2011 IL App (2d) 100083-U
No. 2—10—0083
Order filed September 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09—CF—234
PRIEST D. LITTLE,	)	Honorable Fred L. Foreman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

Held: Defendant was not entitled to a reversal or a new trial where victim-impact and other-crimes evidence was properly allowed, there was no prosecutorial misconduct during opening and closing statements, the evidence was sufficient to sustain his conviction, and his ineffective assistance of counsel claim failed. Further, where the record reflects that the trial court did not rely upon an improper sentencing factor, we deny defendant's request for a new sentencing hearing.

¶ 1 Defendant, Priest D. Little, was convicted of drug-induced homicide (720 ILCS 5/9—3.3(a) (West 2008)), and sentenced to 30 years' imprisonment. On appeal, he argues that: (1) he was deprived of a fair trial when the State was allowed to introduce and argue victim-impact evidence;

(2) the trial court erred in admitting other-crimes evidence; (3) prosecutorial misconduct occurred during closing statements, warranting reversal of his conviction or a new trial; (3) there was insufficient evidence to prove him guilty beyond a reasonable doubt; (4) he received ineffective assistance of counsel when his trial counsel failed to tender an accomplice-witness jury instruction; and (5) the trial court improperly considered an element of the offense as an aggravating factor when sentencing him to 30 years, warranting a reduction in sentence or a new sentencing hearing. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by information on January 16, 2009, with one count of drug-induced homicide. According to the information, on or about December 26, 2008, defendant knowingly delivered heroin to Danielle Nicholas, who thereafter injected the heroin and died of an overdose. On August 24, 2009, the State moved *in limine* to admit other-crimes evidence, arguing its witnesses would testify to the fact that they purchased heroin from defendant on numerous prior occasions. The State argued that such evidence could be admitted if relevant to any material fact provided that the admission was for any purpose other than to demonstrate defendant's propensity to commit a crime. The State argued that evidence that defendant sold heroin on prior occasions was relevant to establish the existence of a common design or plan, or *modus operandi*, and the probative value of the evidence outweighed any prejudice to defendant. Defendant moved to bar such testimony. The trial court granted the State's motion.

¶ 4 Defendant's trial commenced on August 25, 2009. In opening statements, the State explained that Nicholas had graduated from high school and "everything was smooth sailing. And then she found heroin." The State argued the case was about addiction, that Nicholas was a heroin

addict, but she was in treatment and was "trying to get her life pulled back around." At age 20, Nicholas had been clean for about eight months when she returned from treatment and saw her friend Nicole Barraza. Together, they used heroin on the night of December 25 and early morning hours of December 26. The State argued that Nicholas "was a kind young girl," which her mother would attest to. The State continued, arguing Nicholas bought the heroin that caused her overdose from defendant and explained some of the phone call evidence. The State argued that "in five hours, [Nicholas] went from spending Christmas with her mother and family to being in the morgue. Five Hours. Three phone calls. One life lost. A life cut too short. She had an addiction to heroin, and she lost." The State discussed some of the evidence it was going to present, and stated in the middle of its discussion:

¶ 5 "Again, it's not the cause of death that is our issue, it's a who-dunnit. It's also a case about a nightmare, it's a mother's worst nightmare to get that knock on the door, and about how someone was eight months clean when she chose to use heroin, she gets addicted to it, and it cost her her life."

¶ 6 The State completed its explanation of the upcoming evidence and stated that it was confident that once the jury heard all of the stipulations, the phone records, and the witnesses testifying that defendant sold the heroin to Nicholas as part of his business, it would find defendant guilty and that Nicholas "got the raw end of the deal and she lost her life."

¶ 7 Michelle Schaps testified for the State. Schaps, Nicholas's mother, testified that her daughter did not make it to her birthday on January 7. She testified that her daughter was a happy child from the very beginning, always made friends, and was great natured. Around age 17, Schaps said Nicholas had met some people and gotten involved in drugs. Nicholas managed to graduate high

school but got kicked out of the College of Lake County. Schaps testified that Nicholas loved photography, drawing, and design. She identified Nicholas in a photograph at her high school graduation. Schaps said her daughter battled addiction for approximately one and one-half years and went to rehabilitation centers several times. Following treatment programs at Haymarket and Bridgehouse, Nicholas went to Serenity House and was clean for about eight months. She said her daughter got an apartment in Round Lake Beach and was working at a restaurant at the time of her death.

¶ 8 On December 25, Schaps was with Nicholas in Arlington Heights at a family gathering. Nicholas had just moved into her apartment approximately one week earlier and was happy about her sobriety. Around 8:30 p.m., Nicholas left Arlington Heights to go home as she had a bad cold and was not feeling well. Schaps had no other children and testified that she supported her daughter through her three treatment programs.

¶ 9 On cross-examination, Schaps testified that she saw Nicholas on her phone several times on Christmas night but did not ask her whom she was calling or speaking to. Schaps did not notice any signs of a relapse in Nicholas around that time. She testified that Nicholas had met a new boyfriend, was excited about her new apartment, and was "never doing [heroin] again because it was such a waste of time and money." Schaps knew Barraza, Edgar Lopez, and Amanda Moa, through her daughter. She knew Nicholas met them at a local Round Lake pool hall. At first, she liked them but eventually found out they were on heroin and wanted her daughter to stay away from them.

¶ 10 Nicole Barraza testified that she was currently in the custody of the Lake County Sheriff's Office because of a probation violation. She was on probation for a possession of heroin conviction. She admitted that she used heroin with Nicholas on the night of December 25 and into the early

morning hours of December 26, 2008, and that the State agreed not to prosecute her for that admission. She also admitted using heroin three or four days earlier, and that the State agreed not to prosecute her for that admission as well as for any other admissions she made during the course of her testimony. The State had not made any promises to Barraza regarding her pending probation violation case.

¶ 11 Barraza testified that Nicholas was her best friend and had been for about five years. Late in the evening of December 25, Barraza met Nicholas at Edgar Lopez's house in Round Lake Beach. Barraza drove to Lopez's house in her sister's car. When she pulled up to Lopez's house, Lopez and Nicholas were sitting in Nicholas's car. Barraza and Nicholas said hello, and Nicholas mentioned that she wanted to "get a bag," meaning a bag of heroin. This occurred sometime between 7 p.m. and 9 p.m. Barraza said that it was probably not a good idea because she knew that Nicholas was clean at the time. Barraza brushed it off, and they went to Barraza's sister's house in Fox Lake so she could return her car. That was about a 15-minute drive, plus they stayed at her sister's house for awhile visiting and opening gifts. Barraza then got into Nicholas's car with Nicholas and Lopez, and they drove back to Lopez's house. They sat in Lopez's kitchen, and the topic of getting high came up again. Barraza and Lopez again told Nicholas that it was a bad idea. Nicholas then picked up her phone and made a call. This occurred within 30 minutes of arriving at Lopez's house. After hanging up, Nicholas said that she had to wait around for defendant to be around. About 15 to 20 minutes later, Nicholas received a phone call. After that call, Barraza and Nicholas left Lopez's house to meet defendant in Grayslake. When they arrived in Grayslake, Nicholas called defendant and told him that they were outside. Defendant came out a couple of minutes later; Barraza moved to the

back seat of the car so defendant could sit in the front seat. Defendant then went inside, came back to Nicholas's car, Nicholas paid $50 to defendant, and defendant handed her a tin foil packet.

