2018 IL App (4th) 150667-U

NO. 4-15-0667

FILED
February 8, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JAMES A. CUMMINGS,	)	No. 13CF1079
Defendant-Appellant.	)	
	)	Honorable
	)	Rudolph M. Braud, Jr.,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed in part, concluding (a) the evidence was sufficient to support defendant's conviction of possession of a controlled substance with the intent to deliver; (b) defendant was not denied the effective assistance of counsel; (2) vacated the $1390 street-value fine, which was not supported by evidence in the record and remanded for a hearing on the street-value of the contraband supporting defendant's conviction; and (3) vacated certain fines improperly imposed by the circuit clerk.

¶ 2 In November 2013, the State charged defendant, James A. Cummings, with manufacture or delivery of a controlled substance (720 ILCS 570/401(c) (West 2012)). In June 2015, the jury found defendant guilty. The trial court sentenced defendant to a term of 10 years' imprisonment followed by a 2-year term of mandatory supervised release.

¶ 3 Defendant appeals, arguing (1) the evidence was insufficient to support his conviction for possession with intent to deliver a controlled substance; (2) he received ineffective assistance of counsel at trial; (3) the street-value fine imposed by the trial court should be

reduced; and (4) fines improperly imposed by the circuit clerk should be vacated. We affirm the trial court's judgment in part, vacate the street-value fine, vacate the fines improperly imposed by the circuit clerk, and remand for further proceedings on the street-value fine.

¶ 4 I. BACKGROUND

¶ 5 In November 2013, the State charged defendant with manufacture or delivery of a controlled substance, alleging he "knowingly possessed with the intent to deliver 1 gram or more but less than 15 grams of a substance containing cocaine." 720 ILCS 570/401(c)(2) (West 2012). We note both the charging instrument and the sentencing order incorrectly list the statutory subsection 401(c)(1), which involves "1 gram or more but less than 15 grams of any substance containing heroin." 720 ILCS 570/401(c)(1) (West 2012). However, the record shows the parties proceeded with the understanding defendant was charged with unlawful possession with intent to deliver cocaine under subsection 401(c)(2).

¶ 6 A. Trial

¶ 7 In June 2015, the jury heard the following evidence.

¶ 8 On the evening of October 31, 2013, members of the Springfield police department's emergency-response team, the officers responsible for serving high-risk search warrants, served a no-knock search warrant at Larandis Wright's residence at 815 Governor Street. Officer Robert Davidsmeyer testified the emergency-response team approached the apartment from an alley and, ultimately, entered into the kitchen. Officer Timothy Ealey testified he and another officer used a ram to break the locking mechanism of the door, allowing it to swing open. When the door opened, Officer Ealey observed a man jump up from a table and run toward the back of the residence.

¶ 9 Upon entering the residence, Officer Davidsmeyer observed a man standing near the basement door who began pacing back and forth in the kitchen as the officers gave commands to get down on the ground. Davidsmeyer testified another man was in the kitchen along the east wall who got down on the ground after officers gave several commands. After securing the residence, Davidsmeyer returned to the kitchen to switch the handcuffs he had placed on the two men. According to Davidsmeyer, he saw a "moderate amount" of a white powdery substance and a digital scale on the kitchen table. Officer Davidsmeyer testified he spoke with Wright, who made a statement that everything in the house was his. Once the emergency-response team secured the residence, officers from the street-crimes unit searched the residence and collected evidence.

¶ 10 Sergeant Gerry Castles testified he was the security-perimeter supervisor the night the search warrant was executed. One of Castles's primary responsibilities was to ensure no one entered or exited the residence while the emergency-response team entered. Once the emergency-response team secured the apartment, Castles and his team searched the residence and collected evidence. Castles testified the two men in the residence were defendant and Wright. According to Castles, the team found two cellular telephones and a bag of what was later discovered to be crack cocaine on the kitchen table. A Pyrex jar with crack cocaine residue was found on the kitchen floor. In the bedroom, the team found another bag of crack cocaine on the bed, a pillow with $1050 in it, and mail addressed to Wright in the dresser. Castles testified there appeared to be two separate sleeping quarters in the apartment.

¶ 11 According to Castles, two other officers informed him they stopped a vehicle travelling south down the alley as the emergency-response team made entry into the apartment. The two people in the vehicle were taken to the police station to be interviewed. Orville

Sullivan, one of the people in the vehicle, told officers he was going to 815 Governor Street to purchase crack cocaine from someone. One of the officers used Orville's telephone to call a contact listed as "Jilla." One of the telephones recovered from the kitchen table at Wright's residence rang and showed an incoming call from "O." Castles testified defendant's street name was "Jilla."

