights when the officers lacked a reasonable suspicion to stop defendant's vehicle when it was standing in an alley with the headlights off and when the officers frisked him after observing him take his hand from the waistband of his pants; and (2) his trial counsel was ineffective for failing to seek severance of the UUWF charge and failing to object to improper comments made during the State's closing argument.

¶ 4 At approximately 8:50 p.m. on February 12, 2013, Chicago police officers observed defendant's vehicle standing in an alley near West Montrose Avenue and North Linder Avenue in Chicago with its headlights off and sought to stop defendant to investigate. As the officers approached defendant's vehicle, defendant was observed putting one hand in his pants and removing it. The officers asked defendant to step out of the vehicle for a protective pat-down. During the pat-down, an officer felt a semi-hard object and defendant interjected that he had "some coke there." Defendant was subsequently placed under arrest and given his *Miranda* warnings. Defendant waived his rights and disclosed to officers that he possessed cocaine, cash, and a firearm at his home. He subsequently signed a consent to search form. The officers went to defendant's residence where he lived with his parents and his developmentally impaired sister. At the house, defendant's father and mother each signed a consent to search form. The officers then searched the basement room belonging to defendant and recovered 8 grams of cocaine and about $500 in cash from a coffee table as well as a loaded .45 caliber handgun from a closet.

¶ 5 In July 2013, defendant filed a motion to quash arrest and suppress evidence, arguing that the police officers violated his fourth amendment rights when his vehicle was detained without a reasonable suspicion that he had committed a crime or a traffic violation. A hearing on defendant's motion was conducted in August 2013.

¶ 6 Defendant gave the following testimony. At around 8:50 p.m. on February 12, 2013, defendant was driving his vehicle on North Central Avenue in Chicago. He turned right onto Montrose Avenue, and then immediately left into an alley. He drove north in the alley before turning right to proceed east in the alley, which was parallel to Montrose. He continued driving down the block, did not stop, and his headlights were on. He was driving to a liquor store at the corner of Linder and Montrose, at the end of the alley.

¶ 7 As he was driving, he saw lights in his rear view mirror. Defendant estimated that he was near the end of the alley and he drove about 50 feet before stopping. He did not stop right away because he was at the end of the alley and did not want to block the alley so he turned into a parking space on Linder. He had not committed any traffic violations before he was stopped.

¶ 8 After he parked, he saw the two officers approach his vehicle, with one on each side. He identified the officers as Officer Russell Bacius and Officer Robert Arnolts. The officers were in plain clothes and carrying flashlights, which they shined on defendant's face. Defendant admitted he had drugs on his person, which he had hidden between his buttocks. He placed the drugs there about half an hour earlier. He was wearing jogging pants without pockets. He denied that any drugs or weapons were in plain view in the vehicle.

¶ 9 Officer Arnolts approached on the driver side, opened the door and told defendant to exit the vehicle. Defendant complied and was walked to the back of the squad car. As they were walking, Officer Arnolts asked defendant why he was driving in the alley and defendant told him

he was going to the liquor store. Defendant was not asked for his name, driver's license, or insurance. He was directed to put his hands on the car and to spread his legs. He denied that he attempted to run or that he made any movement toward the officers. The officer then began to search defendant. According to defendant, the officer "opened the front of [his] jogging pants and shine[d] his light in [his] pants, and then he did the same with the back. Then he started patting [him] down, and he ran his fingers in between [defendant's buttocks], and he said what do you have in your [buttocks]." Defendant told the officer that he did not have anything and the officer then reached in and "grabbed" the cocaine. Defendant was then placed under arrest.

¶ 10 Officer Russell Bacius provided the following testimony. On February 12, 2013, he was on duty with his partner, Officer Robert Arnolts. They were in an unmarked vehicle and in plain clothes. They were in the area near Central and Montrose at around 8:50 p.m. while on routine patrol. They had not received a dispatch to bring them to that location. Officer Arnolts observed the vehicle first and alerted Officer Bacius of a "suspicious vehicle in the alley." Officer Bacius initially saw defendant in the alley north of Montrose when defendant's vehicle was parked facing east with the headlights off. The vehicle was 60 to 70 feet away. Officer Bacius found the vehicle suspicious because it was parked in the alley with its lights off and there had been a lot of garage burglaries in the area. Officer Bacius admitted that he had not responded to a garage burglary and had not observed defendant exit the vehicle and approach a garage. Officer Bacius could not say how long the vehicle had been in the alley before he observed it.

¶ 11 According to Officer Bacius, "it could be construed as parked in an alley" to sit in an alley with the lights off and it could obstruct traffic. Officer Bacius did not observe any traffic in the alley. No traffic citations were issued to defendant.

¶ 12 As the officers turned into the alley, defendant turned on his headlights and started to drive slowly down the alley. Officer Bacius testified that this action was not illegal. Officer Arnolts then activated the police vehicle's emergency lights to stop defendant and investigate. He estimated that the emergency lights were turned on about three-quarters of a block away from Linder. The siren was not activated. Defendant's vehicle proceeded east in the alley and turned right onto Linder. Officer Bacius testified that his partner activated the lights to stop the vehicle "in order to ask him what he was doing in the alley." Defendant parked his vehicle about three car lengths from the alley on Linder at approximately 4404 North Linder.

¶ 13 Officer Bacius approached the vehicle on the passenger side with Officer Arnolts on the driver side. He had a flashlight which he shined into the vehicle. Officer Bacius observed defendant's arms move and then he observed defendant's "hand inside his pants at his waistband and his hand coming out of his pants." He did not see anything in defendant's hand. The officer released one of the safeties on his firearm because he did not know if defendant had a weapon. Officer Arnolts asked to see defendant's hands and asked defendant to exit the vehicle.

