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SIXTH DIVISION
March 25, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|-------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS |) | Appeal from the Circuit Court |
| |) | of Cook County |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | 08 CR 5870 |
| |) | |
| GEORGE RANDLE, |) | Honorable |
| |) | Neera Lall Walsh, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

ORDER

HELD: (1) the State proved defendant guilty beyond a reasonable doubt where he had actual possession of two packets of heroin; (2) the trial court properly denied defense counsel's request for a continuance during trial to call a witness that the defense had not subpoenaed and defense counsel was not ineffective for failing to subpoena the witness; (3) defendant forfeited his challenge as to the admission of prior convictions under *People v. Montgomery*, 47 Ill. 2d 510 (1971); and (4) the trial court did not abuse its discretion in sentencing defendant to an extended-term sentence based on defendant's extensive criminal background.

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Following a bench trial, defendant George Randle was convicted of one count of possession of a controlled substance. Subsequently, the trial court sentenced defendant to an extended-term sentence of six years based on defendant's multiple prior felony convictions. Defendant appeals, arguing that: (1) the State failed to prove him guilty of possession of a controlled substances where the testifying police officer admitted he lost sight of the recovered narcotics for a few seconds; (2) the trial court erred in denying defense counsel's request for a continuance to call the police officer who recovered the narcotics and as an alternative, defense counsel was ineffective for failing to subpoena the officer; (3) the trial court erred in allowing the State to admit four of defendant's prior convictions for possession of a controlled substance where the prejudicial effect outweighed the probative value; and (4) defendant's six-year extended-term sentence was excessive.

Defendant was arrested on March 4, 2008, and charged with one count of possession of a controlled substance.

In July 2008, defendant filed a motion to quash arrest and suppress evidence, alleging that his arrest was made without a valid search or arrest warrant and during the arrest, the police recovered evidence that connected defendant to a crime.

At the hearing on the motion, defendant denied possession of any narcotics. He testified that on March 4, 2008, he left his home, located at 402 N. Avers Avenue in Chicago, at approximately 10:30 p.m. to go to the store to purchase orange juice for his then-fiancee Mary McQueen and a wine beverage for Mary's brother Johnny McQueen. Defendant went to Sunrise liquor store, located near the intersection of Ridgeway and Chicago Avenue.

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When defendant arrived at the store, there were about 15 people standing in the vicinity. Defendant said that he waited in line for five to ten minutes to make his purchase. The items were placed in a black plastic bag. Defendant had his gloves in his left hand. At that time, defendant stated that there were approximately eight people outside the store. As he moved through the people, he stopped to speak with a man he knew named "Lano." Defendant testified that the police then pulled up, "jumped" out of the car and detained a number of people. Defendant said he was wearing black jeans with a black hoody and a black coat.

Defendant testified that the police detained five people and took them over to the car. He said he had the liquor store bag in his right hand and his gloves in his left hand. He was told to put the bag and gloves on the car. He was then handcuffed to another man. The police searched him and took out his wallet. The police then walked to the side and had a conversation. When they returned, the officers released the other people, but handcuffed defendant's hands behind his back and told him he would have to go with them.

Defendant stated that he told the officers that he needed to take his purchases home. An officer asked where he lived. The officers drove defendant to his house. An officer took out defendant's cell phone, dialed Mary's phone number, and held the phone to defendant's ear. Defendant told Mary to come downstairs to get the purchases. Defendant said the officer put his wallet in the plastic bag and then the officer placed the bag on a little table outside the front door. Mary came out and asked what was wrong. Defendant stated that the officer responded, "Oh, he will be all right." Defendant was then transported to the police station.

At the police station, defendant was handcuffed to a bench. While he was seated,

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defendant saw an officer take items from the officer's pocket. The officer placed two bags on the table. Defendant described the bags as "blue little Ziploc bags." Defendant denied that the officers found the bags on him. Defendant stated that the police did not have an arrest warrant for him or a search warrant for his home or any other location.

The State called Officer Brian Town. Officer Town testified that he was on duty in the 11th district for the Chicago police department on March 4, 2008. Officer Town stated that at approximately 11:15 p.m., he and his partners were responding to complaints of drug sales along the Chicago Avenue corridor, which runs from Pulaski to around Kedzie. The officers were driving an unmarked police car and were in plain clothes. When they reached 3736 West Chicago Avenue, Officer Town observed defendant. Officer Town exited the vehicle and saw defendant turn from the crowd and made a motion with his left hand and dropped two items to the ground. Officer Town stated that he saw the direction those items fell and were within one foot of defendant. He was approximately ten feet from defendant when defendant dropped the items. Officer Town testified that defendant was detained while he recovered the items.

Officer Town stated that he recovered two packets containing a powder, which he suspected to be heroin. When asked if he remembered the color of the packets, Officer Town said, "they were clear." Officer Town further stated that the area was very well lit from streetlights and floodlights from the liquor store.

On cross-examination, Officer Town testified that the police receive numerous calls daily about drug sales on that section of Chicago Avenue. He estimated five to ten calls come in every day. He said the officers intended to perform field interviews that night in front of the liquor

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store, but none were conducted because Officer Town observed a crime and defendant was arrested. Officer Town said that he did not see anything in defendant's right hand and saw him throw the packets from his left hand. Officer Town denied making any stops after defendant was arrested, he said they went directly to the station.

