2012 IL App (1st) 091330
No. 1-09-1330

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances under Rule 23(e)(1)

FIFTH DIVISION
March 16, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
	)	
	)	No. 07 CR 16106
v.	)	
	)	
DAWON COLE,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Held: Where defendant was charged with possession of a look-alike substance with intent to deliver, the trial court was not required to instruct the jury on the lesser-included offense of simple possession where the State introduced uncontradicted and unimpeached testimony that defendant was yelling "blows, blows," and handing small shiny objects in exchange for money. Further, where defendant was charged with aggravated battery of a police officer, evidence of his unlawful possession of suspect cannabis, for which crime he was not charged, was admissible, in addition to his possession of look-alike heroin, for which he was

charged, to provide an enhanced motive to commit aggravated battery of a police officer in an effort to avoid arrest.

¶ 1 Following a jury trial, defendant Dawon Cole was convicted of aggravated battery of a police officer pursuant to section 5/12-4 of the Illinois Criminal Code ("Code") (720 ILCS 5/12-4(b)(18) (West 2007)) and possession with the intent to distribute of a look-alike substance, a Class 3 felony under section 404(b) of the Illinois Controlled Substances Act ("Act") (720 ILCS 570/404(b) (West 2007)), and was sentenced to concurrent terms of ten and five years' imprisonment. The Act defines a look-alike substance as a substance, other than a controlled substance which would lead a reasonable person to believe that it is a controlled substance either: "(1) by overall dosage appearance, including shape, color, size, markings or lack thereof, taste, or other identifying physical characteristic ***;" or "(2) is expressly or impliedly represented to be a controlled substance or is distributed under circumstances" that would lead to such conclusion. 720 ILCS 570/102(y) (West 2007). On appeal, defendant contends that the trial court abused its discretion in refusing to instruct the jury on the lesser-included offense of simple possession of a look-alike substance, a Class C misdemeanor under section 404(c) of the Act (720 ILCS 570/404 (c) (2007)), and in admitting evidence of suspect cannabis found on defendant's person. He further contends that this court should vacate his $20 preliminary hearing fee, his $5 court system fee and his $200 DNA ID fee, and amend his fee order accordingly.

¶ 2BACKGROUND

¶ 3 Defendant was charged by indictment on: (1) two counts of aggravated battery of a police officer, one alleging bodily harm and one other alleging physical contact of an insulting or

provoking nature; and (2) possession with the intent to deliver a look-alike substance. Those charges were brought in conjunction with an incident that took place on July 8, 2007, on the west side of Chicago.

¶ 4 At trial, the State first called Chicago police officer Justin Isaac, who testified that in the evening in question, he and his partner, Officer Pruski, were patrolling the area of 4300 west on Adams street, which, according to Officer Isaac, was "known for high narcotics sales." Officer Isaac further testified that at approximately 6 p.m. they noticed a group of men standing at the corner of Adams Street and Kildare Avenue, and when his car pulled up, the men scattered. The officer considered that suspicious behavior, and notified another patrol car in the area that he was going to set up surveillance near that area. In that second patrol car were officers Ebersole and Dieball.

¶ 5 Officer Isaac set up surveillance about 80 to 100 feet from the corner where he had observed the men, hid behind a building and used his binoculars to watch that corner. Officer Pruski remained in their squad car and kept an eye on Officer Isaac. The officer observed defendant and another individual, later identified as Jarvis Mallet, a co-defendant who is not a party to this appeal, at that same corner, yelling "blows, blows" to oncoming traffic and pedestrians. In Officer Isaac's experience, defendant's and Mallet's conduct indicated that they were trying to sell heroin to people in the area. Officer Isaac then watched an unknown man approach defendant, and after a brief conversation with defendant, the man took money out of his pocket and handed it to Mallet. After the money was handed to Mallet, officer Isaac observed defendant reach into his right pant pocket, pull out an unknown small shiny object and

hand it to the pedestrian, who then departed. About 30 seconds later, Officer Isaac observed an identical transaction, where another unknown man approached defendant and handed money to Mallet, before defendant handed him a small shiny object retrieved from his right pocket. The officer acknowledged, on cross-examination, that he could not hear the conversation that either man had with defendant, or see how much money they tendered to Mallet.

¶ 6 The officer, believing that he had just observed two narcotics transactions, called officers Ebersole and Dieball and asked them to come to his location. These additional officers arrived and met officers Isaac and Pruski about a minute later, and officer Isaac gave officers Ebersole and Dieball a description of defendant and Mallet. The officers then drove to the corner of Kildare and Adams, where officers Isaac and Pruski approached Mallet while officers Ebersole and Dieball walked towards defendant. As Mallet began to flee, Officer Pruski chased him on foot while Officer Isaac returned to the squad car and followed Mallet in his car. Officer Pruski caught up with Mallet about one block away and arrested him. After a custodial search of Mallet, Officer Pruski recovered $136 from his person.