¶ 12 Barraza identified defendant and testified that she knew him for the last three years. Barraza stated that she had had hundreds of contacts with defendant to purchase heroin. She purchased heroin from him on numerous occasions by calling his phone number, meeting him at a set location, and exchanging money for the heroin. When Barraza was using, she would buy from defendant daily. She typically bought powder-form heroin, which would be packaged in tin foil packets. She would buy $40 worth of heroin at a time. Barraza would cook the heroin by putting the powder in a spoon with some water and heating it with a lighter until it liquified. The liquid could then be injected with a needle.

¶ 13 After Nicholas was finished with defendant, Barraza and Nicholas drove to the house of Korin Peters, whom Barraza was living with at the time in Round Lake Beach. Barraza wanted to retrieve some belongings because they planned to spend the night at Lopez's house. In the house, Nicholas approached Barraza and stated that she wanted to use a little bit before they went back to Lopez's house. Nicholas began to cook the heroin, and they got their needles ready. Nicholas put some of the liquified heroin into a syringe, and Barraza injected some heroin. Barraza told Nicholas to wait because it "was really strong and I—I was just kind of scared." Barraza went downstairs for some water, and Nicholas said she would wait until she came back. Barraza went back upstairs to the bathroom, closed her eyes for a minute, and "lost track of time." Barraza "nodded out," a term used to describe the effect of heroin on the user. Nicholas was still in the bedroom of Peters' house when Barraza nodded out in the bathroom. When Barraza awakened, she was sitting on the toilet and had no idea how long she had been sitting there. She went into the bedroom and observed

Nicholas laying down on the bed. Nicholas looked like she was sleeping. Barraza tried to wake her up. Barraza observed an empty needle near Nicholas.

¶ 14 Barraza moved Nicholas's body to the floor to try to resuscitate her but her efforts were not working. She carried her to the bathroom to get some water to splash on Nicholas's face, but she still would not wake up and did not appear to be breathing. Someone had come out of the other room, and Barraza told that person to call an ambulance. Barraza called 911. The 911 call was played for the jury.

¶ 15 On cross-examination, Barraza admitted she used about $10 worth of heroin four days prior to testifying. She bought the heroin on the west side of Chicago from someone on the street. She had been clean from December 25 until four days prior. She had undergone several treatment programs during that time but admitted to using four days earlier. She had previously been using about $40 worth of heroin a day. During that time, when buying from defendant, she would buy either early in the morning or after defendant got off of work. Sometimes she and Peters would drive defendant to his workplace off of Lake-Cook Road. She testified that defendant would not sell amounts less than $40 at a time. Barraza testified that she bought daily from defendant for about two years. When she first began using heroin, Barraza got her heroin from a friend named Mike. She met defendant through her friends, Gilbert and Amanda Moa. Nicholas was friends with the Moas and bought heroin with them from defendant. At one point, Nicholas was dating Gilbert. Barraza admitted that she had the needles, the bent spoon, a cup of water, and lighter in the bedroom at Peters' house because she used heroin there regularly. She admitted she injected first to see how strong the heroin was before Nicholas would inject. Barraza told Nicholas to be careful and to not use as much as she had because it was strong. Barraza had injected less than her normal usage

amount but it was still strong. Barraza was not sure how much Nicholas had injected. After Barraza had taken some of the powder for her spoon, she gave the tin foil packet back to Nicholas to use. She was not sure how much Nicholas put on the spoon or what she did with the tin foil packet. Barraza assumed Nicholas folded it up and set it down but she could not remember. Barraza admitted that she gave Nicholas a spoon but did not recall whether Nicholas used the water Barraza had in a cup or if she went to the bathroom to get water. She saw Nicholas put the heroin into the needle but did not see her inject because she had gone downstairs and then nodded out in the bathroom.

¶ 16 Barraza could not remember exactly what time it was when Nicholas called defendant but thought he called her back around 20 minutes later. She did not recall telling the police that it was around midnight and that they would not have arrived in Grayslake until after midnight.

¶ 17 Officer Kennth Lupi, an evidence technician with the Round Lake Beach police department, testified next. He took photos upon arriving in response to Barraza's 911 call. He retrieved a syringe from a trash can in the bedroom next to the bed. He also retrieved a syringe that sat on top of the trash can in the bedroom. Lupi recovered another used syringe that was inside a bag of unused syringes that was on the bed. He recovered two metal spoons, one from the floor of the bedroom, found next to the bed, and one from the top of the bed. Lupi did not find any tin foil packets. He described the house as a cluttered mess, "in total disarray."

¶ 18 At this point, defense counsel renewed its motion *in limine* to bar the State from introducing evidence that defendant sold heroin to others on a regular basis. Alternatively, defense counsel argued that if the court did allow such evidence in, a limiting instruction should be provided to instruct the jury to only consider the evidence for motive, intent, knowledge, and design. The court

allowed the evidence but agreed to provide the limiting instruction at the time of the testimony and at the close of all evidence.

¶ 19 Edgar Lopez, age 22, testified for the State that he considered Nicholas a close friend for the five or six years preceding her death and that he knew Barraza for six or seven years before Nicholas's death. Lopez began using heroin at age 15 and used for three or four years. He stopped using heroin in August 2006. Lopez had used heroin with Nicholas and Barraza in the past. Nicholas would inject the heroin when she used. On December 25, 2008, Nicholas arrived at Lopez's home around 8 or 9 p.m. He thought it was 9 p.m. Nicholas told Lopez that she had a bad night and wanted to come over and hang out with him. She also told him that she wanted to use heroin. Lopez had been clean for over two years at that point and did not want to use. He told her that he had liquor and they could have fun and hang out without using. They got in Nicholas's car to go get cigarettes when Barraza pulled up in her sister's car. Barraza asked if they would follow her to her sister's house to drop off the car so she could come back with them and hang out. Nicholas and Lopez agreed. They drove to Fox Lake so Barraza could drop off the car. They stayed at Barraza's sister's house for at least 45 minutes. Nicholas then drove them to Lopez's home. During the car ride, Nicholas and Barraza discussed wanting to use and that Nicholas had money. Lopez encouraged them to just come back to his house to drink and hang out. They arrived back at his house around 10:30 p.m. or 11 p.m. At Lopez's home, Nicholas made several phone calls and eventually she and Barraza left his house. He did not recall Nicholas receiving any phone calls before she left his home. Lopez testified that they left his house sometime between midnight and 1 a.m.

