2019 IL App (2d) 170322-U
No. 2-17-0322
Order filed October 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LENNY A. BECK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-2228 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel was not ineffective for not objecting to certain comments during the prosecution's closing argument. However, we remand the cause to allow defendant to file a motion challenging fees imposed in sentencing. Therefore, we affirmed and remanded.

¶ 2 Following a jury trial, defendant, Lenny A. Beck, was convicted of possession of a controlled substance with intent to deliver and sentenced to 10 years' imprisonment. On appeal, he argues that: (1) his trial counsel was ineffective for failing to object to improper comments in the prosecution's closing argument, and (2) the $250 DNA analysis fee and $750 drug ER fee are not statutorily authorized. We conclude that defendant has failed to demonstrate ineffective

assistance of counsel. However, pursuant to Illinois Supreme Court 472(e) (eff. May 17, 2019), we remand the cause to allow defendant to file a motion challenging the fees.

¶ 3 I. BACKGROUND

¶ 4 On December 1, 2015, defendant was charged with two counts of unlawful possession of a controlled substance with intent to deliver. The first count alleged that on November 11, 2015, he knowingly possessed with the intent to deliver more than 1 gram but less than 15 grams of a substance containing heroin (720 ILCS 570/401(c)(1) (West 2014)), and the second count differed only in that it alleged that the substance contained cocaine (720 ILCS 570/401(c)(2) (West 2014)).

¶ 5 On May 24, 2016, defendant filed a motion to suppress statements that he made to the police. The trial court denied the motion on June 23, 2016. Defendant thereafter filed a motion to quash arrest and suppress evidence. The trial court granted the State a directed finding on the motion on November 3, 2016.

¶ 6 A. Trial

¶ 7 Testimony in defendant's jury trial began on January 25, 2017, with Detective Douglas Dunteman of the Carol Stream police department testifying as follows. On November 11, 2015, Michael O'Connor turned himself in to the police on a DUI charge. He said that he could provide the police with information about drugs coming into Carol Stream, in that he had a dealer named "Twin" who would often come to the suburb to provide him with drugs. Dunteman then contacted the DuPage Metropolitan Enforcement Group (DUMEG), which was comprised of officers from various jurisdictions who focused on narcotic-based crimes.

¶ 8 Between 1:21 and 1:30 p.m. on November 11, 2015, Dunteman observed O'Connor receive two unsolicited text messages on his phone from a contact listed as "Twin." The first

message from Twin said, "Well mike dnt never say I ddnt try 2 give wat was own 2 u bro[.] [*sic*]" The next message said, "N 2day is the last day he goin 2 try n give it 2 u mike[.][*sic*]" The following text message exchange then occurred:

O'Connor (1:49 p.m.): "Sorry bro I lost my phone in my mom's car an didn't know your number by heart to get up wit you yesterday. But I came up on some more loot an gonna need 4 g's (plus the half you owe) an jab hard, so lmk if you can do that when your girl get off work…I got the 550 so we all good. Thx bro. [*sic*]"

Twin (1:50 p.m.): "N whn u nd it[.][*sic*]"

O'Connor (1:52 p.m.): "I'm wit my mom but need it soon bro, so get the order ready, thx[.][*sic*]"

Twin (2 p.m.): "[M]ike I dnt want 2 call dude n get all dis sh*t frm him n u stand me up n dude get piss off cuz like he said dat sh*t he gave me the other day I just slove yesterday cuz u wasn't pickn up he said dat he couldnt slove it his self but he told me 2 hold it 4 u cuz he was tryn make good wit u [.][*sic*]"

O'Connor (2:07 p.m.): "Yea hold it for me bro, I'm on point this time, don't trip. [*sic*]"

Twin (2:09 p.m.): "K im about 2 call him now[.][*sic*]"

O'Connor (2:30 p.m.): "Ok, cool can you hurry it up an meet me around 330 bro[.] [*sic*]"

O'Connor (3:40 p.m.): "Getting close bro? [*sic*]"

Twin (3:41 p.m.): "Yup[.][*sic*]"

O'Connor (4:01 p.m.): "?"