¶ 7 After Mallet was placed in their vehicle, Officer Isaac heard a lot of commotion on the radio from Officer Ebersole, who was calling for help. He then drove up to the location where he saw Officers Ebersole and Dieball struggling to take control over defendant, who was flailing his elbows while Officer Ebersole tried to push him against the car and arrest him. According to Officer Isaac, Officers Ebersole and Dieball eventually took defendant into custody and placed him in their squad car.

¶ 8 On cross-examination, Officer Isaac stated that he would set up a surveillance "if the

offenders are out there that [he was] used to seeing." When asked what offenders he was referring to, Officer Isaac answered that he referred to the defendant. On re-cross examination, when asked whether he had met this particular defendant before the date in question, Officer Isaac stated that he had not.

¶ 9 The State next called Officer Ebersole, who testified that on the evening of the incident, he was on patrol with his partner, Officer Dieball. He stated that at approximately 6 p.m., they were called by Officers Isaac and Pruski to assist with an arrest. After speaking to Officer Isaac, Officers Ebersole and Dieball drove to the corner of Adams and Kildare, exited their vehicle and approached defendant to place him into custody. As the officers approached him, defendant began to walk slowly westbound, and when Officer Ebersole ordered him to stop, defendant initially complied. Officer Ebersole then grabbed defendant's wrist to place him under arrest and told Officer Dieball to assist Officers Isaac and Pruski in their foot chase of Mallet, who had fled when the officers approached him.

¶ 10 According to Officer Ebersole, as he pulled out his handcuffs to place defendant under arrest, defendant clenched his fists, struck the officer's upper chest with his elbow, knocking him backward. Defendant then knocked the officer into an iron fence and fled on foot. Officer Ebersole stated that he then chased defendant and "took him to the ground" deploying an "emergency take down," which consists of utilizing momentum to bring defendant to the ground before pulling defendant's hand back and straightening his arm out to maintain control of him. At that time, the officer and defendant were "tossing and turning," and as defendant got on top and attempted to flee again, Officer Ebersole grabbed his left arm and took him down using the

same technique as before. The officer then called for assistance over the radio, at which time Officer Dieball returned and saw him struggling with defendant. He told Officer Dieball to grab defendant's free arm and the officers handcuffed him.

¶ 11 Officer Ebersole performed a custodial search of defendant and recovered two tin foil packets containing suspect heroin from defendant's right pant pocket, the same pocket from which Officer Isaac had earlier observed him those retrieve small shiny objects during his initial surveillance of the suspect narcotics sales. The officer testified that in his experience making narcotics arrests, those small tin foil packets were consistent with the way heroin is "usually packaged." Additionally, Officer Ebersole recovered from defendant a hand-rolled cigar containing suspect cannabis.

¶ 12 The State next called Officer Dieball, who corroborated Officer Ebersole's testimony that when the officers initially approached defendant, he began to walk away. The officers then curbed their car and detained defendant on foot. Officer Dieball then then returned to his patrol car and went after Mallet, who had run off. The officer drove around the block and observed that Officers Isaac and Pruski had already placed Mallet into custody. Officer Dieball drove back to the area after hearing his partner, Officer Ebersole, call for help over the radio and drove back to the area where they had detained defendant. When he returned, Officer Dieball observed Officer Ebersole struggling with defendant on the ground, that defendant was rolling around, swiping his arms and kicking, while Officer Ebersole was attempting to place defendant under custody. Officer Dieball stated that, at that time, he exited his vehicle, grabbed defendant's free arm to bring his arms together, and placed handcuffs on him.

¶ 13 The parties stipulated that forensic scientist Brian Stevenson, tested the suspect heroin and found that it contained no controlled substance. If called, he would have testified that heroin is frequently packaged in powder form in small tinfoil packets, and that the two items recovered from defendant were similar in shape, size and consistency of heroin.