¶ 14 Officer Bacius walked to the back of the vehicle. He was able to see defendant's hands and did not see a weapon. He did not see a bulge in defendant's clothing because defendant was wearing loose fitting clothes. Defendant did not make any threatening or furtive movements as he was being escorted to the rear of the car. Defendant was told to put his hands on the truck and Officer Bacius performed a protective pat-down starting at defendant's waist. The pat-down was focused on a weapon. He felt a "semi-hard object" immediately after beginning the pat-down. He did not find a weapon. As the officer felt the object, defendant stated, "I have some coke there." At that point, defendant had not been asked name or why he was in the alley. After defendant indicated the object was cocaine, Officer Bacius removed the object from the waistband and saw

a bag containing four baggies of a white powder he believed to be cocaine. He denied checking between defendant's buttocks and denied looking down his pants with a flashlight.

¶ 15 On cross-examination, Officer Bacius testified that the alley had residential garages on the north side and small businesses on the south side. In his experience, there has been a history of garage burglaries in that area. His partner had observed the car a minute earlier, and then did a U-turn to come back and investigate. According to Officer Bacius, after he observed defendant's furtive movements, it was no longer a traffic stop because he feared for his safety. He described the bag as smaller than a golf ball. He could feel the object from the outside of defendant's clothing and he could feel "the plastic and then the squishy powder." On redirect, Officer Bacius could not remember if he personally investigated any burglaries on that block of Montrose prior to February 12, 2013. He testified that burglaries were the "number one crime" in the 16th district, including this neighborhood in Portage Park. Officer Bacius admitted that he did not believe the packet containing white powder was a weapon.

¶ 16 Following arguments, the trial court denied defendant's motion. The court made the following findings.

> "I did listen very carefully and every case is different. In this particular case I did have the defendant testify. There were some parts of his testimony that were credible, there were other parts that simply were not credible.
>
> The officer testified that they saw this vehicle in this alley with the lights off. It drew their suspicion. And they were going to do a field interview under *Terry*. They had every right at that point to go to the car to do that, to investigate their suggestion [*sic*].

> Circumstances changed. [Officer Bacius] testified he saw [defendant's] hand in his pants and the coming out of his pants, which I guess, you have to take it out once it's in. And at that point, he stated that he took one of the safeties off of his gun, got him out of the car, and immediately went to the waistband where he was concerned. That testimony is reasonable. And there are part of the officer's testimony that absolutely were corroborated by some of the defendant's testimony, that he was immediately taken out of the vehicle.
>
> If they had not seen a furtive movement, if they had not seen his hand in his pants, then you have a different situation. But those were not the facts that were testified to by the officer, nor were they – and, again, the scenario changed at that point. And the officers at that point have every right to protect themselves and do a pat-down search, which is what the officer stated."

¶ 17 Defendant subsequently filed a motion to reconsider the denial of his motion and a supplement to the motion to reconsider, which the trial court denied. A separate hearing was later conducted on defendant's motion to quash arrest and suppress evidence in which defendant argued that the consent to search forms were not knowingly, voluntarily, and intelligently signed. Following the hearing, the trial court denied the motion. Defendant does not challenge this ruling on appeal.

¶ 18 The following evidence was presented at defendant's July 2015 jury trial.

¶ 19 Officer Bacius testified generally consistent with his testimony from the suppression hearing regarding the initial stop and recovery of the cocaine with the following differences. On February 12, 2013, he and Officer Arnolts were in an unmarked Ford Explorer and acting as a "tac team," which is more "proactive" as they search for crime as it happens or may happen. While on patrol near Central and Montrose, Officer Arnolts told him that he had seen a suspicious vehicle in a parking lot where the business was closed. Officer Arnolts made a U-turn to go to the parking lot, but the vehicle had moved. The parking lot was connected to an alley so the officers proceeded into the alley and then Officer Bacius first observed the vehicle 50 to 60 feet away without its lights on. As the officers approached the vehicle, the lights turned on and the vehicle began to drive slowly down the alley. Officer Bacius testified that the vehicle would drive slowly, then stop for a second, then continue driving, and then stop again. This continued until the end of the block when Officer Arnolts hit the air horn a couple times. The car then turned onto Linder and parked.

¶ 20 After Officer Bacius removed the cocaine from defendant's waistband, he continued the pat-down search and then placed defendant into custody. Officer Arnolts then did a search of the vehicle "incident to arrest and impound." Officer Bacius observed Officer Arnolts take a cell phone from the center console. The screen was lit up with a text message. After reading the message, Officer Bacius placed defendant in the rear of the squad car and gave defendant his *Miranda* rights. Defendant indicated that he understood and would answer some questions.

¶ 21 Defendant told Officer Bacius that he sells cocaine to pay his bills and was going to meet a buyer in the alley. With that information, Officer Bacius drove defendant's vehicle to Long and Cullom, which was approximately a block away. Officer Arnolts followed in the squad car with defendant in the rear. When he arrived at that location, he observed a vehicle parked on Long

facing southbound with his window open. He drove defendant's vehicle northbound so his driver's window was within two feet of the driver of the other vehicle. He could see a male driver, a female in the rear passenger seat, and a baby seat in the rear passenger seat. At that time he could not determine whether there was a baby in the seat. As he pulled up to the vehicle, the driver immediately handed him $40 in cash. Officer Bacius did not say anything before the money was passed. At that time, Officer Arnolts turned on his emergency lights. The driver was arrested for attempt possession of a controlled substance and identified as Benjamin Sosa. Both Sosa and defendant were transported to the 16th district and placed in separate locations.