Twin (4:01 p.m.): "Just got off the express[.][*sic*]"

O'Connor (4:02 p.m.): "K [*sic*]"

Twin (4:14 p.m.): "It about 2 rain so b by the door cuz im run n out cuz I got sumbdy I got 2 take care dwn the strt frm ur so cum 2 the door now[.][*sic*]"

O'Connor (4:15 p.m.): "K [*sic*]"

Dunteman testified that, based on his training and experience, "slove" meant trying to get rid of product; "4g's" meant four grams; and a "jab hard" meant one gram of crack. In situations involving narcotics, people used coded language to disguise what the actual conversation was about.

¶ 9 Dunteman testified that, after observing the initial text messages, the officers developed a plan for the investigation. Dunteman was going to be in a vehicle with O'Connor and Detective Gregory Walker. They were going to drive to O'Connor's residence, conduct surveillance, and wait for Twin to arrive. Officers in two other vehicles were assigned to be the arrest teams; there were nine total officers involved in the operation. They arrived at the scene at about 3:40 or 3:45 p.m.

¶ 10 Walker parked the vehicle about two or three houses south of O'Connor's residence. O'Connor had his cell phone with him, and Dunteman continued to observe the above-quoted exchange of text messages. Shortly after the 4:14 p.m. text message came in, Dunteman observed a red Buick pull into O'Connor's driveway. A black male, whom Dunteman identified as defendant, exited the front passenger-side door. He paused for a moment and then walked around the corner of the garage toward the front door of the residence. At this point, Dunteman lost sight of defendant, but Dunteman was still in communication with the other two surveillance vehicles. One of the other officers gave an arrest signal, and the other vehicles converged on the house. Officers emerged with their guns drawn, Dunteman could not see the actual arrest from his

location. Dunteman and Walker waited a short time to make sure the arresting officers did not need help, and then they drove back to the police department, which took about five minutes.

¶ 11 Defendant arrived at the police station in a different vehicle at about 4:36 p.m. Dunteman and Walker began interviewing him about 20 minutes later. Walker read defendant his *Miranda* rights and asked if he understood each one. Defendant initialed and signed the form containing his *Miranda* rights and agreed to speak to the officers. He said that he had come to Carol Stream to provide O'Connor with crack and heroin. He was trying to make some money because he was unemployed and his residence had caught on fire. He had been delivering drugs to O'Connor two to three times per week since the previous month. Defendant said that O'Connor was supposed to pay him $550 that day and that defendant would profit about $240 from the sale. Defendant was calm, respectful, and cooperative throughout the interview. He never denied having drugs in his possession.

¶ 12 Defendant further said that one of his sources for drugs was a man called "Ty." Defendant was given a form to write a statement, and Dunteman left the interview to attempt to verify the information about Ty. The interview room had video-recording capabilities, but defendant's interview was not recorded.

¶ 13 Walker provided testimony consistent with that of Dunteman regarding their surveillance of O'Connor's home and defendant's waiver of his *Miranda* rights. Walker testified that when getting background information on defendant, defendant revealed that his nickname was "Twin." When asked if he knew why he was at the police station, defendant said that he had brought some heroin and crack to sell to O'Connor, who lived at the residence where defendant was arrested. Defendant said that his wife drove him there from Chicago. Defendant related that he

had been coming to Carol Stream about two to three times per week for a few months. Defendant wrote in a statement:

> "I came out here so I can make some money so I can buy my wife a ring[.] I came out here to make $550[.] Me in [*sic*] my wife is [*sic*] homless [*sic*][.] We lost everything and [*sic*] a fire Oct 26, 2015 in [*sic*] that why [*sic*] I came out here. In [*sic*] I only came out here to me 1 person I didn't [*sic*]."

After reading the statement, Walker had further questions that he wrote out and gave to defendant to write answers, as herein set forth:

> "Q. What did you come to Carol Stream to sell?
>
> A. 4 grams in seven rock 4 grams of heroin in 7 rock conicr [*sic*]
>
> Q. How long have you been selling heroin and cocaine?
>
> A. Ever sence [*sic*] we lost everything in a fire Oct 26, 2015 off in [*sic*] on
>
> Q. How much money were you going to profit from this drug deal? How much money do you profit in a week?
>
> A. $240/350
>
> Q. How many customers do you sell illegal drugs too [*sic*]?
>
> A. 1
>
> Q. Did you provide this statement of your own free will?
>
> A. Yes
>
> Q. Do you use any illegal street drugs? What?
>
> A. No.
>
> Q. How were you treated by the police?"

