

2012 IL App (2d) 110259-U  
No. 2-11-0259  
Order filed November 21, 2012

**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 allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-302
	)	
TIMOTHY M. JACKSON,	)	Honorable Timothy J. McCann,
	)	Judge, Presiding.
Defendant-Appellant.	)	

---

JUSTICE HUDSON delivered the judgment of the court.  
Justices Zenoff and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Decision to call defendant to testify in sur-rebuttal and not during case-in-chief was a matter of trial strategy and did not constitute ineffective assistance of counsel; (2) defense counsel's failure to object to evidence of defense witness's prior convictions and sentences did not result in ineffective assistance of counsel; (3) defense counsel was not ineffective for failing to object to the State's references to defense witness's prior convictions during closing argument as no prejudice resulted; (4) trial court did not abuse its discretion in refusing to allow defendant to call witness who violated order excluding witnesses as defendant did not establish that witness's testimony was material; (5) instructional error which misstated the State's burden of proof did not deny defendant of a fair trial; (6) cumulative effect of alleged errors did not deny defendant of a fair trial; and (7) monetary fines authorized in legislation that took effect after the offense at issue was committed would be vacated pursuant to *ex post facto* principles.

¶ 2 Following a jury trial in the circuit court of Kendall County, defendant, Timothy M. Jackson, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2008)) and was sentenced to 24 months' probation. On appeal, defendant raises five issues, namely: (1) whether trial counsel was ineffective; (2) whether the trial court erred in prohibiting the testimony of a defense witness who, in violation of an order excluding witnesses, had been in the courtroom listening to testimony on the first day of trial; (3) whether an instructional error with respect to the State's burden of proof required reversal of defendant's conviction; (4) whether the cumulative effect of the alleged errors denied defendant of a fair trial; and (5) whether two fines imposed by the trial court should be vacated. For the reasons set forth below, we affirm defendant's conviction of unlawful delivery of a controlled substance, but vacate pursuant to *ex post facto* principles two of the fines imposed by the trial court in conjunction with defendant's sentence.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2008)) and one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)), based on an incident occurring on July 30, 2009. The former count alleged that defendant knowingly delivered to another one or more grams but less than fifteen grams of a substance containing heroin. The latter count alleged that defendant knowingly and unlawfully had in his possession less than 15 grams of a substance containing heroin.

¶ 5 A jury trial commenced on May 17, 2010. Prior to trial, the trial court granted defendant's motion to exclude witnesses from the courtroom. The State's first witness, Officer Steve Bozue of the Yorkville police department, testified as follows. In July 2009, Bozue was assigned to the Cooperative Police Assistance Team, a multi-jurisdictional police task force focusing primarily on

narcotics drug enforcement. On July 30, 2009, while working undercover, Bozue called Ramonda Stevenson to set up a heroin purchase. Stevenson instructed Bozue to meet him at a restaurant in Oswego. At that time, however, the men did not discuss the exact quantity of heroin that Bozue wanted to purchase. Bozue drove a Chevrolet Silverado pickup truck and parked in the restaurant's parking lot. Shortly later, a red Mitsubishi sedan pulled into the adjacent parking spot so that the window on the driver's side of Bozue's truck was next to the passenger-side window of the Mitsubishi. Bozue stated that because his truck sits high, he was looking into the Mitsubishi at a downward angle and was able to see most of the body of the driver of the vehicle as well as the upper torso of the passenger. Bozue identified defendant as the driver of the Mitsubishi and Stevenson as the passenger. Bozue told Stevenson that he had \$80 and Stevenson began moving his hands in his lap, although Bozue could not see Stevenson's hands at the time. Stevenson then exited the vehicle, walked over to the driver's side window of Bozue's truck, placed nine bags in the door handle, took Bozue's money, and returned to the Mitsubishi. Bozue testified that during this time, defendant was "[j]ust sitting in the car, sitting in the driver's seat looking around." Defendant did not exit the vehicle, and Bozue never spoke to defendant.

¶ 6 Special Agent Joe Stavola of the Illinois State Police testified that on July 30, 2009, he was conducting surveillance of the controlled buy from a parking lot across the street from the restaurant. Stavola testified that a red Mitsubishi pulled into the same lot where he was parked. Within 10 minutes, Stavola observed Bozue arrive at the restaurant. At that time, the Mitsubishi drove across the street and parked next to Bozue's vehicle. Subsequently, Stavola observed Stevenson walk over to Bozue's truck and then return to the Mitsubishi. The Mitsubishi drove away, but was stopped a short time later by the police. Stavola identified defendant as the driver of the Mitsubishi. On cross-

examination, Stavola acknowledged that none of the “marked money” used to purchase the drugs was recovered from defendant.

¶ 7 David Vanwingeren, a forensic scientist employed at the Illinois State Police forensic science laboratory, testified that the substance sold to Bozue weighed more than one gram and tested positive for heroin. Following Vanwingeren’s testimony, the State rested.

¶ 8 The defense called Stevenson to the stand. Stevenson related that on July 30, 2009, he went to defendant’s home in Harvey, Illinois. Stevenson told defendant that his driver’s licenses had been suspended and he asked defendant to take him to Aurora to see his girlfriend. Defendant agreed to do so in Stevenson’s car, a Mitsubishi Diamante. En route, Stevenson told defendant that someone was bringing him money. Subsequently, the transaction with Bozue occurred. When Bozue arrived at the agreed-upon location, he informed Stevenson that he had \$80. At that point, Stevenson exited the car, pulled the drugs out of his pocket, and placed them on the door handle inside Bozue’s truck.

¶ 9 Stevenson acknowledged that at least one phone conversation with Bozue took place in the presence of defendant. Nevertheless, Stevenson denied showing defendant any drugs or discussing a drug deal with him. According to Stevenson, defendant was “clueless” and if defendant had known that Stevenson was going to sell drugs, defendant would not have driven him. Stevenson further testified that defendant never asked about Bozue, and Stevenson assumed that defendant thought Bozue was the person who owed Stevenson money.

¶ 10 On direct examination, Stevenson acknowledged that he is “serving time” for delivery of a controlled substance as a result of his role in the July 30, 2009, transaction. On cross-examination, Stevenson testified that he was sentenced to 6½ years in prison for the 2009 offense. The State also

elicited testimony from Stevenson about four prior convictions and the sentences therefor. Defense counsel did not object to these inquiries.

¶ 11 Following Stevenson's testimony, the court admonished defendant about his right to testify. Defendant indicated that he understood his rights, and, after consulting with his attorney, opted not to take the witness stand.

¶ 12 Prior to trial, the State filed a motion *in limine* to admit evidence that Bozue had seen defendant drive Stevenson to another controlled drug buy on July 16, 2009. The State argued that this earlier incident was relevant to show intent, motive, absence of mistake, and *modus operandi*. The court ruled that this evidence could not be introduced in the State's case-in-chief, but may become admissible on rebuttal if the defense "open[s] the door." After Stevenson's testimony, the State again moved for the introduction of evidence regarding the events of July 16, arguing that the defense had in fact opened the door to it through Stevenson's testimony that defendant did not know that the drug deal was going to take place. Over defense counsel's objection, the trial court ruled that the State could present this evidence in rebuttal to show defendant's knowledge.

¶ 13 In response to the trial court's ruling, defense counsel argued that if the court was going to allow the State to call a rebuttal witness to elicit "additional information," he should be allowed to recall Stevenson to indicate that defendant was not present on July 16. The court then told defense counsel: "If you are wishing to reopen your proof with Mr. Stevenson in your case in chief as opposed to doing it as sur-rebuttal, I'm open to that as well. If you wish to not rest yet even though we're somewhat out of order here. If you want to call Mr. Stevenson again, I'm inclined to allow you to do it now or I would consider allowing it in sur-rebuttal if you need to." Subsequently, the

jury was brought back to the courtroom, and, after the court asked defense counsel if he had any additional witnesses, the defense rested.