¶ 20 As Barraza and Nicholas left, Lopez told them that he knew what they were going to do and to come back to his house later so he could be sure that they were okay. They never came back to his house. Lopez waited up until about 5 a.m., attempted to call them, but no one answered his calls. When he found out about Nicholas's death, Lopez testified that his reaction was that he "completely broke down." A friend informed him of Nicholas's death and told him to get in touch with Detective Hird. Lopez called Detective Hird between 8 a.m. and 9 a.m. that morning. He called him immediately because he could not believe Nicholas was dead, and if that were true, he wanted to give the police any information he had. On cross-examination, Lopez testified that he was urging Nicholas to not use but Barraza was encouraging her to use. On redirect, Lopez clarified that Barraza did not push Nicholas but was not saying no to Nicholas's suggestion to use. Barraza was agreeable, Lopez testified,in that she said "all right if we can get some, let's get some heroin." Barraza was definitely not trying to stop Nicholas.

¶ 21 Prior to Amanda Moa's testimony, the court gave its limiting instruction to the jury that it should only consider the evidence that defendant had been involved in conduct other than that charged in the indictment for the issues of motive, design, knowledge, and *modus operandi*. Moa testified that she was currently on felony probation for a burglary charge. She admitted that she was testifying under the State's grant of immunity that it would not charge her for any admissions she made regarding her heroin usage and purchases. The State also declined to charge her with a probation violation after she used two days after meeting with the State in relation to this case. Moa was currently undergoing drug treatment pursuant to her felony probation terms. She was clean from January 2009 through June 28, when she relapsed and used heroin. She was still in treatment.

¶ 22 Moa knew defendant because she bought heroin from him. Moa started using heroin at age 15; she was now 23. She started buying heroin from defendant around age 19 or 20, during her heaviest drug using period, which was 2006 to 2007. At that time, Moa used heroin three times a day. She purchased heroin during that time from defendant. She bought tin foil packs from defendant, usually in Round Lake Beach. Moa would spend between $65 and $130 per day on heroin at that time. The smallest purchase amount of heroin that defendant would sell was $40. Moa could not remember a lot of details.

¶ 23 Detective John Hird of the Round Lake Beach police department testified that he was informed by a patrol officer of Nicholas's death. Detective Hird had the officer secure the scene and had evidence technicians called to the scene. The officer informed him of Barraza's presence, and Detective Hird ordered that she be brought in to the station for questioning. However, Barraza was taken to the hospital upon arrival at the police department because she was hysterically crying, vomiting, had slowed, slurred speech, and was agitated. After Barraza was treated, Detective Hird spoke with her at the hospital. She was still not in good condition. Barraza told him that she was at Lopez's house with Nicholas, and they went to drop off Barraza's sister's car in Fox Lake. They stayed at her sister's house for awhile and then returned to Lopez's house in Round Lake. At Lopez's house, Nicholas and Barraza agreed to try to locate some heroin. Barraza told Detective Hird that they went to the Peters' home where Barraza was staying to use heroin. Barraza "fell out" and when she woke up, Nicholas was blue and not breathing. Detective Hird then spoke to Nicholas's mother, who was with the body. Detective Hird testified that Nicholas "was on the table and they still had the mouth piece intubator coming out of her mouth and her mother was by her head caressing her hair." Schaps would not leave her daughter's body to speak to him elsewhere.

¶ 24 Lopez called Detective Hird the next morning. Lopez explained what had happened the night before. Around 10:30 a.m. on December 26, Detective Hird picked up Barraza from her sister's home, took her to the police station, and questioned her. She told him that she met Nicholas at Lopez's house around 9 p.m. The three of them then drove to Fox Lake to return Barraza's car to her sister. They stayed there for about 45 minutes and then returned to Lopez's home. Barraza stated that Nicholas wanted to get some heroin, and they decided to call "P." Barraza said that Nicholas made three calls to "P." Nicholas first called "P"; "P" returned the call sometime later; the third call was to "P" to tell him they were outside his residence waiting. Barraza described "P's" residence as an apartment in Grayslake. When "P" came out, he told Nicholas that he needed a ride to his girlfriend's house in Round Lake, and that was where they exchanged the money and heroin. Barraza stated that Nicholas gave "P" $50 and received a small tin foil package in return. Nicholas and Barraza then went to the Peters' residence to inject. Detective Hird traced the addresses for "P" to defendant.

¶ 25 Barraza told Detective Hird that Nicholas was a little bit worried about taking the heroin because she had not used in eight months. Nicholas wanted Barraza to shoot up first. Barraza injected first and told Nicholas that it was really strong. Barraza saw Nicholas put some heroin on the spoon with some water, and Barraza told her that she did not need that much. Then Barraza stated that she "fell out." When Barraza awoke, Nicholas was half on the bed, blue in the face, not breathing, with a needle next to her arm. She tried to revive her, dragged her to the bathroom to put water on her face, and tried to perform CPR. She then called 911.

¶ 26 Detective Hird testified that the drive from Lopez's residence to Barraza's sister's residence typically took about 15 minutes. He testified that the drive from Lopez's residence to defendant's

residence in Grayslake also took about 15 minutes. He testified that the drive from defendant's Grayslake apartment to the home of his girlfriend, Theresa Hamilton, took about 15 minutes. Detective Hird testified that the drive from Hamilton's residence to Peters' residence took a couple of minutes.

¶ 27 Terrence Barrett testified that he was Nicholas's probation officer in relation to Nicholas's class A misdemeanor case. As part of the probation, Nicholas attended a rehabilitation program on January 7, 2008. She briefly relapsed in March and was terminated from the program. She then completed in-patient treatment for the next several months. Her last urinalysis drop was performed on December 17, 2008, and was clean. Barrett testified that Nicholas completed treatment on December 5 and was due to complete supervision in February. He testified that relapses are expected during recovery and often occur on holidays or other special occasions.

¶ 28 The parties stipulated to the following facts, which were read into evidence. On December 26, 2008, paramedics responded to a call regarding a nonresponsive female. They arrived at 1:20 a.m., finding Nicholas lying on the bathroom floor with no vital signs. Nicholas was brought to the emergency room where she was pronounced dead. An autopsy was performed and photos were taken of the body, which were admitted into evidence. Through toxicology evidence, it was determined that the cause of her death was a heroin overdose and that she ingested the heroin shortly before her death. A spoon taken from the scene tested positive for the presence of heroin. Additionally, the parties stipulated to phone record evidence, which contained the phone records for Nicholas and defendant. The parties also stipulated to cell phone records, which showed Nicholas called defendant at 9:12 p.m., 10:19 p.m., 11:10 p.m., and 11:36 p.m. on December 25. Nicholas's

cell phone received a call from defendant's phone at 11:22 p.m. Additionally, Dr. Manual Montez testified that his autopsy revealed that Nicholas's cause of death was heroin intoxication.

¶ 29 The defense first called Fiona Jones, defendant's sister, to testify that she lived in Zion and on Christmas Day 2008, defendant arrived at her house around 4:30 p.m. Defendant arrived with his son, Theresa Hamilton, and Hamilton's two kids. Hamilton and her kids stayed only about 15 minutes and left as she was just dropping off defendant and his son. Defendant's ex-wife arrived with their daughter, and defendant left with them around 9:45 p.m. They went to see defendant's grandmother, who also lived in Zion. Jones testified that defendant was living with Hamilton since August or September 2008, after he had an accident at work. Prior to that, he lived in Grayslake. While at her house, defendant was on his phone several times.