Defendant did not answer the last question because Dunteman came in the room to question defendant about his source, and the officers got sidetracked. Defendant signed the statement under a preprinted line that said, "In waiving my right to remain silent, I wish to state that no promises or threats have been made to me. Having read this statement, I find that it is true and correct."

¶ 14 Walker denied promising anything to defendant or threatening him; saying that defendant's wife would be charged with a crime; raising his voice; telling him what to write; or making him sign the statement. He also did not record the interview because it was not standard protocol for DUMEG, and because a lot of people would not want to reveal information about their source of supply or their "target" if they knew that the interview was going to be recorded.

¶ 15 Officer Brian Plackett testified that he was part of the primary arrest team. In particular, he and four other officers were in an unmarked minivan that was about six houses south of O'Connor's residence. At about 4:15 p.m., a red car pulled into O'Connor's driveway, and defendant began walking toward the front door. An arrest signal was given, and the minivan pulled up to the house. The five officers exited the vehicle. Plackett observed a black female in the driver's seat of the red car. Plackett rounded the corner to the garage and saw that defendant was about three feet from the front door. Placket yelled twice, "Police. Get on the ground." Defendant did not comply. Instead, he began to look around and took a step. Plackett thought that potentially defendant was going to run, so he tackled and handcuffed him. Plackett searched defendant and found a large plastic bag in his left front pant pocket. That bag contained two bags, one with a gray chunky substance and another with seven very small Ziploc baggies, each with a white rock-like substance.

¶ 16 Defendant was taken to the minivan. Plackett stayed in the front yard because another officer thought that he had seen defendant throw something, and he and other officers searched the front yard and some neighboring yards. Plackett obtained a ladder from a neighbor and used it to look on the roof of O'Connor's garage. A K9 unit also searched the scene. There was a white pill placed in evidence, but Plackett did not remember where it came from.

¶ 17 The parties stipulated to testimony establishing the following. Police found a cell phone in the front passenger seat of the car. They obtained a search warrant and found that the phone contained the same text messages as were on O'Connor's phone. The chunky gray substance in People's Exhibit Number 4 contained heroin and weighed 3.965 grams. The white rock-like substance in one of the seven Ziploc baggies in People's Exhibit Number 5 contained cocaine and weighed .116 grams. The substances in the remaining six Ziploc baggies weighed .618 grams, but their chemical composition was not analyzed.

¶ 18 Another police officer testified that a bag of marijuana was found in the red Buick.

¶ 19 The parties also stipulated to three recordings of phone calls that defendant made from jail. In the first call, defendant told his mother that he was in jail because he was "trying to make some money." In the second call, defendant's brother asked, "How much you [*sic*] get caught with?" Defendant replied, "Four grams and a half." In the third call, defendant told his wife that the marijuana was going to be thrown out because "the weed ain't nothing," and that the cocaine was going to be thrown out because it was "going to come out zero zero zero point sub-one [*sic*]." He did not know how many times the "dope" had been "stepped on," so it would amount to "one or two." At trial, Walker testified that "dope" was a street term for heroin, and that "stepped on" meant adding another substance to the drug to increase profits.

¶ 20 After the State rested its case, the defense called a neighbor of O'Connor, who testified that an officer asked to borrow a ladder from him, and that the officers remained at the scene for a couple of hours. The parties stipulated that another neighbor would testify that an officer searched her yard for about five minutes after obtaining permission from her.