¶ 14 When the trial continued the next morning, defense counsel informed the court that he just learned of a witness who he would like to testify. Defense counsel indicated that the proposed witness “looks very close to the identity of [his] client” and would testify that Stevenson asked him to drive Stevenson to Oswego in July 2009. Defense counsel asserted that this evidence was relevant to establish Stevenson’s “mode of operation,” *i.e.*, that he used different individuals to “drive him up to do his business.” The State informed the court that the proposed witness had watched the entire first day of trial. The court stated, “All witnesses are excluded, so I’m not going to allow anybody who’s been sitting watching the trial to testify at this point.” Nevertheless, the court indicated that it would reconsider the matter at a later time.

¶ 15 In rebuttal, Bozue testified that on July 16, 2009, he purchased heroin from Stevenson at the same location as the July 30, 2009, transaction. Bozue further testified that the same red Mitsubishi pulled into the parking lot, with Stevenson in the passenger seat and defendant driving the vehicle. Bozue told Stevenson that he wanted “four,” and Stevenson said that it would cost \$40. Bozue then exited his truck, leaned in the passenger-side window of the Mitsubishi, and exchanged four bags for \$40. The transaction lasted less than one minute. Bozue stated that July 16 was the first day that he had seen defendant and that on July 30, he recognized defendant from the earlier encounter. Over the objection of defense counsel, Bozue also testified in rebuttal that, with respect to the transaction on July 30, 2009, he did not observe Stevenson put his hands in his pocket after he exited the Mitsubishi and that Stevenson’s hands were visible the entire time he was outside of the car. In this regard, Bozue noted that during drug buys he is on “extremely heightened alert.” Thus, if Stevenson

had put his hands in his pockets, Bozue would have drawn his gun or driven away. On cross-examination, Bozue testified that in his report from the July 16 transaction, he described the driver of the vehicle as an unidentified black male and the report did not include any descriptive features of the driver. Bozue did not speak with the driver on the 16th and he could not remember what the driver was wearing. The defense stipulated that the substance purchased on July 16 weighed less than one gram and tested positive for heroin.

¶ 16 After the State's rebuttal, defense counsel informed the court that in sur-rebuttal he intended to call Stavola, defendant, and the unidentified man who had been sitting in the courtroom. Defense counsel reiterated that the unidentified man would establish that persons other than defendant had driven Stevenson to the Oswego area in July 2009. The court ruled that it would allow Stavola and defendant to testify, but their testimony would be limited to responding to the State's rebuttal evidence. However, the court refused to allow the unidentified man to testify.

¶ 17 In sur-rebuttal, Stavola testified that he authored a report with regard to the July 16, 2009, incident. Stavola admitted that the report does not reference defendant "by name." For his part, defendant denied driving Stevenson to Oswego on July 16. Defendant also testified that he had never been arrested for anything or convicted of any crime. Defense counsel subsequently asked defendant whether he had any knowledge of the July 30, 2009, drug transaction. The State objected to this line of questioning on the basis that it was outside the scope of rebuttal. Defense counsel argued that the testimony elicited by the State in rebuttal opened the door to addressing the charged incident. However, the trial court sustained the State's objection as beyond the scope of the State's rebuttal evidence.

¶ 18 Following deliberations, the jury found defendant guilty of unlawful delivery of a controlled

substance and not guilty of unlawful possession of a controlled substance. The trial court denied defendant's post-trial motion. Thereafter, the parties agreed to a sentence of 24 months' probation and various monetary charges, including a \$50 Performance-enhancing Substance Testing Fund fee (730 ILCS 5/5-9-1.1(d) (West 2010)) and a \$25 assessment for the State Police Services Fund (730 ILCS 5/5-9-1.1-5(c) (West 2010)). The trial court sentenced defendant in accordance with the agreed-upon disposition. Subsequently, defendant filed the present appeal.

¶ 19

## II. ANALYSIS

¶ 20 Defendant raises five distinct issues on appeal. First, defendant alleges that, for various reasons, defense counsel was ineffective. Second, defendant argues that the trial court erred in prohibiting him from calling as a witness the individual who had been in the courtroom listening to testimony on the first day of trial. Third, defendant argues that an error in the instructions tendered to the jury misstated the State's burden of proof and therefore deprived him of a fair trial. Fourth, defendant asserts that the cumulative effect of the alleged errors denied him of a fair trial. Fifth, defendant contends that two monetary charges imposed by the trial court as part of his sentence were improper because the legislation authorizing the charges did not take effect until after the date of the commission of the offense of which he was convicted. We address each contention in the order raised by defendant in his opening brief.

¶ 21

### A. Ineffective Assistance of Counsel

¶ 22 Defendant first argues that he was denied a fair trial as a result of several errors committed by trial counsel. First, defendant complains that trial counsel was ineffective for not calling him to testify in his case-in-chief. Second, defendant asserts that counsel was ineffective for failing to object to the introduction of Stevenson's prior convictions and the sentences for those convictions.

Third, defendant contends that trial counsel was ineffective for failing to object to the State's use of Stevenson's convictions for purposes "beyond mere impeachment" during closing argument.

¶ 23 The sixth amendment of the United States Constitution (U.S. Const., amend. VI) guarantees a criminal defendant the effective assistance of counsel. *People v. Simms*, 192 Ill. 2d 348, 402 (2000), citing *People v. Hattery*, 109 Ill. 2d 449, 460-61 (1985); see also Ill. Const. 1970, art. I, § 8. The purpose of this guarantee is to ensure that a criminal defendant receives a fair trial. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). However, "[e]ffective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). We evaluate claims of ineffective assistance of counsel under the analysis developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The *Strickland* analysis consists of two components. First, a defendant alleging that he was deprived of the effective assistance of counsel must demonstrate that counsel's performance was deficient, that is, it fell below an objective standard of reasonableness. *People v. Fillyaw*, 409 Ill. App. 3d 302, 311-12 (2011); *Rodriguez*, 364 Ill. App. 3d at 312. To establish that counsel's performance was not objectively reasonable under the first prong of the *Strickland* analysis, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). A defendant must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment. *Fillyaw*, 409 Ill. App. 3d at 312.

¶ 24 The second prong of the *Strickland* analysis requires a defendant to establish prejudice. *Fillyaw*, 409 Ill. App. 3d at 312; *Rodriguez*, 364 Ill. App. 3d at 312. To show prejudice, the

defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 13. Mere conjecture and speculation are insufficient to undermine confidence in the outcome. *People v. Williams*, 139 Ill. 2d 1, 12 (1990) (holding that speculative allegations and conclusory statements are insufficient to support a claim of ineffective assistance of counsel); *Rodriguez*, 364 Ill. App. 3d at 312 (same). Because a defendant's failure to establish either component of the *Strickland* analysis will defeat an ineffectiveness claim, a reviewing court need not address both prongs of the inquiry if the defendant makes an insufficient showing as to one prong. *Strickland*, 466 U.S. at 697; *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003).

¶ 25 1. Defendant's Testimony

¶ 26 Defendant argues that defense counsel's failure to call him to testify during his case-in-chief constituted deficient performance under the first prong of the *Strickland* analysis. Initially, we note that the decision whether to testify on one's own behalf belongs to the defendant but should be made with the advice of counsel. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify. *Youngblood*, 389 Ill. App. 3d at 217. Here, defendant does not suggest that defense counsel refused to allow him to testify in his case-in-chief. To the contrary, the evidence shows that the trial court admonished defendant regarding his right to testify and that defendant indicated that he understood his rights. However, after consulting with defense counsel, defendant decided not to take the witness stand.

¶ 27 Defendant nevertheless insists that, under the circumstances present here, a reasonable attorney would have called his client during the case-in-chief. Defendant notes that sur-rebuttal

evidence is limited to refuting or opposing new matters interjected into the trial by the State on rebuttal. See *People v. Cannon*, 62 Ill. App. 3d 556, 560 (1978). Thus, defendant posits, his attorney should have been aware that defendant could not testify about the incident on July 30, 2009, when the State's rebuttal evidence dealt solely with the earlier incident on July 16. Moreover, defendant points out that the trial court ruled on the State's request to present evidence of the July 16, 2009, incident in rebuttal, before the defense formally rested. Therefore, defendant reasons, defense counsel knew this rebuttal evidence would be admitted and he should have called defendant in the case-in-chief before formally resting. Defendant asserts that the trial court "even gave defense counsel the option of continuing with his case-in-chief after ruling that the rebuttal evidence was admissible."

