2019 IL App (4th) 160713-U

NO. 4-16-0713

FILED
March 20, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW DONNELL COE, Defendant-Appellant.	) Appeal from the) Circuit Court of) McLean County) No. 14CF1141)) Honorable) Robert L. Freitag,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) In the circumstances of this case, corrective admonitions adequately remedied an earlier failure to give admonitions pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), and because defendant, in response to the corrective admonitions, confirmed his knowing and voluntary waiver of counsel, the record shows a lack of prejudice from the initial failure to give the admonitions.

(2) Assuming that a *pro se* letter to the trial court raised a posttrial claim of ineffective assistance, remanding the case for an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), is unnecessary, considering that, in the posttrial hearing, defense counsel on his own initiative provided the explanations that such an inquiry would have sought.

(3) Defendant's challenge to the sufficiency of the evidence lacks merit because when all the evidence is regarded in a light most favorable to the prosecution, a rational jury could find the elements of the charged drug offenses to be proven beyond a reasonable doubt.

(4) Defendant's allegations of perjury in the grand-jury hearing are unjustified by the record, and, besides, the guilty verdicts rendered any error in the grand-jury hearing harmless beyond a reasonable doubt.

(5) Defendant has forfeited his claims of prosecutorial misconduct in the opening statement and closing argument, and because there was no such misconduct, let alone clear or obvious misconduct, the doctrine of plain error does not avert the forfeiture.

(6) Defendant has forfeited his claim that the trial court incorrectly instructed the jury on his legal accountability, and because there was no error in the jury instructions on legal accountability, let alone a clear or obvious error, the doctrine of plain error does not avert the forfeiture.

¶ 2 A jury found defendant, Andrew Donnell Coe, guilty of drug offenses and obstruction of justice, and the Circuit Court of McLean County sentenced him to imprisonment. Defendant appeals on six grounds.

¶ 3 First, defendant argues that we should reverse his convictions because, in the arraignment, the trial court failed to admonish him pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before accepting his waiver of counsel. We agree that the court failed to give defendant the required admonitions before accepting his waiver of counsel. Nevertheless, later, before the trial, the court corrected the oversight by giving him all the admonitions that the rule required, and at that time he confirmed his earlier waiver of counsel. Thus, the record dispels any possibility of prejudice from the initial omission of the admonitions; the record shows a knowing and voluntary waiver of counsel.

¶ 4 Second, defendant argues that in violation of *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court neglected to inquire into his complaint that his defense counsel (reappointed, at his request, after the trial) had been rendering ineffective assistance. We see no merit in this argument. Assuming that the letter defendant wrote to the court really did allege ineffective assistance, defense counsel proactively provided explanations, in the posttrial hearing, that he would have provided had the court sought them in a *Krankel* inquiry.

¶ 5 Third, defendant challenges the sufficiency of the evidence to support the drug convictions. When we look at all the evidence in a light most favorable to the prosecution, drawing all reasonable inferences in favor of the prosecution, we are unconvinced it would be impossible for a rational jury to find the elements of the drug offenses to be proven beyond a reasonable doubt.

¶ 6 Fourth, defendant argues that his convictions should be reversed because a detective perjured himself (or so defendant claims) in his testimony to the grand jury. In our review of the record, we find defendant's allegations of perjury to be baseless—and, besides, the guilty verdicts rendered any error in the grand-jury hearing harmless beyond a reasonable doubt.

¶ 7 Fifth, defendant argues that prosecutorial misconduct in the opening statement and closing argument destroyed the fairness of the trial. This argument is procedurally forfeited, and because there was no misconduct in the prosecutor's opening statement and closing argument, let alone clear or obvious misconduct, the doctrine of plain error does not avert the forfeiture.

¶ 8 Sixth, defendant argues that the trial court incorrectly instructed the jury on the issue of his legal accountability for another's criminal conduct. This argument likewise is procedurally forfeited, and because the jury instructions on legal accountability were legally correct, there was no error, let alone plain error.

¶ 9 Therefore, we affirm the judgment.

¶ 10 I. BACKGROUND

¶ 11 A. The Indictment

¶ 12 The information was superseded by an indictment, which had five counts.

¶ 13 Count I alleged that on September 3, 2014, defendant criminally conspired with Darrell Harris to commit unlawful delivery of a controlled substance. See 720 ILCS 570/401(d)(i), 405.1 (West 2014).

¶ 14 Count II alleged that on September 3, 2014, defendant committed unlawful delivery of a controlled substance. See *id.* § 401(d)(i).

¶ 15 Count III alleged that on September 23, 2014, defendant committed unlawful possession of a controlled substance with the intent to deliver it. See *id.*

¶ 16 Count IV alleged that on September 23, 2014, defendant committed unlawful possession of a controlled substance. See *id.* § 402(c).

¶ 17 Count V alleged that on September 23, 2014, defendant committed obstruction of justice (720 ILCS 5/31-4(a)(1) (West 2014).

¶ 18 Before the trial, the State dismissed count I of the indictment.

¶ 19 B. Defendant's Waiver of Appointed Counsel, a Waiver He Later Confirmed After Being Fully Admonished

¶ 20 The arraignment was on October 10, 2014. Defendant appeared with his appointed defense counsel, who told the trial court that defendant wanted to dispense with his services and represent himself and that defendant had some *pro se* motions to file, none of which defense counsel had seen.

¶ 21 The trial court explained to defendant what an arraignment was and asked him if it was true that he wanted to dismiss the public defender's office and represent himself. Defendant answered in the affirmative.

¶ 22 The trial court warned defendant that if he proceeded *pro se*, he would receive no additional library time or any other special privilege and that he would be held to the same standards to which an attorney would be held. Defendant responded that, having been "through

this before," he understood. The court asked defendant if he had represented himself before, and he answered in the affirmative. The court asked him what his level of education was, and he answered that he was a high school graduate. The court then ruled: "Court will show the PD [(public defender)] as being withdrawn."