¶ 14 On August 12, 2008, the first day of his trial, defendant had filed a motion in *limine*, entitled "MOTION TO BAR THE INTRODUCTION OF EVIDENCE AS TO CHARGES DEFENDANT WAS ARRESTED FOR BUT NOT INDICTED AS TO," which appears to seek exclusion of, *inter alia*, a suspect marijuana cigar found on defendant's person at the time of his arrest, since he was not charged for any offense pertaining to that cigar. Defense counsel argued that evidence of defendant's possession of cannabis was irrelevant because it was not what led the police officers to arrest him, and had no probative value as to the charges of aggravated battery or possession of a look-alike substance with intent to distribute. The court denied defendant's motion to exclude the cannabis, stating: "it seems to me we're talking about the actual circumstances surrounding the whole situation and surrounding the arrest. It might perhaps be evidence as to why Mr. Cole acted as he allegedly acted, not wanting to be arrested in possession of the cannabis and look-alike substance he had in his possession."

¶ 15 On the following day, before resting, the State moved to admit its exhibits, including the cigar containing suspect cannabis. Defense counsel again objected to the admission of the cigar, arguing this time that the parties had not stipulated to the substance contained in that cigar, and reiterating his argument in *limine* that, in any event, the suspect cannabis had no relevance to either of the charges against defendant. The court overruled the objection, stating that "[i]t was

testified to. The proper foundation was laid. It is part and parcel of the arrest that took place." The court later allowed the cigar to be sent to the jury during deliberations.

¶ 16 Defense counsel further requested a jury instruction on the lesser-included offense of simple possession of a look-alike substance. She argued that there had been cross-examination of Officer Isaac with regard to the element of intent to distribute, and that there was sufficient evidence to support a jury finding of simple possession, but not possession with intent to deliver. The State responded that there was no dispute that defendant had been yelling "blow, blows," and that he delivered items to two unknown people. The court refused to give the instruction on the lesser-included offense, stating that "[i]t's the court's feeling that the evidence such as it is, either the jury believes it and it is a guilty or they don't believe it and it is a not guilty."

¶ 17 The jury found defendant guilty of aggravated battery to a police officer on the count alleging physical contact of an insulting or provoking nature, but not guilty on the count alleging bodily harm. In addition, the jury found defendant guilty on the count of possession of a look-alike substance with intent to deliver. The record indicates that before reaching that verdict, the jury apparently deliberated for at least three hours. During deliberations, they sent three notes to the court, asking to hear Officer Ebersole's testimony again and to see the police reports, and for the definition of bodily harm.

¶ 18 Defendant then filed a motion for a new trial, arguing, *inter alia*, that the court erred in denying defendant's motion to exclude evidence of his possession of cannabis, and in refusing to instruct the jury on the lesser-included offense of simple possession of a look-alike substance. That motion was denied on the same day.

¶ 19 On February 3, 2009, the trial court sentenced defendant to ten years' imprisonment for the aggravated battery, and to a concurrent term of five years' imprisonment for possession with intent to distribute a look-alike substance.

¶ 20ANALYSIS

¶ 21 On appeal, defendant first challenges his conviction for possession of a look-alike substance with intent to deliver, which resulted in a 5-year concurrent sentence. In challenging that conviction, defendant contends that the trial court erred in refusing to give a jury instruction on the lesser-included offense of simple possession of a look-alike substance. He argues that the evidence that he only had a small quantity of suspect heroin on his person, and the fact that Officer Isaac did not overhear the conversations between the defendant and those unknown men on the street so as to establish a sale, are sufficient to compel an instruction on the lesser included offense simple possession of a look-alike substance. We note that while a look-alike substance does not actually contain any controlled substances in its composition, section 404(c) of the Act nevertheless provides that a person who knowingly possesses a look-alike substance is guilty of a Class C misdemeanor. 720 ILCS 570/404(c) (West 2007).

¶ 22 The State responds that a jury instruction on the lesser-included offense was not warranted because the State "overwhelmingly" proved that defendant had the intent to deliver the look-alike substance, and no evidence was presented which would negate that he had such intent.

¶ 23 Our supreme court has established a two-part analysis to determine whether a trial court must instruct a jury on a lesser offense. *People v. Ceja*, 204 Ill. 2d 322, 360 (2003). "First, a

court must determine whether the charging instrument describes the lesser offense. *** 'Second, *** [a] court must examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense." *Ceja*, 204 Ill. 2d at 360 (quoting *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002)). That evidentiary requirement is " 'usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense from the lesser offense. However, where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may be fairly inferred from the evidence presented.'" *People v. Garcia*, 188 Ill. 2d 265, 284 (1999) (quoting *People v. Novak*, 163 Ill. 2d 93, 108 (1995), abrogated on other grounds by *People v. Kolton*, 219 Ill. 2d 353 (2006). In fact, our supreme court has stated that " '[t]he amount of evidence necessary to meet this factual requirement, i.e., that tends to prove the lesser offense rather than the greater, has been described as 'any,' 'some,' 'slight,' or 'very slight.' ' " *Garcia*, 188 Ill. 2d at 284 (quoting *Novak*, 163 Ill 2d at 108-09. Thus, a defendant is entitled to an instruction on a lesser-included offense if there is any evidence tending to establish the commission of the lesser offense, rather than the greater one. *People v. Scott*, 256 Ill. App. 3d 844, 850 (1993). However, an instruction on a lesser-included offense is not required where the evidence introduced at trial shows that defendant is either guilty of the greater offense or not guilty of any offense. *People v. Cardamone*, 381 Ill. App. 3d 462, 508 (2008).