The State then was allowed to introduce seven of defendant's prior convictions as impeachment. Defense counsel objected that the convictions were more prejudicial than probative. The trial court overruled the objection and admitted the convictions.

In rebuttal, the defense called Mary McQueen to testify. Mary testified that she lived at 402 N. Avers with defendant and her brother. She stated that on March 4, 2008, she sent him to the store to purchase orange juice for her and some type of wine beverage for her brother. A short time later, she received a phone call from defendant asking her to come downstairs and get a bag. Mary looked out of the window and saw three police officers and defendant in a car. She went downstairs to get the bag. She got a black plastic bag from a table. She saw defendant in the backseat of the car with two officers in the front seat and one sitting next to defendant in the back. Mary testified that when she looked in the bag, she found orange juice, a drink, defendant's wallet and a phone. On cross-examination, Mary admitted that she was not at the store with defendant.

After the parties rested, the trial court denied defendant's motion to quash arrest and suppress evidence.

The case was set for a bench trial on September 29, 2008. On that date, the parties appeared for trial. The prosecutors noted to the trial court that they had just received defendant's

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supplementary answer to discovery which disclosed a new witness on September 26, 2008.

Defense counsel answered ready for trial and stated that both of her witnesses were present.

Defense counsel also stated that she was not prepared to stipulate to the lab reports and had an issue on the chain of custody. In response, the prosecutors informed the court that the chemist was not present and with no stipulation to the lab, they were not able to answer ready. Before setting a new trial date, the prosecutors conferred with all of the officers to find a date in which all could be present. Trial was reset for October 10, 2008. At that time, defense counsel asked the court to “please continue the subpoenas.” The trial court stated that, “Any subpoenas that are here today are in full force and effect until October 10th.”

On October 10, 2008, both parties answered ready for trial and the case proceeded to a bench trial.

Officer Edward Carroll testified that on March 4, 2008, he was assigned to the 11th district and was on a directed patrol mission along the Chicago Avenue corridor, from Pulaski to Kedzie. He was in an unmarked vehicle and in plain clothes, but was wearing his vest with star and name tag. He was working with Officers May and Town. Officer May was driving and Officer Carroll was in the rear passenger seat.

Officer Carroll stated that they arrived at 3737 West Chicago Avenue at approximately 11:15 p.m. He observed a group of males in front of a liquor store. He identified defendant as one of the men he saw at that location. He said defendant was standing on the sidewalk in front of the liquor store. Officer Carroll stated that the area was “very well lit, street lamps, flood lights.”

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When the officers curbed the vehicle and got out of the car, the men started to walk away. Officer Carroll observed defendant with his left fist clenched. He was approximately 10 feet away and approaching defendant. Officer Carroll said he intended to conduct field interviews with the individuals. Officer Carroll testified that he saw defendant's fist clenched and as the officer approached, he observed defendant drop two small items to the ground. Officer Carroll described the two small items as "two small [Ziploc] bags containing white powder." He stated that he watched the items fall to the ground. He then walked over to defendant and detained him while his partner, Officer Town, recovered the items. Officer Town showed him the recovered items. Officer Carroll stated that he was shown "two small [Ziploc] bags containing a blue tint containing [*sic.*] white powder suspect heroin."

Officer Carroll testified that Officer Town did not recover any other items. He also said that when he observed defendant drop those items from his left hand, he did not see anything else being dropped. He stated that he did not see any other debris that matched what he saw defendant drop on the ground. At that time, he took defendant into custody and Officer Town secured the items on his person until they arrived at the police station.

At the station, Officer Carroll stood next to Officer Town while Officer Town inventoried the two items. He watched Officer Town inventory the narcotics. Officer Carroll stated that Officer Town got a specific inventory number related to the case and narcotics recovered, the items were placed in a narcotics bag and the bag was heat-sealed. The bag is then given to the desk sergeant for collection. Officer Carroll testified that the inventory number assigned to the narcotics was 11237561.

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Officer Carroll stated that he worked in that district for 12 years and testified that the area is known for drug sales. He admitted that he “very briefly” lost sight of the items when defendant dropped them. When asked how long of a period of time he lost sight of the items, Officer Carroll responded, “It was seconds.” At that moment, he was focused on defendant while Officer Town recovered the items. Officer Town then immediately showed the recovered items to Officer Carroll.

On cross-examination, Officer Carroll stated that he did not look at the ground as he was walking to defendant. He testified that he did not believe that defendant was holding anything in his right hand and in his left hand, defendant was holding the two bags until he dropped them. Officer Carroll stated that the items were recovered “almost immediately” after defendant dropped them and he did not recall seeing anything else on the ground. He further described the small bags as “a clear bag and it’s just blue tint to it.” Officer Carroll admitted that his police report did not indicate that the bags had a blue tint. Officer Carroll did not recall making any stops before arriving at the police station.

Leann McDowell testified that she is a forensic scientist with the Illinois State Police forensic science center. Her job was to analyze evidence for the presence of controlled substances. She stated that she received inventory with the number 11237561 from Amanda Darnell, the evidence technician in the drug chemistry section of the lab. McDowell received this inventory on March 6, 2008. She stated that the evidence was in a sealed condition and she checked to make sure it was sealed as well as verified that the labels on the evidence bag matched the attached paperwork. McDowell then weighed the evidence and concluded that the

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total weight was 0.3 grams.