¶ 23 Then, at the trial court's request, defendant acknowledged receiving a copy of the five counts of the indictment. The trial court recited the five counts to him and told him the minimum and maximum punishment for each count. Defendant pleaded not guilty to all five counts (subsequently reduced to four counts by the State's voluntary dismissal of the conspiracy count).

¶ 24 After pleading not guilty, defendant handed the trial court several *pro se* motions, including motions for discovery and for the suppression of evidence. In the succeeding months, he filed and argued other *pro se* motions.

¶ 25 On July 30, 2015, the State moved for the trial court to admonish defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) because "the State believe[d] that the [d]efendant was not properly admonished under the requirements of Rule 401(a) before being allowed to proceed *pro se* on October 10, 2014" (to quote the motion).

¶ 26 There was a hearing for that purpose on August 3, 2015. The record on appeal lacks a transcript of the hearing, but a docket entry for that date reads: "Defendant admonished fully per SCR 401 [(Ill. S. Ct. R. 401 (eff. July 1, 1984))] and confirms waiver of counsel."

¶ 27 C. Defendant's Motion to Dismiss the Indictment

¶ 28 On August 3, 2015, the trial court heard a motion by defendant to dismiss the indictment on the alleged ground that a police officer, Stephen Brown, perjured himself before the grand jury. Defendant argued that the perjury was evident when one compared the testimony

Brown gave to the grand jury on October 8, 2014, with the testimony Brown later gave in a suppression hearing on February 18, 2015.

¶ 29 Specifically, according to defendant, the perjury lay in the following question and answer in Brown's grand-jury testimony:

> "Q. Okay. So[,] based on your training and experience and common sense, it was pretty clear that appeared to be drug deal?
>
> A. Correct."

By "that," the prosecutor meant what Brown saw on September 23, 2014, in the parking lot behind Rosie's Pub, in Bloomington, Illinois. Immediately before the quoted question and answer, Brown testified to the grand jury that he went to Rosie's Pub on September 23 for lunch and that as he was leaving the restaurant, he saw defendant, whom he "recognized from work," standing in the foyer of the restaurant. Defendant was talking on his cell phone, "directing somebody to where he was, trying to explain where he was." Brown stepped outside the restaurant and saw a car pull up. The prosecutor asked Brown what happened next. He answered:

> "A. I observed [defendant] walk outside and flag the car down to the parking lot behind Rosie's. He then walked over to that car and sat in the back seat of the car for a few minutes. When he got out and left, we were trying to follow the car. I could see the front seat passenger handing something, it looked like a little white object, to the driver[,] which was a female."

¶ 30 Defendant argued to the trial court that by answering, "Correct," to the prosecutor's question, "[B]ased on your training and experience and common sense, it was pretty clear that [the meeting in the parking lot] appeared to be drug deal?" Brown committed perjury

and that the perjury was exposed when Brown later admitted, in the suppression hearing, that he never actually *saw* defendant hand anything to anyone in the car.

¶ 31 The trial court, however, found no contradiction at all between Brown's grand-jury testimony and his testimony in the suppression hearing. The court reasoned that even though Brown, by his own admission, never actually saw defendant hand anything to the occupants of the car, it nevertheless could have appeared to Brown, by a process of inference, that defendant had engaged in a drug transaction with the occupants of the car, considering (1) defendant's history of drug offenses and (2) the little white object that Brown saw the passenger hand the driver after defendant got out of the car and the car drove away. Therefore, finding no perjury by Brown, the court denied defendant's pretrial motion to dismiss the indictment.

¶ 32 D. The Jury Trial

¶ 33 A jury trial was held on April 12 and 13, 2016. Defendant continued to represent himself.

¶ 34 In his opening statement to the jury, the prosecutor said:

> "Moving forward, you will hear about more bad decisions. Moving to September 23, [2014,] when the defendant is at Rosie's in the foyer, across the street from the courthouse here, arranging a drug transaction in an area where, unfortunately for him, police officers eat lunch. They overheard this conversation and quickly set up surveillance to try to determine what exactly the defendant was doing. This is when you will hear from Detective Brown, who is able to actually observe much of what happened that day, and he will testify that he observed what he believed, based on his training and experience, to be another drug transaction involving the defendant. This time, no controls, no confidential

source, because they just happened to be in the right place at the right time. One of those bad decisions of the defendant."

¶ 35 In the trial, the State presented evidence of two drug offenses, one of which defendant committed on September 3, 2014, corresponding to count II of the indictment, and the other of which he committed on September 23, 2014, corresponding to counts III and IV. (In the part of his opening statement quoted above, the prosecutor described the second drug offense.)

¶ 36 Detective Kevin Raisbeck testified that on September 3, 2014, Richard Velez came to the Bloomington police station and told Raisbeck that defendant, Velez's roommate, had been selling cocaine.

¶ 37 After signing an agreement to be a confidential source, Velez used Raisbeck's cell phone, with the speaker function on, to call someone whose voice, Raisbeck testified, "sounded very similar to [defendant's] voice." (From his own conversations with defendant, both in person and by phone, Raisbeck believed he was able to recognize defendant's voice.) In the speaker phone conversation, Raisbeck heard defendant tell Velez that he, defendant, still had seven grams to sell.

¶ 38 On the basis of that phone conversation, Velez (with Raisbeck listening) made phone calls directly to defendant's source for the cocaine, a man named Corey. Velez and Corey agreed on a location. Raisbeck searched Velez and the undercover police car for narcotics, and other preparations were made for a controlled purchase from Corey. Velez then went to the agreed-upon location, but Corey never showed up. Defendant telephoned Velez and explained that Corey had been scared off by an unmarked police car but that defendant still was willing to "take care of" Velez.

¶ 39 Defendant and Velez agreed on another location, at Locust and Catherine Streets, 1½ blocks from defendant's residence. Surveillance units went to the new location. Raisbeck gave Velez $200 in cash, and Velez left the undercover police car. Raisbeck testified:

> "A. Mr. Velez was under constant surveillance from the time that he's with me, walking to any meet locations. He's constantly being watched by other detectives in the area to ensure that he doesn't meet with anyone else other than the people that he's supposed to meet."