¶ 22 Officer Bacius placed defendant in an interrogation room. He asked defendant if he remembered his *Miranda* rights, and defendant said he did. The officer then asked if defendant wanted to talk and defendant indicated that he did. Defendant told the officer that he lived at 5428 West Cullom with his parents and mentally-challenged sister. Defendant lived in the basement and was the only one who lived in the basement. Defendant admitted that he sold cocaine. When asked if he had more cocaine at home, defendant admitted that he had "probably 3 to 5 grams of cocaine at home and probably around $300 cash." When asked if he had any other narcotics, defendant said no. Officer Bacius asked if defendant had any guns, and defendant admitted he had one .45 caliber handgun in the closet in his room. Officer Bacius then confirmed the locations of the narcotics and handgun. Defendant indicated the cocaine was on a small table in an adjoining room used as a living room for him. There was no door between this room and the bedroom. Officer Bacius asked defendant if he would sign a consent to search form. He read the form with defendant. After he was done, defendant asked what would happen if he did not sign it. Officer Bacius told him that he believed he had enough evidence to get a

search warrant for defendant's house. Defendant told him he would sign it and expressed concern for his sister.

¶ 23 After defendant signed the consent to search, Officer Bacius proceeded to defendant's house with Officer Arnolts, Sergeant Sprandel and Officer Hernandez as well as defendant. Defendant remained in the car with Officer Hernandez while the other three officers went to the residence. Officer Bacius knocked on the door and defendant's sister answered. He asked her to get her father or mother. She left and returned with defendant's father. Officer Bacius introduced the officers to him and explained that something had happened with his son. Defendant's father allowed the officers into the home. As they entered, defendant's mother came toward them. He explained that defendant was under arrest for narcotics and defendant had admitted there were narcotics and a handgun in the house. He told them that defendant had signed a consent to search form and asked if they would each sign one as well. They each agreed to sign a form, which they then did. After the forms were signed, defendant's father led them to defendant's room in the basement. Defendant's mother remained upstairs.

¶ 24 The officers entered the room. Officer Bacius described the room as having a partial wall that divided the room into two halves. He immediately observed a small table and saw three clear plastic bags containing a white powder he believed to be cocaine. It was sitting on a large amount of U.S. currency, which he counted as $504. He also observed a small digital scale and a box of lunch bag baggies on the table. He also found a piece of mail on the dresser addressed to defendant at that address. The items were recovered and placed into an empty shoe box. Officer Bacius observed a freestanding clothes closet in the room. He opened the closet and on the top shelf he recovered a Glock 21 .45 caliber handgun. He removed the magazine, and then pulled the chamber to recover the live round in the chamber. A total of six live rounds were in the

weapon. The officers then left. The basement area was the only area they searched. Officer Bacius kept the recovered items with him until the officers returned to the 16th district. Officer Arnolts then took custody and checked the items into evidence.

¶ 25 On cross-examination, Officer Bacius testified that the cocaine recovered from defendant's house weighed a total of 8 grams. The officer denied telling defendant that if he did not sign the consent to search form, then the officers would go to the house the next day with a SWAT team, knock down the door, and detain everyone at the house. Officer Bacius stated that "just over an hour" had passed from when defendant was seen in the alley to the arrival at defendant's residence. The officer also denied that defendant's mother was not present when his father signed the consent to search form and that her form was signed after the search had transpired.

¶ 26 Officer Robert Arnolts gave testimony that was consistent with Officer Bacius regarding the circumstances related to defendant's arrest and the search of his residence. We will discuss only those portions of his testimony related to his relevant observations. He was on routine patrol on February 12, 2013, with Officer Bacius. Officer Arnolts was driving an unmarked police vehicle on Montrose just east of Central when he observed a vehicle parked in an empty lot of closed businesses. The vehicle was parked, but was not in a parking space, and the lights were off. He told Officer Bacius what he had observed. Then he did a U-turn on Montrose to return to that spot, but the vehicle was not in the lot. He found the car suspicious because it was near a gas station with a pay phone that was used for narcotics as well as burglaries and garage burglaries in the area. Officer Arnolts then continued north in the alley. The alley is a T alley where an east/west alley crossed the north/south alley. He observed the vehicle parked facing east in the middle of the alley. Officer Arnolts initially testified that the headlights were on, but

immediately followed that statement with testimony that defendant turned his lights on and started to move slowly away when Officer Arnolts began to drive toward defendant's vehicle.

¶ 27 After defendant had stopped his vehicle, Officer Arnolts approached on the driver side. He observed some movement from defendant's arms toward his waist, but could not see what defendant was doing. He immediately ordered defendant out of the vehicle because based on defendant's movement, the officer thought defendant might have been concealing a weapon. He was present when Officer Bacius performed the pat-down. When Officer Bacius started at defendant's waist, Officer Arnolts heard defendant respond that he had "coke" on him. While Officer Bacius placed defendant into custody, Officer Arnolts made a cursory search of the vehicle and heard a vibrating noise and light from the center console. He observed a cell phone with a text message on the screen. He took the phone to Officer Bacius who asked defendant about the text. Following the search of defendant's residence, Officer Arnolts inventoried all recovered items at the 16th district and identified the items at trial.

¶ 28 Following Officer Arnolts's testimony, the parties entered two stipulations. The first stipulation was that defendant "does have a prior felony conviction." The second stipulation was that a forensic chemist at the Illinois State Police crime lab testified that the bags of suspected cocaine recovered from defendant's waist tested positive for the presence of cocaine and weighed 1.4 grams. The chemist also tested the bags of suspected cocaine recovered from defendant's residence which were positive for the presence of cocaine and weighed a total of 8 grams.

¶ 29 The State then rested its case. Defendant moved for directed verdict, which the trial court denied. Defendant presented the testimony of his sister and mother in defense. Both women testified that defendant's mother did not sign the consent to search form until after the search had

occurred. Defendant's mother also testified that she had been in the basement, including defendant's room, four hours before the search and did not see any cocaine or money on a table in defendant's room, nor did she see a gun in his closet.