¶ 28 To the extent that the decision not to call defendant to testify during his case-in-chief can be attributed to defense counsel, defendant has failed to establish that this decision fell below an objective standard of reasonableness. Although the record does not indicate why this decision was made, we can conceive of various reasons not to call defendant during the case in chief. The defense was premised on whether defendant had knowledge that a drug transaction would take place on July 30. Stevenson's testimony regarding defendant's knowledge was the last impression the jury had about the issue. It is conceivable that defense counsel did not want to draw attention away from that by calling defendant to the stand and subjecting him to cross-examination where the State may have been able to elicit statements from defendant that would have contradicted Stevenson or left the jury with a different, less-favorable impression.

¶ 29 It is also plausible that defense counsel did not want to risk opening the door to evidence of the July 16, 2009, transaction. Defendant suggests that this explanation is illusory because the

decision to admit evidence of the July 16 incident had been made prior to the defense resting. However, the decision regarding whether defendant would testify in the defense case-in-chief was made *before* the State asked the trial court to reconsider its ruling on its motion *in limine*. Further, contrary to defendant's assertion, the trial court limited the evidence defense counsel could present after ruling on the State's request to present rebuttal evidence regarding the incident on July 16. Notably, defense counsel argued that if the court was going to allow the State to call a rebuttal witness to elicit "additional information," he should be allowed to recall *Stevenson* to indicate that defendant was not present on July 16. In response, the court indicated that it was "open" to defense counsel "reopen[ing]" proofs to present additional testimony from *Stevenson*. The trial court never indicated that it would allow defense counsel to reopen its case-in-chief to allow *defendant* to testify.

¶ 30 Defendant speculates that trial counsel "clearly wanted [him] to testify about the 30th, as evidenced by the fact that he attempted to question him about it on surrebuttal." This argument ignores the fact that claims of ineffective assistance of counsel " 'must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002)). The fact that defense counsel attempted to question defendant about his knowledge of the July 30, 2009, transaction on surrebuttal does not necessarily signify that defense counsel wanted defendant to testify about the issue at an earlier time. Indeed, as we explain below, the circumstances had changed between the conclusion of *Stevenson's* testimony and sur-rebuttal.

¶ 31 Significantly, the State recalled Bozue in rebuttal. Defendant's claim that the State's rebuttal evidence dealt solely with the earlier incident on July 16, 2009, is incorrect. Although the majority

of Bozue's testimony concerned the transaction occurring on July 16, 2009, the State also elicited testimony regarding the transaction occurring on July 30, 2009. In particular, the State asked Bozue if, *on July 30, 2009*, he observed Stevenson put his hand in his pocket *after* he exited the Mitsubishi. Defense counsel objected to this line of inquiry, arguing that it would be improper "to go back again to the 30th" because the rebuttal evidence was supposed to be limited to the incident of July 16, 2009. The State responded that the testimony would rebut "what Mr. Stevenson said on the stand that he got out of the vehicle, he put his hand into his pocket, that's when he produced the heroin." The trial court overruled defense counsel's objection. Bozue then testified that Stevenson did not put his hands in his pocket after he exited the Mitsubishi on July 30, 2009, and that Stevenson's hands were visible the entire time he was outside of the car. Bozue explained that during drug buys he is on "extremely heightened alert." Thus, if Stevenson had placed his hands in his pockets on July 30, Bozue would have drawn his gun or driven away.

¶ 32 Subsequently, when defendant took the witness stand in sur-rebuttal, defense counsel attempted to question defendant regarding his knowledge of the July 30, 2009, transaction. However, the State objected on the basis that this inquiry exceeded the scope of its rebuttal evidence. Defense counsel responded that the testimony elicited by the State in rebuttal opened the door to addressing the charged incident. Nevertheless, the trial court sustained the State's objection. When placed in context, defendant's claim that defense counsel "clearly wanted [him] to testify about the 30th" prior to sur-rebuttal finds no support in the record. Rather, the record suggests that the reason defense counsel attempted to question defendant in sur-rebuttal regarding his knowledge of the July 30 transaction was to counteract Bozue's rebuttal testimony regarding the circumstances under which Stevenson produced the heroin. This, in turn, reflected on defendant's knowledge. Given these

circumstances, we find the decision not to call defendant to testify at an earlier time was a matter of trial strategy. As such, it was not amenable to a claim of ineffective assistance of counsel. See *Coleman*, 183 Ill. 2d at 397.

¶ 33 2. Stevenson's Prior Convictions and Sentences

¶ 34 Defendant next argues that defense counsel was ineffective for failing to object to the State's impeachment of Stevenson with his four prior convictions and the sentences imposed in conjunction with these convictions.

¶ 35 In *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), the supreme court adopted a rule regarding the use of prior convictions to impeach a witness's credibility. Under the rule adopted in *Montgomery*, evidence of a witness's prior conviction is admissible to attack the witness's credibility if: (1) the prior conviction involved a crime that was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) a period of not more than 10 years has passed since the date of conviction of the prior crime or the release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516-19 (adopting then-proposed Federal Rule of Evidence 609); see also *People v. Atkinson*, 186 Ill. 2d 450, 455-56 (1999); *People v. Williams*, 161 Ill. 2d 1, 36 (1994).<sup>1</sup> The 10-year limit referenced in *Montgomery* is calculated in relation to the date of the defendant's trial. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). Further, the proponent of the prior conviction is responsible for presenting evidence of a release date, and absent such evidence, the date of conviction is used to calculate the 10-year limit.

---

<sup>1</sup>The *Montgomery* rule is now codified in the new Illinois Rules of Evidence, which became effective January 1, 2011. See Ill. R. Evid. 609, Committee Comment (eff. Jan. 1, 2011).

*Naylor*, 229 Ill. 2d at 597.

¶ 36 As noted earlier, on direct examination by defense counsel, Stevenson acknowledged that as a result of his role in the July 30, 2009, transaction, he was “serving time” for delivery of a controlled substance. On cross-examination by the State, Stevenson stated that he was serving a sentence of six-and-a-half years for the 2009 offense. The State also elicited testimony from Stevenson regarding four other convictions and his sentences therefor, to wit: (1) a 2000 conviction of unlawful delivery of a controlled substance for which he was sentenced to three years’ imprisonment;<sup>2</sup> (2) a 1998 conviction of aggravated battery for which he received probation; (3) a 1993 conviction of unlawful possession of a controlled substance for which he was sentenced to three years’ incarceration; and (4) a 1993 conviction of armed violence for which he was sentenced to six years’ imprisonment concurrent to the sentence for the 1993 possession conviction. Defense counsel did not object to any of these inquiries.

¶ 37 a. Deficient Performance

¶ 38 Defendant asserts that there is a reasonable probability that three of Stevenson’s four prior convictions would have been inadmissible because they were more than 10 years old at the time of trial. We agree that had defense counsel objected to Stevenson’s 1993 convictions and his 1998 conviction, these convictions would likely have been found to be inadmissible under *Montgomery*

---

<sup>2</sup>It is not clear from Stevenson’s testimony whether his 2000 conviction was for attempt unlawful deliver of a control substance or attempt unlawful possession of a controlled substance. However, because both parties refer to the 2000 conviction as one for unlawful delivery of a controlled substance, we do the same here.

since more than 10 years had passed since the dates of these convictions.<sup>3</sup> See *People v. Blackwell*, 76 Ill. App. 3d 371, 379 (1979) (holding that evidence of prior convictions which predated the 10-year limit set forth in *Montgomery* were properly excluded). Thus, defense counsel was deficient in failing to object to the admission of these three convictions. Since there is a reasonable probability that evidence of these three convictions would have been excluded, it necessarily follows that the sentences therefore should not have been admitted.