Velez returned in less than 10 minutes and handed over to Raisbeck several bags of what appeared to be cocaine, People's exhibit No. 1. Also, he gave back to Raisbeck the $200—which Raisbeck was not expecting to receive back, since, typically, drugs changed hands only if payment was made.

¶ 40 Defendant then followed up with a telephone call to Velez, telling him that he, defendant, needed $200 to reimburse Corey for the cocaine. After texting defendant that he was on his way, Velez met with defendant to drop off the cash, taking with him, in his pocket, a recording device. Upon returning to the car, Velez no longer had the $200. He handed over the recording device to Raisbeck, and it was still on. The recording was People's exhibit No. 8. The prosecutor asked Raisbeck:

> "Q. MR. RIGDON: Detective, during some of the early portions of that recording, you could hear a voice ask, ['D]id you rob someone, did you rob an[']—expletive. Are you able to say whose voice you believe to have been in that recording that made that statement?
>
> A. That's the voice that I believe is very similar to [defendant's] voice.

Q. And that's based on your multiple interactions with the defendant at this point?

A. Yes."

¶ 41 On September 8, 2014, Raisbeck texted defendant several times, identifying himself and suggesting that they get together and talk. At last, defendant answered Raisbeck, agreeing to meet with him the next day. Raisbeck and another Bloomington detective, Stephen Brown, met with defendant on September 9, 2014. They had a conversation with defendant in an undercover police car, attempting to recruit him to be a confidential source.

¶ 42 At that time, defendant admitted to the two detectives that he had been selling cocaine as an "employee" of Corey, who had been fronting him "eighth ounces, quarter ounces, and half-ounces of crack-cocaine." (To clarify, "employee" might be Raisbeck's word. Raisbeck testified: "Basically[,] [defendant] is an employee for this Corey person."). Defendant told them he had to pay Corey between $200 and $250 per eighth of an ounce of cocaine and that any additional money that defendant made from the sales was his own profit. Defendant further told the detectives that the last time Corey fronted him cocaine was September 3, 2014. He provided them a physical description of Corey as well as Corey's telephone number.

¶ 43 On September 23, 2014, Brown went to Rosie's Pub, on Front Street, for lunch. As Brown was leaving the restaurant, he saw defendant in the foyer. Defendant was on his cell phone and was giving someone directions to the restaurant. Brown sat in his vehicle and watched as a car pulled up to Rosie's Pub and defendant got in the backseat of the car. Brown moved his vehicle to a better vantage point, but he still could not see what was happening in the car. After two minutes, defendant got out of the car, which then drove away. Brown followed the car, and while he and the car were waiting at a stop light, he saw a passenger in the car hand a small

white object to the driver. Brown then returned to Rosie's Pub and requested another police officer to "make contact with [defendant] and see what was going on, basically."

¶ 44 Aaron Veerman, a Bloomington police officer assigned to the street crimes unit, went to Rosie's Pub to investigate defendant. At Veerman's request, defendant accompanied him outside the restaurant. Veerman searched his person and found a cell phone and, beneath the waistband of defendant's pants, a Baggie. Inside the Baggie were 10 Baggie corners, each of which contained what appeared to be a chunk of crack cocaine. Veerman laid the Baggie on the roof of his squad car and placed the cell phone on top of the Baggie so it would not be blown away.

¶ 45 Another Bloomington police officer, Jerad Johnson, assisted Veerman with defendant's arrest. As Veerman was putting defendant in handcuffs, defendant lunged toward the bag of suspected cocaine, which was still on the roof of the squad car, and "grabbed it *** with his mouth." Johnson took defendant by the jaw and ordered him to spit out the Baggie. Veerman wrestled defendant to the ground. Even after Johnson sprayed defendant on the mouth with pepper spray, he refused to spit out the evidence. The police officers were able to remove the Baggie, People's exhibit No. 2, from defendant's mouth, but he had succeeded in swallowing most of the suspected cocaine that had been inside the Baggie. The red stain on the Baggie was defendant's blood. Out of concern that defendant would suffer an overdose, the police called an ambulance, which took him to OSF St. Joseph Medical Center. At the hospital, however, defendant resolutely refused medical treatment.

¶ 46 Brown spoke with defendant at the hospital. Defendant told him that the Baggie had contained crack cocaine and pills and that he had obtained the cocaine from Velez.

Defendant explained that the people in the car at Rosie's Pub had come merely to collect a debt that defendant owed them.

¶ 47 In the hospital, Brown searched defendant's person and found $56 in cash in a front pants pocket. A $20 bill and a $10 bill were folded separately from the remaining $26. Brown testified that, in his experience, drug dealers folded the cash from each sale separately instead of ostentatiously pulling out the rest of their cash and folding it all together.

¶ 48 An Illinois State Police forensic scientist, Michelle Dierker, described People's Exhibit No. 1 as five hand-knotted plastic "corner bags." A chunky, off-white substance, weighing a tenth of a gram, tested positive for cocaine.

¶ 49 Another Illinois State Police forensic scientist, Denise Hanley, testified that People's exhibit No. 2 contained off-white chunks, which weighed less than a tenth of a gram and tested positive for cocaine.

¶ 50 In his closing argument to the jury, the prosecutor asserted:

> "The defendant's a drug dealer. He's not a drug dealer because any one person says he is. Not because any one of the witnesses you heard from says he is. He's a drug dealer because he chose to be. That's how he decided to make money. The defendant sells cocaine. The evidence that you heard points to no other conclusion."