¶ 30 Following deliberations, the jury found defendant guilty of two counts of possession of a controlled substance with intent to deliver based on the cocaine recovered on his person and from his bedroom and one count of UUWF. The trial court subsequently sentenced defendant to a term of five years in prison.

¶ 31 This appeal followed.

¶ 32 Defendant first argues that the trial court erred in denying his motion to quash arrest and suppress evidence. Specifically, he contends that the police did not have a reasonable suspicion that a crime had been committed or was about to be committed that authorized a stop of his vehicle when parked in an alley with the headlights off. The State maintains that the stop was lawful and this court should affirm the trial court's denial of the motion.

¶ 33 In reviewing a trial court's ruling on a motion to suppress, this court applies a *de novo* standard of review. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); see also *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, findings of historical fact will be reviewed only for clear error and the reviewing court must give due weight to inferences drawn from those facts by the fact finder. *Ornelas*, 517 U.S. at 699. Accordingly, we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress. *Sorenson*, 196 Ill. 2d at 431. "Further, the reviewing court may consider evidence adduced at trial as well as at the suppression hearing." *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 34 "Both the fourth amendment and the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures." *People v. Colyar*, 2013 IL 111835, ¶ 31 (citing U.S. Const., amend. IV and Ill. Const. 1970, art. I, § 6). "This court has explained that '[t]he "essential purpose" of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions.' " *Id.* (quoting *People v. McDonough*, 239 Ill. 2d 260, 266 (2010), quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)).

¶ 35 "It is well settled that not every encounter between the police and a private citizen results in a seizure." *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006) (citing *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 215 (1984)). "Courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or '*Terry* stops,' which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *Luedeman*, 222 Ill. 2d at 544 (citing *United States v. Black*, 675 F.2d 129, 133 (7th Cir. 1982) and *United States v. Berry*, 670 F.2d 583, 591 (5th Cir. 1982)). "In *Terry*, the Court held that a brief investigatory stop, even in the absence of probable cause, is reasonable and lawful under the fourth amendment when a totality of the circumstances reasonably lead the officer to conclude that criminal activity may be afoot and the subject is armed and dangerous." *Colyar*, 2013 IL 111835, ¶ 32 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

¶ 36 "For a stop to be justifiable under *Terry*, the officer must present specific, articulable facts which would cause a reasonable person to fear for his safety or the safety of others." *People*

v. Anderson, 304 Ill. App. 3d 454, 462 (1999). "Absent such circumstances, a warrantless search is unreasonable and the testimony by an officer that he subjectively feared for his safety, standing alone, does not satisfy this requirement." *Id.* "When reviewing the officer's action, we apply an objective standard to decide whether the facts available to the officer at the time of the incident would lead an individual of reasonable caution to believe that the action was appropriate." *Colyar*, 2013 IL 111835, ¶ 40. "As in *Terry*, ' "[t]he issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." ' " *Colyar*, 2013 IL 111835, ¶ 39 (quoting *Long*, 463 U.S. at 1050, quoting *Terry*, 392 U.S. at 27). The Illinois legislature has codified the *Terry* standard in section 107-14 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/107-14 (West 2012) (a peace officer, after identifying himself, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense). Additionally, the legislature has allowed for a limited patdown by a police officer during a *Terry* stop. 725 ILCS 5/108-1.01 (West 2012) (when a peace officer has made a *Terry* stop "and reasonably suspects that he or another is in danger of attack, he may search the person for weapons.")

¶ 37 Defendant argues that the officers did not have a lawful reason to stop defendant's vehicle. Based on Officer Bacius's testimony, defendant was stopped for two reasons: (1) defendant committed a traffic violation, and (2) the officers suspected criminal activity was afoot. Defendant asserts that neither basis for the stop was supported by the evidence.

¶ 38 Chicago Municipal Code (Code) § 9-64-130 details traffic violations for parking in alleys.

> " (a) It shall be unlawful to park any vehicle in any alley for a period of time longer than is necessary for the expeditious loading, unloading, pick-up or delivery of materials from such vehicle.
>
> (b) It shall be unlawful to park a vehicle in an alley in such a manner or under such conditions as to leave available less than ten feet of the width of the roadway for the free movement of vehicular traffic or to block the entrance to any abutting property." Chicago Municipal Code § 9-64-130 (added July 12, 1990).

¶ 39 Defendant contends that he had not committed the traffic violation for parking in an alley because his vehicle was "standing." He cites the Code's definitions for both "standing" and "parking," relying on a strict interpretation of their language. However, we need not reach the question of whether defendant's vehicle was "standing" or "parking" under the Code because a determination of whether defendant committed a traffic violation is not required for a *Terry* stop.

¶ 40 It is well settled that " ' "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ' " *People v. Hackett*, 2012 IL 111781, ¶ 20 (quoting *People v. McDonough*, 239 Ill. 2d 260, 267 (2010), quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)). As the Illinois Supreme Court has observed, "though traffic stops are frequently supported by 'probable cause' to believe that a traffic violation has occurred, as differentiated from the 'less exacting' standard of 'reasonable, articulable suspicion' that justifies an 'investigative stop,' the latter will suffice for purposes of the fourth amendment irrespective of whether the stop is supported by probable cause." *Id*. (citing *People v. Gonzalez*, 204 Ill.2d 220, 227-28 (2003); *People v. Close*, 238 Ill. 2d

497, 505 (2010)). "A police officer may conduct a brief, investigatory stop of a person where the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id*.

¶ 41 Here, both officers testified that it was a violation of the Code to park in an alley and discussed the basis for their suspicion of defendant's traffic violation. At trial, Officer Bacius testified that defendant was "parked in the middle of the alley where traffic could not go either direction." Officer Arnolts testified that "You can only park in an alley when you're blocking an alley to unload or load a vehicle." Officer Arnolts further testified that the decision to issue traffic citations was up to the officers, and they opted not to issue any since defendant had been "charged with two felonies."

