

No. 1-11-3087

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
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 0330602
)	
SERGIO BARRERA,)	The Honorable
)	Nicholas Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s factual findings underlying the denial of defendant’s motion to suppress were not against the manifest weight of the evidence, and the evidence was sufficient to sustain the jury verdict that defendant was proven guilty beyond a reasonable doubt of drug delivery given the material consistencies in the testimony. The trial court did not abuse its discretion in permitting the State to introduce codefendant’s prior consistent written statement, given to police, because defense counsel charged her with recent fabrication on cross-examination. Likewise, the trial court did not abuse its discretion in denying defense counsel’s proposed non-Illinois Pattern Jury Instruction because counsel did not have it properly prepared, and it was not so essential to the case as to affect its outcome. The State’s comments in closing argument did not deprive defendant of a fair trial because they did not constitute vouching for the State’s witness and were in response to defense counsel’s closing argument. The trial court did not abuse its discretion in denying defendant’s motion for a mistrial because the court adequately

instructed the jury to disregard the State's suggestive comment that defendant might have engaged in other crimes. Defendant's sentence was not improper. This court affirmed the judgment of the trial court.

¶ 2 Following a jury trial, defendant Sergio Barrera was found guilty of delivering drugs, then sentenced to 14 years' imprisonment. Defendant raises seven contentions on appeal. He contends the trial court erred in denying his motion to quash his arrest and suppress the evidence because Investigator Mack, the sole witness to testify at the suppression hearing, was incredible. He also contends that the evidence was insufficient to support his conviction based on inconsistencies in the trial testimony. In addition, defendant raises a number of trial errors, arguing the trial court erred in permitting the State to introduce prior "consistent statements" by the codefendant; the trial court erred in declining to introduce defendant's proposed non-Illinois Pattern Jury Instruction, which he orally submitted late the last day of trial without citation to authority; he was denied a fair trial because the State introduced prejudicial statements in closing arguments; and the trial court erred in denying defendant's motion for a mistrial because the State improperly introduced evidence of other crimes. Finally, defendant challenges his 14-year sentence as excessive, although he offers no record regarding the imposition of his sentence in support. For the reasons stated below, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Following their arrest, defendant and codefendant Nancy Balthazar (also spelled Baltazar) were charged with delivering between 100 and 400 grams of cocaine to undercover sheriff's police investigator Mack. Defendant filed a motion to quash his arrest and suppress the evidence arguing probable cause was lacking. Investigator Mack, the only witness to testify at the motion-to-suppress hearing, stated that he was acting as an undercover agent with 12 years' experience and having overseen over 100 narcotics transactions. He had previously negotiated with

No. 1-11-3087

Balthazar for the delivery of cocaine for money. The day of November 12, 2009, was no different in that he arranged to purchase 4.5 ounces of cocaine from Balzathzar for \$3,200. In pursuance of this transaction, the two met at a gas station around 7 p.m., with Investigator Mack in a covert vehicle and Balthazar arriving on foot. Balthazar stated “she had to go pick up the cocaine from a friend,” then directed Investigator Mack to the nearby Shell gas station. A silver car containing two individuals arrived shortly thereafter and parked about 12 feet away.

Balthazar stated, “[t]hat’s my guy,” then without a thing in hand she proceeded to the passenger-side of the silver car, where defendant was seated. Balthazar engaged in conversation with defendant. Investigator Mack observed defendant hand Balthazar an item, which she tucked close to her body, and she returned to his car. Balthazar, after reaching from the same spot where she had tucked the item, presented Investigator Mack with a clear plastic bag containing cocaine in exchange for \$3,200. Following this transaction, Investigator Mack signaled to his surveillance team, and the relevant parties present at the station were then taken into custody.

¶ 5 The trial court denied the motion to suppress after finding Investigator Mack credible. The case proceeded to a jury trial, where Investigator Mack testified in a manner consistent with his pretrial testimony. Investigator Mack added that the November 12 transaction was the fourth drug buy he had conducted with Balthazar. He also added that once at the Shell gas station, Balthazar made a telephone call and defendant thereafter appeared in the silver car. Investigator Calvin Blanchard, who acted as surveillance for this transaction, corroborated Investigator Mack’s testimony.

¶ 6 Following defendant’s arrest, he was read his *Miranda* rights and indicated he understood them. He made a voluntary statement memorialized in writing, which was read aloud to the jury. In the statement, defendant admitted that on November 12, his friend Bluto asked him to deliver

No. 1-11-3087

4.5 ounces of cocaine in exchange for \$300. Defendant agreed, and Bluto stated defendant would receive a call from a female who would direct him to the location. Around 7 p.m., defendant in fact received that call from a female directing him to a certain location, but then later received another call directing him to the gas station. There, he met her and gave her the cocaine. In spite of this statement, Investigator Mack released defendant with instructions to check in weekly with information because Investigator Mack hoped to identify a much larger drug target. Defendant did not provide information, and consequently, he was rearrested about two months later.