¶ 24 While a trial court's refusal to allow a proposed jury instruction is not to be reversed absent an abuse of discretion, the question of whether a defendant has met the evidentiary

threshold for a certain jury instruction on a lesser offense is reviewed *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008).

¶ 25 In this case, the parties do not dispute that simple possession of a look-alike substance is a lesser-included offense of the crime of possession of a look-alike substance with intent to distribute. Thus, the only question to be determined by this court is whether the evidence presented at trial would have permitted a jury to rationally find the defendant guilty of simple possession of a look-alike substance, but acquit him of the greater offense of possession with intent to distribute said substance.

¶ 26 This court has held that even where the evidence presented is sufficient to give rise to an inference of intent to deliver, an instruction on the lesser offense of simple possession is required if that same evidence could also support an inference of mere possession only. *Scott*, 256 Ill. App. 3d at 850. However, an instruction on simple possession is improper "where the evidence supports only delivery or intent to deliver and the jury would only be justified in finding defendant guilty of the greater offense." Id. Accordingly, an instruction on the lesser offense of possession is not required where the State's evidence clearly indicates a sale, or intent to sell, and leaves no room in which to support a clear inference of possession only. See, *e.g.*, *People v. Zipprich*, 141 Ill. App. 3d 123, 127-28 (1986); *People v. Dunn*, 49 Ill. App. 3d 1002, 1010 (1977). Even where a witness testifies only to observing the drugs that were in a defendant's possession, that testimony is not sufficient to warrant an instruction of simple possession if that witness was in no position to observe the entire transaction and, therefore, cannot contradict another witness' testimony to the sale of that substance. See, e.g., *Zipprich*, 141 Ill. App. 3d at

127-28; *Dunn*, 49 Ill. App. 3d at 1010. In *Dunn*, 49 Ill. App. 3d at 1010, where defendant was charged with delivery of a controlled substance, the court held that the trial court did not err in refusing to instruct the jury on simple possession where an undercover police officer testified that defendant had sold her a bag of cocaine, and no evidence was introduced to impeach her testimony or in any way indicate that defendant was in possession only, with no intent to deliver. In doing so, the court noted that while one must be in possession in order to deliver, it does not warrant an instruction on simple possession where no evidence was introduced to support the lesser offense only. Id. While only one officer testified to the sale of the cocaine, and the other officer only observed the cocaine after its purchase, it did not affect the court's conclusion that the evidence did not warrant an instruction on a lesser-included offense where the officer who testified to the sale was unimpeached. Id. Similarly, in *Zipprich*, 141 Ill. App. 3d at 127-28, this court found that the trial court committed no error in refusing to instruct the jury on simple possession where the State presented testimony from an undercover officer who bought cocaine from defendant, and no evidence was presented by either party to rebut that testimony, or to support an inference limited to mere possession. Although one of the officers testified that all he observed was possession, that witness did not arrive until after the transaction was concluded, and consequently his testimony did not purport to contradict the other witnesses' testimony to the sale. See Id. at 125. Accordingly, that did not alter the court's conclusion that an instruction of possession was not warranted. Id. at 125-28.

¶ 27 In this case, Officer Isaac testified that he observed defendant and Mallet yelling "blows, blows," at oncoming traffic and pedestrians and explained that it meant that they were offering

to sell heroin. See *People v. Lundy*, 334 Ill. App. 3d 819, 830, n. 3 (2002) ("blows" is the street term for heroin). Further, while Officer Isaac could not hear the conversations between defendant and the men who stopped, he observed defendant hand small shiny objects to each man, retrieved from the same pant pocket where small tin foil packets of suspect heroin were later recovered by Officer Ebersole. Furthermore, Officer Isaac observed each unknown man tender money to Mallet before receiving a shiny object from defendant, and $136 in cash was later recovered from Mallet. As in *Zipprich*, while Officer Ebersole testified only to finding the look-alike substance in defendant's pocket, he did not arrive until the transaction was complete, thus, his testimony did not controvert or challenge Officer Isaac's observations of his sales efforts. Further, as in *Zipprich* and *Dunn*, Officer Isaac's testimony describing defendant's offer to sell heroin and the transactions with the two unknown men was unimpeached and uncontroverted by any evidence introduced by either party, and no evidence was introduced to indicate that he was merely in possession of the look-alike heroin. Under these circumstances, the jury could have either believed the Officer Isaac's testimony and found defendant guilty, or not believed it and found him not guilty. Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on simple possession.