¶ 12 Orville Sullivan testified that, on October 31, 2013, he and his girlfriend, Luanne Wuhrl, were on their way to a friend's house and stopped to buy crack cocaine from a man named "J," who was later identified as defendant. Orville stopped at an automated teller machine (ATM), took out $600, and headed to a house on Governor Street to meet "J." The State asked if Sullivan always met defendant at the house on Governor Street, and Sullivan stated, "No, actually I hadn't met him there but maybe once, one other time." According to Orville, he purchased crack cocaine from defendant "a long time ago." Orville communicated with defendant that night using Wuhrl's telephone. Although he was taken into custody, Orville testified he was not arrested that night. Finally, Orville testified he did not pay any money to defendant and he did not receive any drugs.

¶ 13 Springfield police officer Jeramie Mayes testified he assisted with the search of 815 Governor Street and recovered a Samsung cellular telephone from the living room where defendant was located. Mayes also recovered a flip-style cellular telephone and an HTC cellular telephone from the kitchen table. According to Mayes, he saw narcotics on the kitchen table and officers later found money in a pillowcase and mail in the bedroom.

¶ 14 Prior to searching the apartment, Mayes stopped a vehicle heading toward the residence in the alley. Wuhrl and Sullivan were in the vehicle and were transported to the police department. Mayes stated he asked "them" multiple questions during an interview at the police

station. Sullivan told Mayes he contacted a person named "J" to purchase narcotics and showed Mayes the phone they used to call him. With Sullivan's permission, Mayes sent a call to the telephone number for "J" and the flip-style cellular telephone recovered from the kitchen table rang.

¶ 15 Officer Brian Harhausen testified he searched the kitchen of 815 Governor Street and collected the evidence recovered from the apartment. Harhausen recovered a plastic bag containing a hard rock-like white substance from the kitchen table, which was admitted into evidence as People's exhibit No. 1. Also on the kitchen table was a black scale with white residue on it, which was admitted as People's exhibit No. 2. A paper napkin containing a white powdery substance was admitted as People's exhibit No. 3. On the floor, Harhausen found a glass Pyrex container with white residue on it, which was admitted as People's exhibit No. 5. Based on his training and experience, Harhausen opined the Pyrex container was consistent with the production of crack cocaine. Officers did not recover any glass pipes, Brillo pads, smoking devices, or paraphernalia to snort crack cocaine.

¶ 16 Sergeant Jarod Maddox testified he searched the only bedroom in the apartment. According to Maddox, he found a plastic bag containing a substance that appeared to be crack cocaine sitting on the bed, which was admitted into evidence as People's exhibit No. 4. Maddox also found $1050 tucked inside a pillowcase on the bed.

¶ 17 The parties stipulated that no latent fingerprints of comparison quality suitable for testing were found on People's exhibit Nos. 1, 2, 4, and 5. The parties stipulated, in pertinent part, that People's exhibit No. 1 weighed 13.9 grams and tested positive for cocaine. The parties further stipulated that technical difficulties prevented investigators from downloading information from two of the three cellular telephones found in the residence.

¶ 18 Additionally, the parties stipulated inspector Russell Lehr was an expert in the field of narcotics and drug distribution. According to Lehr, crack cocaine is typically made by combining powder cocaine with baking soda and heating it in the microwave or on the stove. Lehr testified Pyrex is commonly used in manufacturing crack cocaine.

¶ 19 The State showed Lehr People's exhibit No. 1, and stated it contained 14.3 grams of crack cocaine. One-tenth of a gram is a dosage unit, and Lehr testified People's exhibit No. 1 contained approximately 140 dosage units. Lehr estimated the value of the crack cocaine in People's exhibit No. 1 to be between $600 and $750.

¶ 20 According to Lehr, the digital scale found in the kitchen was used to weigh the crack cocaine and divide it into individual bags for sale. Although the Pyrex container and the scale did not have crack cocaine on them, the white powdery residue on the items was consistent with the baking soda or other cutting agent used in the production of crack cocaine. Lehr opined the crack cocaine in People's exhibit No. 1 was for distribution, based on (1) the amount of the substance, (2) the phones between the two subjects found in the alley, (3) the phone calls made after the two were taken into custody, (4) the information in the telephone referring to defendant as "Jilla," (5) the presence of scales, (6) the lack of paraphernalia, and (7) the value of the substance.

¶ 21 On cross-examination, Lehr testified he was aware no illegal substances, weapons, or other contraband were found on defendant. Defendant's counsel then asked, "So, you're basing your decision just on the fact that he was present in this home on [*sic*] the time of the executed search warrant?" Lehr responded, "No, I'm basing my decision on the reports of the officers making contact with the two subjects out in the alley and the fact that they stated that they were there to buy cocaine from [defendant]."

¶ 22 At the beginning of defendant's case, the parties stipulated the target of the no-knock search warrant was Larandis Wright. Wright testified he and defendant had been good friends for approximately 10 years. According to Wright, defendant missed his birthday celebration on October 26, 2013. Wright testified he sent defendant a message on Facebook and the two men planned to go to a club on October 31, 2013, to celebrate. Defendant went over to Wright's house and fell asleep on the couch while he was waiting for Wright to get dressed. Wright lived in his apartment alone and defendant lived elsewhere.