¶ 42 Moreover, the testimony from both Officer Bacius at the suppression hearing as well as Officer Arnolts at trial support a finding that the *Terry* stop was reasonable. Officer Arnolts first observed a suspicious vehicle parked with its headlights off and not in a designated parking space of a closed business near a gas station with a pay phone used for narcotics transactions. The officer turned around to investigate. When the officers reached the parking lot on Montrose, the car was no longer present, but the alley was adjacent to the parking lot and the officer proceeded into the alley. Defendant's vehicle was observed by both officers parked in the middle of the alley with its headlights off. As the officers' vehicle turned in the direction of defendant's vehicle, defendant turned on the headlights and began to drive slowly down the alley. When the officers activated the emergency lights, defendant continued driving slowly, turned onto Linder and parked. Additionally, both officers testified that garage burglaries were the most common crime in the neighborhood.

¶ 43 We also find the circumstances present in this case to be distinguishable from the cases relied on by defendant. See *People v. Kipfer*, 356 Ill. App. 3d 132 (2005), *People v. Shipp*, 2015 IL App (2d) 130587, and *People v. Harris*, 2011 IL App (1st) 103382. In all three cases, the defendants were pedestrians when each was approached by police officers for their presence in an area with criminal activity. See *Kipfer*, 356 Ill. App. 3d at 138 (The reviewing court found no reasonable suspicion where an officer drove past a Dumpster and saw the defendant "[come] out from behind that Dumpster[,] * * * walk[ ] in the direction opposite to the direction the squad car was traveling," and ignore the officer's initial efforts to stop him); *Shipp*, 2015 IL App (2d) 130587 (The police were called to a fight with guns possible, the defendant was walking a block away and stopped by police and frisked, finding a weapon and acontrolled substance. The reviewing court reversed the summary dismissal of the defendant's postconviction claim of ineffective assistance of appellate counsel for failing to challenge the denial of his motion to suppress); and *Harris*, 2011 IL App (1st) 103382, ¶ 15 (The defendant was walking with another man in an area characterized by police officers as " 'one of high burglaries and high robberies' " when the officers followed the men and gave chase when the men fled. The defendant was frisked and a gun was found. The reviewing court concluded that an officer's testimony regarding a high crime neighborhood was unsupported by any additional evidence in the record.) In contrast to these cases, the police officers first observed defendant parked in a lot of a closed business, then he was stopped in an alley with the headlights off while blocking any traffic proceeding in the alley, and garage burglaries were the most common crime in the area. These circumstances distinguish this case from the above cases where pedestrians were stopped without any indication of a crime or traffic violation.

¶ 44 Accordingly, when we consider the officers' reasonable suspicion that defendant had committed a traffic violation along with their testimony that garage burglaries are the most common crime in that area, we conclude that defendant's motion to suppress was properly denied. Since we have found that the officers had a reasonable suspicion to engage in a *Terry* stop, we need not reach defendant's contention that all the evidence is fruit of the poisonous tree.

¶ 45 Defendant further contends that the officers violated his fourth amendment rights when they frisked him after Officer Bacius observed defendant take his hand out the waistband of his pants. The State responds that the protective pat-down was warranted by defendant's actions.

¶ 46 The testimony from Officer Bacius indicated that as the officers approached defendant's vehicle, he observed defendant move his hands into the waistband of his pants and then pull his hands out. He did not observe a weapon, but thought defendant could be armed with a weapon. Officer Bacius disengaged one of the two safeties on his firearm as he continued to approach the vehicle. While Officer Arnolts did not see defendant's hands in his pants, he did see movement by defendant that corroborated Officer Bacius's observations. Based on these observations, defendant was asked to exit the vehicle and a protective patdown was performed by Officer Bacius. Officer Bacius focused at defendant's waistband where he had seen the movement. As he felt a semi-hard object, defendant volunteered that he had cocaine in that location. The cocaine was subsequently recovered from defendant's waistband in plastic bags.

¶ 47 "A police officer may perform a protective pat-down search where, after making a lawful stop, the officer has a reasonable articulable suspicion that he or another is in danger of attack because the defendant is armed and dangerous." *People v. Surles*, 2011 IL App (1st) 100068, ¶ 35 (citing *Sorenson*, 196 Ill. 2d at 432). "The sole justification for the search allowed by the *Terry* exception is the protection of the police officer and others in the vicinity, not to gather

evidence." *Sorenson*, 196 Ill. 2d at 432. "If the protective search goes beyond what is necessary to determine if a suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.* "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id*. at 433 (citing *Terry*, 392 U.S. at 27). "Although furtive movements may be considered justification for performing a warrantless search when coupled with other circumstances tending to show probable cause [citations], looks, gestures, and movements taken alone are insufficient to constitute probable cause to search since they may be innocent [citation]." *People v. Creagh*, 214 Ill. App. 3d 744, 747-48 (1991).

¶ 48 Here, we find the officers' conduct to be reasonable to determine if defendant possessed a weapon. Officer Bacius testified that when he observed defendant's movements, he released a safety on his firearm because he feared for his safety. The testimony from both officers confirmed that defendant was frisked for their protection and focused on defendant's waistband where Officer Bacius observed defendant's hand. In denying defendant's motion to suppress, the trial court found the testimony to be "reasonable." The court noted that if the officer had not seen defendant's furtive movements, then the situation would be different, but under these facts, "the officers at that point have every right to protect themselves and do a pat-down search." Based upon our review of this record, we cannot say the trial court's findings of fact were against the manifest weight of the evidence.

¶ 49 The cases relied upon by defendant are distinguishable from the instant case. In *People v. Creagh*, 214 Ill. App. 3d 744, 746 (1991), the defendant was a passenger in a vehicle stopped for improper display of license plates and a loud muffler. As the officer approached the vehicle, he observed the defendant lift his body off the seat as if he was putting something in his pants.