¶ 21 We summarize defendant's testimony. O'Connor owed defendant $100 for driving O'Connor around. On November 10, 2015, defendant received a text from O'Connor saying that O'Connor had defendant's money. Both defendant and O'Connor used drugs, and O'Connor asked defendant to pick up a package from their dealer when defendant came to get his money. Defendant was under the influence of drugs and alcohol that day and said that he would text O'Connor the following day. Defendant sent two texts the next morning but did not get a response, so he decided to "play" O'Connor and sent him the text message about getting what was owed to him. O'Connor said that he had defendant's money and requested drugs, and defendant decided to "play the game." That is, he pretended that he was going to bring O'Connor the drugs he requested because he thought that otherwise, O'Connor would use the money he owed defendant to buy drugs. Defendant admitted sending and receiving the text messages previously described.

¶ 22 Defendant drank alcohol, and later his wife began driving him to O'Connor's house. Defendant did not bring any heroin or cocaine with him. On the way there, they stopped at a liquor store, and defendant bought two bags of marijuana. Defendant smoked some of the marijuana. They arrived at O'Connor's house, and defendant began to walk toward the front door. When he was a few feet away, he heard tires "squeaking." Defendant took a couple of steps in the grass to see if his wife was "cool." He saw the passenger side door of a van open, and people started jumping out with their guns drawn. Plackett and Walker told him to get on the

ground. Defendant put his hands in the air and began turning to get on the ground when Plackett tackled him. Defendant did not throw anything. The officers handcuffed and searched defendant. They found one of the bags of marijuana, some cash, and some "cards."

¶ 23 The officers led defendant to the van. He saw other officers removing his wife from their car. An officer twisted her wrist, pulled her out of the car, patted down her breasts and butt, and led her to a squad car. Defendant was placed in the front passenger seat of the van. A sergeant sat in the driver's seat and asked what he did with the drugs. Defendant said that he did not have any drugs. The sergeant said that they could charge defendant and his wife with drug trafficking. Another officer opened the sliding door behind defendant and asked where the drugs were. Defendant said that he only had a bag of marijuana. Defendant observed officers searching the area of O'Connor's house. Walker then came to the van door and said that they knew from text messages that defendant came to deliver drugs. He said that defendant needed to tell them where the drugs were, and they could then "go to the police station and figure this out." Defendant again said that all he had was a bag of marijuana. Defendant was in the van for 25 to 30 minutes before being taken to the police station in an SUV.

¶ 24 At the police station, Walker and Dunteman took defendant to an interview room. Walker said, "[The] [o]nly thing you got to do is help me help you and your wife." Walker said that they had 4½ grams of drugs and seven bags of crack cocaine, and text messages saying that defendant was coming to sell drugs. Defendant said that the drugs were not his. Defendant denied having any drugs for 10 to 15 minutes. Afterwards, Walker said that he could get defendant and his wife a deal with the prosecutor, and they could go home. The only thing defendant had to do was write out a statement saying why he came to Carol Stream. Defendant said that he came to pick up money from O'Connor and go to the jewelry store with his wife, but Walker said that he

needed "something [he] could take to the prosecutor." After receiving a promise that defendant and his wife could leave with their vehicle, defendant falsely stated that he possessed heroin and cocaine. Defendant was then advised of his *Miranda* rights, and he signed the waiver form. Defendant next wrote out a statement, ending with "I didn't" because defendant did not "want to participate in this stuff." Defendant admitted at trial that he had previously testified that when the police returned to the room, he had not finished his written statement. Walker subsequently wrote down questions, and defendant wrote answers. Defendant did not answer the last question about how the police treated him because he was not treated fairly. Defendant signed the form.

¶ 25 Walker left the room and later came back saying that the prosecutor said that he needed "some more to go off of." He asked defendant who the "big fish" was. Defendant gave him the name of one person, but it was not defendant's supplier. Dunteman brought back a photo of the person, and defendant identified him. Subsequently, the police said that they had let his wife go but that the prosecutor told them to charge defendant based on his statement.

¶ 26 Defendant testified that in the first recorded phone call to his mother, he was saying that he was trying to make some money by driving O'Connor around. In the second phone call to his brother, defendant was talking about how much he was charged with, which he knew from the police interrogation. In the third phone call to his wife, defendant was relaying information about drugs that he learned from a "jail house lawyer." Defendant acknowledged that in 2012 he was convicted of unlawful possession of a controlled substance.