McDowell next performed two tests on the substance. The first test was “a series of color tests which indicates what compound might be present in the sample.” McDowell stated that test indicated that heroin might be present. McDowell performed a second test called a gas chromatography mass spectrometry (GCMS). The GCMS “is a method that separates the [sample] into its individual components and then proceeds to identify each component in the mixture.” McDowell’s results showed that the powder from both Ziploc bags contained heroin. She concluded that in her opinion to within a reasonable degree of scientific certainty the powder contained heroin.

After she concluded her testing, McDowell testified that she sealed the evidence into a new Ziploc bag and heat-sealed that bag and placed it into the original evidence bag and heat-sealed the bag.

On cross-examination, McDowell stated that if the description on the inventory sheet did not match the package she was testing, she would file a discrepancy and fax that to the commanding officer of the unit that submitted the evidence. McDowell said that in this case, the inventory sheet described the packaging. McDowell recalled that the Ziploc bags were blue in this case. McDowell testified that she would not file a discrepancy if the officer described the packages as white while she described them as blue. She stated that not all of the officers will indicate color on the inventory sheet and noted that there was not a color indicated on this inventory sheet. McDowell further testified that she would not consider that a discrepancy because the lab’s discrepancies are based on the number of items or if the content of the

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packaging is different from what was described.

Following McDowell's testimony, the State rested. Defendant asked for a directed verdict, arguing that a sufficient chain of custody had not been established by the State. The trial court denied the motion.

Yakop Alawuai testified for the defense. Alawuai testified that he worked for Sunrise liquor store, located at 3737 West Chicago Avenue. On March 4, 2008, he was working at Sunrise as a clerk behind a window. He stated that the store was open until midnight, but from 7 or 8 p.m., the doors to the store are closed and business is conducted from a small window. Alawuai said that he cannot see the outside of the store from the window. He stated there are lights outside the store that light the area well, but he cannot see from inside the store. Alawuai testified that he recognized defendant as a customer of the liquor store.

When asked if Alawuai ever reported people loitering outside of the store or complain about drug sales, Alawuai responded that it was not his job. He stated that he is just the cashier and it would be his boss's job. He did not remember if he saw defendant at the store in March 2008.

Defendant testified on his own behalf. He stated that on March 4, 2008, he was at home, located at 402 North Avers. At around 10:30 p.m., defendant left his house to go to the store for a couple items. At the time, he lived with his girlfriend Mary McQueen and her brother Johnny McQueen. He went to Sunrise liquor store to get orange juice for Mary and an alcoholic beverage for Johnny. When he arrived at the store, he got in line. He estimated that about 15 people were around the store. It took about ten minutes for defendant to make his purchase. He

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made the purchase through the store's service window.

After he made his purchase, defendant turned to leave. He had his gloves in his left hand and the bag with his purchases in his right hand. He stated there were still several people outside the store. Defendant testified that he was wearing dark colors as were most of the people outside the store. As he was walking away, defendant stated that a Crown Victoria pulled up and three men in plain clothes got out of the vehicle. The others outside the store starting "going in other directions." The men then "grabbed" everyone. Defendant said he did not know the men were police officers because they wore jackets over their shields and did not identify themselves.

The men took defendant over to their car and told defendant to put his hands flat on the car. One of the men handcuffed defendant to another man detained from outside the store. Defendant stated that "a bunch" of men were handcuffed together. The officers then searched the men, including defendant. They took defendant's keys, cell phone and wallet from his pockets.

Defendant denied holding or dropping any little packages when the police officers approached him. He denied having packets of heroin that night. After the officers finished their searches, they walked to the side and had a conversation. Then, the officers released the other men, but kept defendant and handcuffed his hands behind his back. They put defendant in the car. They retrieved defendant's bag with his store purchase and got into the vehicle.

As they were driving, defendant asked why he was being detained, but no one answered him. He also asked what he was going to do with his store purchases. Defendant testified that one of the officers asked where he lived and they drove to defendant's house. At the house, an officer used defendant's cell phone to call Mary's number. The officer held the phone to

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defendant's ear and defendant told Mary to come downstairs to get the bag from the store. The officer also placed defendant's wallet, cell phone and gloves inside the bag. One of the officers got out of the car and walked up to defendant's door. He sat the bag on a table near the door. Defendant stated that Mary came out of the house and asked where defendant was, but the officer did not answer her.

The officers then started to drive to the station. While in the car, defendant stated that the officers asked him if he knew about any "drug spots." Defendant said he told them he did not because he was new to the neighborhood.

At the police station, defendant testified that he was handcuffed to a bench. While he was seated, he watched one of the officers take items from his pockets. He saw the officer place "some dark blue bags" on the table. Defendant denied knowing what was in the bags. He also denied that the officers got the bags from him. He stated that the first time he saw the bags was at the station.

On cross-examination, defendant stated that he was not startled when the officers approached him, but he did freeze. He said that he did not know the men were police officers until they put him on the car. Defendant testified that he could not see through the dark blue bags.

Mary McQueen testified that she lived with defendant at 402 North Avers in March 2008. She stated that defendant was her ex-boyfriend. On March 4, 2008, she sent defendant to the store to get her an orange juice and her brother a wine beverage. Mary stated it took a long time for defendant to return from the store and she became concerned.

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Eventually, she received a call telling her to come downstairs to get a bag. She looked out of the window and saw “a detective car” with “three detectives in there.” She went downstairs and got the bag. She stated that she asked the officer the reason they had arrested defendant. Mary stated that the bag contained orange juice, a grape wine and defendant’s phone and identification.