Unlike the present case, the officer did not testify that he was in fear of his safety, but he ordered the defendant out of the car and frisked him. The officer felt a soft bulge in the defendant's pants pocket, which the officer testified did not resemble a gun or weapon. *Id*. at 748. In reversing the denial of the defendant's motion to suppress, the reviewing court found the act of putting something in his pants pocket could be viewed as innocent, but even if the patdown was proper, the officer's scope was limited to a search for weapons. Once the officer knew the object was not a weapon, the seizure of the contents was beyond the scope. *Id*.

¶ 50 In *People v. Davis*, 352 Ill. App. 3d 576, 580-83 (2004), the defendant was stopped while riding his bicycle late at night without a light. During the stop, the officer testified that the defendant appeared nervous and kept putting his hands in his pockets after the officer asked him to remove his hands from his pockets. The reviewing court found the frisk of the defendant to be improper and affirmed the trial court's grant of the defendant's motion. *Id*. at 581. The Second District reasoned that the defendant's nervousness did not create a reasonable belief he was armed and dangerous and when considering all the facts available to the officer, they could not find the frisk was proper. *Id*. at 582. "The fact that defendant was stopped for a minor traffic offense, coupled with his behavior during the stop, simply does not create a reasonable belief that defendant was armed and dangerous." *Id*.

¶ 51 More recently, in *People v. Smith*, 2015 IL App (1st) 131307, this court found the search of the defendant's vehicle was improper. There, the defendant was stopped for making a left turn without stopping at a stop sign. As the officer approached the vehicle, he observed the defendant make a movement toward the rear of the passenger seat, but did not see a weapon. The defendant was quiet and compliant. The officer offered no specific or articulated facts other than "officer safety" to support why he asked the defendant to exit his vehicle with no explanation for the

search of the vehicle, which yielded the recovery of a firearm. *Id*. ¶ 28. We concluded there was no reasonable basis for the officer to engage in a search of the vehicle and reversed the denial of the defendant's motion to suppress. *Id*. ¶ 36.

¶ 52 In contrast to all three cases relied on by defendant, Officer Bacius testified that defendant's movement toward his waistband caused him concern because he thought defendant might have a weapon and he immediately disengaged a safety on his firearm. This testimony is significant as it established the officer's reasonable articulable suspicion that defendant was armed and there was danger of an attack. Moreover, defendant's action of placing his hands in his waistband is markedly different from reaching behind a passenger seat, nervously putting hands in one's pockets, and lifting one's body up from a car seat. Additionally, the protective patdown by Officer Bacius was specifically focused at defendant's waistband. The officer's testimony supported that the search was limited to a search for weapons. Officer Bacius testified that he began the patdown at defendant's waistband and immediately felt the semi-hard object which defendant volunteered was cocaine. In denying defendant's motion to suppress, the trial court reasoned as follows:

> "If they had not seen a furtive movement, if they had not seen his hand in his pants, then you have a different situation. But those were not the facts that were testified to by the officer, nor were they – and, again, the scenario changed at that point. And the officers at that point have every right to protect themselves and do a pat-down search, which is what the officer stated."

¶ 53 We find that the officers had a reasonable articulable suspicion that defendant was armed based on the movement of putting his hand in his waistband, and that the following patdown

search was conducted for the limited purpose of searching for a weapon. Both officers testified that defendant voluntarily interjected that he had cocaine in his waistband before the object was removed from defendant's pants. For these reasons, we affirm the trial court's denial of defendant's motion to suppress evidence.

¶ 54 Defendant also asserts that his trial counsel was ineffective for failing to seek a severance of the UUWF charge from his possession of controlled substance charges and for failing to object to improper comments made during the State's closing argument. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 55 "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *Id.* at 330-31 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Strickland*, 466 U.S. at 689).

¶ 56 In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Id*. at 697.

¶ 57 Defendant first argues that his attorney should have filed a motion to sever the gun charge from the drug charges. At trial, the State, in order to prove UUWF, presented a stipulation that defendant had a prior felony conviction. The prior crime was not disclosed to the jury, only the fact of a prior conviction. According to defendant, if a severance had been allowed, then the jury on the drug charges would not have learned that he had a prior felony conviction.

¶ 58 "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West Supp. 2013). "If it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." 725 ILCS 5/114-8 (West 2012)). Here, defendant was charged by information with multiple counts of possession of a controlled substance with intent to deliver and UUWF. "Generally, a defense decision not to seek a severance, although it may prove unwise in hindsight, is regarded as a matter of trial strategy." *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 24; see also *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10. Further, "an attorney's failure to pursue a motion to sever cannot amount to

ineffective assistance where, even if presented, the motion would have been unsuccessful." *People v. Bock*, 242 Ill. App. 3d 1056, 1080 (1993).

¶ 59 In support of his argument, defendant relies on the supreme court's decision in *People v. Edwards*, 63 Ill. 2d 134 (1976) and the First District's decision in *People v. Bracey*, 52 Ill. App. 3d 266 (1977). In *Edwards*, the supreme court found that the trial court had abused its discretion in refusing to grant the defendant's motion to sever an unlawful use of weapons charge from an armed robbery charge. *Id.* at 140. While recognizing the State's interest in pursuing judicial economy by prosecuting all charges in one trial, the court concluded that "the joinder of the armed robbery and the felonious unlawful use of a weapon charges created such a strong possibility that the defendant would be prejudiced in his defense of the armed robbery charge that it was an abuse of the trial court's discretion to deny a severance." *Id.*