¶ 7 Balthazar pleaded guilty to four counts of delivery of a controlled substance, which included a reduced charge in this case, and was sentenced to the agreed term of seven years' imprisonment. Balthazar testified at defendant's trial, stating that her guilty plea had not been entered in exchange for testifying against defendant and she had not been offered anything in exchange for her testimony. She admitted she had prior convictions for aggravated unlawful use of a weapon and criminal trespass to a vehicle. Like Investigator Mack, Balthazar testified she had engaged in previous narcotics transactions with him. On November 12, following her conversation with Investigator Mack, she called defendant, he identified himself, and she said she recognized his voice. Balthazar asked for 4.5 "white t-shirts" or 4.5 ounces of cocaine, defendant said he had it, and that it would cost \$2,400. Her testimony thereafter corroborated that of Investigator Mack's regarding the drug transaction at issue. She added that she immediately recognized defendant when she saw him pull into the gas station.

¶ 8 Defendant testified on his own behalf and denied delivering drugs to Balthazar. He testified that on the evening in question, he and his brother-in-law drove to pick up food for their family, but went to the Shell gas station instead. Once there, "a complete stranger came up to the

driver's side" of the car and had a conversation with defendant's brother-in-law. Defendant did not hear what was said, however, and the next thing he knew he was arrested. He testified the police essentially threatened his brother-in-law and defendant then signed the written statement without reading it because he was told he could go home if he did. Investigator Mack later rebutted these statements.

¶ 9 Following evidence and argument, the jury found defendant guilty of drug delivery, and the court sentenced defendant to 14 years' imprisonment. Defendant appealed.

¶ 10 ANALYSIS

¶ 11 Defendant first contends the trial court erred in denying his motion to quash arrest and suppress the evidence. Although the State argues this contention has been forfeited, the record reveals otherwise. In determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). We review *de novo*, however, the legal challenge to the trial court's ruling on a suppression motion. *Id.* Further, it is proper for us to consider the testimony adduced at trial, as well as at the suppression hearing. *Id.*

¶ 12 At the motion to suppress hearing in this case, defendant argued that the police report in this case was so entirely lacking in detail as to render Investigator Mack's single account of the drug transaction entirely incredible. As such, he argued there was no evidence of a drug delivery and no basis for arrest. Defense counsel, for example, argued that the report failed to detail Balthazar's statement – "[t]hat's my guy" – in reference to defendant, and also failed to offer a description of the object being exchanged, or the fact that Balthazar tucked the object near her body and then tendered it to the Investigator. The report also failed to detail the angle of the

silver car and Investigator's Mack's ability to see the transaction. Defense counsel further focused on Investigator Mack's failure to secure a videotape of the drug transaction. Defense counsel argued that Balthazar in essence called defendant to the scene and feigned obtaining drugs from him because she had them on her person all along.

¶ 13 In response, the court called defendant's theory "utterly ridiculous," stating "you're asking me to somehow *** guess that [Balthazar] is such a bright person in the milieu in which she operates that she decided to create a shell, another person for whom she originally allegedly gets drugs *** [and] pretend to get an object, then return and tender that object." The court stated that theory, "certainly attaches a degree of intellectual foresight that is absolutely unheard of in this building." The court stated that although Investigator Mack had been substantially impeached regarding the omissions from his police report, the court nonetheless found him "extremely credible" and the circumstantial evidence strong. The court concluded Investigator Mack testified that Balthazar directed Investigator Mack to a second gas station, where she exited his vehicle and returned with drugs in her hand, then tendered him cocaine. The court concluded the evidence and common sense dictated that the drug transaction occurred as reported by Investigator Mack, and the court denied the motion to quash the arrest and suppress the evidence.

¶ 14 Defendant now challenges that determination. He argues before this court, as he did below, that Investigator Mack's omissions in his police report rendered his account of the incident incredible. Notably, although police reports may be used to impeach a witness, the statements contained therein are inadmissible hearsay, and cannot be used as substantive evidence. *People v. Shief*, 312 Ill. App. 3d 673, 680 (2000); *People v. Williams*, 240 Ill. App. 3d 505, 506 (1992). Factual discrepancies in a police report do not necessarily nullify an officer's identification testimony, but rather go to the weight and credibility of that testimony, which is a

No. 1-11-3087

matter exclusively within the province of the fact finder. *People v. Lockett*, 273 Ill. App. 3d 1023, 1027 (1995); *People v. Wehrwein*, 190 Ill. App. 3d 35, 40 (1989); *People v. Spain*, 91 Ill. App. 3d 900, 905 (1980). Here, Investigator Mack testified in a manner largely consistent with Investigator Blanchard, Balthazar, and defendant's own inculpatory written statement, that defendant was beckoned by Balthazar to the Shell gas station, where he delivered the drugs from his vehicle. Balthazar and the officers testified consistently that once there, she obtained an object, then returned to Investigator Mack's car and finally presented Investigator with the item, which was cocaine. Viewing the pretrial evidence together with that at trial (see *Slater*, 228 Ill. 2d at 149), we cannot say the trial court's factual findings were against the manifest weight of the evidence or that the opposite conclusion was clearly evident. See *People v. Wells*, 403 Ill. App. 3d 849, 854 (2010). A reasonable person, having the knowledge possessed by the officer at the time of arrest, would believe that defendant committed to offense of delivering cocaine. See *People v. Bobiek*, 271 Ill. App. 3d 239, 241 (1995). Defendant's motion to suppress claim fails.