¶ 28 Defendant's reliance in *Scott*, 256 Ill. App. 3d at 850-52, is misplaced. In that case, this court found that the trial court erred in refusing to instruct the jury on the lesser offense of simple possession of heroin where the only evidence introduced of his intent to deliver was testimony from two police officers who saw defendant reach into two different cars and withdraw money from their occupants after reaching into his own pocket. *Scott*, 256 Ill. App. 3d

at 850-51. However, unlike this case neither officer in *Scott* saw what, if anything, defendants handed to the occupants in the car, and it does not appear that either officer heard defendants offer drugs to oncoming traffic. Since the quantity of controlled substance found on defendants was consistent with personal use, and no other evidence, such as large amounts of cash, appeared to indicate that they had been engaged in the sale of narcotics, the evidence introduced at trial could have given rise to an inference of mere possession, to the exclusion to an intent to sell. Id. In contrast, in this case, Officer Isaac saw that defendant handed small shiny objects to each man who stopped and handed money to his co-defendant, and the officer also observed defendant and Mallet effectively advertise to the public that they were selling heroin. While only two packets of look-alike heroin were found on defendant, that was not inconsistent with Officer Isaac's unimpeached and uncontroverted testimony that he had sold similar packets, which would have decreased the amount remaining in his inventory. Thus, here, the quantity of look-alike substance found on defendant would not suffice to support mere possession only when accompanied by the uncontroverted testimony that defendant was attempting to sell them as heroin, and that he engaged in those two transactions. Although in *Scott*, 256 Ill. App. 3d at 852, an officer testified that defendant had told him that he worked for a drug dealer, that testimony was inconsistent with the vice case report, which quoted defendant as saying that he knew nothing about narcotics sales. In this case, however, there was no conflicting evidence with respect to defendant's actions in offering look-alike narcotics to the public.

¶ 29 For similar reasons, defendant's reliance on *People v. Crenshaw*, 202 Ill. App. 3d 432 (1990); and *People v. Blan*, 392 Ill. App. 3d 453 (2009), is misplaced. In *Crenshaw*, 202 Ill

App. 3d at 433-34, the trial court improperly refused to give instructions on mere possession where defendant was found with a bag containing smaller bags of cocaine, an undisclosed amount of money in his pocket and a gun, but there was no evidence that he had engaged in any transactions that would be indicative of a drug delivery or sale. Likewise, in *Blan*, 392 Ill. App. 3d at 459, where defendant was convicted on the charge of possession with intent to deliver 30 to 500 grams of cannabis, the trial court erred in refusing to tendered a jury instruction consistent with his theory that he intended to sell only 3.6 grams of the 31 grams of cannabis found on him. However, defendant in that case had told the police that he intended to smoke most of the cannabis and sell only a small portion of it, which was evidence consistent with the lesser offense only. In contrast, defendant in this case presented no such evidence.

¶ 30 In any event, any error in refusing to instruct the jury on simple possession would have been harmless. As our supreme court has noted, "[a] refusal to give an instruction will be held to be harmless and not a ground for reversal where it can be said that the result of the trial would not have been different if the instruction had been given." *People v. Moore*, 95 Ill. 2d 404, 410 (1983). In fact, "error in *** refusing an instruction will not, alone, justify a reversal when the evidence of a defendant's guilt is so clear and convincing *** that a jury could not have reasonably found the defendant not guilty." *Id*. (quoting *People v. Davis*, 10 Ill. 2d 430, 443 (1945)); but see *Blan*, 392 Ill. App. 3d at 459-60 (harmless error analysis may not apply where the trial court improperly refused to give an instruction on a lesser-included offense because the inquiry into whether a jury could acquit defendant of the greater offense is already considered in the question of whether an error occurred).