¶ 27 In rebuttal, the State presented a stipulation that surveillance video would show that defendant arrived at the Carol Stream police department at 4:36 p.m. The parties also stipulated that on January 19, 2016, Walker met with defendant after defendant asked to see him to give him information.

¶ 28 The jury found defendant guilty of unlawful possession of heroin with intent to deliver and not guilty of unlawful possession of cocaine with intent to deliver. Defendant filed a motion for a new trial/judgment *n.o.v.* on February 23, 2017. The trial court denied the motion on March 9, 2017.

¶ 29 On April 26, 2017, the trial court sentenced defendant to 12 years' imprisonment, followed by three years of mandatory supervised release. Defendant filed a motion to reconsider his sentence on May 2, 2017. The trial court granted the motion in part on May 4, 2017, and reduced his sentence to 10 years' imprisonment. As part of the sentenced, the trial court ordered defendant to pay a $250 DNA analysis fee and a $750 drug ER fee.

¶ 30 Defendant timely appealed.

¶ 31 II. ANALYSIS

¶ 32 A. Ineffective Assistance of Counsel

¶ 33 Defendant first argues that his trial counsel was ineffective for failing to object to certain comments that the prosecution made during closing argument. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Dupree*, 2018 IL 122307, ¶ 44. The defendant must first establish that, despite the strong presumption that trial counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *People v. Valdez*, 2016 IL 119860, ¶ 14. A reasonable probability is one that is sufficient to undermine

confidence in the proceeding's outcome. *People v. Peterson*, 2017 IL 120331, ¶ 79. A failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance. *Id.*

¶ 34 Regarding closing argument, a prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences arising from the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor may also comment on witnesses' credibility and respond to statements by defense counsel that invite a response. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. We view the challenged remarks in the context of the closing argument as a whole. *People v. Sims*, 2019 IL App (3d) 170417, ¶ 47. Where a prosecutor makes numerous improper remarks, we may consider their cumulative impact rather than viewing them in isolation. *People v. Clark*, 335 Ill. App. 3d 758, 764 (2002). However, improper remarks constitute reversible error only if they result in substantial prejudice to the defendant, such that absent the remarks, the verdict would have been different. *People v. Branch*, 2018 IL App (1st) 150026, ¶ 32.

¶ 35 Defendant argues that the most problematic of the prosecutor's improper comments were those that implied that the police officers were more credible simply by virtue of their status as police officers. After discussing the recorded phone calls, the prosecutor stated: "The testimony pointing a finger at officers from a convicted felon who lied under oath is astonishing, it shocks the conscience, and you should give it no weight." When talking about why Plackett tackled defendant before arresting him, the prosecutor stated that Plackett perceived that defendant was taking a step, and defendant corroborated in his testimony that he made a movement. The prosecutor then made a comment that defendant takes issue with, namely, "And let's not second guess the officer's judgment." Defendant argues that the following emphasized comments were also improper:

> "Let's go to defense counsel's idea that there was only one report written and, therefore, this whole idea that there is some grand conspiracy because Walker was the one who wrote the report. *It was his job to write the report. He did his job that day.* He was the lead agent. *Don't fault Officer Walker for doing his job.* The fact that in his report about a search and someone borrowing a ladder is not included in the report is nothing but a red herring." (Emphases added.)

¶ 36 Defendant notes that a prosecutor may not argue that a police officer is more credible because of his profession. See *People v. Adams*, 2012 IL 111168, ¶ 20. Defendant analogizes his case to *People v. Ford*, 113 Ill. App. 3d 659, 661 (1983), where the prosecutor stated, " 'Now, on the one hand you have got Donna Kurlinkus. She is a sworn Warren County Deputy, and on the other hand you have got Paula Ford who, in the words of her attorney, is a drug addict.' " The prosecutor repeatedly made similar statements, causing the appellate court to order a new trial based on the cumulative impact. *Id.* at 662-63.