On cross-examination, Mary admitted that she did not go to the liquor store with defendant and did not know what happened at the store.

After Mary’s testimony, defense counsel asked the trial judge to continue the case until she could bring in Officer Town to testify. She stated that she was under the impression that all of the officers were present in court, but she learned that Officer Town was not in court. The trial judge asked her if she had subpoenaed Officer Town and defense counsel admitted that she had not. Defense counsel stated that she believed that “the subpoenas were continued for everybody.” Defense counsel said she assumed that the continued subpoenas included the State’s witnesses.

The State responded that it notified all the officers and she said that she had anticipated all the officers to be present. The prosecutor had four officers present and opted to present the State’s case with Officer Carroll’s testimony. The prosecutor noted that it is the State’s discretion to put on witnesses to sustain their burden and to present the elements of the case. The trial judge asked defense counsel if she had answered ready and she stated that she had “mistakenly assumed” that Officer Town would be present. The trial judge asked defense counsel if she had an offer of proof as to what she believed would be Officer Town’s testimony.

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Defense counsel stated she did and made the following offer of proof.

“Well, I believe the officer is going to testify in his vice case report he described the objects that he allegedly observed my client dropping as being two red objects and that at the motion to quash he testified when asked by the State what color the objects were, he testified they were clear.”

The trial judge asked the prosecutors if they were willing to stipulate, and they declined to stipulate to the offer of proof of Officer Town’s testimony. The trial judge then made the following statement.

“And I am not going to force the State to stipulate. It was just to determine if it was something that was possible. None of my comments were to reflect that I believe that if the State did or didn’t do that that I would grant or deny the continuance, I’m still making that determination, and based on the fact that this case has been set for trial on two dates and that Defense did not subpoena the witness for either date, that the Defense answered ready and on the last date State did not have that witness here either, the Defense did not have that witness here either, I’m going to deny the motion for continuance.”

The defense then rested. In rebuttal, the State moved to admit four prior convictions under *People v. Montgomery*. The State stated that in the last ten years, defendant had been

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convicted of possession of a controlled substance in 2003, two concurrent convictions of possession of a controlled substance in 2002 and possession of a controlled substance with the intent to deliver in 1998. Defense counsel objected that the prior convictions were more prejudicial than probative. The trial court held: “At this time the State’s – it turns out to be four convictions that the State is entering in rebuttal as to those certified copies of conviction. Those will be accepted and your objection is noted but overruled.”

Following arguments by the parties, the trial court found defendant guilty of possession of a controlled substance. In her ruling, the trial judge stated that she found Officer Carroll to be credible. The judge further noted:

“The story that the defendant testified to and his girlfriend testified to I find to be incredulous and, therefore, I do not believe that Officer Town would have added anything further and it is clear that the Defense did not subpoena this witness on this date or on a prior date and that testimony would not have swayed me differently based on this offer of proof.

And for those reasons I believe the State has met their burden of proof and I find this defendant guilty of possession of controlled substance.”

The court also noted that regarding the defense’s allegation that every witness needs to testify to prove the chain of custody, “the case is very similar, *People v. Sandy Williams*, where it is clear that the State does not need to bring in every single person to prove the chain of custody

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and I believe the State did establish its chain of custody.”

In November 2008, defendant filed his motion for a new trial alleging that the State failed to prove defendant guilty beyond a reasonable doubt as the evidence was insufficient and he was entitled to an outright reversal because (1) the State failed to establish a chain of custody, (2) the State failed to prove that defendant possessed heroin where neither Officer Carroll or the lab technician identified the evidence in court, (3) the bags tested were not the same bags the officer claimed to see because the bags did not match the description given in police reports, and (4) Officer Carroll’s testimony was incredible and insufficient to support a finding of guilty.

Defendant further moved for a new trial on several grounds: the trial court’s failure to grant the motion to quash arrest and suppress evidence, defendant was denied his constitutional right to cross-examine McDowell by sustaining the State’s objections to defense counsel’s questions on issues related to chain of custody and discrepancies, the trial court erred in denying defense counsel’s request for a continuance, and the State impermissibly shifted the burden of proof by failing to bring in Officer Town and the narcotics. The State filed a response to the motion for new trial. Following arguments from the parties, the trial court denied defendant’s motion.

In her ruling, the trial judge noted that both parties answered ready on October 10, 2008. The judge stated that defense counsel did not subpoena Officer Town and further pointed out that “[j]ust as the State can choose what witnesses they want to put on, they can choose which witnesses they are going to subpoena. They don’t have to subpoena the Defense’s witnesses.” The ruling continued.

“Furthermore, there was discussion in my ruling about had

Officer Town come to court, had Officer Town testified as the Defense had wanted Officer Town to testify, that this Court's ruling would not have been any different.

So the point of whether Officer Town was here and whether he would have said that the bags were blue or they were clear would not have had any impact on this Court's ruling. And therefore, I think it is a moot point as to whether Officer Town was here or not."

At the sentencing hearing, the State argued in aggravation that defendant had an extensive criminal background, which included 12 felony convictions, six of which were felony drug convictions. Based on defendant's criminal history, the State sought an extended-term sentence of six years pursuant to section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2 (West 2008)). In mitigation, the defense argued that defendant had a history of drug abuse, but had been successful in some treatment programs and asked the minimum extended-term sentence. The trial court noted defendant's extensive background and eligibility for an extended-term sentence. The court then sentenced defendant to an extended-term of six years. Defendant filed a motion to reconsider his sentence, which the court denied.