¶ 31 Here, as mentioned above, the State presented Officer Isaac's unimpeached and uncontradicted testimony that he observed defendant yelling "blows, blows," and delivering small shiny objects to two unknown men shortly after they gave money to Mallet, a co-defendant. It was a result of that activity that defendant was apprehended and consequently searched to determine how much of those shiny objects still remained in his possession. Under those circumstances, it would have been wholly arbitrary and unsupportable for a jury to reject evidence of this his sale activity, which was unimpeached and uncontroverted, and accept only evidence of his possession, proffered by the testimony of a witness who arrived just in time to confront defendant and consummate his arrest, after being summoned by the officer who observed defendant's sales efforts. Thus, it would not be error to refuse an instruction on a lesser-included offense. Moreover, even if we were to conclude, which we do not, that these circumstances were technically sufficient to require a lesser-included offense instruction, the denial of that instruction would be harmless in that there would be no realistic likelihood that a jury would, in any event, conclude that he was not a seller, but a mere possessor.

¶ 32 Defendant next contends that the trial court erred in admitting evidence that he had a cigar of suspect cannabis on his person because it was irrelevant to the charges of aggravated battery and possession of a look-alike substance with intent to deliver, and was prejudicial insofar as it highlighted a collateral crime with which he was not charged. Defendant urges that without independent relevance to the crimes for which he was charged, it was impermissibly admitted solely to indicate that he had a propensity to engage in criminal activity.

¶ 33 The State responds that the suspect cannabis found on defendant at the time of his arrest was properly admitted to show his motive in resisting arrest and attacking Officer Ebersole, which, contrary to defendant's contention, was also the explanation given by the trial court in denying defendant's motion to exclude that evidence.

¶ 34 Defendant contends that the State waived its argument that the cannabis provided defendant with increased motive to resist arrest, since it did not raise it at trial. We disagree. As an appellee, the State is not precluded from raising an issue for the first time on review in order to sustain a judgment. See, e.g., *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1050 (2008). This is consistent with the rationale for the waiver rule, namely, that by raising it for the first time on appeal, the trial court is denied the opportunity to consider the issue and self-correct. See, e.g. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Consequently, even if the appellee were required to advise the trial court of any applicable reason that would have supported its ruling, there would be no such need where, as here, the trial court demonstrated that it was aware of the reason now proffered by the appellee on appeal, and was guided by it, *sua sponte*, without input from any of the parties.

¶ 35 Thus, since we are not restricted by any waiver rule, we now proceed to consider on its merits, whether the evidence of defendant's possession of the cigar was admissible for the legitimate purpose of establishing defendant's additional motive to resist arrest. The admissibility of evidence rests within the trial court's discretion, and will not be overturned absent an abuse of discretion. *People v. Placek*, 184 Ill. 2d 370, 385 (1998). It is black letter law that while evidence of other crimes committed by defendant is generally inadmissible to

show only propensity to commit a crime, trial courts may admit such evidence if it has independent relevance to a contested issue in the case, such as defendant's intent, *modus operandi*, knowledge, or motive for committing the crime charged. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998); *People v. Dewey*, 42 Ill. 2d 148, 157 (1969). Thus, where a defendant is charged with assaulting a police officer, evidence that a defendant had committed another crime, for which he was not being charged, is admissible to show his motive in attacking the officer. See, e.g., *People v. Hutter*, 29 Ill. App. 3d 92, 99 (1975) (evidence of defendant's possession of marijuana admissible to show his motive in shooting at police officer who had entered his residence); *People v. Witherspoon*, 27 Ill. 2d 483, 487 (1963) (evidence that warrants had been issued for defendant's arrest for previous, unrelated crimes of larceny, may be shown to establish his motive for attempting to kill a police officer who approached him in connection with his gun possession).

¶ 36 Furthermore, our supreme court has found that "[t]he prosecution is not precluded from presenting evidence of other crimes for a proper purpose merely because it had some other evidence on that point." *People v. Tiller*, 94 Ill. 2d 303, 318 (1982). Instead, when such evidence is offered, the court must weight the relevance of the evidence for the purpose for which it is offered against the prejudice to the defendant. *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991). For instance, evidence that defendant had committed an earlier robbery earlier before acting as an accomplice to the robbery for which he was on trial was admissible to show intent, even though intent was already demonstrated when another witness testified that defendant and his accomplice had planned the later robbery. *Tiller*, 94 Ill. 2d 303, 318; see also

People v. McCall, 190 Ill. App. 3d 483, 491 (1989) (evidence of an uncharged robbery to establish defendant's identity was admissible where other witnesses who identified defendant were cross-examined on their ability to observe defendant, who claimed that had an alibi.