¶ 37 We conclude that the disputed comments were not improper argument, such that trial counsel was not ineffective for not objecting to them. Regarding the first comment (see *supra* ¶ 35), the prosecution could state that defendant was a convicted felon, as this fact was admitted into evidence. Further, a prosecutor may call a defendant a liar if conflicts in the evidence make this assertion a fair inference (*People v. Smith*, 2014 IL App (1st) 103436, ¶ 69), and defendant's version of events was diametrically opposed to the police officers' version in crucial respects. It also was not improper for the prosecutor to argue that the jury should not give any weight to the defendant's testimony, as it is the jury's responsibility to assess witnesses' credibility, determine the weight to give their testimony, and resolve conflicts or inconsistencies in the evidence. See *People v. Ealy*, 2019 IL App (1st) 161575, ¶ 27. Significantly, the prosecutor did not say that the

officers' testimony was entitled to more weight by virtue of their status as police officers, which was repeatedly implied in *Ford*.

¶ 38 The second comment about not disputing the officer's judgment related to Plackett's decision to tackle defendant before arresting him. The fact that this occurred was not disputed at trial, and the comment pertained more to Plackett's perception that defendant might run and choice to tackle defendant, as opposed to Plackett's credibility as a whole.

¶ 39 The last group of comments that defendant cites were made in rebuttal closing argument and all relate to Walker doing his job by writing a police report about the arrest. In defense counsel's closing, he stated that there were nine officers involved in the "bust team" who took many significant actions, but "none of them wrote anything," even though many testified that putting information in reports was an important part of the process. Defense counsel also stated that many significant facts were excluded from the report, such as defendant throwing something before his arrest. During closing argument, the prosecutor may respond to comments made by defense counsel that invite response. *Burman*, 2013 IL App (2d) 110807, ¶ 25. Therefore, the statements about Walker doing his job were not improper.

¶ 40 Defendant argues that the prosecutor also misrepresented the burden of proof when stating, in reference to the jury instruction on credibility:

> "This happens to you, each and every one of you whether you are parents, co-workers, managers, supervisors who have fellow employees or even among your friends, you get two sides of a story, one friend tells you one thing, another friend tells you another thing, and *you have to figure out who is telling the truth, what is more plausible*." (Emphasis added.)

Defendant argues that deciding who is "more plausible" is akin to the preponderance of the

evidence standard, whereas in a criminal trial, the standard of proof "is not whether one side is more believable, but whether, taking all of the evidence into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt." *People v. Wilson*, 199 Ill. App. 3d 792, 797 (1990).

¶ 41 Defendant's argument is not persuasive, as the prosecutor directly linked the comment to the jury instruction on credibility, and not the issue of the standard of proof. Additionally, defense counsel's choice not to object can clearly be seen as a matter of trial strategy, in that he chose to respond:

> "You are not here to decide do I believe Child A more than Child B. The term the State used in their argument was *** whose story is more plausible. The burden here on the State is beyond a reasonable doubt. So even if you completely disbelieve Child A, do you believe Child B so much that you are convinced of guilt beyond a reasonable doubt. It's not simply which one you think is a little more truthful."

As "matters of trial strategy are generally immune from claims of ineffective assistance of counsel" (*People v. Dupree*, 2018 IL 122307, ¶ 44), defendant's argument fails.

¶ 42 Defendant next argues that the prosecutor improperly stated that the defense wanted the jury to believe that there was a vast police conspiracy against defendant, but that theory "taxes the sensibilities that you are the most gullible people." Defendant argues that the quoted comment implied that defense counsel was trying to trick the jury, and he cites *People v. Johnson*, 208 Ill. 2d 53, 82 (2003), where the supreme court stated: "Unless predicated on evidence that defense counsel behaved unethically, it is improper for a prosecutor to accuse defense counsel of attempting to create reasonable doubt by confusion, misrepresentation, or deception." Defendant further cites *People v. Abadia*, 328 Ill. App. 3d 669, 682 (2001), where

the prosecutor stated that the defense theory "defies common sense and it's an insult to your intelligence," in addition to 21 other comments. The appellate court concluded that the cumulative impact of the remarks required a new trial. *Id.* at 684-85. Defendant additionally cites *People v. Triplett*, 99 Ill. App. 3d 1077, 1084 (1981), where the court stated that it was improper for the prosecutor to state that defense counsel's closing argument "ridiculed the jury's intelligence," among other things.