¶ 23 According to Wright, he was in the kitchen making something to eat when he heard a bang at the door and the police entered his house. Defendant jumped up from the couch and headed toward the kitchen area when he heard the bang. After police handcuffed the men, Wright stated he took full responsibility for everything in the house, including the money and the narcotics. Wright testified he later pleaded guilty to charges related to the narcotics and reiterated that defendant was not involved in anything going on in the house.

¶ 24 Wright testified defendant had not contacted him that night to set up a deal for somebody else. Wright had no idea who Sullivan and Wuhrl were, and defendant did not tell Wright he was expecting visitors that evening. Wright had also never heard anyone call defendant "Jilla."

¶ 25 The State impeached Wright's credibility with testimony regarding four prior felony convictions. Wright testified one of the three telephones found in his house was his. Wright denied knowing who owned the other two telephones and stated, "I got several associates that be in and out of my house, so that could have been anybody's phone." Wright denied telling Officer Mayes that defendant owned the other two telephones found in the house. Wright also

denied telling Officer Mayes that he had been fronted approximately an ounce of powder cocaine to cook into crack to be sold.

¶ 26 On rebuttal, Mayes testified he made contact with Wright who stated he had been fronted an ounce of powder cocaine that he cooked into crack cocaine to sell. Wright also stated everything in the residence was his. Wright told Mayes a cellular telephone found on the kitchen counter was his and defendant possessed the two other cellular telephones found in the house.

¶ 27 B. Verdict and Sentence

¶ 28 In pertinent part, the jury instructions included the following definition of possession of a controlled substance:

> "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person.
>
> If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession."

See Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 4.16). During deliberation, the jury sent out the following question written on the instruction defining possession: "We would like a verbal description of this more detailed explanation." The circuit court judge proposed sending back his standard response, which read, "Please rely on the jury instructions, the witnesses' testimony, and the admitted exhibits."

Counsel for defendant had no objection. The jury subsequently found defendant guilty of possession with the intent to deliver a controlled substance. In July 2015, the trial court sentenced defendant to 10 years' imprisonment followed by a 2-year term of mandatory supervised release.

¶ 29 C. Fines and Fees

¶ 30 The trial court ordered defendant to pay the following fines: (1) a $2000 mandatory drug assessment, (2) a $100 crime lab fee, (3) a $100 trauma center fund fee, (4) a $5 spinal cord injury fund fee, (5) a $25 criminal justice information projects fund fee, and (6) a $1390 street-value fine.

¶ 31 The record shows the circuit clerk imposed the following assessments against defendant: (1) a $10 "child advocacy" assessment, (2) a $15 "ISP Op Assistance Fund" assessment, (3) a $5 "drug court fee," (4) a $10 "Probation Op Fund" assessment, (5) a $100 "Victims Assist Fund" assessment, (6) a $2 State's Attorney automation assessment, (7) a $15 "automation" assessment, and (8) a $15 "document storage" assessment.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant argues (1) the evidence was insufficient to support his conviction for possession with intent to deliver a controlled substance; (2) he received ineffective assistance of counsel at trial; (3) the street-value fine imposed by the trial court should be reduced; and (4) fines improperly imposed by the circuit clerk should be vacated.

¶ 35 As an initial matter, we note the State filed a motion to strike portions of defendant's reply brief, arguing he raised additional issues not included in his opening brief. We

ordered the motion taken with the case. For the following reasons, we deny the State's motion to strike portions of defendant's reply brief.

¶ 36 The State contends defendant raised for the first time in his reply brief the claim that the trial court erred in its response to the jury's question regarding the instruction defining possession. Defendant responds, arguing his initial brief asserted the trial court erred in its response to the jury's question regarding the instruction defining possession. Specifically, defendant argues "defense counsel could not be ineffective for failing to object to the court's response to the jurors' inquiry about the possession instruction if the court properly responded to that inquiry." We agree with defendant that the argument made in his initial brief involved raising the issue of whether the court erred in its response to the jury. Accordingly, we deny the State's motion to strike the portion of defendant's reply brief that raises a plain-error argument.

¶ 37 The State next asserts defendant raised a statutory construction argument regarding the imposition of the street-value fine and improperly sought to add a due process argument in his reply brief. Defendant contends this court should not strike the portion of his reply brief addressing due process because it was made in response to the State's argument that defendant could be fined for possessing cocaine found in Wright's bedroom even though defendant was not prosecuted for possessing those narcotics. We conclude this argument was an appropriate response to the State's argument. Ill. S. Ct. R. 341(j) (eff. Nov. 1, 2017). Accordingly, we deny the State's motion to strike this portion of defendant's reply brief. We turn now to defendant's first claim on appeal.