¶ 30 On cross-examination, Jones admitted that she did not make a statement until after defendant was arrested in January 2009, after he retained counsel. She wrote a statement in February. She admitted that she did not go to the police station immediately after defendant was arrested to provide this information. She also did not go to the State's Attorney Office. Jones explained that while she knew what her brother was charged with, she did not know all of the underlying facts and did not know she might be a witness.

¶ 31 Tamika Terrell, a friend of Jones, testified that she knew Jones and defendant since high school. Defendant arrived at Jones's house around 4:30 p.m. on Christmas Day 2008. He left around 9:45 p.m. or 10 p.m. with his ex-wife and his children to go to his grandmother's house. She did not see him after that. She acknowledged that defendant used his phone several times. On cross-examination, Terrell admitted that she did not go to the police or the State's Attorney Office after defendant was arrested to provide any information regarding defendant's actions on Christmas.

¶ 32 Fallon Coleman testified that she went to the home of Jones, her cousin, on Christmas Day 2008 around 6 p.m. Defendant was already there. Defendant' s ex-wife arrived with the kids later that night. Eventually, defendant, his ex-wife, and their kids left to go to their grandmother's house. Coleman also left to go visit her grandmother and arrived there sometime around 11:20 p.m. Her grandmother lived about 10 minutes away from Jones's house in Zion. Defendant was there when she arrived. They all spoke and visited with each other for a short time. Defendant left with his brother and sister-in-law, Eiko and Lisa, around 11:35 p.m. Coleman admitted on cross-examination that she did not come forward with this information after defendant was arrested. She only spoke to defense counsel a few months prior to trial. She explained that she did not know the underlying facts surrounding defendant's arrest.

¶ 33 Robin Valerie Coleman, Fallon's mother and defendant's aunt, testified consistently with Fallon, but stated she arrived at her mother's home around 11 p.m. and that defendant left with Eiko and Lisa about 15 minutes later.

¶ 34 Lisa Jones, defendant's sister-in-law, testified that she arrived at Fiona Jones's house around 5:30 p.m. on Christmas Day 2008. Defendant arrived after her. Lisa left with Eiko around 9 p.m. to go to their grandmother's house. Defendant arrived around 9: 45 p.m. Lisa, Eiko, and defendant left the grandmother's home in Zion around 11:30 p.m., and dropped defendant off at Hamilton's home in Round Lake around midnight. On cross-examination, Lisa acknowledged that she did not speak to police or the State's Attorney until his lawyer spoke to her months after defendant's arrest. She knew he was arrested in January.

¶ 35 Alicia Gordon, a friend of defendant's, testified that at 11:57 p.m. on Christmas Day 2008, she called defendant to ask him if he was home because she wanted to stop by. Defendant was at

Hamilton's home in Round Lake, so she drove there, which took about five minutes. When she arrived, she saw Eiko and Lisa pulling out of the driveway, and defendant was at the screen door. Gordon asked what he was drinking, and then she drove to the liquor store. As she was leaving for the store, Hamilton pulled up and they briefly spoke. Gordon then went to the store and went to her home. Defendant then came to her house around 12:30 a.m. After that, Hamilton came with her nieces and nephews. Gordon testified that in March 2008, Detective Hird came to her house. Gordon thought he was there regarding her fiance's death because he was the investigator on that case. When Detective Hird began asking her questions about defendant, Gordon told him that she did not have time to talk to him. She then told him that defendant was at her house between 12 and 12:30. Hamilton was present during the conversation and told Detective Hird that they did not have to answer his questions and that they were at Gordon's house at 11 or 11:30 p.m. Gordon denied ever changing her statement that defendant was at her house between 12 and 12:30 a.m. She denied telling Detective Hird that defendant was at her house between 11 p.m. and 12 a.m. and stated that his police report was incorrect.

¶ 36 Theresa Hamilton testified that she lived on Bonnie Brook in Round Lake Beach. Defendant was her fiancee and was living with her at Christmastime 2008. On Christmas Day 2008, she dropped defendant and his son off at Fiona Jones's house. When she arrived home that night around midnight, defendant and Gordon were speaking in the driveway. Gordon was leaving. Hamilton then drove defendant to Gordon's house, then went home to retrieve the kids because they would not all fit in her car, and drove back to Gordon's. They were at Gordon's house until about 5:30 a.m. Hamilton acknowledged that she was at Gordon's home when Detective Hird came over to question Gordon. Hamilton overheard the questioning and said to Detective Hird that the police were trying

to frame defendant, and he had to leave. She also told Detective Hird they were at Gordon's house at 11 p.m. not midnight. Hamilton said that was what she first thought but then checked her phone records and realized they did not get there until later. On cross-examination, Hamilton admitted that she never went to the jail to see defendant or speak to anyone with the police or State's Attorney's Office. She also admitted that defendant stayed in Grayslake at times in addition to her home. She admitted that because she had children, she would not want drugs kept in her home.

¶ 37 On rebuttal, the State called Christine Hecker, a probation officer, who indicated that when she interviewed defendant in January 2009, he informed her that he was living in Round Lake Beach with Hamilton for the last three months. He informed her that his previous residence was in Grayslake. Detective Hird testified on rebuttal that when he went to question Gordon and she informed him that defendant arrived at her house between 11 p.m. and midnight, Hamilton became belligerent but did not provide any time frame.

¶ 38 During closing arguments, the State made the following remarks. The State discussed that the case was about addiction, that heroin addiction was a powerful addiction, that Nicholas "tried and she tried, and she couldn't get off of it." Barraza and Moa also could not get off and were still trying to kick the habit. The State argued "In order to break an addiction–in order to have an addiction, you have to have a supplier," and defendant was the supplier for Nicholas, Barraza, and Moa. The State mentioned that Nicholas graduated from high school, was going to the College of Lake County, got an apartment, and had been in and out of treatment, trying to fight her addiction. The State also argued that there was no evidence that Barraza did anything wrong, "no evidence [Barraza] did anything wrong criminally," but only evidence that she was a bad friend who did not try to stop Nicholas from getting heroin that night. The State extensively argued the phone call

records to establish that Nicholas contacted defendant to purchase heroin and the testimony of Lopez and Barraza about how and when they left Lopez's house to go purchase the heroin, and Barraza's testimony as to how they brought the heroin back to Peters' house and shot up. The State argued it had sustained its burden in proving the elements of drug-induced homicide. The State then stated "You may not like the fact that Danny Nicholas was addicted to heroin and she went out and she asked for it, she got it, she doesn't deserve to die." But, the State argued, it did not have to prove that; it only had to prove that defendant knowingly delivered it to her, and that she took it and she died. The State told the jury to look at all the evidence and "let's close [defendant] down, let's close that shop of 101 phone calls. Let's stop [defendant] from selling heroin."