Specifically, the prosecutor argued that on September 3, 2014, "[t]he defendant sold what was lab weight [0].7 grams." Also, the prosecutor argued, it was readily inferable that defendant sold the cocaine again on September 23, 2014:

> "That circumstantial evidence is—the large part is Steve Brown's observations. He wasn't in the car with the defendant, and those two other individuals to say,

['Y]es, I was there. I saw a hand-to-hand transaction[']; but everything else that occurred around that leads you to the reasonable inference that a delivery of cocaine just happened pretty similar to the one that happened on September 3rd except, this time, it was [defendant] physically handing the cocaine to the front-seat passenger.

DEFENDANT COE: Objection, [Y]our Honor. There's no evidence to that.

THE COURT: Overruled."

¶ 51 After deliberating for about an hour, the jury found defendant guilty of all four counts of the indictment.

¶ 52 E. Posttrial Proceedings

¶ 53 At defendant's request, the trial court appointed defense counsel to represent him in posttrial proceedings. Nevertheless, defendant filed his own *pro se* motions for a new trial. In addition, defense counsel filed a motion for a new trial, in which he argued merely that defendant was not proven guilty beyond a reasonable doubt and that the verdict was against the manifest weight of the evidence.

¶ 54 In a hearing on June 1, 2016, defense counsel told the trial court that defendant was "adamant" in his desire to argue his own posttrial motions. Defense counsel had explained to defendant that while he was represented by counsel, the court would forbid him to represent himself by arguing his own *pro se* motions. "Armed with that knowledge, [defendant] now wishe[d] to represent himself in all matters [that day]," defense counsel told the court.

¶ 55 After admonishing defendant on his right to be represented by counsel in posttrial proceedings, the trial court pointed out to defendant that although simultaneous self-

representation and representation by an attorney were indeed forbidden, a defense counsel, if he or she saw fit to do so, could adopt *pro se* motions that "raise[d] proper legal issues." The court asked defense counsel if he were willing to adopt defendant's *pro se* posttrial motions. Defense counsel replied: "I have reviewed the defendant's motions. I was prepared to adopt in part the defendant's *pro se* motions, but in discussing with him his options, he was adamant that he wanted to argue them himself." The court asked defendant whether, instead of dismissing defense counsel and representing himself, he would prefer that defense counsel adopt what defense counsel regarded as the arguable parts of the *pro se* motions—and in putting that question to defendant, the court disclaimed any intention to pressure defendant to do one thing or the other. Defendant asked the court: "Can I briefly meet with [defense counsel] in the room to see what part of the motion he's trying to adopt?" The court answered:

> "THE COURT: We're running out of time, but[,] yes, we'll take a few minutes if you want to try to clarify what it is. I don't want to make you waive your right to counsel because you don't think he's going to argue the things you want. So[,] if you're not even sure what he's arguing, we're going to need to take a minute to figure that out."

Defense counsel remarked: "Given the time constraints today, this may not be an opportune time to proceed with the hearing."

¶ 56 After a recess, the trial court observed that "we've run out of time" and suggested rescheduling the posttrial hearing and sentencing hearing for July 25, 2016. The parties agreed with that suggestion.

¶ 57 In the interim, defendant wrote the trial court a letter. Although defendant dated the letter July 20, 1016, it was file-stamped July 25, 2016. The letter reads as follows:

> "[Defense counsel] has yet to consult with me concerning my posttrial motion or what claims he intends to amend. I am unaware of his actions. He promised to consult with me two weeks after my June 1, 2016, court date[,] and that meeting has yet to happen. I even wrote him expressing my concern[,] and he has yet to respond. So[,] this letter is to inform the court that I'm preparing my argument to the claims I raised in my postrial motion for a new trial for this purpose. There's a chance that I may have to proceed *pro se* because of the improper representation by [defense counsel's] refusal to consult with me prior to my upcoming court date scheduled for July 25, 2016. It should also be noted, although probation finally sent me a 'PSI' packet to fill out, they have yet to consult with me as well."

¶ 58 On July 25, 2016, the trial court held the rescheduled posttrial hearing. Defense counsel told the court he was abandoning the posttrial motion he had filed and was adopting portions of the two *pro se* posttrial motions that defendant had filed. Defense counsel listed the paragraphs he was adopting and gave explanations for why he was not adopting the remaining paragraphs of the *pro se* motions. Defendant, who was present at the hearing, voiced no objection to the selectivity of the adoption; nor, in that hearing, did he request to dismiss defense counsel and argue his own *pro se* motions.

¶ 59 After hearing defense counsel's arguments in favor of holding a new trial and the prosecutor's opposing arguments, the trial court declined to grant a new trial.

¶ 60 The matter proceeded to sentencing. Noting that (1) defendant accumulated an additional felony conviction while this case was pending, (2) he was on mandatory supervised release for a drug offense when he committed the present drug offenses, and (3) he repeatedly misbehaved while in jail, the prosecutor recommended 24 years' imprisonment.

¶ 61 Defense counsel suggested that defendant's "troubled childhood" and "victimiz[ation] as a child" might "help in some way to explain or understand his inability to conform his conduct to the requirements of the law."

¶ 62 Defendant then made a statement in allocution. He explained that "the victimization [he] suffered" as a child made him prone to depression and anxiety and that his illegal conduct might have been a way of expressing frustration at "the horrific things" he had endured as a child.

¶ 63 The trial court believed that defendant was sincere in his statement in allocution. Defendant had "just helped explain a little bit and give a context to" to the "jail violations"—but those violations were nevertheless "very concerning to the [c]ourt." And even though the amount of cocaine in this case was small—even though "it wasn't like [defendant was] carrying around a couple bricks of cocaine or anything of that nature"—his criminal record was "very significant," and, as the prosecutor had noted, he was on mandatory supervised release for a prior drug offense at the time he committed the present drug offenses.

¶ 64 After weighing the aggravating and mitigating factors, the trial court imposed a term of 18 years' imprisonment for possession of a controlled substance, a concurrent term of 18 years' imprisonment for possession of a controlled substance with the intent to deliver it, and a term of 3 years' imprisonment for obstruction of justice.