¶ 39 Defendant further asserts that had defense counsel objected to the admission of Stevenson's 2000 conviction it "may have been inadmissible as the prejudicial effect of this conviction substantially outweighed its probative value." In support, defendant asserts that: (1) drug crimes are not inherently indicative of a witness's veracity (see *O'Bryan v. Sandrock*, 276 Ill. App. 3d 194, 196 (1995); *People v. Siebert*, 72 Ill. App. 3d 895, 903 (1979)); (2) the fact that the delivery conviction was for the same crime that Stevenson committed in the present case adds to the prejudicial effect since it shows a propensity for crime more than a lack of credibility (see *Siebert*, 72 Ill. App. 3d at 902); and (3) Stevenson's conviction was "towards the tail-end of the *Montgomery* window." We disagree.

¶ 40 First, neither the *Siebert* court nor the *O'Bryan* court rejected outright the proposition that a drug conviction may be probative of a witness's veracity. See *O'Bryan*, 276 Ill. App. 3d at 196 (stating that a felony drug possession conviction "bears little, if any, relation to veracity and is thus only remotely probative, if at all, of truthfulness"); *Siebert*, 72 Ill. App. 3d at 903 (concluding that

---

<sup>3</sup>The parties have not cited any evidence of record indicating when Stevenson was released from confinement for these offenses. Accordingly, in calculating the 10-year limit, we use the date of conviction.

a conviction of possession of marijuana for sale “does not have a direct bearing on honesty” and is therefore “inconclusive as to a witness’ veracity”). We also note that merely because a conviction is not “intimately related to dishonesty and false statement does not mean that the conviction lacks probative value for impeachment.” *People v. Medreno*, 99 Ill. App. 3d 449, 452 (1981). By admitting all crimes punishable by death or imprisonment in excess of one year, the *Montgomery* rule “presume[s] that such crimes are probative of the witness’s credibility.” *Medreno*, 99 Ill. App. 3d 449, 453 (1981). Indeed, more recently, the first district determined that a conviction involving the possession or delivery of a controlled substance “ ‘is the type of conviction which would be probative of credibility and would afford a basis for impeaching credibility.’ ” *People v. Harden*, 2011 IL App (1st) 092309, ¶ 49 (quoting *People v. Tribett*, 98 Ill. App. 3d 663, 675-76 (1981)).

¶ 41 Second, we find that defendant’s argument of prejudice due to the similarity of the charged crime makes little sense in light of the fact that it was a witness who was being impeached. *Cf. Siebert*, 72 Ill. App. 3d at 902 (“Evidence of past crimes is not admissible to prove a defendant’s propensity to commit the crime charged.” (Emphasis added.)). There is no danger of propensity being used against Stevenson as to the charged crime as he had already been convicted. Thus, Stevenson’s prior crimes do not establish *defendant’s* propensity for any particular crime. To the contrary, defendant testified in sur-rebuttal that he had no prior criminal record. In any event, even where it is the defendant who is impeached by a crime similar to the one for which he is on trial, courts have found no error. See *People v. Atkinson*, 186 Ill. 2d 450, 461 (1999) (finding no error in a burglary trial to allow the defendant to be impeached with two prior burglary convictions); *Harden*, 2011 IL App (1st) 092309, ¶ 49 (“The mere fact that [the defendant’s] prior conviction is for an offense identical to one [he] was charged with does not preclude its use for impeachment.”); *Tribett*,

98 Ill. App. 3d at 676 (same).

¶ 42 Finally, we note that while this conviction may have fallen towards the “tail-end” of the *Montgomery* period, defendant does not dispute that it falls within the 10-year limit. Accordingly, we are not convinced that Stevenson’s 2000 conviction would have been inadmissible under *Montgomery*. As such, we decline to find defense counsel deficient for failing to object to the admission of Stevenson’s 2000 conviction.

¶ 43 Defendant also challenges the admissibility of evidence regarding the sentence Stevenson received in conjunction with the 2000 conviction. Defendant suggests that evidence regarding the sentence was *per se* inadmissible pursuant to *People v. DeHoyos*, 64 Ill. 2d 128, 131-33 (1976). However, in *People v. Pruitt*, 165 Ill. App. 3d 947, 953 (1988), the court noted that the admission of excess facts beyond the conviction of a witness is not *per se* reversible error. In *Pruitt*, the court stated that where it is a witness, not the defendant, who is to be impeached, it is within the discretion of the trial court to determine whether to permit cross-examination of the witness regarding the details of his prior convictions. *Pruitt*, 165 Ill. App. 3d at 953 (citing *People v. Upshire*, 62 Ill. App. 3d 248, 252 (1978) (holding that trial court did not abuse its discretion where only the date, crime, and sentence were elicited from the witness)). The *Pruitt* court described *DeHoyos* as “merely one instance where the trial court was found to have abused its discretion in allowing a witness \*\*\* to be improperly cross-examined concerning the details of his prior conviction based on the specific facts of that case as they unfolded.” *Pruitt*, 165 Ill. App. 3d at 954. Defendant does not suggest how the facts of this case are similar to *DeHoyos* such that evidence regarding the sentence Stevenson received in conjunction with his 2000 conviction would have been convicted. As such, we find that defendant has failed to establish that defense counsel’s failure to challenge the admissibility of the

sentence constituted deficient performance.

¶ 44

b. Prejudice

¶ 45 As noted above, there is a reasonable probability that had defense counsel challenged the admissibility of Stevenson's 1993 convictions and his 1998 conviction, they would have been excluded. As such, evidence regarding the sentences for those convictions should have been excluded. However, defendant has failed to establish the likelihood that Stevenson's 2000 conviction would have been excluded had its admissibility been challenged by defense counsel. We are also not convinced that evidence of Stevenson's sentence for the 2000 conviction would have been excluded. Moreover, defendant does not challenge the admissibility of Stevenson's 2009 conviction or the sentence he received in conjunction with that offense. Given that some of Stevenson's prior convictions and sentences were properly admitted, any prejudice due to the fact that the other convictions may have been outside of the 10-year period was minimal as those convictions were cumulative of properly-admitted evidence. See *People v. Hawkins*, 243 Ill. App. 3d 210, 223-24 (1993) (holding that although admission of prior conviction was improper under *Montgomery*, any prejudice was minimal in light of other properly admitted convictions); *People v. Bock*, 242 Ill. App. 3d 1056, 1081 (1993) (holding that any prejudice suffered by any erroneously admitted conviction was minimal where other convictions were properly admitted). As such, we are not convinced that the outcome of the trial would have been different had defense counsel objected to the improperly admitted convictions. Thus, defendant has failed to establish the prejudice necessary to support a claim of ineffective assistance of counsel.

¶ 46

3. State's Closing Argument

¶ 47 Next, defendant claims that the State improperly stated several times in closing argument

that the prior convictions showed Stevenson to be dangerous, and defense counsel's failure to object constituted ineffective assistance. In particular, defendant complains about the following comment by the State in its rebuttal closing argument:

“Would it surprise you that Mr. Stevenson was arrested immediately after he was taken down and when the car was stopped driven by him [*sic*] because he was a dangerous convicted felon, multiple times? Probably wouldn't. Care and due caution by police officers because they knew who they were dealing with when they started making deals, because they knew his identity and read his record which is why what Mr. Stevenson said about putting his hands in his pockets is ridiculous and here's why: Officer Bozue knew exactly the background of Ramondo Stevenson who was a multiple convicted felon, convicted of crimes of violence, armed violence, one of the convictions from 1993 in Cook County aggravated battery. He's hit people before, he struck people before, he's caused injuries before. He's had dangerous weapons in his possession before.”

Defendant further complains that the State mentioned Stevenson's convictions in relation to his dangerousness on at least three other occasions during its rebuttal closing argument.