¶ 60 In *Bracey*, the defendant was convicted of the offenses of murder, attempted murder, aggravated battery, UUW, and felony UUW. The weapons offenses required proof of the defendant's prior conviction for armed robbery. The trial court denied the defendant's motion to sever the enhanced weapons count from the other charges, and evidence of the prior conviction was introduced at trial. Relying on *Edwards*, the appellate court held that the trial court abused its discretion in denying a severance. *Bracey*, 52 Ill. App. 3d at 273. The court noted that "evidence which directly, or by inference, tends to show that the accused has committed another criminal offense is inadmissible where its only value is to create an inference that because an individual has committed other crimes he is more likely to have committed the one for which he is on trial." *Id.* The court found that, although the jury was instructed to consider the prior convictions only as to the weapons offense and in determining the defendant's credibility, and not as evidence of guilt, the error was not cured. "If such limiting instructions were insufficient

to prevent the defendant from being prejudiced by the introduction of evidence of his prior convictions where such evidence was offered to impeach that defendant's credibility," it was difficult for the court to see how such instructions could effectively prevent prejudice where the evidence was offered to establish an element of the crime of the felonious unlawful use of a weapon. *Id.* at 274-75.

¶ 61 Defendant contends that he was prejudiced in two ways: (1) the jury was informed that he had a prior felony conviction "which invited them to speculate as to what that felony conviction was," and (2) he "possessed a firearm *and* drugs in a city awash with both." (Emphasis in original.) According to defendant, if his trial attorney had filed a motion to sever, the State would not have been able to introduce evidence of the gun possession at his trial on the drug charges.

¶ 62 However, more recently the Second Division of this court distinguished these cases from cases based on a claim of ineffective assistance of counsel for failure to file a motion to sever counts. *Fields*, 2017 IL App (1st) 110311-B. In *Fields*, as in the present case, the defendant claimed his trial attorney was ineffective for failing to seek a severance from his charges of armed robbery and armed habitual criminal. As in this case, the defendant relied on *Edwards*. Significantly, the reviewing court pointed out that *Edwards* did not involve a claim of ineffective assistance of counsel. *Id*. ¶ 25.

¶ 63 The *Fields* court opined that "when deciding whether to seek a severance, defense counsel may choose to pursue an 'all or nothing' trial strategy, in which the defendant is acquitted or convicted of all charges in a single proceeding." *Id*. ¶ 28 "The mere fact that an 'all-or-nothing' strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance." *Id*. In that case, the reviewing court observed that "while an 'all or nothing' strategy required exposing the jury hearing the armed robbery charge to prejudicial

information it would not have heard if the cases had been severed, the stipulation to the mere fact of the conviction mitigated the prejudice to defendant." *Id*. The court reasoned that defense counsel may have believed that the odds were greater to get two acquittals in one proceeding instead of two separate proceedings. *Id*. For this reason, the court held the defendant had failed to overcome the presumption that defense counsel's action was the product of sound trial strategy and concluded that he had not received ineffective assistance of counsel. *Id*.

¶ 64 The Fourth District in *Poole* rejected the defendant's argument that his trial counsel was ineffective for failing to move to sever his possession of a firearm by a felon charge from his charges of aggravated battery with a firearm and aggravated discharge of a firearm. *Poole*, 2012 IL App (4th) 101017, ¶ 1. The reviewing court pointed out that "[a] major disadvantage of a severance is that it gives the State two bites at the apple. An evidentiary deficiency in the first case can perhaps be cured in the second. 'Perhaps trial counsel felt that it made sense to try for an acquittal of both counts in one proceeding, thinking that the impact of the additional conviction would not be significant.' " *Id.* ¶ 10 (quoting *Gapski*, 283 Ill. App. 3d at 943). The court concluded the defendant had failed to show his attorney's performance fell below an objective standard of reasonable, noting that "[a] potential trial strategy is apparent here, even if counsel should choose to deny it." *Id*.

¶ 65 We agree with the reasoning of *Fields* and *Poole*. Here, defense counsel opted to try all charges together and presented a defense through defendant's mother suggesting that neither the drugs nor the gun were present in defendant's room before the officers searched. Counsel's trial strategy indicated an "all or nothing" approach and we cannot find this strategy to be below an objective standard of reasonableness. Further, the stipulation of the prior conviction did not state what the prior felony was for, which was possession of a controlled substance, thus reducing the

potential prejudice to defendant. Since defendant has not satisfied the first prong under *Strickland*, his claim of ineffective assistance fails.

¶ 66 Defendant next asserts that his trial counsel was ineffective for failing to object to improper comments made by the prosecutor during closing arguments.

¶ 67 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial." *Id*. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Stated another way, "[p]rosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment[s], its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123.

¶ 68 Here, defendant complains of the following statements made by the prosecutor during the initial closing argument.

> "On the night of February 12, 2013, Benjamin Sosa needed a fix. So he dragged his girlfriend and his baby out into the night to meet his drug dealer, to meet this man, the defendant. But the defendant did not care about Benjamin Sosa, he did not care about [Sosa's] baby."

¶ 69 Later in closing, the prosecutor argued, "Sosa and his family are just a casualty of the defendant's illegal business of selling drugs." Defendant asserts that these statements were "completely irrelevant to the questions before the jury – specifically, whether [defendant] was guilty of possession with intent to deliver cocaine, or unlawful possession of a firearm by a felon." According to defendant, there was no evidence that the woman and baby in Sosa's car were his girlfriend and his child and nothing about Sosa's drug use or effect on his family was probative to defendant's guilt.