¶ 38 A. Sufficiency of the Evidence

¶ 39 When considering whether the evidence was sufficient to support a conviction, "our function is not to retry the defendant." *People v. Sutherland*, 223 Ill. 2d 187, 242, 860

N.E.2d 178, 217 (2006). Instead, we determine " '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.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Accordingly, we allow all reasonable inferences in favor of the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). It is for the finder of fact to determine the credibility of a witness and that finding is entitled to great weight. *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999). However, the jury's determination is not conclusive and where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt, we will reverse. *Id.*

¶ 40 To sustain a conviction for possession of a controlled substance with intent to deliver, the State must prove (1) the defendant had knowledge of the presence of a controlled substance, (2) the substance was in the defendant's immediate possession or control, and (3) the defendant intended to deliver the controlled substance. *People v. Robinson*, 167 Ill. 2d 397, 407, 657 N.E.2d 1020, 1026 (1995).

¶ 41 Possession can be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335, 934 N.E.2d 470, 484 (2010). "Evidence that a defendant knew drugs were present and exercised control over them establishes constructive possession." *People v. Besz*, 345 Ill. App. 3d 50, 59, 802 N.E.2d 841, 849 (2003). Knowledge may be established by circumstantial evidence of the defendant’s acts, declarations, or conduct from which the inference may be drawn that he or she knew of the existence of the contraband. *People v Maldonado*, 2015 IL App (1st) 131874, ¶ 40, 35 N.E.3d 1218. Control over the area where a controlled substance is found gives rise to an inference that the defendant possessed the contraband. *People v. McCarter*, 339 Ill. App. 3d

876, 879, 791 N.E.2d 1278, 1280 (2003). However, it is not necessary to prove the defendant owned or had a legal interest in the premises where the controlled substance was found. *People v. Williams*, 98 Ill. App. 3d 844, 848, 424 N.E.2d 1234, 1236-37 (1981). Two or more people who share the intent and power to exercise control of the contraband share joint possession. *Givens*, 237 Ill. 2d at 335.

¶ 42 The evidence showed defendant was present in the kitchen area, where a bag of cocaine, a scale with residue, a paper napkin with residue, and his cellular telephone were all in plain view on the kitchen table. Additionally, the Pyrex container with residue was in plain sight on the floor of the kitchen. Knowledge may be inferred from several factors, including the visibility of the contraband. *People v. Love*, 404 Ill. App. 3d 784, 788, 937 N.E.2d 752,756 (2010). All of these items were in places defendant had easy access to and could exercise control over. Further, both Wright and defendant were in the house during the search and Sergeant Castles testified there appeared to be two separate sleeping quarters with fresh clothing, suggesting defendant was staying at the residence. Although Wright testified he lived alone and defendant lived elsewhere, a reasonable jury could have rejected this testimony, particularly where his credibility was challenged with testimony regarding his four prior felony offenses and impeachment of his statement to Officer Mayes. *Smith*, 185 Ill. 2d at 541 (it is the province of the jury to determine witness credibility). Finally, Sullivan testified he was going to this residence to purchase crack cocaine from defendant and he had purchased drugs from defendant at this house before. We conclude this evidence is sufficient to show defendant had knowledge of the presence of a controlled substance and the substance was in his immediate possession or control. *Robinson*, 167 Ill. 2d at 407.

¶ 43 Direct evidence of intent to deliver a controlled substance is rare and usually is proved by circumstantial evidence. *People v. Johnson*, 2013 IL App (4th) 120162, ¶ 28, 986 N.E.2d 782. "Generally, we look to a variety of factors as indicative of intent to deliver, including, among other things, (1) whether the quantity is too large to be viewed as being solely for personal use[;] (2) the purity of the drug confiscated[;] (3) possession of weapons[;] (4) possession of large amounts of cash[;] (5) possession of police scanners, beepers, or cellular telephones[;] (6) possession of drug paraphernalia[;] and (7) the manner in which the substance is packaged." *Id.* The quantity of a controlled substance may be sufficient evidence to prove an intent to deliver beyond a reasonable doubt where the amount could not reasonably be viewed as designed for personal consumption. *Robinson*, 167 Ill. 2d at 410-11. Whether the inference of intent is sufficiently raised is determined on a case-by-case basis and the enumerated factors are not exclusive. *People v. Stewart*, 366 Ill. App. 3d 101, 110, 851 N.E.2d 672, 680 (2006). The lack of drug paraphernalia for personal consumption leads to the inference the defendant intended to deliver a controlled substance. *People v. Johnson*, 334 Ill. App. 3d 666, 678, 778 N.E.2d 772, 782 (2002). "Further, as the quantity of controlled substance on the defendant's person decreases, the need for additional circumstantial evidence of intent to deliver increases." *People v. Sherrod*, 394 Ill. App. 3d 863, 865, 916 N.E.2d 1256, 1259 (2009).

¶ 44 The evidence was sufficient for a reasonable jury to conclude defendant intended to deliver the crack cocaine. First, the amount of the controlled substance alone is sufficient to support such a conclusion, as the bag of cocaine in the kitchen weighed approximately 14 grams. Inspector Lehr testified the amount and value of the crack cocaine was consistent with distribution, and he further testified the bag in the kitchen contained approximately 140

individual doses. This evidence alone is sufficient for a reasonable jury to conclude the crack cocaine was too much for defendant's personal consumption and find intent to deliver.