¶ 39 Defense counsel argued that the phone calls did not prove that Nicholas purchased heroin and that Barraza and Lopez testified that they left Lopez's around midnight and they were not in Grayslake at the time of the 11:36 p.m. call to defendant. Defense counsel argued that Barraza already had drugs at Peters' house, where the syringes and drug paraphernalia were located. No tin foil packet was found at Peters' because they did not buy a tin foil packet from defendant. Defense counsel attacked the credibility of Detective Hird, his failure to investigate all avenues, and his police report conflicting with the defense's witnesses' account.

¶ 40 On rebuttal, the State made the following remarks. The State argued that the defense was "trying to impugn the integrity of John Hird who has spent the last decade of his life dedicated to law enforcement. He worked his way up the ranks, working 9 to 5; on the night that this happened he was awoken at 1:30 in the morning, he cleaned himself up, he got dressed and he went to the hospital" to deal with Barraza and Nicholas's grieving mother. Contrary to the defense's accusation that Hird did not investigate all the evidence, the State argued that he interviewed Barraza, Lopez,

and drove all around Zion, Waukegan, and North Chicago to try to interview the defense witnesses, only to encounter Hamilton's belligerence. "Detective Hird's only mission is what his mission is every day and that is to find the truth. That is our only mission to find the truth," the State argued. The State continued:

¶ 41 "There is another side of this that tried to hide it, that tried to tell people not to bring forward truth and evidence, that told people not to talk to the police. To question Detective John Hird's dedication, hard work and integrity is patently absurd. It is so patently absurd, that it wouldn't be worth mentioning if it wasn't so offensive to our common sense."

¶ 42 The State argued that the defense presented no evidence that the Peters' residence had drugs present to substantiate its claim that Barraza and Nicholas went back to Peters' house and did drugs that were already present. The State reiterated the evidence that they bought the heroin from defendant who was in the business of selling heroin to addicts. The State ended with these remarks:

¶ 43 "What is a human life worth? What was Danielle Nicholas' life worth? We heard from Edgar Lopez, Nicole Barraza and as they claim to be Danny's friends, and we can doubt whether or not they were truly her friends at all, they definitely failed her that night, but at the end of the day when Danny died, if you ask them what her life was worth they will tell you they lost a friend.

You heard from Michelle, Danielle's mother, maybe she could have done more to help her daughter out, but at the end of the day when Danny died, if you ask her what Danny's life was worth, she will tell you she had to bury her only daughter, her only child. She would tell you that her life was priceless. How much was Danny's life worth? To this defendant, 50 bucks."

¶ 44 The jury returned a guilty verdict. On November 24, 2009, the matter proceeded to sentencing. Defendant represented himself at the sentencing hearing. In aggravation, the State presented the victim impact statement of Schaps. Detective Hird testified that he spoke to several people who told him they regularly purchased heroin from defendant, including Barraza, Amanda Moa, Gilbert Moa, Edgar Lopez, Melissa Moriarty, Korin Peters, and Michael Parker. These witnesses expressed fear in testifying or helping with the investigation against defendant, according to Detective Hird. Barraza's sister also told Detective Hird that defendant threatened Barraza while they were both being held in the Lake County jail.

¶ 45 Defendant called Theresa Hamilton in mitigation. She knew defendant for five years and knew him to be a hardworking man who always held a job and took care of his kids and her two kids. When defendant got off of work, he would watch the news, help with the kids, and help with chores around the house. With defendant in jail, Hamilton testified that things have been hard because he is no longer able to help with bills and the kids. On cross-examination, Hamilton testified that she did not know defendant in 1995 when he was convicted of an unlawful weapon offense. She also did not know him in 1996 when he and his brother Eiko were convicted of armed robbery and home invasion in which he duct-taped people and hit them over the head with a hammer. She did not know defendant when he was serving 16 years for that crime. Hamilton also did not know defendant in 2004, when he was on parole. She did know him in 2005, when he was picked up for driving while his license was revoked while on parole and sent back to prison for two years. Hamilton also admitted knowing defendant in 2007 when he was convicted of a felony DUI in Lake County.

¶ 46 Diane Hamilton, Theresa's mother, testified that she knew defendant for five years and saw him treat her daughter well. He was respectful and good to her children too. Diane was unaware of any of the prior convictions besides the DUI.

¶ 47 Fiona Jones, defendant's younger sister, testified that she had a good relationship with defendant and he got along well with the whole family. She knew her brother to be a good father, even when he was in prison, he wrote and communicated with the kids. Jones admitted she could not call her brother for help when she was arrested and charged with unlawful possession of a controlled substance because he was in jail at the time. She also was charged with resisting arrest and driving while her license was suspended.

¶ 48 Mary Ann Hollins, defendant's mother, testified that defendant was a responsible son who always tried to provide for his children.

¶ 49 The State argued that because of defendant's history, the range for this offense was six to 60 years' imprisonment. It asked for 50 years' imprisonment based on the evidence and to assist in the deterrence of the heroin trade. Defendant argued that he was innocent and wanted to go home. The trial court considered the evidence in aggravation and mitigation, including the financial impact of defendant's incarceration on his family. It also considered the presentencing hearing investigation report. The court commented:

¶ 50 "Also, in reviewing the factors in aggravation, the key factors here are the fact that the defendant has a substantial criminal history and that serious harm was caused to the victim in this case and that the defendant was on probation at the time that these offenses took place.

* * *

> The Court has considered the State's request for an extended term. I have carefully reviewed the law regarding that case, and at this time I am not going to sentence you to an extended term in the Department of Corrections.
>
> However, because of your history and the Court's feeling that you are dangerous and have forfeited your right to walk amongst other free people in a society, I am going to sentence you to 30 years in the Illinois Department of Corrections with a three-year mandatory supervised release term, credit for time served here in the department — in the Lake County Jail."

¶ 51 On January 15, 2010, the trial court denied defendant's *pro se* motion for reconsideration. He argued his sentence was excessive and the State did not prove he was a drug dealer or sold drugs to Nicholas. The trial court commented that as part of the statutory considerations for aggravation, it had to take into account defendant's prior criminal history as well as the appropriate sentence for deterring others. It stated "You weren't a first offender. There was a death involved here. I did take into consideration those other issues, and that's why I rendered the sentence that I did."

¶ 52 Defendant timely appealed.

¶ 53 II. ANALYSIS

¶ 54 On appeal, defendant raises several evidentiary issues, sufficiency of the evidence, ineffective assistance of counsel, and an error in sentencing.

¶ 55 A. Evidentiary Issues

¶ 56 We first address defendant's evidentiary issues, beginning with the introduction of victim-impact evidence during trial. Regarding victim-impact evidence, defendant complains of Schaps' testimony that her daughter was a "very great natured person" who loved drawing, photography and

design, and Lopez's testimony that he "completely broke down" upon hearing of Nicholas's death. He also complains that Detective Hird was allowed to testify that Schaps was by Nicholas's side, caressing her hair when he attempted to speak to her. Similarly, defendant argues that the prosecutor made remarks in opening and closing statements that were prejudicial in nature because they referenced Nicholas's life. Defendant argues that the prejudicial nature of this evidence warrants reversal because such evidence was all irrelevant to defendant's guilt and only introduced only to inflame the jury's emotions because it did not matter if Nicholas was a Nobel Prize winner or a heroin addict for 50 years. Defendant acknowledges that no objections were made during trial but argues that we should review under the plain-error doctrine.