¶ 43 Unlike the cases defendant relies on, here the prosecutor attacked the theory of the defense rather than defense counsel, which "is an important distinction that typically removes a prosecutor's comments from consideration as prejudicial." *People v. Tijerina*, 381 Ill. App. 3d 1024, 1037 (2008). In *People v. Ligon*, 365 Ill. App. 3d 109, 124 (2006), the appellate court held that the prosecutor's use of the words "ridiculous," "sad," and "pathetic," to describe the defense were proper comments on the defendant's credibility and theory of defense rather than an impermissible attack on defense counsel. The same logic applies here, as the prosecutor was commenting on the defense theory that there was an innocent explanation for the text messages, presence at O'Connor's house, written confession, and phone calls, which all corroborate the police testimony regarding the drugs found on defendant.

¶ 44 Last, defendant argues that the prosecutor erred by telling the jury what he personally would have done if he were in defendant's shoes. In discussing defendant's phone call with his wife, the prosecutor questioned where defendant's sense of injustice was and then stated: "If something like what he told you happened up on the stand, I am telling my wife, [h]ire the best lawyer, hire the Johnny Cochran of Chicago because my constitutional rights just got trampled on, these people set me up." Defendant argues that a prosecutor may not use a personal anecdote in closing argument. See *People v. Shief*, 312 Ill. App. 3d 673, 679 (2000), (prosecutor's remarks

that he could recognize his ailing son's nurse improperly served to bolster the credibility of the victim and her testimony); *People v. Barraza*, 303 Ill. App. 3d 794, 798 (1999) (prosecutor's personal story about a conversation with his daughter served to improperly bolster the victims' credibility and elicit sympathy); *People v. Hayes*, 183 Ill. App. 3d 752, 756 (1989) (prosecutor's description of almost personally being attacked improperly bolstered the victim's credibility and improperly appealed to the jury's passions and prejudices). Defendant asserts that such arguments improperly introduce "new material by a witness whom [the] defendant cannot cross-examine." *Hayes*, 183 Ill. App. 3d at 757. Defendant maintains that the statement was also improper because the prosecutor knew that he had been appointed a public defender and could not afford to hire the "Johnny Cochran of Chicago." Defendant argues that it was improper to imply that defendant was guilty because he did not do something his indigency prevented him from doing.

¶ 45 This case is readily distinguishable from the cases that defendant cites because there, the prosecutors told personal stories to improperly bolster the credibility of the victims and appeal to the jury's emotions. Here, in contrast, the prosecutor's reference to Johnny Cochran was not a personal story and did not relate to the credibility of the State's witnesses. Rather, it was a response to defendant's testimony that the officers never found drugs on him, and defendant's explanation of the recorded phone calls. The prosecutor was commenting that if defendant's version of events were true, one would expect that he would be talking about the violation of his rights with his family members, as opposed to the incriminating comments that he made in the calls. We note that the report of proceedings shows that defendant was initially planning to hire a private attorney, but regardless, the comment was not directed at defendant's inability to hire

private counsel but instead at the fact that defendant was not complaining about the injustice of his situation in the calls. Accordingly, the prosecutor's comment was not improper.

¶ 46 As defendant has failed to show that any of the complained-of comments were improper, his counsel cannot be said to have acted unreasonably in not objecting to them, such that defendant cannot satisfy the *Strickland* test for ineffective assistance of counsel. See *Peterson*, 2017 IL 120331, ¶ 79.

¶ 47 Even if, *arguendo*, the comments were improper, we would conclude that defendant cannot satisfy the second prong of the *Strickland* test, meaning that he still would not have been able to demonstrate ineffective assistance of counsel. That is, defendant is unable show prejudice, because the evidence against defendant was overwhelming. See *People v. Patterson*, 2014 IL 115102, ¶ 87 (overwhelming evidence against the defendant meant that it was not reasonably probable that the jury would have acquitted the defendant even in the absence of deficient performance).