¶ 45 However, additional circumstantial evidence suggested defendant's intent to deliver. Police recovered cell phones, a Pyrex container, and a digital scale in the kitchen, which supports an inference of intent to deliver. See *People v. Romero*, 189 Ill. App. 3d 749, 756, 546 N.E.2d 7, 11-12 (1989). The jury also heard Sullivan's testimony that he was going to the residence to purchase crack cocaine from defendant. Although he did not specifically testify that defendant agreed to sell him crack cocaine, Sullivan testified he communicated with defendant by cellular telephone. When police officers sent a call from the telephone Sullivan used, the cellular telephone recovered from the kitchen (the telephone Wright explicitly testified was not his) rang. Moreover, Sullivan testified he withdrew $600 from the automated teller machine (ATM), which is the same amount Inspector Lehr estimated the bag of cocaine found in the kitchen was worth.

¶ 46 This evidence is not so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Smith*, 185 Ill. 2d at 542. Viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found defendant guilty beyond a reasonable doubt of possession with the intent to deliver a controlled substance. See *Collins*, 106 Ill. 2d at 261. Accordingly, we affirm the judgment of the trial court.

¶ 47 B. Ineffective Assistance of Counsel

¶ 48 We review claims of ineffective assistance of counsel under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a defendant must show counsel's performance was deficient and prejudice resulted from counsel's deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143, 874 N.E.2d 23, 29 (2007). To

establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Cherry*, 2016 IL 118728, ¶ 30, 63 N.E.3d 871. Judicial evaluation of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* Defendants are entitled to reasonable representation, and a mistake in strategy or judgment does not, by itself, render the representation incompetent. *People v. Fuller*, 205 Ill. 2d 308, 331, 793 N.E.2d 526, 542 (2002).

¶ 49 Defendant contends (1) he was denied the effective assistance of counsel where his attorney failed to (a) request a responsive answer to the jury's question regarding the instruction defining "possession," (b) cross-examine a State witness regarding his bias, (c) object to, or request an instruction limiting, the jury's consideration of other-crimes evidence, and (d) object to certain testimony given by one of the officers; or (2) the cumulative impact of these errors denied him the effective assistance of counsel.

¶ 50 1. *Jury Instruction Defining Possession*

¶ 51 Defendant first argues counsel was ineffective for failing to request a response be provided to the jury's question regarding the instruction defining possession.

¶ 52 To determine whether counsel's failure to object to the trial court's response to the jury question was objectively unreasonable, we must first determine whether the trial court's response was an abuse of its discretion. Ordinarily, juries are entitled to have their questions answered. *People v. Averett*, 381 Ill. App. 3d 1001, 1012, 886 N.E.2d 1123, 1133 (2008). "A

circuit court has a duty to instruct the jury where clarification is requested, when the original instructions are insufficient or when the jurors are manifestly confused." *Id.* However, the court has the discretion to decline to answer a question from the jury if the jury instructions are readily understandable and sufficiently explain the relevant law, further instructions would serve no useful purpose or might mislead the jury, and the jury's question involves a matter of fact. *Id.* "A circuit court may also refuse to answer an inquiry by a jury if the jury's question is ambiguous and any response to the question may require a colloquy between the court and the jury, a further explanation of the facts, and perhaps an expression of the trial court's opinion on the evidence." (Internal quotation marks omitted). *Id.*

¶ 53 In this case, the jury was provided with a copy of the pattern instruction defining possession, which read as follows:

> "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person.
>
> If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession."

See IPI Criminal 4th No. 4.16. The committee notes to this instruction indicate the first paragraph should be given when constructive possession is an issue and the second paragraph should be given when joint possession is an issue. Accordingly, both paragraphs of this

instruction were appropriately given to the jury in this case. See *People v. Simms*, 192 Ill. 2d 348, 412, 736 N.E.2d 1092, 1133 (2000) ("If an appropriate IPI instruction exists, it must be used."). After beginning to deliberate, the jury sent out a note written on the instruction defining possession, which read, "We would like a verbal description of this more detailed explanation." The trial court, with no objection from defense counsel, sent back the following response: "Please rely on the jury instructions, the witnesses' testimony, and the admitted exhibits."

¶ 54 The trial court's response to the jury's question was appropriate. First, the jury's note did not raise an explicit question. It asked for a verbal, more detailed description or explanation of the possession definition. This was an ambiguous question and further instructions may have risked misleading the jury. *People v. Hernandez*, 229 Ill. App. 3d 546, 593 N.E.2d 1123 (1992). A specific inquiry into the jury's confusion might also have risked improperly highlighting certain language in the instruction or had the effect of commenting on the facts of the case. See *People v. Lee*, 342 Ill. App. 3d 37, 55, 795 N.E.2d 751, 765 (2003).