¶ 65 On August 3, 2016, defense counsel filed a motion to reduce the sentences. On September 26, 2016, the trial court denied the motion.

¶ 66 This appeal followed.

¶ 67 II. ANALYSIS

¶ 68 A. Lack of Prejudice From the Initial Noncompliance With Rule 401(a)

¶ 69 Defendant complains that on October 10, 2014, the trial court accepted his waiver of counsel without first giving him the admonitions that Rule 401(a) required. That rule provided as follows:

> "(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without *first*, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." (Emphasis added.) Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 70 On October 10, 2014, in the arraignment, the trial court told defendant the nature of each offense with which he was charged as well as the minimum and maximum punishment for each offense. But the court did so after, rather than before, accepting defendant's waiver of counsel. And on that date, the court never told him he had the right to appointed counsel if he were indigent. Therefore, on October 10, 2014, the court failed to follow Rule 401(a).

¶ 71 Defendant acknowledges that he never objected on October 10, 2014, when the trial court failed to follow the letter of Rule 401(a), and he further acknowledges he never raised this issue in his motion for a new trial. To preserve an issue for review, a defendant must make a

contemporaneous objection and also reiterate the objection by including it in a posttrial motion. *People v. Reese*, 2017 IL 120011, ¶ 60 (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); *People v. Lewis*, 234 Ill. 2d 32, 40 (2009); *People v. Eyler*, 133 Ill. 2d 173, 206 (1989). (It does not appear that the supreme court has exempted Rule 401(a) issues from this rule in *Enoch* (see *Reese*, 2017 IL 120011, ¶ 60), although requiring defendants to make a contemporaneous objection when a court fails to comply with Rule 401(a) would be little different, it seems, from requiring them to admonish themselves.) With respect to the Rule 401(a) issue, defendant never took the preservative measures that *Enoch* requires. Consequently, he invokes the doctrine of plain error (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)), which, the appellate court has held, may be invoked in cases of noncompliance with Rule 401(a) since the right to counsel is a fundamental right (*People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000)).

¶ 72 The right to counsel is indeed a fundamental right, which a defendant can waive only knowingly and voluntarily, but defective or omitted admonitions do not automatically invalidate such a waiver. See *People v. Wright*, 2017 IL 119561, ¶ 41. If the record affirmatively shows a lack of prejudice from the trial court's noncompliance with Rule 401(a) on October 10, 2014—if, despite the court's failure to follow that rule, the record shows that the waiver of counsel was knowing and voluntary—reversal is unwarranted. See *Reese*, 2017 IL 120011, ¶¶ 62, 65; *People v. Redmond*, 2018 IL App (1st) 151188, ¶ 25. "Each waiver of counsel must be assessed on its own particular facts." *Reese*, 2017 IL 120011, ¶ 62.

¶ 73 In our *de novo* review of this issue (see *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114), we conclude that the facts in the record show a knowing and voluntary waiver of counsel (see *Reese*, 2017 IL 120011, ¶ 65)—a waiver that remained in effect until defendant retracted it in the posttrial proceedings—and that the trial court's noncompliance with Rule 401(a) on

October 10, 2014, caused defendant no prejudice. Defendant must have known from the start, on October 10, 2014, that he had the right to appointed counsel if he were indigent (see Ill. S. Ct. R. 401(a)(3) (eff. July 1, 1984)), considering that such appointed counsel appeared with him on that date, for the arraignment. Also, although it is quite true that on October 10, 2014, the court did not inform defendant of the nature of the charges and the minimum and maximum punishments *before* accepting his waiver of counsel (see Ill. S. Ct. R. 401(a)(1), (2) (eff. July 1, 1984)), the court so informed him *moments after* accepting his waiver of counsel—and upon being so informed, defendant did not change his mind about representing himself. Nor, on August 3, 2015, did he change his mind about representing himself after the court fully admonished him in accordance with Rule 401(a). Instead of changing his mind, he explicitly confirmed his earlier waiver of counsel—even though, if defendant had seen fit to change his mind on August 3, 2015, reappointed counsel could have amended, refiled, and reargued the pretrial motions that defendant had filed *pro se*.

¶ 74 For all those reasons, the record affirmatively dispels any possibility of prejudice from the court's noncompliance with Rule 401(a) on October 10, 2014. See *Reese*, 2017 IL 120011, ¶ 65. Therefore, we find no plain error, and reversal on the basis of deficient admonitions is unwarranted.

¶ 75 B. An Adequate Inquiry Pursuant to *Krankel*

¶ 76 Defendant argues that in his *pro se* letter filed on July 25, 2016, he complained of receiving ineffective assistance from posttrial counsel and that, in violation of *Krankel*, the trial court failed to investigate this complaint.

¶ 77 We decide *de novo* whether the trial court fulfilled the requirements of *Krankel*. See *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 24. The supreme court has explained:

> "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations." *People v. Moore*, 207 Ill. 2d 68, 78 (2003).

The practical equivalent of such an interchange occurred in the posttrial hearing of July 25, 2016. For each issue in defendant's *pro se* posttrial motions that defense counsel declined to adopt, defense counsel gave a reason for declining to adopt that issue. These proactively provided explanations for weeding out certain *pro se* arguments from the posttrial motion left nothing to be investigated.

¶ 78 "The inclusion of an issue [in a posttrial motion] is a matter of trial strategy; such strategy is entitled to great deference on review." *People v. Schnurr*, 206 Ill. App. 3d 522, 527 (1990). "[W]hen dealing with matters of trial strategy, the trial court at the *Krankel* hearing must determine if the allegations and factual bases therefor could support a claim that trial counsel was objectively unreasonable. If the allegations and factual bases could support that claim, new counsel should be appointed." *People v. Roddis*, 2018 IL App (4th) 170605, ¶ 77. In his brief, defendant does not argue that defense counsel's refusal to adopt certain issues from defendant's *pro se* motions was objectively unreasonable. Arguments not made in the appellant's brief are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Therefore—assuming that defendant's letter

complained of ineffective assistance and further assuming that by filing the letter on the day of the posttrial hearing, defendant "[brought] the claim to the trial court's attention" (*People v. Patrick*, 2011 IL 111666, ¶ 29)—we find an adequate inquiry into defense counsel's strategic decisions to omit some issues from the posttrial motion.