This appeal followed.

First, defendant argues that the State failed to prove him guilty beyond a reasonable doubt because the evidence was insufficient to establish that defendant possessed the narcotics recovered by a non-testifying police officer and the testifying officer lost sight of the items

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dropped by defendant. Specifically, defendant contends that Officer Carroll's testimony failed to establish a link between the items dropped by defendant and the items recovered by Officer Town because Officer Carroll "never testified that the recovered items were the same items he saw [defendant] drop." Defendant further asserts that Officer Town's testimony was necessary to prove that he recovered the items dropped by defendant. The State maintains that the evidence supported defendant's conviction for possession of a controlled substance where Officer Carroll credibly testified that he saw defendant drop two bags of heroin and he observed Officer Town immediately recover the bags.

When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. In conducting this inquiry, as noted, the reviewing court must not retry the defendant. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). The

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reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *Cunningham*, 212 Ill. 2d at 280. Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 280. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Cunningham*, 212 Ill. 2d at 280. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330. The same standard of review applies regardless of whether the defendant received a bench or jury trial. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

“In order to convict an individual of unlawful possession of a controlled substance, the State must prove that the defendant had knowledge of the presence of the controlled substance and that he or she also had immediate and exclusive possession or control of the narcotics.” *People v. Woods*, 214 Ill. 2d 455, 466 (2005); see also 720 ILCS 570/402 (c) (West 2008). Possession may be established by evidence of either actual or constructive possession. *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003). “Constructive possession exists without actual physical dominion over the narcotics but where there is an intent and a capacity to exercise control and dominion over them.” *Blue*, 343 Ill. App. 3d at 939. In contrast, “[a]ctual possession is proved by testimony which shows the defendant exercised an act of physical dominion over the unlawful

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substance, such as trying to conceal it or throw it away.” *People v. Clark*, 173 Ill. App. 3d 443, 449 (1988).

Defendant asserts that the State failed to prove that he had immediate or exclusive possession of the two bags recovered by Officer Town. Specifically, he argues that the State did not prove constructive possession because it did not show that defendant exercised control over premises where the narcotics were found nor did the State prove actual possession because it did not present any evidence that the narcotics were recovered from defendant’s person. Defendant contends that the State failed to prove that the recovered items were the dropped items.

Contrary to defendant’s claims, the evidence presented at trial, when viewed in the light most favorable to the prosecution, established that defendant had actual possession of narcotics. Officer Carroll testified at trial that he observed defendant with his left hand clenched in a fist and then saw defendant drop two small bags. As he detained defendant, his partner, Officer Town, immediately recovered the bags. When asked if he saw any other debris on the ground that matched what he saw defendant drop, Officer Carroll answered no. Officer Carroll stated that he lost sight of the bags for only “seconds.” Officer Town recovered the bags and showed them to Officer Carroll. Officer Town retained possession of the bags until they were inventoried at the police station. Officer Carroll said the bags were two small clear Ziploc bags with a blue tint containing a white powder. Officer Carroll stated he was next to Officer Town when the bags were inventoried. McDowell testified that she received the inventoried bags and stated they were blue-tinted. McDowell stated that the results of her analysis showed the presence of heroin. Further, the trial court specifically stated on the record that it found Officer

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Carroll's testimony to be credible while defendant's testimony was "incredulous." Accordingly, we conclude that the State's evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession of a controlled substance.

Defendant next contends that the trial court erred in denying defense counsel's request during trial for a continuance to call Officer Town to testify. Specifically, defendant asserts that the trial court should have allowed a continuance for defense counsel to call Officer Town because Officer Town was under a subpoena by the State and his anticipated testimony was relevant to defendant's argument that the State failed to establish a sufficient chain of custody. As an alternative argument, defendant argues that his trial counsel was ineffective for failing to subpoena Officer Town. The State responds that the trial court properly denied defense counsel's request for a continuance because defense counsel was not diligent in securing Officer Town's testimony for trial. Additionally, the State responds that defense counsel was not ineffective because defendant did not suffer any prejudice.

"[T]he granting or denial of a continuance is a matter resting in the sound discretion of the trial court, and a reviewing court will not interfere with that decision unless there has been a clear abuse of that discretion. " *People v. Chapman*, 194 Ill. 2d 186, 241 (2000). "However, '[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed.' " *People v. Walker*, 232 Ill. 2d 113, 125 (2009) (quoting *People v. Lewis*, 165 Ill. 2d 305, 327 (1995)). Nevertheless, whether an abuse of discretion occurred depends upon the facts of the case and there is no mechanical test to determine when a denial of a continuance for

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judicial economy violates a defendant's right to defend. *Walker*, 232 Ill. 2d at 125. The trial court may consider several factors in determining whether to grant a defendant's request for continuance: a movant's diligence, the defendant's right to a speedy, fair and impartial trial, the interests of justice, the history of the case, the complexity of the matter, whether the defense counsel had been unable to prepare while at trial on another case, the seriousness of the charges, docket management, judicial economy, and inconvenience to the parties and witnesses. *Walker*, 232 Ill. 2d at 125-26.