¶ 57 Plain-error analysis begins by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). If error is found, the reviewing court then proceeds to consider whether either of the two prongs of the plain-error doctrine have been satisfied. *Id.* Under either prong, the defendant carries the burden of persuasion. *Id.* The two prongs of the plain-error doctrine allow a reviewing court to consider an unpreserved error when either (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id. at 189.*

¶ 58 A defendant's guilt must be established by legal and competent evidence. *People v. Hope*, 116 Ill. 2d 265, 275 (1986). The supreme court has condemned the admission of evidence that the deceased left a spouse and a family because such evidence has no relationship to the guilt or innocence of the accused but normally serves to prejudice the defendant in the eyes of the jury. *Id.*

However, every mention of a deceased's family does not *per se* entitle a defendant to a new trial. *Id.* at 276. Depending upon how the evidence is introduced, statements may be harmless and this is particularly true when the death penalty is not imposed. *Id.* The supreme court has stated that testimony regarding the deceased's family members that is not elicited incidentally but rather is presented in such a manner as to cause the jury to believe it is material is highly prejudicial. *Hope*, 116 Ill. 2d at 275.

¶ 59 In *People v. Adams,* 109 Ill. 2d 102, 119 (1985), the supreme court did not find that the prosecutor erred when he commented on the victim's qualities and life, such as that he was "meticulous," and an "honest businessman," and that "his wife loved him enough to call him." The references were taken from testimony and related to the facts of the case. *Id.* Further, the case was distinguishable from *People v. Bernette*, 30 Ill. 2d 359, 370-73 (1964), which involved excessive reference through direct testimony and argument to the murder victim's young children. In *Hope*, the court found that the defendant was entitled to a new trial after the prosecutor allowed the murder victim's widow to testify regarding her deceased husband and the three children he left behind. *Hope*, 116 Ill. 2d at 276-77. The prosecutor did not limit his questions pertaining to the victim's family to the widow but continued by asking another State's witness to identify the widow and children in a photograph with the victim. *Id.* at 277. The photograph was also sent back to the jury room, and the prosecutor commented during closing argument that "Little did [the victim] know that when he said good-bye to his wife, that would be the last time he saw her alive as he went to work." *Id.* The *Hope* court determined that the evidence concerning the decedent's family was not brought to the jury's attention *incidentally*, rather it was presented in a series of statements and questions in such a method as to permit the jury to believe it material. *Id.* at 278.; see also *People v. Blue*, 189

Ill. 2d 99 (2000) (reversing where the State displayed bloodied police officer victim's uniform on a headless mannequin through proceedings).

¶ 60 We find the facts of this case distinguishable from *Blue* and *Hope*, which defendant relies upon, where both of those cases involved specifically inflammatory references and involved death penalties. In this case, defendant has failed to persuade us that error was made in allowing Schaps to testify about her daughter's interests, her addiction, her friends, and her activities on the night of her death. Schaps's testimony related to her daughter's characteristics and interests as a child was limited, and the fact that she graduated from high school around the time she began using heroin was incidental. Further, Schaps's testimony predominantly served to help the State establish its timeline of when Nicholas left Arlington Heights on Christmas Day 2008 and the fact that she had been sober for several months at that time. The testimony about her recent sobriety also assisted in establishing a reason why Nicholas would likely not have had heroin with her that night and would have had to go purchase some. Regarding the State's question to Lopez about what his reaction was to Nicholas's death, his answer that he "completely broke down" was incidental and limited to those three words. The testimony that defendant complains of by Schaps and Lopez was incidental, and the State did not present the testimony as if it proved defendant guilty or in such a way that the jury would believe the testimony was material. During the trial and during its arguments, the State made repeated reference to the elements necessary to prove its case, and it did not argue that Nicholas's death caused Lopez to "break down" or affected Schaps in any detail. Thus, we do not agree with defendant that the trial court erred in allowing this "victim-impact" evidence.

¶ 61 The prosecutor's comments during opening statements reflected on the fact that Nicholas was struggling with addiction which, within five hours of spending Christmas with family, led to her

death. In closing, the State argued again that Nicholas battled addiction and lost and that her supplier was defendant. These comments were not prejudicial but drawn from the facts. The character and scope of opening and closing arguments are left to the trial court's discretion, and prosecutors are afforded wide latitude in their closing arguments. *People v. Allen*, 401 Ill. App. 3d 840, 855 (2010). Prosecutors may comment on the relevant evidence as well as any fair and reasonable inferences therefrom. *Id.* A prosecutor's remarks will not warrant a new trial unless they are so prejudicial to the defendant that, absent those remarks, there is doubt as to whether the jury would have rendered a guilty verdict. *Id.* Here, the prosecutor's opening and closing statements focused heavily on the phone call records and the testimony of Lopez and Barraza to establish that after Nicholas left her family's home in Arlington Heights, she expressed a desire to use, made phone calls, left with Barraza to meet defendant, paid defendant $50 in exchange for a tin foil packet, and then went to Peters' home to inject with Barraza. See *People v. Brazziel*, 406 Ill. App. 3d 412, 432 (2010) (we review prosecutor's comments in their entirety, and we view comments in context). The comments about Nicholas's battle with addiction and that her death, while probably more costly to her friends and family, were in fact caused by a $50 purchase from defendant's heroin dealing business. The opening comment about this case being about a mother's worst nightmare does not quite parallel the comments made in *Blue*, which were much more inflammatory given the rest of the facts of that case and since it involved the death penalty. We do not agree with defendant that the statements made by the State in opening or closing statements were error as the comments were based on facts in evidence or reasonable inferences drawn therefrom.

¶ 62 Because we find no error was made in the complained-of testimony and prosecutorial remarks, we need not go further with a plain-error analysis. Even if we did find error as to any of

the complained-of comments, we would not find that the evidence was closely balanced, as we discuss the sufficiency of the evidence below, nor would we find that the error was so egregious that it infected the integrity of the process.