¶ 79 C. The Sufficiency of the Evidence

¶ 80 1. *Count II of the Indictment*

¶ 81 Count II of the indictment charged defendant with unlawfully delivering a controlled substance on September 3, 2014. See 720 ILCS 570/401(d)(i) (West 2014). Defendant argues that the State failed to prove him guilty, beyond a reasonable doubt, of count II because no one saw defendant deliver cocaine to Velez and no one saw Velez pay defendant $200.

¶ 82 The State counters that when all of the evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could find, beyond a reasonable doubt, that defendant aided and abetted the unlawful delivery of cocaine to Velez on September 3, 2014. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Tinoco*, 185 Ill. App. 3d 816, 824 (1989). We agree with the State.

¶ 83 Section 5.2(c) of the Criminal Code of 2014 provides:

> "A person is legally accountable for the conduct of another when:
>
> * * *
>
> (c) either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2014).

¶ 84 From the circumstantial evidence, viewed in a light most favorable to the prosecution, a reasonable trier of fact could find, beyond a reasonable doubt, that defendant aided and abetted the unlawful delivery of cocaine to Velez on September 3, 2014. See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (the *Collins* standard of review is to be applied regardless of whether the evidence is direct or circumstantial). Raisbeck recognized defendant's voice on the speaker phone. See *People v. Nunn*, 101 Ill. App. 3d 983, 989 (1981). On the telephone, Raisbeck heard defendant make arrangements with Velez for the delivery of cocaine to Velez and for Velez's subsequent payment of $200 so that defendant could reimburse his supplier, Corey. It appears that by following those arrangements, Velez obtained cocaine and paid for the cocaine. Defendant subsequently admitted to two detectives that Corey had been fronting him cocaine to be sold. Even if someone other than defendant physically handed the cocaine to Velez on September 3, 2014, defendant is legally accountable as a promoter or facilitator of the transaction. See 720 ILCS 5/5-2(c) (West 2014).

¶ 85 2. *Count III of the Indictment*

¶ 86 The jury also found defendant guilty of count III, which alleged that on September 23, 2014, he committed unlawful possession of a controlled substance with the intent to deliver it. See 720 ILCS 570/401(d)(i) (West 2014). Defendant argues that "[s]imple possession of 0.2 grams [of] cocaine is insufficient to establish intent to deliver."

¶ 87 We agree. But the State proved more than simple possession of 0.2 grams of cocaine. The evidence tended to prove the following additional facts, all of which were relevant to the question of whether defendant intended to deliver cocaine on September 23, 2014.

¶ 88 First, except for the 0.2 grams of cocaine that the police managed to retain, defendant, while he was being handcuffed, swallowed about 9 or 10 Baggie corners, each of

which contained what appeared to be a chunk of crack cocaine. That defendant would swallow those items, possibly at the risk of choking to death, strongly suggests that they were incriminating—and, indeed, in the hospital, he admitted that the Baggie contained cocaine. So, representing the amount of cocaine that defendant possessed on September 23, 2014, to be only 0.2 grams could be misleading. This is not to suggest that the total amount of the cocaine, whatever it was, and the individual packaging necessarily would be dispositive on the question of whether defendant intended to deliver the cocaine, but the individual packaging tends to move the needle of probability closer toward such an intent. See *People v. Robinson*, 167 Ill. 2d 397, 408 (1995); *People v. Anderson*, 2018 IL App (4th) 160037, ¶ 73; *People v. Beverly*, 278 Ill. App. 3d 794, 802 (1996).

¶ 89 Second, as we have discussed, defendant telephonically arranged a sale of cocaine to Velez on September 3, 2014.

¶ 90 Third, on September 9, 2014, after the controlled purchase by Velez, defendant admitted to Raisbeck and Brown that he had been selling cocaine that Corey had been fronting to him.

¶ 91 Fourth, on September 23, 2014, in the parking lot behind Rosie's Pub, Raisbeck witnessed what was apparently a drug transaction. From what Raisbeck knew about defendant, he could reasonably infer that the white object he saw the passenger hand to the driver after defendant left the car was cocaine that defendant had just sold to them. See *People v. Little*, 322 Ill. App. 3d 607, 617-18 (2001).

¶ 92 We have examined the cases that defendant cites in support of his contention that the evidence is insufficient, as a matter of law, to prove he had an intent to deliver cocaine on September 23, 2014. See *People v. Sherrod*, 394 Ill. App. 3d 863, 868 (2009); *People v.*

Hendricks, 325 Ill. App. 3d 1097, 1114 (2001); *People v. Nixon*, 278 Ill. App. 3d 453, 457 (1996); *People v. Thomas*, 261 Ill. App. 3d 366, 371 (1994); *People v. Hodge*, 250 Ill. App. 3d 736, 747 (1993); *People v. McLemore*, 203 Ill. App. 3d 1052, 1057 (1990). "The question of whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis" (*Robinson*, 167 Ill. 2d at 412-13), and the cases that defendant cites are distinguishable because they all lack what the present case has: "other, more positive, indicia of drug dealing" (*Hodge*, 250 Ill. App. 3d at 747). See also *Little*, 322 Ill. App. 3d at 619 (distinguishing *Nixon*, *Thomas*, and *Hodge* on the ground that "in none of the foregoing cases was the accused observed by officers, like here, engaging in conduct that was suggestive of a drug transaction"). *Hendricks*, for example, found insufficient evidence of an intent to deliver the cocaine (*Hendricks*, 325 Ill. App. 3d at 1114), and in explaining why the evidence was insufficient, the appellate court remarked:

> "There was no evidence [that the] defendant had any knowledge of local drug trafficking and no evidence of any involvement with drugs. ***
>
> We further note the absence of any observations of drug transactions involving the defendant or other activity suggestive of such conduct." *Id.* at 1112.