¶ 48 Inasmuch as some of the convictions referenced in the State's closing argument referenced improperly admitted prior convictions, we agree that defense counsel should have objected to them. However, even assuming that defense counsel's failure to object to the improper references fell below an objective standard of reasonableness, we find that defendant has failed to establish prejudice as a result. As noted above, to establish ineffective assistance of counsel, a defendant must prove not only that defense counsel's performance fell below an objective standard of reasonableness, but also that this substandard performance caused prejudice by creating a reasonable

probability that, but for counsel's errors, the result of the trial would have been different. See *Strickland*, 466 U.S. at 691. In this regard, we again note that some of the convictions were properly admitted. Moreover, the jurors were given instructions which told them that closing argument was not evidence, and that evidence of prior convictions was only to be used in judging the witness's credibility. Further, the trial court orally informed the jury shortly before closing arguments commenced that they were not evidence. Under such circumstances, we are not convinced that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See *People v. Williams*, 192 Ill. 2d 548, 573 (2000) (noting that a verdict is not to be disturbed unless it is shown that the State's improper remarks caused substantial prejudice). As such, we decline to find that defense counsel's failure to object to the complained-of remarks during the State's rebuttal closing argument resulted in ineffective assistance of counsel.

¶ 49

B. Surrebuttal Witness

¶ 50 Next, defendant argues that the trial court erred in refusing to allow a person who had been in the courtroom listening to testimony on the first day of trial to be called as a defense witness in sur-rebuttal. Prior to trial, the trial court granted defendant's motion to exclude witnesses from the courtroom. On the morning of the second day of trial, defense counsel informed the court that he had just learned of another potential witness. Regarding this individual, the following exchange occurred between defense counsel, the trial court, and the State:

“MR. SUTTON [defense counsel]: Your Honor, I just learned some information that I think is germane to my case, you honor. That there is another gentleman that's here that I just learned that Mr. Stevenson has also asked him to drive him up here around the same

time of when this occurrence happened. I think—and I just learned this information. I didn't know. I mean, I just learned it and I think it's very germane to my case to be able to call him to show Stevenson's mode of operation that he gets different people to drive him up to do his business and it's not always just the same person. I would like to call him so the jurors know that's the way he operates and hasn't been just my client he's had. This person looks very close to the identity of my client.

THE COURT: Are you going to call him in sur-rebuttal?

MR. SUTTON: I would like to.

THE COURT: Mr. Dore [Assistant State's Attorney]?

MR. DORE: My understanding this is somebody that's been sitting watching the entire trial.

THE COURT: All witnesses are excluded, so I'm not going to allow anybody who's been sitting watching the trial to testify at this point.

MR. SUTTON: He has not been watching the whole trial, judge.

THE COURT: If he's been present in the courtroom while the trial has taken place, I'm not going to allow him to testify. That would be a direct violation [of the order excluding witnesses].”

Upon the urging of defense counsel, the trial court indicated that it would reconsider the matter at a later time. Defense counsel then asked the potential witness to step out of the courtroom before rebuttal began. After the State presented its rebuttal evidence to the jury, defense counsel again requested that he be allowed to call the aforementioned witness in sur-rebuttal. The trial court again denied the request, explaining:

“Motions to exclude witnesses are made for very valid reasons primarily because it does a disservice to parties to allow someone to observe the testimony of witnesses and then decide they’re going to testify or offer evidence in response to testimony that they have just had the opportunity to observe. At the time the motion to exclude was made, [defense counsel] may not have been aware of this witness, but I’m going to require that that witness not be allowed to testify because I believe the gentleman \*\*\* was here all day yesterday, has heard all the testimony, and I think the fact that he now proposes to testify in response to that testimony is inappropriate and unfair. So I’m going to not allow that testimony.”

¶ 51 On appeal, defendant argues that in prohibiting him from calling this witness in sur-rebuttal, the trial court “did not consider the importance of this testimony or the blamelessness of the defense.” According to defendant, the testimony was critical for his defense as it “would have called into question Bozue’s identification of [him] as the driver on July 16.” The State responds that defendant forfeited this issue by failing to include it in his post-trial motion. Even absent forfeiture, the State contends that the trial court did not abuse its discretion in prohibiting defendant from calling the proposed witness in sur-rebuttal because the proposed testimony was not material to defendant’s case.

¶ 52 Initially, we agree with the State that this issue has been forfeited because defendant did not include it in his post-trial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Nevertheless, defendant urges review of this issue pursuant to the plain-error doctrine. Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) creates an exception to the forfeiture rule by allowing courts of review to notice “[p]lain errors or defects affecting substantial rights.” A reviewing court may consider a forfeited error under the plain-error rule when “the evidence in a case is so closely balanced that the

jury's guilty verdict may have resulted from the error and not the evidence" or when "the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Because this issue impacts defendant's right to present witnesses in his own behalf, we address it under the substantial-rights prong of the plain-error doctrine. Ill. Const. 1970, art. I, § 8; U.S. Const., amend. VI; *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *People v. Johnson*, 47 Ill. App. 3d 362, 375 (1977) ("The right of an accused to summon witnesses in his defense is fundamental to our legal system.").

¶ 53 "Exclusion of witnesses from the courtroom during trial is a time honored practice designed to preclude one witness from shaping his testimony to confirm or otherwise meet the evidence previously introduced." *People v. Boles*, 52 Ill. App. 3d 707, 709 (1977). Nevertheless, a violation of a court order excluding witnesses does not result in the automatic exclusion of a witness's testimony. *In re H.S.H.*, 322 Ill. App. 3d 892, 896 (2001). It is within the sound discretion of the trial court whether to permit the testimony of a witness who has violated an order excluding witnesses, and a court of review may not overturn that decision absent a clear abuse of discretion. *In re H.S.H.*, 322 Ill. App. 3d at 896. The principal inquiry is whether the exclusion of the proposed testimony would prejudice the affected party. *People v. Wiatr*, 119 Ill. App. 3d 468, 474 (1983). Further, where a trial court refuses to allow a witness to testify, the affected party must demonstrate that it was deprived of material testimony through no fault of his or her own. *People v. Bridgeforth*, 51 Ill. 2d 52, 63 (1972); *In re H.S.H.*, 322 Ill. App. 3d at 897; *Wiatr*, 119 Ill. App. 3d at 473-74. The rationale underlying this rule is that the trial court should not punish a party by depriving it of testimony material to its case where, without the party's knowledge or fault, a witness violates a

court order. *Johnson*, 47 Ill. App. 3d at 369.

¶ 54 Here, defendant argues that there was no evidence that either he or his attorney at trial was at fault in this case. The State does not disagree with this proposition. Indeed, the record establishes that defense counsel repeatedly stated that he had just learned of the potential witness on the second day of trial. Further, neither the prosecutor nor the trial court implied that defense counsel was at fault. Accordingly, we find that defendant was not at fault for the violation of the order excluding witnesses.

¶ 55 We next consider the materiality of the testimony of the proposed witness. Generally, an offer of proof as to what the excluded testimony would have been is required to preserve the issue for review. *People v. Bodeman*, 105 Ill. App. 3d 39, 43 (1982); *Boles*, 52 Ill. App. 3d at 710. In this case, defense counsel did not make a formal offer of proof at trial regarding the contents of the proposed testimony. However, defense counsel informally related what the proposed testimony would establish. See *Boles*, 52 Ill. App. 3d at 710 (addressing issue where, although no formal offer of proof was made, the purpose and materiality of the proposed testimony was clear from the record). In particular, defense counsel related that the proposed witness, who allegedly resembled defendant, would testify that he was asked by Stevenson to drive him (Stevenson) to Oswego in July 2009. Defense counsel indicated that the purpose of the proposed testimony would be to show that Stevenson's "mode of operation" involved employing other people, not just defendant, to transport him to the site of drug transactions. Further, on appeal, defendant asserts that the proposed testimony "would have called into question Bozue's identification of [defendant] as the driver on July 16."

¶ 56 Assuming that the proposed witness would have testified as defendant contends, we do not

find that the exclusion of this evidence was so prejudicial to defendant as to require reversal. Evidence is material if it tends to raise a reasonable doubt of the defendant's guilt, and so the pertinent inquiry with respect to materiality is not whether the evidence might have helped the defense, but whether it is reasonably likely that the evidence would have affected the outcome of the case. *People v. McLaurin*, 184 Ill. 2d 58, 89 (1998).