¶ 37 It is worth commenting that the case of *People v. Thigpen*, 306 Ill. App. 3d 29, 37 (1999), has only superficial similarity to the case at bar. There, defendant was charged with the murder of a rival gang member. Id. at 31. The evidence showed that the motive for that murder was the theft of drugs by the victim's rival gang. Id. at 34. The court found that the trial court should have excluded evidence of an uncharged double murder of members of that rival gang as proof of defendant's motive, since the motive which was attributable to the uncharged murders was the same as the charged murder, namely, the theft of drugs. Id. at 37. In this case, however, defendant's possession of the suspect cannabis cigar provided independent motivation, separate and apart from the possession of the look-alike heroin. Moreover, while his possession of the look-alike heroin was in itself a reason for the officers to arrest defendant, he may have believed that a search incident to that arrest would have revealed the cannabis and provided the police with a reason to charge him with an additional crime, with a potentially harsher sentence. In fact, while possession of a look-alike substance is only a Class C misdemeanor, which a petty offense (720 ILCS 404(c) (West 2007)), his possible possession of cannabis could have carried a harsher sentence if his cigar contained any more than 2.5 grams of a substance containing cannabis (720 ILCS 550/4 (West 2007)). This would be consistent with the trial court's stated rationale that the cigar "might perhaps be evidence of why [defendant] acted as he acted, not wanting to be arrested for possession of the cannabis and look-alike substance he had in his

possession."

¶ 38 Defendant's reliance on *People v. Agee*, 307 Ill. App. 3d 902 (1999); and *People v. Harbold*, 124 Ill. App. 3d 363 (1984) is misplaced. In each of those cases, the trial court admitted evidence which indicated other crimes, but which had no bearing to those defendants' motive in committing the crime for which they were charged. See *Agee*, 307 Ill. App. 3d at 904; *Harold*, 124 Ill. App. 3d at 384.

¶ 39 Moreover, even assuming, *arguendo*, that the trial court had erred in admitting evidence of defendant's possession of suspect cannabis, any error would have been harmless, given the fact that the evidence of the aggravated battery was unequivocally established from the testimony of multiple witnesses, and that he was identified as the seller and possessor of a look-alike substance by unimpeached and uncontradicted police testimony. For instance, in a trial for delivery of a controlled substance, improper introduction of defendant's unrelated drug use was considered harmless where an officer identified that defendant as the person who engaged in a drug transaction, and the defendant's alibi witnesses were successfully rebutted. See *People v. Carlson*, 92 Ill. 2d 440, 449-50 (1982). Similarly, the admission of evidence of another act of misconduct was considered harmless in a trial for aggravated battery where multiple witnesses testified to seeing defendant commit the battery. *People v. Walker*, 291 Ill. App. 2d 597, 604-05 (1997).

¶ 40 As previously noted, in this case, with respect to defendant's charge of possession of a look-alike substance with intent to deliver, the State introduced Officer Isaac's unrebutted testimony that he observed defendant and Mallet yell "blows, blows," and saw defendant hand

small shiny objects to two unknown males who had handed money to Mallet, who, had $136 on his person. Further, Officer Ebersole testified that he retrieved two tinfoil packets containing look-alike heroin from defendant's pant pocket. With respect to his charge of aggravated battery, Officer Ebersole testified that defendant struck him on the chest and struggled with the officer when he tried to place defendant under arrest. That testimony was corroborated by Officer Dieball and Officer Isaac, both of whom observed defendant struggle with Officer Ebersole on the ground. The fact that it may have taken the jury at least three hours deliberating, and that they made inquiries about the evidence, does not preclude the conclusion that the evidence of the crimes of which they ultimately convicted defendant was less than overwhelming. See, e.g., *People v. Boshears*, 228 Ill. App. 3d 667, 688 (1992) (the length of time that a jury deliberates is not always indicative of whether the evidence is closely balanced).

¶ 41 Defendant nevertheless appears to argue that the evidence of his possession of the cigar was cumulatively prejudicial when viewed in conjunction with Officer Isaac's testimony that the incident took place in an area "known for high narcotics sales," and that defendant was an "offender" that the officer was "used to seeing" in the area. We disagree. We first note that before cumulative error may be recognized, "there must first be a showing of individual error." *People v. Garmon*, 394 Ill. App. 3d 977, 991 (2009). No such showing can be made in this case. As already fully discussed, there was no error in admitting evidence of defendant's possession of the suspect cannabis cigar, since it is admissible to show additional motive to assault the police officer who was coming to arrest him. Furthermore, evidence that defendant was apprehended in