In the present case, by contrast, there was evidence that defendant not only had knowledge of local drug trafficking but that he himself was a local drug trafficker.

¶ 93 In sum, "[v]iewing *all* of the evidence in the light most favorable to the prosecution"—not just the isolated fact of how much cocaine the police managed to rescue from defendant's mouth on September 23, 2014—we conclude that a rational trier of fact could find, beyond a reasonable doubt, that defendant had an intent to deliver the cocaine that he possessed

on that date. (Emphasis added.) *People v. Gray*, 2017 IL 120958, ¶ 53; see *Little*, 322 Ill. App. 3d at 614.

¶ 94 D. Alleged Perjury by Brown in the Grand-Jury Hearing

¶ 95 Defendant claims that Brown perjured himself two times before the grand jury and that the resulting due-process violation calls for a reversal of his convictions. See *Wright*, 2017 IL 119561, ¶ 62 ("The due process rights of a defendant may be violated if the State deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence.")

¶ 96 First, defendant claims that Brown perjured himself in the following portion of his grand-jury testimony:

> "Q. *** So[,] based on your training and experience and common sense[,] it was pretty clear that appeared to be a drug deal [in the parking lot of Rosie's Pub on September 23, 2014]?
>
> A. Correct."

Defendant compares that grand-jury testimony to Brown's testimony in a subsequent suppression hearing, in which Brown admitted that (1) he did not *see* defendant give any drugs to the men in the car and (2) he could not be certain that the white object the passenger handed to the driver, after defendant exited the car, was in fact cocaine.

¶ 97 "[B]ecause the essential facts concerning what happened at the grand jury proceedings are undisputed, we review *de novo* whether defendant suffered a prejudicial denial of due process that could warrant dismissal." *People v. Mattis*, 367 Ill. App. 3d 432, 435-36 (2006). We conclude *de novo* that Brown did not commit perjury in the above-quoted portion of his grand-jury testimony. He stated what "appeared" to him by deduction from the facts known

to him. Depending on the circumstances, it can be reasonable to deduce that drugs were sold even though one never actually saw the drugs change hands. The supreme court has held that to be perjurious, "[t]he alleged false statement must be a statement of fact and not a conclusion, opinion or deduction drawn from given facts." *People v. White*, 59 Ill. 2d 416, 418 (1974). "That the conclusion, opinion[,] or deduction is erroneous, or is not a correct construction or a logical deduction from the facts cannot constitute false swearing." *Id.*; see also *People ex rel. Madigan v. Baumgartner*, 355 Ill. App. 3d 842, 849 (2005).

¶ 98 Second, defendant claims that Brown committed perjury by testifying to the grand jury: "[Defendant] admitted that he had been involved in it, and he stated that the bag that he had eaten, he had picked that up from a friend of his and believed it to be cocaine." Defendant argues that the following testimony by Brown in the trial proves that his testimony to the grand jury was false:

> "Q. Is it also true that the defendant never admitted that he had eaten a bag believed to be cocaine?
>
> A. Correct. You did not admit that. Yes."

But Brown's grand-jury testimony need not be interpreted as being inconsistent with his trial testimony. "[T]he bag that he had eaten" could be understood as Brown's description of the bag, not defendant's description. In other words, instead of saying, "I ate a bag containing cocaine," defendant could have told Brown simply, "The bag contained cocaine," or words to that effect, enabling Brown to testify truthfully: "Defendant admitted that the bag he had eaten contained cocaine."

¶ 99 Third, defendant claims that Brown perjured himself before the grand jury by testifying: "I observed [defendant] walk outside and flag the car down to the parking lot behind Rosie's." By contrast, the transcript of Brown's testimony in the trial reads as follows:

> "[DEFENDANT]: Detective, when you were having lunch at Rosie's Pub, did you ever observe the defendant walk outside, flag a taxi or car down to the parking lot behind Rosie's?
>
> [BROWN]: No.
>
> Q. He did walk over to that car, correct?
>
> A. While I was in Rosie's, I couldn't see anything outside."

Here, defendant has found an apparent inconsistency between Brown's testimony to the grand jury and his testimony in the trial—but, for two reasons, the inconsistency is not perjury. First, an inference that Brown deliberately falsified this trivial detail, in either the grand-jury hearing or the trial, would be unjustified. See *Baumgartner*, 355 Ill. App. 3d at 849 ("One must wil[l]fully, corruptly, and falsely testify to a matter material to the issue or point in question to commit perjury." (Internal quotation marks omitted.)). Second, the statement lacks materiality. To be perjurious, the false statement must be "material to the issue or point in question." 720 ILCS 5/32-2(a) (West 2014). A false statement is material if it "influence[d], or could have influenced, the trier of fact." *People v. Acevedo*, 275 Ill. App. 3d 420, 423 (1995). The grand jury's decision whether to indict defendant could not have turned on whether Brown actually saw defendant flag down the car outside Rosie's Pub. Plainly, defendant told the occupants of the car, by telephone, how to find the restaurant; the car arrived at the restaurant; defendant got in the car and exited the car a couple of minutes later; Brown followed the car and, at a stop light, saw the passenger hand the driver a white object; the police searched defendant outside the restaurant and found,

under the waistband of his pants, a Baggie containing about 10 Baggie corners, each of which in turn contained what looked like a chunk of crack cocaine; defendant ate most of the Baggie corners as he was being handcuffed; and the fragment that the police were able to salvage from his mouth tested positive for cocaine. Whether Brown did or did not see defendant flag down the car when it arrived at Rosie's Pub was an incidental detail that made no possible difference in the outcome of the grand-jury proceeding. The element of materiality is lacking.