¶ 55 Moreover, the jury in this case was provided with a complete set of instructions and the instruction defining possession was clear and accurately stated the law. See *Averett*, 381 Ill. App. 3d at 1014. The jury also did not ask for clarification on a specific term, or request further clarification on a subject to which a different pattern instruction applied. See *People v. Comage*, 303 Ill. App. 3d 269, 274-75, 709 N.E.2d 244, 248 (1999) (reversible error where the trial court declined to answer a jury request for a definition of the term "knowingly" and the Illinois Pattern Jury Instructions included a definition of "knowingly" primarily for response to jury inquiries).

¶ 56 Defendant relies primarily on *People v. Childs*, 159 Ill. 2d 217, 636 N.E.2d 534 (1994), which we find distinguishable. In *Childs*, the jury posed an explicit question, which

clearly manifested juror confusion on a point of law. *Id.* at 229. In this case, the jury requested a general elaboration on a clear and accurate pattern instruction defining possession. The trial court apparently determined the jury was not manifestly confused. The court also determined, and the parties agreed, the written instructions were sufficient to answer the jury's question. Based on the question posed, the court did not have a duty to define the various terms defendant speculates might have been confusing the jurors. See *Averett*, 381 Ill. App. 3d at 1014 (trial court did not err in instructing jury to continue deliberating after the jury requested clarification of the charges of intent to sell). We conclude the court did not abuse its discretion in refusing to answer the jury's broad request for further explanation and instructing the jury to continue deliberating. Accordingly, defense counsel was not ineffective for failing to object to the court's determination. Moreover, defense counsel's failure to object to the trial court's standard response, which directed the jury to continue deliberating, did not constitute deficient performance, as the IPI instruction accurately stated the law and the jury did not ask an explicit question regarding the instruction. See *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶ 88, 21 N.E.3d 466.

¶ 57 2. *Cross-Examination of Sullivan*

¶ 58 Defendant next contends counsel was ineffective for failing to cross-examine Sullivan about his bias. Specifically, defendant argues Sullivan was not charged with attempted possession of a controlled substance in connection with this case, "perhaps because he agreed to testify against [defendant]." Because defense counsel failed to question Sullivan about this alleged bias, defendant claims he was denied the effective assistance of counsel. We disagree.

¶ 59 Whether, or how, to conduct cross-examination is normally a matter of trial strategy, which will not by itself support a claim of ineffective assistance of counsel. *People v.*

Pecoraro, 175 Ill. 2d 294, 326, 677 N.E.2d 875, 891 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Id.* at 326-27.

¶ 60 In this case, defense counsel cross-examined Sullivan and focused his questions on establishing that defendant did not, in fact, actually deliver any controlled substance to Sullivan. Defendant contends counsel should have focused his questions on Sullivan's alleged bias because he was not charged with attempted possession of a controlled substance. Defendant argues counsel's failure to take this tactic on cross-examination was deficient performance because Sullivan's testimony was "arguably the most important evidence presented" at trial.

¶ 61 Defendant relies on *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 187, 754 N.E.2d 866, 870 (2001). In that case, the victim was the only eyewitness to testify against the defendant and was in State custody facing charges. *Id.* Defense counsel assumed evidence of the victim's pending charges was inadmissible and did not seek to introduce this evidence. *Id.* The appellate court concluded defense counsel's failure to introduce this evidence was not objectively reasonable. *Id.* The appellate court determined the deficient performance prejudiced the defendant because "the credibility of the victim was critical to the State's case. Evidence that she might have been biased or had a motive to lie could have changed the jury's decision." *Id.*

¶ 62 We find *Roy W.* distinguishable. In that case, the witness "had pending charges for retail theft and domestic battery against her mother and was in State custody at the time of the defendant's trial." *Id.* In the instant case, nothing in the record shows Sullivan had any pending charges, or was in State custody. Sullivan testified that, although the police took him into

custody that night, he was not arrested. Moreover, the jury heard evidence that Sullivan used drugs in the past and planned to buy drugs the day of the police raid, which affected his credibility.

¶ 63 We conclude defendant cannot show a reasonable probability the result of the trial would have been different if counsel pursued a line of questioning regarding the failure to charge Sullivan with a crime. His credibility had already been impeached and the evidence against defendant was strong, even without Sullivan's testimony. As discussed above, defendant was in the house when the police conducted the search, there appeared to be two sleeping quarters in the house, the contraband was in plain sight in a location conducive to defendant exercising control over it, and the amount of the substance alone could have supported the inference that defendant intended to deliver a controlled substance.

¶ 64 3. *Other-Crimes Evidence*

¶ 65 Next, defendant argues counsel was ineffective for failing to object to, or request an instruction limiting the jury's consideration of, other-crimes evidence that defendant allegedly committed. Specifically, defendant contends counsel was ineffective for not requesting a limiting instruction regarding Sullivan's testimony that he purchased crack from defendant "a long time ago."