¶ 63 In addition to the references to victim-impact evidence in the prosecutor's opening and closing statements, defendant also complains of prosecutorial misconduct in its rebuttal argument. In rebuttal, the State remarked that Detective Hird's only mission was to find the truth and the other side tried to tell people not to talk to the police. The State argues that the error was forfeited because defendant never objected to the comments now complained of, and alternatively, the defense invited the statements by arguing that Detective Hird failed to properly investigate. We agree with the State that defendant forfeited this argument by failing to object and by failing to establish that the plain error rule applies in his brief on this point. Regardless, we disagree with defendant that there was any error in the State's comments given that in its closing, the defense argued that "it is unfortunate that I think that Detective Hird didn't follow-up on the investigation," and when "a known heroin addict, gives him a name and there is a phone number, case closed, he has got his man." Defense counsel went on to argue that Nicholas's boyfriend called ten minutes before Barraza claimed that they were buying drugs, but Detective Hird failed to follow up and "a little investigation might have gone a long way to clarifying some of these questions" but Detective Hird "didn't, he stopped." Defense counsel also questioned the accuracy of Detective Hird's report regarding his attempt to interview Gordon. When reviewing a claim of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *People v. Spicer*, 379 Ill. App. 3d 441, 463 (2008). For a prosecutor's closing remarks to constitute error, they must fall outside the wide latitude

accorded to a prosecutor making closing arguments. *Id.* In closing, the prosecutor may comment on the evidence and any, fair reasonable inferences it yields. *Id.* The defendant cannot object to comments made in rebuttal when defense counsel invited the alleged error. *Id.* In this case, defense counsel argued that Detective Hird failed to investigate the facts of this case and did not accurately account information from his interview with Gordon, attacking his credibility as a witness. The prosecutor's remarks in rebuttal, when taken in context to the entirety of its closing and rebuttal arguments, did not rise to the level of the "us v. them" mentality that defendant argues. Rather, the State clearly stated it was responding to defense counsel's attempt to "impugn the integrity" of its witness and in so doing, the State recounted some of the testimony adduced at trial, including the fact that Hamilton threw Detective Hird out of Gordon's home and told her not to speak to him. Therefore, we do not agree with defendant that there was error in the State's rebuttal remarks.

¶ 64 Defendant's next evidentiary argument is that the trial court erred in allowing evidence that he sold heroin to others. The State contends the evidence of defendant's other heroin sales was properly admitted to show motive, a common design, and *modus operandi*. Generally, evidence showing that a defendant committed prior bad acts is improper where its purpose is to demonstrate the defendant's propensity to commit crime. *People v. Davis*, 248 Ill. App. 3d 886, 891 (1993). Such evidence may be admissible, however, when it is relevant to show motive, intent, identity, absence of mistake or accident, *modus operandi*, or the existence of a common plan or design. *People v. Spyres*, 359 Ill. App. 3d 1108, 1112 (2005). Other-crimes evidence is admissible to prove any material fact other than propensity that is relevant to the case. *Id.* Even when relevant for a permissible purpose, the trial court may exclude other-crimes evidence if its prejudicial effect substantially outweighs its probative value. *Id.* The admissibility of other-crimes evidence is left

to the trial court's sound discretion, and we will not disturb that decision absent an abuse of that discretion. *Spyres*, 359 Ill. App. 3d at 1113. An abuse of discretion occurs when the decision made by the trial court was arbitrary, fanciful or unreasonable or no reasonable person would reach the same conclusion. *Id.*

¶ 65 Evidence of common design proves the existence of a larger criminal scheme of which the crime charged is only one element. *Id.* at 1112. The several crimes must have some degree of identity between the facts of the crime charged and those of the other offense in which the defendant was involved. *Id.* at 1113. *Modus operandi* refers to a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person. *People v. Rose*, 198 Ill. App. 3d 1, 8 (1990). If evidence of other crimes is offered to prove *modus operandi*, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if the defendant committed those acts, he may have committed the act at issue. *Id.* We cannot find that the trial court abused its discretion in admitting the other-crimes evidence in this case under either common design or *modus operandi.* Here, the evidence of defendant selling heroin was not only relevant and an element to the crime of drug-induced homicide, the State presented the evidence of drug sales through friends of Nicholas, making it all the more likely that Nicholas also used defendant as her heroin provider. Barraza and Moa both testified that they purchased heroin from defendant in the same manner that Barraza described Nicholas's purchase–they called defendant, met defendant near his home in Grayslake or in Round Lake Beach, exchanged at least $40 for a tin foil packet of heroin, and then sometimes drove defendant someplace, such as his workplace or near Hamilton's home. The factual similarities of the drug sales to Moa and Barraza, including the location of the sales, the buyers being within the same circle of friends, and the type of drug

purchased and pricing, all support that defendant sold heroin as part of a common design or participated in a pattern of criminal behavior, *modus operandi*, such that it was likely he sold the heroin to Nicholas. Since the evidence of other sales was limited to sales within the circle of Nicholas's friends, we cannot say that the evidence was more prejudicial than probative of whether defendant sold to Nicholas. Thus, we agree with the State that the other-crimes evidence was properly admitted under either common design or *modus operandi,* and we need not even address whether the evidence was admissible to show motive.

¶ 66 B. Sufficiency of the Evidence

¶ 67 Defendant next argues the evidence was insufficient to sustain his conviction. We disagree. When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). The critical inquiry on review of the sufficiency of the evidence is to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.* This standard of review applies regardless of whether the evidence is direct or circumstantial. *Id.* The reviewing court will not retry a defendant when considering the sufficiency of the evidence. *Id.* The trier of fact is best equipped to judge the credibility of witnesses, and due deference must be given to the fact that the trial court and jury saw and heard the witnesses. *Id.* "Accordingly, a jury's findings concerning credibility are entitled to great weight." *Id.* However, despite this deference, a fact finder's decision is neither conclusive nor binding, and a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt. *Id.*

¶ 68 Defendant argues that his conviction was based solely on Barraza's testimony that Nicholas purchased heroin from him and that her testimony carried inherent weaknesses since she was an admitted heroin addict and an accomplice. We reject defendant's argument as it is the trier of fact's duty to determine the credibility of witnesses and resolve any conflicts in testimony. Here, the jury was adequately informed that Nicholas was a heroin addict and injected heroin just before Nicholas. The jury could still believe that Barraza was truthful in her testimony that Nicholas called defendant, paid him $50 for the heroin, and then injected heroin after she injected and nodded out. The jury had the phone record evidence which corroborated Barraza's testimony, and Lopez also testified consistently that Nicholas was wanting to purchase heroin and had the money to do so. The jury also could have placed more weight on the State's witnesses than the alibi witnesses that defendant put on the stand as they were family members who did not cooperate with police or provide the alibi information until they went to see defense counsel after defendant's arrest. Further, there was no evidence that was presented that substantiated the defense theory that there were drugs already present in Peters' house and that Barraza supplied Nicholas the drugs. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime of drug-induced homicide were proven beyond a reasonable doubt.

¶ 69 C. Ineffective Assistance of Counsel

¶ 70 Defendant next argues that he was denied effective assistance of counsel when his trial counsel failed to tender an accomplice instruction with respect to Barraza. According to defendant, had counsel tendered the instruction, the trial court "would have been obliged to give it." The failure to offer the accomplice instruction was "obviously prejudicial," defendant argues, relying on *People v. Wheeler*, 401 Ill. App. 3d 304 (2010) and *People v. Campbell*, 275 Ill. App. 3d 993 (1995).

Further, defendant argues that not only was the jury not instructed that Barraza was an accomplice, the prosecutor told the jury in closing that it had no evidence that Barraza did anything wrong. Thus, defendant requests a new trial. The State argues that there was no evidence to support defendant's theory that Barraza delivered the heroin to Nicholas or aided and abetted defendant in delivering the heroin to Nicholas. We agree with the State.