¶ 100 And, besides, assuming, merely for the sake of argument, that Brown committed perjury in the grand-jury hearing, the error is harmless beyond a reasonable doubt because, in the subsequent trial, a jury found defendant guilty of all four counts of the indictment. See *United States v. Mechanik*, 475 U.S. 66, 70 (1985) (by returning a guilty verdict, the jury signified "not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt," and it follows that "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt"); *People v. Shields*, 143 Ill. 2d 435, 446 (1991) ("Constitutional errors may be deemed harmless if it can be shown that the error was harmless beyond a reasonable doubt."). "The purpose of the grand jury's investigation is not only to cause the prosecution of the guilty, but also to protect the innocent from unfounded criminal prosecutions." *People v. Herbert*, 108 Ill. App. 3d 143, 150 (1982). Defendant is not innocent; a jury of his peers found him guilty, beyond a reasonable doubt, of all four counts of the indictment. The guilty verdicts rendered moot any error in the grand-jury hearing. The jury's finding of proof beyond a reasonable doubt encompassed and exceeded the probable-cause standard of the grand jury (see *People v. O'Dette*, 2017 IL App (2d) 150884, ¶ 67).

¶ 101 E. Asserted Misconduct by the Prosecutor in His Opening Statement

¶ 102 In his opening statement to the jury, the prosecutor said the evidence would show that on September 23, 2014, Brown overheard defendant arranging a drug transaction in the foyer of a restaurant and that the drug transaction took place, shortly afterward, in the parking lot of the restaurant. Defendant quotes from *People v. Terry*, 312 Ill. App. 3d 984, 993 (2000): "It is impermissible for a prosecutor to comment during opening statements upon what testimony will be introduced at trial and then fail to produce that testimony since such an argument is in effect an assertion of the prosecutor's own unsworn testimony in lieu of competent evidence." Although defendant never objected during the prosecutor's opening statement (see *Enoch*, 122 Ill. 2d at 186), defendant invokes the doctrine of plain error, arguing that the evidence in the trial was closely balanced (see *People v. Herron*, 215 Ill. 2d 167, 178 (2005)).

¶ 103 In plain-error analysis, the first step is to determine whether there was a clear or obvious error. *People v. Henderson*, 2017 IL App (3d) 150550, ¶ 37. We find no error at all in the prosecutor's opening statement, let alone a clear or obvious error. As we have discussed, the State presented circumstantial evidence that defendant engaged in a drug transaction in the parking lot of Rosie's Pub on September 23, 2014. Therefore, the prosecutor made good on the representations in his opening statement.

¶ 104 F. Asserted Misconduct by the Prosecutor in His Closing Argument

¶ 105 In his closing argument to the jury, the prosecutor characterized defendant as a "drug dealer"; asserted that defendant sold 0.7 grams to Velez on September 3, 2014; and accused defendant of physically handing drugs to buyers in the parking lot of Rosie's Pub on September 23, 2014. Defendant cites *People v. Moore*, 356 Ill. App. 3d 117, 120 (2005), in which the appellate court stated: "A closing argument is improper if it is not based on relevant evidence."

¶ 106 Again, we find no error. The prosecutor's closing argument had a basis in the direct and circumstantial evidence the State adduced in the trial. In their closing arguments, prosecutors are permitted to draw "any fair and reasonable inference the evidence may yield." *Anderson*, 2018 IL App (4th) 160037, ¶ 52. "An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human reasoning." (Internal quotation marks omitted.) *People v. Toliver*, 2016 IL App (1st) 141064, ¶ 27. It is quite true, as defendant argues, that prosecutors "should not make comments that could cause the jury to speculate about facts not in evidence." *Anderson*, 2018 IL App (4th) 160037, ¶ 52. Reasonable inferences, however, are not speculation. "Reasonable inferences, unlike speculation, depend on the facts in evidence and may support a criminal conviction." (Internal quotation marks omitted.) *Toliver*, 2016 IL App (1st) 141064, ¶ 27

¶ 107 G. Alleged Error in the Jury Instructions

¶ 108 According to defendant, the trial court committed plain error by instructing the jury that he was guilty of unlawful delivery of a controlled substance if he "or one for whose conduct he was legally responsible" knowingly delivered a substance containing cocaine. Defendant argues that this instruction was incorrect because it "could have allowed jurors to return a guilty verdict without finding that defendant *** himself agreed to delivery of cocaine." Defendant cites section 405.1 of the Illinois Controlled Substances Act (720 ILCS 570/405.1 (West 2014)), which, in subsection (a) (*id.* § 405.1(a)), provides that one of the elements of criminal drug conspiracy is that the defendant "agrees with another to the commission of" a drug offense.

¶ 109 Defendant appears to confuse the offense of criminal drug conspiracy (*id.* § 405.1) with the broader concept of legal responsibility (720 ILCS 5/5-2(c) (West 2014)).

Whereas criminal drug conspiracy is an offense, legal responsibility or accountability is not an offense in and of itself. *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992). The supreme court has explained:

> "A charge based upon accountability must necessarily flow from the principal crime at issue. Accountability is not in and of itself a crime, but rather a method through which a criminal conviction may be reached. Simply, the statute is a statement of the principles of accessoryship. [Citation.] Individuals are not charged with the offense of accountability. Instead, they may be charged, as here, with [an offense], with their guilt established through the behavior which makes them accountable for the crimes of another." *Id.*

¶ 110 Subsections (a), (b), and (c) of section 5-2 of the Criminal Code of 2014 (720 ILCS 5/5-2(a), (b), (c) (West 2014)) describe the types of behavior that make one legally accountable for someone else's criminal offense, and agreement is only one type of behavior that has such an effect (*id.* § 5-2(c)). Therefore, we find no error in the jury instruction that defendant was guilty of unlawful delivery of a controlled substance if he "or one for whose conduct he was legally responsible" knowingly delivered a substance containing cocaine. The quoted phrase was nothing more than a statement of section 5-2 of the Criminal Code of 2014 (*id.* § 5-2).

¶ 111 III. CONCLUSION

¶ 112 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 113 Affirmed.