¶ 66 In this case, defendant failed to show that his trial counsel was not functioning as the "counsel" guaranteed by the sixth amendment when he failed to request a limiting instruction for this other-crimes evidence. Counsel may have made a tactical decision not to request a limiting instruction to avoid unduly emphasizing Sullivan's testimony. See *People v. Evans*, 209 Ill. 2d 194, 221, 808 N.E.2d 939, 954 (2004); *People v. Johnson*, 368 Ill. App. 3d 1146, 1161, 859 N.E.2d 290, 304 (2006). Moreover, defendant cannot establish prejudice as to his failure to

request a limiting instruction where—as here—the evidence that Sullivan and defendant engaged in a prior drug transaction involving the same substance was admissible to show defendant's knowledge and intent. See *People v. LeCour*, 273 Ill. App. 3d 1003, 1008, 652 N.E.2d 1221, 1226 (1995) ("[E]vidence of the defendant's prior narcotics transactions is admissible to prove his intent, knowledge, or system of distribution.").

¶ 67 4. *Lehr's Testimony*

¶ 68 Defendant asserts counsel was also ineffective for failing to object to Lehr's testimony explaining that police reports indicated Sullivan's girlfriend told the police that "they" intended to purchase cocaine from defendant.

¶ 69 On cross-examination, defense counsel asked Inspector Lehr if his opinion that defendant was distributing narcotics was based solely on defendant's presence in Wright's home at the time the search warrant was executed. Lehr responded, "No, I'm basing my decision on the reports of the officers making contact with the two subjects out in the alley and the fact that they stated that they were there to buy cocaine from [defendant]." Defendant contends this statement by Lehr was inadmissible hearsay if offered for the truth of the matter asserted and served to improperly bolster Sullivan's testimony that he was going to buy crack cocaine from defendant by implying Wuhrl also stated she was there to buy drugs from defendant. We disagree.

¶ 70 Lehr's testimony about the contents of the police reports was admissible for the limited purpose of explaining part of the basis for his expert opinion that this is a distribution case. *People v. Eveans*, 277 Ill. App. 3d 36, 46, 660 N.E.2d 240, 248 (1996). Defendant does not dispute this but argues counsel was ineffective for failing to (1) object to Lehr's testimony or (2) request a limiting instruction. Defendant contends this failure "effectively acted to double the

amount of people who the jury learned planned to purchase drugs from [defendant]." This overstates both the nature of Lehr's testimony and the effect his testimony would have had.

¶ 71 First, Lehr did *not* explicitly testify that Wuhrl stated she was going to purchase drugs from defendant. He merely said "they"—meaning Sullivan and Wuhrl—told officers "they" were going to purchase drugs from defendant. This was not the first time a witness referred to Sullivan and Wuhrl collectively. Sergeant Castles testified "both" occupants of a vehicle stopped by the perimeter security team were taken to the station for questioning. Officer Mayes testified he asked "them" questions during an interview at the police station and Sullivan told him "they" contacted defendant using a cellular telephone. Moreover, Sullivan testified he was with Wuhrl and used her cellular telephone to contact defendant. While no one testified that Wuhrl told police officers she was there to purchase narcotics from defendant, neither did Lehr. He merely used the term "they," as other officers had when referring to the two occupants of the vehicle stopped in the alley that night. This testimony was not only consistent with other testimony referring to Wuhrl and Sullivan collectively, it was brief and likely given minimal consideration by the jury.

¶ 72 As noted, defendant does not dispute Lehr's testimony about the reports was admissible as the basis for his expert opinion that this was a distribution case. Accordingly, counsel was not ineffective for failing to object to the admissible evidence. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33, 63 N.E.3d 211 ("Necessarily, counsel cannot be deemed ineffective for failing to raise an objection to admissible evidence—such an objection would be futile."). We further conclude counsel was not ineffective for failing to request a limiting instruction regarding this portion of Lehr's testimony, as such an instruction would have emphasized the basis for his opinion. The failure to request a limiting instruction may well have

been "a matter of sound trial strategy, and does not necessarily establish deficient performance." *Evans,* 209 Ill. 2d at 221.

¶ 73 5. *Cumulative Error*

¶ 74 Finally, defendant contends the cumulative impact of the errors denied him the effective assistance of counsel. Because defendant has demonstrated no errors, we need not consider this issue.

¶ 75 C. Street-Value Fine

¶ 76 Defendant contends the trial court erred in imposing a street-value fine of $1390 because it "appears" the court imposed the fine on the entire amount of the drugs seized from Wright's home, as opposed to only the amount of drugs associated with defendant's underlying conviction of possession with intent to deliver more than 1 gram but less than 15 grams of a controlled substance. The State asserts the trial court properly imposed a street-value fine based on the total amount of the controlled substance seized from Wright's home.