¶ 57 Here, we conclude that it is not reasonably likely that the testimony of the proposed witness as set forth by defendant would have affected the outcome of the case as it is cumulative of other testimony at trial. In support, we observe the following. First, we note that defense counsel did call into question Bozue's identification of defendant as Stevenson's driver for the July 16 transaction. In rebuttal, Bozue identified defendant as the individual who drove Stevenson to the site of the July 16, 2009. However, on cross-examination by defense counsel, Bozue admitted that in the report he prepared in relation to the July 16 transaction, he merely identified the driver of the vehicle as an "unidentified male." Further, Bozue stated that he did not include a description of the individual in the report, he did not recall what kind of clothes the driver was wearing, and he did not speak to the individual. Similarly, in sur-rebuttal, Stavola acknowledged that the report he authored in relation to the July 16, 2009, transaction did not reference defendant "by name." Second, defense counsel elicited testimony suggesting that Stevenson used others to drive him to the drug transactions. Notably, on sur-rebuttal, defendant denied driving Stevenson to Oswego on July 16, 2009. Further, in closing argument, defense counsel emphasized that the police reports described Stevenson's driver on July 16 as an "unidentified male" and that "could be a whole lot of people that [the police officer] could have seen." In addition, defendant does not suggest that the proposed witness would have testified to any particular fact that established that someone other than defendant was the driver on

July 16. Thus, despite the absence of the testimony of the proposed witness, defense counsel elicited testimony from multiple witnesses calling into question defendant's presence at the July 16, 2009, transaction, and suggesting that Stevenson employed others to drive him to the site of drug transactions. In sum, because the proposed testimony from the excluded witness was presented to the jury by other means, it was cumulative, and we fail to see how it is material to defendant's case.

¶ 58 We find this case distinguishable from *Johnson*, 47 Ill. App. 3d 362, a case cited by defendant. In that case, the victim and one of his companions testified at trial that the assailant was a man wearing a light-colored sports coat. Before resting, defense counsel informed the trial court that he had just discovered another witness, attorney Pat Flynn. Defense counsel explained that Flynn, who had been seated in the courtroom during the trial, would testify that shortly after the charged incident, he encountered the defendant wearing a blue jean outfit. Several other witnesses for the defense had also testified to having seen defendant at the scene of the incident wearing a denim suit. The trial court refused to allow the defense to call Flynn. The *Johnson* court held that, despite the violation of the order excluding witnesses, the trial court committed reversible error in refusing to allow Flynn's testimony. *Johnson*, 47 Ill. App. 3d at 372. The court reasoned that the testimony of the excluded witness as to the clothing worn by the defendant "would have had probative value." *Johnson*, 47 Ill. App. 3d at 372. The court cited two reasons for rejecting the State's contention that Flynn's testimony would have been cumulative in light of the other defense witnesses. First, the court reasoned that the proposed witness, a "disinterested officer of the court, might very well have been more credible to the jury than the other witnesses called by the defense, all of whom were acquaintances of the defendant." *Johnson*, 47 Ill. App. 3d at 472. Second, the court indicated that "[r]acial overtones were inherent in the case" and it was unable to ignore the fact

that Flynn, unlike the defendant and all other defense witnesses, was white. *Johnson*, 47 Ill. App. 3d at 372 n.2.

¶ 59 In contrast to *Johnson*, there is no indication that the proposed witness was a “disinterested officer of the court” or that there were any underlying racial overtones at issue in this case. Defendant has simply not demonstrated how the fact that Stevenson may have had the excluded witness drive him to Oswego at some point in July 2009 is material to the issue of Officer Bozue’s identification of defendant as being the driver on July 16, 2009.

¶ 60 Finally, defendant complains that the trial court erred because it refused to exercise discretion in the erroneous belief that it has no discretion as to the question presented. See *People v. Queen*, 56 Ill. 2d 560, 565 (1974). According to defendant, the trial court’s statements on the record “seem to indicate that he did not know that he had discretion to allow this witness to testify or that he was unwilling to use his discretion.” However, we may affirm the ruling of the trial court on any basis of record, regardless of its reasoning, and we do so for the reasons set forth above. *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 13.

¶ 61 C. Jury Instructions

¶ 62 Next, defendant argues that the jury was improperly instructed on the offense of unlawful delivery of a controlled substance. Whether the jury was properly instructed presents a question of law subject to *de novo* review. *People v. Dorn*, 378 Ill. App. 3d 693, 698 (2008).

¶ 63 With respect to the charge of unlawful delivery of a controlled substance, the following instruction was read to the jury by the trial court and a written copy of the instruction was sent to the jury room:

“To sustain the charge of delivery of controlled substance, the State must prove the

following propositions:

First proposition: That the defendant, or one for whose conduct he is legally responsible, knowingly delivered a substance containing heroin, a controlled substance; and

Second proposition: That the weight of the substance containing the controlled substance was 1 gram or more but less than 15 grams.

If you find from your consideration of all the evidence that *this proposition* has been proved beyond a reasonable doubt, you should find the defendant guilty of that charge.

If you find from your consideration of all the evidence that *this proposition* has not been proved beyond a reasonable doubt, you should find the defendant not guilty of that charge.” (Emphasis added.)

Defendant argues that the foregoing instruction did not comply with Illinois Pattern Jury Instructions, Criminal, No. 17.18 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 17.18). According to defendant, the penultimate paragraph of the instruction should have read: “If you find from your consideration of all the evidence that *each one of these propositions* has been proved beyond a reasonable doubt, you should find the defendant guilty.” (Emphasis in original.) Defendant also contends that the last paragraph of the instruction should have read: “If you find from your consideration of all the evidence that *any one of these propositions* has not been proved beyond a reasonable doubt, you should find the defendant not guilty.” (Emphasis in original.) Relying principally on *People v. Sanders*, 129 Ill. App. 3d 552 (1984), defendant asserts that the instruction given to the jury on the charge of unlawful delivery of a controlled substance lowered the State’s burden of proof. Defendant reasons that the principle issue at trial involved the first proposition set forth in the instruction, *i.e.*, his knowledge of the drug transaction. Defendant asserts, however, that

the tendered instruction implied that the jury was required only to find that the second proposition—the weight of the substance—needed to be proved beyond a reasonable doubt in order to convict him. Thus, defendant argues, he was denied a fair trial.

¶ 64 The State concedes that the instruction given to the jury on the charge of unlawful delivery of a controlled substance was erroneous in that it did not properly relate “the jury’s duties in terms of holding the State to its burden of proof.” Nevertheless, the State insists that defendant forfeited any error by failing to raise the issue below. On the merits, the State responds that the erroneous language could not have misled the jury when considered in light of the instructions as a whole and where the prosecutor, in closing argument, told the jurors that the State must prove *both* that defendant, or one for whose conduct he was legally responsible, knowingly delivered a substance containing heroin *and* that the substance must weigh more than one gram.

¶ 65 At the instruction conference, both the State and the defense proposed an instruction on unlawful delivery of a controlled substance that tracks the language that defendant asserts is the proper phraseology. Nevertheless, for reasons unknown, the instruction read to the jury by the trial court and sent to the jury room contained the complained-of error. As the State correctly notes, defense counsel did not object when the trial court read the erroneous instruction to the jury and the propriety of the instruction was not raised in the posttrial motion defendant filed with the trial court. Generally, the failure to object to a jury instruction at trial and raise the issue in a posttrial motion results in forfeiture. *People v. Anderson*, 2012 IL App (1<sup>st</sup>) 103288, ¶ 43. However, where instructional errors are so grave as to affect the requirements of a fair and impartial trial, the plain error doctrine set forth in Illinois Supreme Court Rule 451(c) (eff. Jan. 1, 2006), provides an exception to the forfeiture rule. Instructional errors involving the burden of proof, the presumption

of innocence, and the elements of the crime charged are the type of errors that impact the fairness of a defendant's trial. *People v. Berry*, 244 Ill. App. 3d 14, 28 (1991); see also *People v. Layhew*, 139 Ill. 2d 476, 486 (1990); *People v. Jenkins*, 69 Ill. 2d 61, 66 (1977); *People v. Ogunsola*, 87 Ill. 2d 216, 222-23 (1981); *People v. Johnson*, 254 Ill. App. 3d 74, 79 (1993); *People v. Freidman*, 144 Ill. App. 3d 895, 902 (1986); *Sanders*, 129 Ill. App. 3d at 562-63. In this case, defendant asserts that the instructional error misstated the State's burden of proof on one element of the offense of which he was convicted. Accordingly, we consider defendant's argument pursuant to the plain-error doctrine.