¶ 70 The State responds that these comments were reasonable inferences as the car seat was equipped in Sosa's vehicle and both the woman and baby were sitting with Sosa in his car waiting to Sosa to purchase drugs at 9 p.m. at night. Further, the State maintains that the reference to them as casualties of defendant's drug dealing was supported by the record. We agree with the State. While the prosecutor may not characterize the defendant as an evil person, a prosecutor "may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear, when such argument is based upon competent and pertinent evidence." *People v. Nicholas*, 218 Ill. 2d 104, 121-22 (2005). The effects of defendant's actions of selling cocaine included the involvement of Sosa, the woman, and the baby present at the time

of the attempted drug sale. The testimony at trial established that Sosa texted defendant to complete the drug deal. Defendant admitted to Officer Bacius that "he sells coke in order to pay his bills and that, yeah, he was going to meet a buyer in the alley." This testimony was not refuted at trial. When Officer Bacius approached Sosa's vehicle, Sosa extended his arm with cash in hand to the officer driving defendant's vehicle. Officer Bacius testified about the woman's presence after Sosa was arrested. According to Officer Bacius's testimony, the woman "had some concern about being in a street at night with her baby" so another squad car transported them to the police station where she could call someone to pick them up. These statements during closing argument were reasonable inferences based on the record and were proper.

¶ 71 Similarly, the prosecutor argued, "The defendant's sister coming in and testifying in front of you is just one more casualty of the defendant's illegal business." Defendant also generally complains of the prosecutor's argument regarding the testimony of defendant's sister and mother. The prosecutor stated:

> "Let's talk about the defendant's sister. A sweet, lovely young woman, who walked into this courtroom an over-conditioned [*sic*], cold courtroom in her nice [sun] dress, sat in that stand, took an oath to tell the truth in front of all of you and why, because she wants to help her brother. And what was the value of that testimony. A weak attempt to boost a theory that the defendant's mother signed the consent to search after the drugs were found. Was that worth it for this young lady to come in here, was that worth it, did it offer anything. And what about his mom,

> another weak attempt to deflect your attention from the facts and the evidence in this case, that her son is a drug dealer and a felon who has a gun in her house."

¶ 72 Defendant contends that the arguments related to his sister were unnecessary and appealed to the juror's emotions. Defendant also argues that the comments about the gun caliber and its dangerousness suggested that defendant was a more dangerous than the average felon in possession of a firearm. Defendant maintains that his attorney's failure to object to these statements "resulted in a verdict that may have been based on emotions as opposed to evidence."

¶ 73 The State again responds that these comments were reasonable inferences based on the evidence. As the State points out, the evidence established that defendant kept cocaine and a firearm in the family home, and the family was subjected to the police coming to their home, informing them of defendant's arrest, and searching defendant's room. Moreover, defendant's sister and mother were called by defendant as witnesses, not the State. Prior to the testimony of defendant's sister, counsel and the trial court discussed her mental disabilities and the impact of testifying. The prosecutor questioned the value of her testimony beyond an opportunity for the jury to feel compassion for defendant because she only opened the door to the residence and was not present for the search. The prosecutor opted not to cross-examine defendant's sister. This comment at closing argument was to highlight the value of her testimony and to downplay any emotional effect her testimony had on the jury. The same reasoning applies to the statements regarding the testimony of defendant's mother. "It is proper for a prosecutor to reflect upon the credibility of witnesses and urge the fearless administration of the law if it is based on facts in the record or inferences fairly drawn from the facts elicited." *People v. French*, 2017 IL App

(1st) 141815, ¶ 48. It was reasonable and proper for the prosecutor to comment on the credibility of both defendant's sister and mother.

¶ 74 Finally, defendant points to the prosecutor's argument that defendant was prohibited from possessing a deadly weapon. Specifically, the prosecutor argued:

> "This isn't any old gun, this is a .45 caliber semi-automatic weapon with .45 caliber bullets that you were able to see when the officer recognized them. This is a deadly weapon. And our laws in our country say some people can have those guns, some people can keep it in their home, some people can have it on the street but there are restrictions. There are some people, like I said, that cannot be trusted under our laws to carry a gun. When the defendant was convicted of a felony, he joined that group. There is no dispute that the defendant is a felon, that was stipulated to, both sides agreed."

¶ 75 Defendant argues that this statement suggests that he was "more dangerous than the average felon in possession of a firearm." The State responds that when this statement is reviewed in context of the closing argument, it was to show the weapon was indicia of defendant's drug dealing. Further, the statement was reasonable argument based on the undisputed fact that defendant had a prior felony conviction. We disagree with defendant's contention that the prosecutor's reference to the caliber of the firearm implied this type of a firearm was more dangerous. This statement was the only reference to caliber and no argument was made that this caliber weapon was more dangerous. We find no error in this comment.

¶ 76 Even if the prosecutor's statements were improper, defendant cannot establish the prejudice prong under *Strickland*. Because the evidence of his guilt was overwhelming, defendant cannot show a reasonable probability that the result of the trial would have been different if his attorney had objected to these comments.

¶ 77 Officers Bacius and Arnolts testified consistently and credibly about the circumstances of their initial stop of defendant, defendant's subsequent arrest, and recovery of the narcotics and firearm. The officers observed defendant parked in an alley, in violation of the Chicago Municipal Code, with his headlights off. The car immediately turned on the lights and began to move as the officers turned into the alley. When the car was curbed, Officer Bacius observed defendant's hands in his pants near his waistband. The following frisk focused on that location and when the officer felt an object, defendant interjected that he had "coke" there. The cocaine was recovered. After waving his *Miranda* rights, defendant told Officer Bacius that he had more cocaine on a table in his bedroom and a firearm in his closet. He signed a consent to search. At defendant's house, his parents each signed a consent to search form and the cocaine and firearm were recovered from the exact locations given by defendant. All of these actions transpired in approximately one hour from when defendant was pulled over by the officers. Given this overwhelming evidence, we conclude that even if defense counsel had objected to all of the complained of comments, there is no reasonable probability that the result of the trial would have been different. For this reason, defendant cannot satisfy the prejudice prong under *Strickland* and his claim of ineffective assistance must fail.

¶ 78 Based on the foregoing reasons, we affirm defendant's convictions and sentence.

¶ 79 Affirmed.