¶ 77 In pertinent part, section 5-9-1.1(a) of the Unified Code of Corrections provides as follows: "When a person has been adjudged guilty of a drug related offense involving possession or delivery of a controlled substance *** in addition to any other penalty imposed, a fine shall be levied by the court at not less than the full street value of the *** controlled substances seized." 730 ILCS 5/5-9-1.1(a) (West 2012). Section 5-9-1.1(a) further provides for the determination of the street value of the controlled substance based on the "testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the *** controlled substance seized." 730 ILCS 5/5-9-1.1(a) (West 2012). It is well settled that the imposition of a street-value fine

without a sufficient evidentiary basis is plain error. *People v. Lewis*, 234 Ill. 2d 32, 48-49, 912 N.E.2d 1220, 1230 (2009).

¶ 78 In this case, Inspector Lehr testified the current street value of crack cocaine was between $1200 and $1500 an ounce. According to Lehr, the cocaine seized from the kitchen, which was the basis for defendant's conviction of possession with intent to deliver, was worth approximately $600 to $750. Lehr further testified the cocaine seized from the bedroom was worth $700 to $800. When the State asked Lehr about the value of the drugs found in the kitchen, it stated the weight of the drugs as 14.3 grams. However, the parties stipulated the weight of the drugs found in the kitchen was 13.9 grams. The trial court imposed a fine of $1390, which falls within the range Lehr testified to as the value for the cocaine in the kitchen as well as the cocaine in the bedroom ($1300 to $1550). Thus, defendant asserts it appears the court imposed a fine based on the entire amount of the drugs seized, instead of just the 13.9 grams found in the kitchen, which was the basis for defendant's conviction for possession with intent to deliver more than 1 gram but less than 15 grams of a controlled substance.

¶ 79 However, in our view, it appears the trial court imposed a street-value fine based on the common price of $100 per gram of cocaine, which would amount to $1390 based on the parties' stipulation that the drugs found in the kitchen weighed 13.9 grams. This seems far more likely than the court randomly choosing an amount $90 more than the minimum value Lehr testified to for the total amount of the drugs seized in Wright's house. It also makes sense because the court imposed a fine only on the narcotics supporting the charges underlying defendant's conviction for possession with intent to deliver between 1 and 15 grams of a controlled substance. See, *e.g.*, *People v. Beavers*, 141 Ill. App. 3d 790, 796, 491 N.E.2d 438, 443 (1986) (finding the evidence showed a street-value of $100 per gram and reducing fine from

$900 to $800 because defendant was only convicted of selling eight grams of a controlled substance). However, nothing in the record supports this valuation, as Lehr testified the narcotics found in the kitchen were worth between $600 and $750. See *People v. Simpson*, 272 Ill. App. 3d 63, 66, 650 N.E.2d 265, 267 (1995). Moreover, the evidence does not support the $1390 street-value fine based on Lehr's testimony, because it does not comport with any computation of the values he estimated. Because nothing in the record supports the imposed street-value fine, we vacate the $1390 street-value fine and the trial court is directed on remand to take valuation evidence for the 13.9 grams of cocaine supporting the charges underlying defendant's conviction.

¶ 80 D. Fines and Fees

¶ 81 Defendant contends the following fines were improperly assessed by the circuit clerk and should be vacated: (1) a $10 child advocacy fee; (2) a $15 "ISP Op Assistance Fund" fee; (3) a $5 drug court fee; (4) a $10 "Probation Op Fund" fee; and (5) a $100 "Victims Assist Fund" fee. The State appears to concede these assessments are fines improperly assessed by the circuit clerk and should be vacated. See *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15 (circuit clerk lacks authority to impose fines). We conclude these assessments are fines improperly imposed by the circuit clerk and vacate the above assessments.

¶ 82 Defendant asserts the circuit clerk also improperly imposed (1) a $2 State's Attorney automation fee; (2) a $15 automation fee; and (3) a $15 document storage fee. The State asserts this court has previously held the State's Attorney automation fee, the automation fee, and the document storage fee are, indeed, fees and, thus, were properly assessed by the circuit clerk. *Id.* ¶ 31. See also *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 100-03, 114-16, 55 N.E.3d 117. Defendant asks this court to reconsider our holding in *Daily* in light of the

First District Appellate Court's decision in *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, 64 N.E.3d 647 (holding the State's Attorney automation fee was not a "fee" because it did "not compensate the [S]tate for costs associated in prosecuting a particular defendant"). We decline to reconsider our holding in either *Warren* or *Daily* and continue to hold the $2 State's Attorney automation assessment, the automation assessment, and the document storage assessment are fees. See *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 54, 80 N.E.3d 72. Accordingly, we do not vacate the $2 State's Attorney automation fee, the $15 automation fee, and the $15 document storage fee.

¶ 83 III. CONCLUSION

¶ 84 For the reasons stated, we vacate the fines improperly imposed by the circuit clerk, that being: (1) a $10 child advocacy fee; (2) a $15 "ISP Op Assistance Fund" fee; (3) a $5 drug court fee; (4) a $10 "Probation Op Fund" fee; and (5) a $100 "Victims Assist Fund" fee. We further vacate the street-value fine and remand for further proceedings consistent with this order. We otherwise affirm the trial court's judgment. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 85 Affirmed in part, vacated in part, and cause remanded with directions.