¶ 66 Although not cited by either party, our research has discovered a case addressing the identical instructional error. In *Berry*, 244 Ill. App. 3d 14, the defendant was convicted of two counts of aggravated criminal sexual assault and one count of robbery. On appeal, the defendant challenged his robbery conviction on the basis that an instruction tendered to the jury misstated the State's burden of proof with respect to that offense. The robbery instruction provided as follows:

“To sustain the charge of robbery, the State must prove the following propositions:

First: That the defendant took United States Currency from the person or presence of [the victim]; and

Second: That the defendant did so by the use of force or by threatening the imminent use of force.

If you find from your consideration of all the evidence that *this proposition* has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that *this proposition* has not been proved beyond a reasonable doubt, you should find the defendant not guilty.’ ” (Emphasis in original.) *Berry*, 244 Ill. App. 3d at 28.

The defendant argued that this instruction was erroneous because, under the standard jury instruction, the phrase “this proposition” in the penultimate and ultimate paragraphs of the tendered instruction should have been, respectively, “each one of these propositions” and “any one of these propositions.” The defendant contended that the error denied him a fair trial because, as given, the instruction did not require the State to prove each element of the robbery offense beyond a reasonable doubt.

¶ 67 In addressing the defendant’s claim, the *Berry* court looked to *Layhew*, 139 Ill. 2d 476, a case from our supreme court. In *Layhew*, the trial court failed to provide a written instruction specifically informing the jury that the defendant was presumed innocent until proven guilty beyond a reasonable doubt. The supreme court recognized that a written instruction that informs the jury of the presumption of innocence and the State’s burden of proof “is a time-honored and effective method of protecting a defendant’s right to a fair trial,” and therefore, the trial court’s failure to instruct the jury on these topics was error. *Layhew*, 139 Ill. 2d at 486. Nevertheless, the *Layhew* court refused to adopt a *per se* rule which would mandate reversal in the absence of a written instruction regarding the presumption of innocence and the burden of proof. *Layhew*, 139 Ill. 2d at 486. Rather, in assessing whether the defendant was denied a fair trial because of the instructional error, the *Layhew* court examined the totality of the circumstances. *Layhew*, 139 Ill. 2d at 486. Under this approach, a reviewing court assesses the instructional error in light of “ ‘all of the instructions of the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors.’ ” *Layhew*, 139 Ill. 2d at 486 (quoting *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979)).

¶ 68 Invoking the totality-of-the-circumstances approach, the *Berry* court concluded that the result of the defendant's trial would not have been different if the jury had been properly instructed and, therefore, the instructional error was harmless beyond a reasonable doubt. *Berry*, 244 Ill. App. 3d at 30. In support of its finding, the *Berry* court noted that both prior to and during *voir dire*, the trial court repeatedly communicated to the prospective jurors that the defendant was presumed innocent of the charges against him and that the State was charged with proving the defendant guilty beyond a reasonable doubt. *Berry*, 244 Ill. App. 3d at 29. The trial court reiterated these principles to the jurors prior to opening statements and prior to closing arguments. *Berry*, 244 Ill. App. 3d at 29. The *Berry* court also examined the instructions as a whole and noted the following. First, the pattern jury instruction given on the aggravated criminal sexual assault charges against the defendant informed the jury that all elements had to be proven beyond a reasonable doubt and the language of the aggravated-criminal-sexual-assault instruction paralleled the language of the robbery instruction except for the error at issue. *Berry*, 244 Ill. App. 3d at 30. Second, the robbery instruction clearly informed the jury that the charge consisted of two elements which the State was required to prove. *Berry*, 244 Ill. App. 3d at 30. Third, the jury received a separate pattern jury instruction which informed them of the defendant's presumption of innocence and the State's burden of overcoming this presumption by proof beyond a reasonable doubt. *Berry*, 244 Ill. App. 3d at 30. The *Berry* court also noted that defense counsel in both opening statement and closing argument reminded the jury of the State's burden of proving the defendant guilty beyond a reasonable doubt. *Berry*, 244 Ill. App. 3d at 30. Finally, while declining to characterize the evidence against the defendant as "overwhelming," the *Berry* court did find that the evidence was not closely balanced and was sufficient to sustain the robbery conviction. *Berry*, 244 Ill. App. 3d at 30. Thus, the *Berry* court

found the instructional error harmless beyond a reasonable doubt. *Berry*, 244 Ill. App. 3d at 30; see also *Layhew*, 139 Ill. 2d at 490-92 (holding that under the totality-of-the-circumstances test, the defendant received a fair trial despite absence of a written instruction on the burden of proof and the presumption of innocence); *People v. Boose*, 256 Ill. App. 3d 598, 602-04 (1994) (concluding that instructional error impacting burden of proof did not prejudice the defendant where the jurors were advised both during *voir dire* and by other instructions that the State has the burden of proving each element of the crime charged); *People v. Harvey*, 209 Ill. App. 3d 733, 739-40 (1991) (applying totality-of-the-circumstances test as set forth in *Layhew* to conclude that inaccurate instruction on burden of proof did not deny defendant of a fair trial).

¶ 69 Applying the totality-of-the-circumstances test, we also conclude that the instructional error in this case was harmless beyond a reasonable doubt and defendant was not denied a fair trial. In particular, we note that the applicable burden of proof was repeatedly emphasized by the trial court to the prospective jurors. Prior to *voir dire*, the trial court informed the prospective jurors as a group that “the burden of proof is beyond a reasonable doubt” and that “the burden of proof remains on the State.” When *voir dire* commenced, the court initially questioned the prospective jurors as a group regarding whether they understood and agreed with the principles that defendant is presumed innocent of the charges against him, that the State must prove defendant guilty beyond a reasonable doubt and that this burden remains with the State throughout the trial. In addition, the trial court asked the prospective jurors as a group whether they would sign a guilty verdict if the State proved defendant guilty beyond a reasonable doubt and whether they would return a not-guilty verdict if the State failed to prove defendant guilty beyond a reasonable doubt. The trial court then questioned each prospective juror individually whether he or she would have “any hesitation” in returning a not-

guilty verdict if the State failed to sustain its burden of proving defendant guilty beyond a reasonable doubt. The trial court also asked each prospective juror individually whether he or she understood and agreed with the principles that defendant is presumed innocent and that the State must prove defendant guilty beyond a reasonable doubt. In addition, prior to closing argument, the trial court reminded the jury that “the State has the burden.”

¶ 70 Moreover, the observations the *Berry* court made regarding the instructions provided to the jury in that case are also applicable here. First, in addition to receiving an instruction on the offense of unlawful delivery of a controlled substance, the jury was given an instruction on unlawful possession of a controlled substance. The latter instruction was given in accordance with Illinois Pattern Jury Instructions, Criminal No. 17.28 (4th ed. 2000), and informed the jury that all elements were to be proven beyond a reasonable doubt. The language used to convey this message tracked the language used in the unlawful delivery instruction except for the error of which defendant complains. Second, the instruction at issue informed the jury that to sustain the charge of unlawful delivery of a controlled substance, “the State must prove the following *propositions*.” (Emphasis added.) The instruction then sets forth the two elements that must be proven. As noted, it is only in the last two paragraphs of the instruction that the error occurs. Third, like the jury in *Berry*, the jury in this case received Illinois Pattern Jury Instructions, Criminal No. 2.03 (4th ed. 2000), which informed the jury of defendant’s presumption of innocence and the State’s burden of proving defendant’s guilt beyond a reasonable doubt.