“In reviewing the trial court's denial of [defendant's] motion, we must consider: (1) whether the defendant was diligent in attempting to secure the presence of the witness; (2) whether the defendant has shown that the testimony of the witness was material and might have affected the verdict; and (3) whether the defendant was prejudiced by the exclusion of the testimony.” *People v. Moore*, 397 Ill. App. 3d 555, 561 (2009) (citing *People v. Ward*, 154 Ill. 2d 272, 307 (1992)).

Further, when a trial court refuses to admit evidence, a formal offer of proof is needed to preserve an appealable issue. *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). “The purpose of an offer of proof is to inform the trial court, opposing counsel, and a reviewing court of the nature and substance of the evidence sought to be introduced.” *Peeples*, 155 Ill. 2d at 457. “Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper.” *Peeples*, 155 Ill. 2d at 457-58. The failure to make an adequate offer of proof forfeits the issue on appeal. *Peeples*, 155 Ill. 2d at

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458.

In this case, defense counsel answered ready for a bench trial on September 29, 2008, but the prosecution requested more time to respond to the defense's recent addition of a new witness and to obtain a witness after defense counsel declined to stipulate to the lab reports due to an issue with the chain of custody. The prosecution informed the trial court that it was picking a date that all police officers could be present. The case was reset for October 10, 2008. Defense counsel requested the court to "please continue the subpoenas." The trial court stated that, "Any subpoenas that are here today are in full force and effect until October 10th."

On October 10, 2008, both parties answered ready for trial and the bench trial commenced. After the State had rested and the defense had presented the testimony of two witnesses as well as defendant, defense counsel asked for a continuance to call Officer Town. Defense counsel indicated that she had been under the impression that Officer Town was going to be present in court for the State's case pursuant to the State's subpoena. However, Officer Town was not in court and the prosecution opted not to call him as a witness. Defense counsel admitted that she never subpoenaed Officer Town to testify for the defense, but understood the trial judge's continuation of the subpoenas on September 29 to include the State's witnesses as well.

The trial judge gave defense counsel an opportunity to make an offer of proof as to what she believed Officer Town's testimony would be. Defense counsel stated she believed Officer Town would testify that his vice case report described the objects dropped by defendant as "two red objects" and that he testified at the motion to quash that the objects were "clear." The trial

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court asked the prosecutors if they would stipulate to this offer of proof, which they declined to do without the “ability to re-direct” Officer Town. The trial court then denied the defense’s request for a continuance, finding that defense counsel answered ready on two dates and did not subpoena the witness. Later, in making her ruling, the trial judge stated that based on the offer of proof, the trial judge did not believe that Officer Town would have added anything further and the testimony would not have changed her finding. Again, at the hearing on defendant’s motion for a new trial, the trial judge stated on the record that Officer Town’s testimony would not have altered the outcome and any issue regarding Officer Town was a “moot point.”

We conclude that defendant has failed to demonstrate any of the factors for us to consider. The record shows that defendant was not diligent in securing Officer Town’s testimony for trial. Though defense counsel asked for the subpoenas to be continued, defense counsel did not subpoena Officer Town for the defense nor did it seek assurance from the prosecution that Officer Town would be present at trial. Defense counsel admitted that she “mistakenly assumed” Officer Town would be present. We point out that defense counsel did subpoena another officer for trial, but did not call the officer to testify. She answered ready for trial and it was not until the conclusion of the defense’s case that she requested a continuance to obtain Officer Town as a witness.

Moreover, the offer of proof was insufficient to establish that Officer Town’s testimony would alter the outcome of the case. Defense counsel did not present the vice case report in which Officer Town allegedly referred to the packets as red to the trial court nor is this report part of the record. Officer Town testified at the hearing on defendant’s motion to suppress that

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the packets were clear. Significantly, defense counsel did not question Officer Town about his description in the vice case report that the packets were red when the officer testified at the suppression hearing. There is nothing in the record, other than defense counsel's assertion, to suggest that Officer Town ever described the packets as red. This offer of proof was deficient to establish the basis of Officer Town's proposed testimony. Given this deficiency, the offer of proof was insufficient to show that the proposed testimony would alter the outcome of the case.

Finally, defendant has not shown how he was prejudiced by the exclusion of this testimony. The trial judge specifically stated on the record in her finding of guilty to the charge of possession of a controlled substance and at the motion for a new trial that Officer Town's proposed testimony would not have affected the outcome. Thus, defendant was not prejudiced by the denial of the continuance where Officer Town's proffered testimony would not have affected the finding of guilty.

In the alternative, defendant contends that his trial counsel was ineffective for failing to subpoena Officer Town's testimony as part of the defense's case. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*,

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195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

Therefore, we need not consider whether defense counsel’s performance was deficient because we have already determined that defendant cannot establish any prejudice by the failure to present Officer Town’s testimony in the defense’s case. Since defendant cannot satisfy the prejudice prong under *Strickland*, his claim for ineffective assistance of counsel fails.

Next, defendant asserts that the trial court erred in allowing the State to admit four of his prior convictions to impeach his credibility because the prejudicial impact outweighed the probative value. The State responds that defendant has forfeited this issue because he failed to raise it in his motion for a new trial.

To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). However, defendant asks this court to review this issue as plain error. Supreme Court Rule 615(a) states that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” 134 Ill. 2d R. 615(a). The plain error rule

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“allows a reviewing court to consider unpreserved error when (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.”