¶ 48 Defendant argues that the State's entire case hinged on the credibility of the police officers, such that the trial came down to a credibility contest between the officers and defendant. Defendant argues that there were many reasons to believe his testimony over the officers' testimony, specifically because: Walker could not account for ten minutes at the scene, supporting defendant's version of events that Walker was one of the arresting officers, and leading to more doubts about Walker's credibility; the officers' extensive search of the area after defendant's arrest was more consistent with defendant's testimony that no drugs were found on his person; it would be strange for defendant's interview to have lasted over one hour if he immediately admitted to the offenses; and several text messages on defendant's phone did not

appear on O'Connor's phone, raising the possibility that messages were deleted from O'Connor's phone.[1]

¶ 49 Defendant's argument is without merit, as the police officers' testimony was corroborated in all crucial respects. That is, defendant admitted sending the texts to O'Connor stating that he would deliver a specific amount of drugs to O'Connor at his home, and defendant arrived at the appointed time. The police testified that they found drugs on defendant consistent with the drugs that he promised to bring. They testified that defendant verbally admitted to the crime, and at trial defendant did not dispute that he wrote a statement saying that he came to Carol Stream to "make some money." He further admitted to writing answers to written questions that stated that he planned to sell "4 grams in seven rock 4 grams of heroin in 7 rock conicr [*sic*]" and profit $240 in the exchange. Defendant signed the statement below a line stating that it was true and correct and that no promises or threats had been made to him. Finally, the State introduced evidence of recordings of phone calls from defendant to family members in which defendant said that he was in jail because he was "trying to make some money"; that he was caught with "[f]our grams and a half" of drugs; that the marijuana and cocaine would be thrown out; and that the "dope" had been "stepped on," so it would amount to "one or two." In contrast to the police testimony that corresponded to the aforementioned evidence, defendant's explanations were fantastical and unreasonable. In sum, given the overwhelming evidence against defendant, he cannot show that he was prejudiced by his counsel's alleged errors.

¶ 50 B. DNA Analysis and Drug ER Fees

[1] The referenced outgoing messages on defendant's phone stated: "Im [*sic*] on my way"; "Did u [*sic*] get my txt [*sic*]"; and "N b lookn @ ur phne [*sic*]." The incoming messages said, "Yea bro" and "Ok bro."

¶ 51 Defendant alternatively argues that both the $250 DNA analysis fee (see 730 ILCS 5/5-4-3(j) (West 2014)) and the $750 drug ER fee (720 ILCS 570/411.4 (West 2014)) should be vacated because they were not statutorily authorized in this case.

¶ 52 Defendant cites *People v. Marshall*, 242 Ill. 2d 285, 301-03 (2011), where our supreme court stated that a defendant needs to submit a DNA sample and pay the analysis fee only where the defendant is not currently registered in the DNA database. Defendant argues, and the State agrees, that the record reveals that his DNA was already on file, such that the $250 DNA analysis fee must be vacated.

¶ 53 Defendant argues that the $750 drug ER fee is improper because it is to be imposed only in situations where the crime proximately causes an "emergency response," which is defined as "the act of collecting evidence from or securing a site where controlled substances were manufactured, or where by-products from the manufacture of controlled substances are present, and cleaning up the site ***." 720 ILCS 570/411.4(a) (West 2014). Defendant argues, and the State agrees, that his crime did not cause an emergency response.

¶ 54 The State points out that while this case was pending on appeal, our supreme court adopted and then amended Illinois Supreme Court Rule 472 (eff. May 17, 2019). The rule states that the trial court retains jurisdiction to correct certain sentencing errors, such as errors in the imposition of fees, even during the pendency of an appeal. Ill. S. Ct. R. 472(a) (eff. May 17, 2019). Further, a party may not appeal on the ground of any specified sentencing error unless it was first raised in the trial court. Ill. S. Ct. R. 472(c) (eff. May 17, 2019). However, there is a special provision for appeals that were pending when the rule first went into effect, like this case:

> "In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule

for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). Accordingly, pursuant to Rule 472(e), we remand the matter to the trial court so that defendant may file a motion to vacate the fees. See *People v. Scott*, 2019 IL App (1st) 163022, ¶ 26.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the judgment of the Du Page County circuit court and remand the cause for defendant to file a motion to challenge the fees imposed.

¶ 57 Affirmed and remanded.