a high narcotics area is likewise relevant, and therefore admissible, to connect a defendant to an offense involving the sales of narcotics. See *People v. Craddock*, 210 Ill. App. 3d 791, 795 (1991) (testimony that the area was targeted for narcotics investigation admissible where defendant had been charged with possession and delivery of cocaine); see also *Agee*, 307 Ill. App. 3d at 906. In that case, the court held that evidence that an arrest had been made in a high narcotics area should have been excluded as irrelevant when the crime charged was unlawful possession of a weapon. Id. at 904-05. However, the court in Agee specifically distinguished its facts from those in *Craddock* by reason of the fact that in *Craddock*, testimony that an area was targeted for narcotics investigation was admissible since, as in this case, defendant was charged with possession and delivery of a narcotic. C.f. *People v. Billingslea*, 292 Ill. App. 3d 1026, 1031 (1997), where the court held that the factor of being in a high narcotics area was relevant in ascertaining whether a *Terry* stop was justified, implicitly recognizing that such a fact would likewise be relevant to help prove that the offense was committed.

¶ 42 Likewise, while defendant contends that the trial court erred in admitting Officer Isaac's testimony that defendant was an "offender" that the officer was "used to seeing" in the area, that contention also lacks merit. It was only during cross-examination that Officer Isaac acknowledged that he set up surveillance if he saw offenders on the street that “he was used to seeing,” and that he referred to defendant as one of those offenders. Thus, such testimony was elicited by defense counsel, and defendant cannot now complain about testimony that he elicited. *People v. Hammonds*, slip op. 1-08-0194, at 14 (May 6, 2011) (defendant could not challenge on

review a forensic expert's testimony that defendants rarely request a DNA or fingerprint analysis, because it was elicited by defense counsel during cross-examination).

¶ 43 Next, defendant contends, and the State agrees, that the trial court improperly assessed a preliminary hearing fee, a court system fee and a DNA ID fee against defendant. With regard to the first fee, the record reveals that the court imposed a fee against defendant titled "preliminary hearing-State's Attorney," which entitles State's Attorneys to a fee of $20 for a "preliminary examination for each defendant held to bail or recognizance." 55 ILCS 5/4-2002.1(a) (West 2009). Our supreme court has recognized that where a defendant is charged by way of indictment and does not receive a probable cause hearing, it is improper for the trial court to assess the preliminary hearing fee. *People v. Smith*, 236 Ill. 2d 162, 174 (2010). Defendant in this case was charged by way of indictment, and the preliminary hearing fee was, therefore, improper.

¶ 44 With respect to the court system fee pursuant to the Illinois Vehicle Code, the statute provides that a $5 fee may be imposed on a defendant on a judgment of guilty or grant of supervision for violation of the Illinois Vehicle Code or similar municipal ordinance. 55 ILCS 5/5-1101(a). Here, defendant was convicted of possession of a look-alike substance with intent to deliver, and aggravated battery of a police officer, neither of which is a violation of the Illinois Vehicle Code or similar ordinance. Thus, we conclude, in agreement with the parties, that the fee should be vacated. See, e.g. *People v. Cleveland*, 393 Ill. App. 3d 700, 714 (2009) (vacating imposition of the court system fee where defendant was convicted solely of possession of narcotics).

¶ 45 Likewise, with regard to the $200 State DNA ID fee pursuant to 730 ILCS 5/5-4-3(j), our supreme court recently held in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), that the statute "authorizes a trial court to order the taking, analysis, and indexing of an offender's DNA, and the payment of the analysis fee, only where the defendant is not currently registered in the DNA database." In this case, the record shows that defendant has been registered in the DNA database since July 29, 2005, when his DNA profile was submitted to the Illinois State Police DNA Indexing Laboratory, and the fee assessed against him in connection with this case was, therefore, improper. Thus, the accumulated total of improperly assessed fees is $225.

¶ 46 Moreover, defendant argues, and the State does not dispute, that in addition to improperly including those erroneously assessed fees, the trial court incorrectly added up their total at $525, because even if those improperly assessed fees were allowed, the total costs and fees against defendant would have added up to $435. Thus, if we subtract the improperly assessed fees, which total $225, from the correctly calculated total of $435, the remaining fees and costs properly assessed against defendant should add up to $210. The record indicates that the parties are correct, and we order that the costs and fees be modified accordingly.

¶ 47 Lastly, the State requests that this court require defendant to pay costs and a fee of $100.00 to the State for having to defend this appeal, which we grant pursuant to *People v. Nicholls*, 71 Ill. 2d 166 (1978), and 725 ILCS 5/110–7(h) (West 2004), 55 ILCS 5/4–2002.1 (West 2004).

¶ 48 For the foregoing reasons, we order that the fines and fees order be modified to reflect the accurate amount of the assessment as $210, and affirm the judgment of the circuit court of

Cook County in all other respects.

¶ 49 Affirmed.