People v. Piatkowski, 225 Ill. 2d 551, 565 (2007), citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this issue is reviewable under the first prong because the evidence was closely balanced. However, “[t]he first step of plain-error review is to determine whether any error occurred.” *Lewis*, 234 Ill. 2d at 43. Therefore, we will review the issue to determine if there was any error before considering it under plain error.

The Illinois Supreme Court in *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), delineated the admissibility of prior convictions for impeachment. For the purposes of attacking credibility, evidence of a prior conviction is admissible if: (1) the crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment; (2) less than 10 years have elapsed since either the conviction or the witness's release from confinement, whichever is later; and (3) the probative value of the conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516. The third factor requires the trial court to perform a balancing test, taking into consideration factors such as

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the nature of the prior offense, its recency and similarity to the present charge, the length of the criminal record, and the age and circumstances of the witness. *People v. Sykes*, 341 Ill. App. 3d 950, 976 (2003). If the trial court determines that the prejudice substantially outweighs the probative value of admitting the evidence, then the evidence of the prior conviction must be excluded. *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999). The determination of whether a witness's prior conviction is admissible for impeachment purposes is within the discretion of the trial court. *Atkinson*, 186 Ill. 2d at 456.

Here, defendant does not contest the first two factors under *Montgomery*, but instead focuses solely on the third: whether the prejudicial effect outweighed the probative value. Specifically, defendant complains that there is no indication in the record that the trial court utilized the *Montgomery* balancing test to determine whether defendant would suffer unfair prejudice if four of his prior convictions were admitted. Defendant argues that the risk of unfair prejudice was great because of the similar nature of the offenses and the weakness of the State's case.

However, similarity between the prior conviction and the offense charged does not mandate exclusion of the prior conviction. *Sykes*, 341 Ill. App. 3d at 976-977; *Atkinson*, 186 Ill. 2d at 463. Instead, similarity is merely a factor for the trial court to consider in the course of balancing probative value against unfair prejudice. *Sykes*, 341 Ill. App. 3d at 977.

Moreover, even though the supreme court has urged trial courts to avoid mechanically applying the *Montgomery* rule to admit all types of convictions (*People v. Williams*, 161 Ill. 2d 1, 39 (1994)), the supreme court has not held that the trial court must explicitly discuss its

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consideration of the balancing test on the record. Rather, in *Williams*, the supreme court emphasized the importance of the third prong balancing test after it appeared as though the trial court admitted the prior conviction as evidence of the defendant's guilt rather than as evidence impacting the defendant's credibility. *Williams*, 161 Ill. 2d at 38-40. Although the trial court must weigh factors relating to the prejudice and probative value of evidence of a prior conviction in reaching its determination as to the admissibility of that evidence, the court is not required to make an express evaluation in open court of those factors. *People v. Watkins*, 206 Ill. App. 3d 228, 245 (1990). Rather, absent an express indication that the trial court was unaware of its obligation to balance these factors, a reviewing court will assume that the trial court gave the factors appropriate consideration. *Watkins*, 220 Ill. App. 3d at 245.

Here, the prosecutor explicitly asked to admit four of defendant's prior convictions under *Montgomery*. The prosecutor moved to admit the prior convictions "for the sole purpose of having Your Honor weigh the credibility of the defendant who testified." Defense counsel then objected that the prior convictions were "more prejudicial than probative." The trial court noted the objection, but overruled it and admitted the convictions.

In *People v. Williams*, 173 Ill. 2d 48, 83 (1996), the supreme court declined to find an error in the admission of a prior conviction where the trial court did not articulate on the record that it was applying the *Montgomery* test.

"Contrary to the defendant's argument, there is no reason to suppose that the trial judge failed to weigh the probative value of the impeachment against its possible prejudicial effect. A review

of the transcript shows that the judge was fully aware of the *Montgomery* standard and the balancing test it requires. The parties referred to the balancing test in their arguments to the judge on the question whether the defendant could be impeached with the earlier conviction. In similar circumstances, this court has declined to find error when the transcript makes clear that the trial judge was applying the *Montgomery* standard, even though the judge did not expressly articulate it (see *People v. Redd*, 135 Ill. 2d 252, 325-26 (1990)), and the same result must be reached here. Although the trial judge in this case did not explicitly state that he was balancing the opposing interests, there is no reason to suppose that he disregarded the familiar, well-established *Montgomery* standard in determining that the impeachment was proper.” *Williams*, 173 Ill. 2d at 83; see also *Naylor*, 229 Ill. 2d at 605 n. 3.

Likewise, we decline to find an error in the instant case. The prosecutor expressly stated that she wanted to admit defendant’s prior convictions under *Montgomery* and defense counsel objected that the prejudicial effect outweighed the probative value. The record fails to establish that the trial court was unaware of the *Montgomery* test and we will not assume otherwise.

Defendant further argues that even if the trial court did exercise its discretion in admitting the prior convictions, it abused its discretion because the convictions were overly prejudicial. Defendant claims that his prior convictions were overly prejudicial because they were identical to

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the crime charged in this case, were not veracity related convictions, and failed to show defendant's "marked efforts at achieving sobriety."