¶ 71 Claims of ineffective assistance of counsel are judged under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which provided a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319 (2011). Counsel's performance is measured by an objective standard of competence under prevailing professional norms. *Id.* In order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Id.* Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *Id.*

¶ 72 The accomplice instruction that defendant argues should have been provided states:

¶ 73 "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17).

¶ 74 If a witness denies involvement but admits presence at the scene and could have been indicted either as a principal or under a theory of accountability, the defendant is entitled to the

accomplice-witness instruction. *Campbell*, 275 Ill. App. 3d at 997. We reject defendant's conclusory assertion that the trial court would have been obligated to give IPI Criminal 4th No. 3.17 because no facts were adduced to suggest that Barraza was involved in the commission of the crime *with defendant*. Defendant twists the facts of the case to argue that Barraza admitted that she aided and abetted the drug-induced homicide of Nicholas by accompanying her on the trip to buy heroin from defendant. To warrant the accomplice instruction, Barraza would have had to admit that she was involved with defendant's delivery of the heroin to Nicholas. Contrary to defendant's assertions, Barraza only admitted to accompanying Nicholas on her purchase and sharing in the use of Nicholas's heroin.

¶ 75 Defendant relies on *Wheeler* for support that the failure to give the accomplice instruction was error but in *Wheeler* there was evidence that the witness drove the defendant to the scene of a murder, was present during the shooting, drove the defendant away from the scene, and avoided the police after the commission of the crime. *Wheeler*, 401 Ill. App. 3d 304, 313 (2010). Further, unlike in *Wheeler*, even if the failure to give the instruction in this case was error, the State had phone records that corroborated Barraza's information that Nicholas bought drugs from defendant and other witnesses from the same circle of friends that identified defendant as their dealer. *Campbell* is also distinguishable in that the two witnesses admitted that they were given deals from the State in order to have reduced charges or for dismissal of charges filed against them for the same offense as the defendant. *Campbell*, 275 Ill. App. 3d at 996-97. In this case, Barraza was never charged or threatened to be charged with the crime of drug-induced homicide or any other delivery of heroin offense. Rather, the State agreed not to charge her with any offense related to her use or possession of heroin, and that fact was brought forth during her testimony. Defense counsel attacked Barraza's

credibility upon cross-examination regarding her addiction, the fact she did not discourage Nicholas, the possibility that drugs were already present in Peters' house, and that Barraza went to get the spoon and provided the water necessary for Nicholas to cook the heroin. However, there was simply no evidence to suggest that Barraza delivered heroin to Nicholas or somehow assisted defendant in the delivery of heroin to Nicholas. The passing of the tin foil packet from defendant to Nicholas to Barraza, to inject first, and back to Nicholas does not constitute "delivery" of heroin under the meaning of the statute. In *Boand*, the court stated that "delivery" is defined as the actual, constructive, or attempted transfer of a controlled substance, with or without consideration, whether or not there is an agency relationship. *People v. Boand*, 362 Ill. App. 3d 106, 141 (2005). Nicholas, in this case, did not relinquish possession when she allowed Barraza to take some of the heroin to cook and inject first. Accordingly, defendant's argument that Barraza was an accomplice fails under the facts of this case and thus his ineffective assistance of counsel claim also fails..

¶ 76 D. Sentencing

¶ 77 Finally, defendant argues that the trial court relied upon the death of Nicholas, which was an element of the offense, as a factor in aggravation when it stated that one of the factors was the "serious harm" caused to the victim. Defendant argues that the trial court's comment in denying his *pro se* motion for reconsideration also proves the trial court improperly relied on an element of the offense when it stated, "You weren't a first offender. There was a death involved here. I did take into consideration those other issues, and that's why I rendered the sentence that I did." Defendant argues that forfeiture should not apply here where he was *pro se* at sentencing and under *People v. Sprinkle*, 27 Ill. 2d 398 (1963), which relaxed the forfeiture rule where it was obvious an objection would have fallen upon deaf ears. The State argues that the record does not support defendant's

assertion and that forfeiture should apply regardless of whether defendant was *pro se*. The State concedes that a factor inherent in the offense should not be considered in aggravation at sentencing. *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981). However, the State argues that the comments that defendant complains of were made in passing and do not reflect that the trial court considered the death of Nicholas as an aggravating factor even though the State included it as one of its factors in its arguments at the hearing. We agree with the State.

¶ 78 The imposition of sentence is within the trial court's discretion and its sentence will not be altered by a reviewing court unless the trial court has abused its discretion. *People v. Jordan*, 247 Ill. App. 3d 75, 94 (1993). Further, a statute within the sentencing range is presumed correct. *Id.* However, a court abuses its discretion when it considers in aggravation a fact which is implicit in the offense for which the defendant is being sentenced. *Id.* In *Jordan*, the sentencing court stated that it considered the mitigating factors, such as the defendant's lack of a prior criminal history, his age and employment experience. *Id.* at 95. In aggravation, the court stated it found the evidence presented at the guilt phase and that it had a duty to impose a sentence to deter others. *Id.* The court also stated that it:

¶ 79 " '[took] into consideration the fact that the Defendant's action along with the actions of others were actions that clearly caused a great loss. It caused the death of an individual, the victim in this particular case.' " *Id.*

¶ 80 The State in *Jordan* argued that the trial court's comment reflected the manner and brutality of the killing, which it could do under *People v. Saldivar*, 113 Ill. 2d 400 (1981), and not the end result as a factor. The appellate court rejected the State's argument, finding that "the court did not make even the most cursory mention of the manner or brutality of the homicide" but instead

"touched only on the fact that defendant killed another human." *Jordan*, 247 Ill. App. 3d at 95. The *Jordan* court acknowledged that not every mention of an impermissible factor necessitates remanding for a new hearing but stated that the "key inquiry is whether the court attached any meaningful significance to the impermissible factor while deciding the extent of the appropriate sentence." *Id.* The court held that it could not affirm the sentence if it could not ascertain from the record the weight given the improper factor, and in its case the trial judge made only passing reference to the improper factor. *Id.* Because its trial judge included other factors in addition to its passing reference to the improper factor and sentenced the defendant to a term well within the range, the appellate court did not remand. *Id.* at 96.

¶ 81 Like in *Jordan*, the trial court in this case made the reference to Nicholas's death in passing, while commenting on several other factors, including defendant's employment history and applaudable parenting skills and his extensive criminal history. The court also expressed that it did not believe defendant should receive an extended term and sentenced defendant to 30 years' imprisonment when the range was six to 60 years' imprisonment. The fact that the court mentioned that there was death involved does not *per se* require a new sentencing hearing. Based on the record, we may affirm the sentence where it is ascertainable that the trial court did not place great emphasis on an improper factor and where the sentence is within the range appropriate for the offense. Based on the record in this case, the trial court did not inappropriately place weight on an element of the offense as an aggravating factor, and we therefore affirm the sentence imposed.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 84 Affirmed.