¶ 71 Moreover, during closing arguments, the parties repeatedly emphasized the State’s burden of proof. The State told the jury that to convict defendant of unlawful delivery of a controlled substance, it had to prove two propositions. Further, defense counsel stressed to the jury that the

State had the burden of proving defendant guilty of the charged offenses beyond a reasonable doubt. Additionally, on multiple occasions, defense counsel argued to the jury that the State had failed to meet its burden with respect to whether defendant had any knowledge of the drug transaction. In addition, in response to defendant's closing argument, the State again repeatedly informed the jury that the applicable burden is proof beyond a reasonable doubt.

¶ 72 Finally, while we do not necessarily consider the evidence presented in this case "overwhelming," we do find that the evidence is sufficient to sustain defendant's conviction of unlawful delivery of a controlled substance. See *Layhew*, 139 Ill. 2d at 490-91; *Berry*, 244 Ill. App. 3d at 30. In sum, after a careful review of the totality of the circumstances, we hold that, had the jury been properly instructed, the results of the trial would not have been different. Accordingly, we conclude that the instructional error was harmless beyond a reasonable doubt. *Layhew*, 139 Ill. 2d at 492; *Berry*, 244 Ill. App. 3d at 30.

¶ 73 In holding that the instructional error at issue is harmless beyond a reasonable doubt, we note that *Sanders*, 129 Ill. App. 3d 552, the principle case cited by defendant in support of his claim of instructional error, is distinguishable. In *Sanders*, the defendant was convicted of various crimes, including attempt murder. The trial court orally instructed the jury on the two elements of attempt murder. As read by the trial court, the last two paragraphs of the attempt-murder instruction said:

"If you find from your consideration of all the evidence that *any one* of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that *any one* of these propositions has not been proved guilty beyond a reasonable doubt, you should find the defendant not guilty.” (Emphasis in original.)

The written instructions submitted to the jury differed from the oral instructions by substituting the word “each” for “any” in the last paragraph, resulting in the following: “If you find from your consideration of all the evidence that *each* one of the propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.” (Emphasis in original.) The defendant in *Sanders* argued that he was denied a fair trial in that the trial court erroneously instructed the jury that he could be convicted if either one of the two elements of the charged offense were proved, and found not guilty only if each element was not proved. The *Sanders* court reversed the defendant’s conviction of attempt murder, finding not only that the oral and written instructions were individually erroneous, but that together, they presented conflicting and contradictory grounds by which the jury was to reach a not-guilty verdict. *Sanders*, 129 Ill. App. 3d at 563.

¶ 74 We conclude that the instructional error at issue in *Sanders* was more egregious than the one in this case. In particular, the *Sanders* jury was instructed that despite the fact the State was charged with proving two propositions for attempt murder, if either *one* of the two propositions was proved beyond a reasonable doubt, they could find the defendant guilty. Further, the oral and written instructions contradicted each other in terms of the State’s burden of proof. We also note that in *Sanders*, both elements of the offense were controverted at trial. Here, one of the two elements of the offense—the weight of the substance—was uncontroverted. Thus, *Sanders* is also distinguishable on this basis. See *Johnson*, 254 Ill. App. 3d at 81 (distinguishing *Sanders* on the basis that there was only one controverted element of the crime).

¶ 75 Alternatively, defendant argues that defense counsel was ineffective for failing to challenge the instructional error. However, as noted above, a defendant alleging ineffective assistance of counsel must demonstrate, *inter alia*, a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Having already concluded that the result of the trial would not have been different absent the instructional error, we reject defendant's ineffective assistance of counsel argument.

¶ 76 D. Cumulative Effect

¶ 77 Next, defendant contends that the cumulative effect of the alleged errors denied him of a fair trial. Our supreme court has stated that while individual trial errors may not require the reversal of a conviction, those same errors considered together may have the cumulative effect of denying defendant a fair trial. *People v. Speight*, 153 Ill. 2d 365, 376 (1992). We conclude that defendant has failed to establish cumulative error in this case. First, to the extent that some of Stevenson's convictions and the sentences therefore were improperly admitted, defendant does not challenge the admissibility of Stevenson's conviction and sentence for his role in the July 30, 2009, offense. Further, defendant has not persuasively argued that Stevenson's 2000 conviction or the sentence therefore would have been excluded. Thus, we conclude that the jurors' view of Stevenson's credibility was not affected by the improperly admitted evidence. Similarly, to the extent that the State's reference to Stevenson's prior convictions in its closing argument constituted error, any prejudice was prevented by the instructions given to the jury. Finally, while there was an instructional error, it was not prejudicial in light of the totality of the circumstances. In sum, we find that the cumulative impact of these errors did not affect the jury's verdict.

¶ 78 E. Propriety of Monetary Charges

¶ 79 Defendant’s final argument concerns the propriety of two monetary charges imposed by the trial court in conjunction with his sentence. As noted above, the parties agreed to a sentence of 24 months’ probation and various monetary charges, including a \$50 Performance-enhancing Substance Testing Fund fee (730 ILCS 5/5-9-1.1 (West 2010)) and a \$25 assessment for the State Police Services Fund (730 ILCS 5/5-9-1.1-5 (West 2010)). The trial court sentenced defendant in accordance with the agreed-upon disposition. On appeal, defendant argues that the imposition of these two monetary charges was improper because they were not in effect at the time of the commission of the offense of which he was convicted. The State concedes that, under the facts present here, these monetary charges are improper. We agree.

¶ 80 In *People v. Carreon*, 2012 IL App (2d) 100391, ¶ 12, this court noted that the imposition of a fine that does not become effective until after a defendant commits an offense violates *ex post facto* principles. See also *People v. Dalton*, 406 Ill. App. 3d 158, 163-64 (2010). In *Carreon*, we determined that although labeled as a “fee,” the Performance-enhancing Substance Testing Fund fee is more properly characterized as a “fine” because it is not subject to reduction for time spent in presentencing custody, it is contained in article 9 of chapter V of the Unified Code of Corrections—an article labeled “Fines,” it is imposed only upon the conviction of a crime, and it is not designed to compensate the State for the costs of prosecution. *Carreon*, 2012 IL App (2d) 100391, ¶ 12. Having found that the Performance-enhancing Substance Testing Fund fee is properly characterized as a fine, we held that if the statute providing for its imposition was not in effect at the time the offense for which it was imposed was committed, the assessment was improper and must be vacated. In this case, the offense at issue was committed on July 30, 2009. However, the portion of the statute authorizing the Performance-enhancing Substance Testing Fund fee did not go into effect until

August 7, 2009. See Pub. Act 96-132 (eff. Aug. 7, 2009). Thus, the imposition of the \$50 Performance-enhancing Substance Testing Fund fee was improper.

¶ 81 Likewise, we conclude that the \$25 assessment for the State Police Services Fund (730 ILCS 5/5-9-1.1-5(c) (West 2010)) is a fine. In particular, we note that the assessment is also included in the section of the Unified Code of Corrections labeled “Fines,” it is imposed only upon the conviction of a crime, and it is not designed to compensate the State for the costs of prosecution. Moreover, the portion of the statute authorizing the State Police Services Fund assessment did not go into effect until January 1, 2010 (see Pub. Act 96-402 (eff. Jan. 1, 2010)), subsequent to the date of the offense at issue here. Thus, the imposition of the \$25 State Police Services Fund assessment was improper. See *People v. Bell*, 2012 IL App (5th) 100276, ¶ 42.

¶ 82

### III. CONCLUSION

¶ 83 For the reasons set forth above, we affirm defendant’s conviction of unlawful delivery of a controlled substance, but vacate the \$50 Performance-enhancing Substance Testing Fund fee and the \$25 State Police Services Fund assessment.

¶ 84 Affirmed in part and vacated in part.