We point out that the trial court conducted a bench trial in this case. While the rules of admissibility are the same whether tried by a jury or not, when a trial court is the trier of fact, the reviewing court presumes the trial court only considered admissible evidence in reaching its conclusion. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). "As a matter of law, we must presume that the trial court considered defendant's prior conviction 'only with respect to the purpose for which it was competent.' " *Naylor*, 229 Ill. 2d at 603 (quoting *People v. Lacey*, 24 Ill. 2d 607, 611 (1962)). However, this presumption may be rebutted if the record indicates to the contrary. *Naylor*, 229 Ill. 2d at 603-04.

Defendant's relies on *Naylor* to assert that there is an increased risk that the prejudicial impact of a prior conviction will outweigh the probative value where the case turns on the trial court's credibility assessment. However, we note that the trial court in *Naylor* improperly considered a prior conviction that occurred more than ten years before the defendant's current trial and the supreme court concluded that this was a reversible error where the incompetent evidence was admitted to impeach the defendant's credibility in a closely balanced case. *Naylor*, 229 Ill. 2d at 607.

In contrast, defendant's prior convictions were competent evidence before the trial court. There is nothing in the record to indicate that the trial court improperly considered defendant's prior convictions beyond impeachment of his credibility. We decline to find any error in this case. Since we have concluded that no error occurred in the admission of defendant's prior

convictions, defendant's plain error argument fails and this issue has been forfeited.

Finally, defendant contends that the trial court abused its discretion in sentencing him to the maximum extended-term sentence of six years despite evidence of mitigating factors. The State responds that the trial court considered all factors in aggravation and mitigation and exercised its discretion in imposing an extended-term sentence.

"It is well established that a trial court has broad discretionary authority in sentencing a criminal defendant." *People v. Evans*, 373 Ill. App. 3d 948, 967 (2007). "An appellate court typically shows great deference to a trial court's sentencing decision since the trial court is in a better position to decide the appropriate sentence." *Evans*, 373 Ill. App. 3d at 967.

"Accordingly, a trial court's sentencing decision is not overturned absent an abuse of discretion." *Evans*, 373 Ill. App. 3d at 967.

"The Illinois Constitution mandates the balancing of both retributive and rehabilitative purposes of punishment." *Evans*, 373 Ill. App. 3d at 967; see also Ill. Const.1970, art. I, §11.

"The trial court is therefore required to consider both the seriousness of the offense and the likelihood of restoring the offender to useful citizenship. *Evans*, 373 Ill. App. 3d at 967.

However, "[a] trial court is not required to give greater weight to the rehabilitative potential of a defendant than to the seriousness of the offense." *People v. Govea*, 299 Ill. App. 3d 76, 91 (1998). "In determining an appropriate sentence, the trial judge is further required to consider all factors in aggravation and mitigation which includes defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age, as well as the nature and circumstances of the crime." *Evans*, 373 Ill. App. 3d at 967. "Generally, the trial court is in a

better position than a court of review to determine an appropriate sentence considering the particular facts and circumstances of each individual case.” *People v. Starnes*, 374 Ill. App. 3d 132, 143 (2007). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Bowman*, 357 Ill. App. 3d 290, 303 (2005). “If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense.” *Starnes*, 374 Ill. App. 3d at 143, citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

The trial court sentenced defendant to an extended-term of six years for possession of a controlled substance. Possession of a controlled substance is a class 4 felony (720 ILCS 570/402(c) (West 2008)) and is punishable by a sentence of one to three years in prison (730 ILCS 5/5-8-1(a)(7) (West 2008)). However, if the trial court finds a defendant eligible under the factors provided under section 5-5-3.2 (730 ILCS 5/5-5-3.2 (West 2008)), an extended-term sentence for a class 4 felony is three to six years in prison (730 ILCS 5/5-8-2(a)(6) (West 2008)). Defendant does not contend that he was ineligible for an extended term, but instead asserts that the trial court did not sufficiently weigh his evidence in mitigation. In mitigation, defendant introduced evidence of his completion of his GED, his employment at Alamo National Car Rental Company and his efforts at recovery from his history of drug abuse, including certificates from treatment programs. Defendant also stated that he has made bad choices in the past and he had a drug problem. He said that his community was “plagued with drugs.” He was trying to

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overcome it and do something right, but “then for this to happen to me and knock me back down, I just – I ask for mercy.”

In contrast, the State presented evidence of defendant’s 12 prior convictions spanning nearly 20 years in aggravation. Of these convictions, defendant was convicted of possession of a controlled substance eight times, including six times from 2001 to 2005. His most recent prior conviction was in 2005 for possession of a controlled substance and he received an extended-term sentence of four and a half years. Defendant’s prior convictions also include unlawful use of a weapon by a felon and possession of a controlled substance with intent to deliver.

The trial court stated on the record that it had the opportunity to consider all the statutory factors in aggravation and in mitigation as well as defendant’s certificates and defendant’s statement. The trial court pointed out that defendant had “quite a background as far as how many narcotics cases [he had] in his background” and defendant was eligible for an extended term. After considering everything presented at the hearing, the trial court imposed a six-year extended-term sentence.

After considering the entire record, we do not find the trial court abused its discretion. The sentence imposed on defendant was within the statutory guidelines for a class 4 felony eligible for an extended-term sentence and was appropriate given defendant’s extensive criminal background. The trial court stated on the record that it considered all factors in aggravation and mitigation before imposing the sentence and properly exercised its discretion in imposing the maximum extended-term sentence. Accordingly, we affirm defendant’s extended-term sentence of six years’ imprisonment.

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

Affirmed.