¶ 15 For similar reasons, we also reject defendant's contention that the State failed to prove him guilty beyond a reasonable doubt. The standard of review when assessing the sufficiency of evidence is, considering all the evidence in the light most favorable to the State, whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 16 Defendant raises the same arguments regarding the testimonial inconsistencies that he did at trial and also relating to his motion to suppress claim, only he does so now in the context of a sufficiency of the evidence claim. He adds that Balthazar's testimony could not have been

No. 1-11-3087

believed because she stated during her plea hearing that defendant was not the individual who delivered the drugs in this instance. As described immediately below, the State adequately and properly rehabilitated Balthazar by demonstrating that her testimony at trial was consistent with her statement made immediately following her arrest in which she identified defendant as the drug delivery man. Balthazar also explained that she did not adequately understand the question presented at her plea hearing. Given that Balthazar's testimony was also in keeping with the officers' testimony and defendant's own inculpatory statement, we must reject defendant's claim that the State's case in chief was so riddled with inconsistencies as to make it entirely incredible. See *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007); Cf. *People v. McCarthy*, 102 Ill. App. 3d 519, 522 (1981) (defendant was not proven guilty beyond a reasonable doubt where there were too many instances of witnesses changing their stories, inconsistent substantial details, and evidence indicating the witnesses planned their testimony). The evidence was not so improbable or unsatisfactory as to create a reasonable doubt regarding defendant's guilt.

¶ 17 This brings us to defendant's next claim. Defendant contends that the trial court erred in allowing Balthazar to testify on redirect regarding her prior consistent statement, arguing this testimony was used "solely to bolster her credibility," which is improper. See *Jones v. Bojorge*, 2013 IL App (1st) 123209, ¶ 23. The State concedes it introduced a prior consistent statement on redirect, but asserts this was permissible in light of defense counsel's cross-examination of Balthazar.

¶ 18 Although statements made prior to trial are generally inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness, two exceptions exist, where there is a charge of recent fabrication or false testimony. *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). To be admissible, the prior consistent statement must have been made before the time of

No. 1-11-3087

the alleged fabrication, influence, or motive came into being. *Bobiek*, 271 Ill. App. 3d at 243.

We review the admission of such evidence for abuse of discretion. *People v. Mullen*, 313 Ill. App. 3d 718,730 (2000).

¶ 19 The State presented the prior consistent statement in this case on redirect examination when the State asked Balthazar about her written statement to Investigator Mack, given shortly after her arrest, in which she said that it was her “friend Sergio who had delivered the cocaine” to her on November 12. Balthazar acknowledged her written statement was consistent with what she was testifying to at trial. The trial court overruled defendant’s objection to the State’s use of that prior consistent statement to rebut the assertion of a recent fabrication, holding that defense counsel had opened the door to such impeachment, “so that ship has sailed.” The court stated, “[t]he whole tenor and meaning of the cross examination of this witness has been to rebut her believability to indicate she is lying today.”

¶ 20 We agree with the trial court’s assessment. The nature of defense counsel’s questions on cross-examination suggested that Balthazar had been fed information by the State and was testifying falsely at trial in order to be released from prison. Counsel, for example, emphasized that Balthazar was already a two-time convict serving a concurrent sentences in this case but implied she could have been subject to consecutive sentences. Then, he stated: “You claim your story is that you have no agreement with anyone, right? You’re doing this right now freely and voluntarily, am I correct?” When Balthazar responded, yes, counsel continued: “Because you are an honest person, correct? *** *You became honest when you got to the witness stand today? *** Today was the first day you became honest, right?*” (Emphasis added). Defense counsel asked if the only reason Balthazar was testifying was to help herself, to which she responded, “no.” Counsel then stated, “Miss Balthazar, you don’t like being in prison, do you? *** It’s not a

No. 1-11-3087

very good place, right? *** You don't like the people with you, right?" *** And you are in a very very small, almost like a cage, right? That's how you live? *** And of course you want to change your conditions, don't you? *** You want to do a good job here because you have a hope or expectation that maybe they will pull some strings for you and make life a little bit better for you in prison, the prosecution, correct?" Then, in reference to Balthazar's March plea hearing, defense counsel asked whether she had denied defendant was the person she was "getting the drugs from." She said, yes, at that time she had denied that. It was after this that the State rehabilitated its witness on redirect by emphasizing her prior consistent statement and allowing Balthazar to explain her misunderstanding at the plea hearing.

¶ 21 Based on this exchange and the implications of false testimony to the jury, the State was perfectly within its right to introduce a prior consistent statement to rehabilitate its witness. See *People v. Titone*, 115 Ill. 2d 413, 423 (1986) (prior consistent statement to ASA allowed where defense counsel's cross-examination implied State's witness was lying at trial; deference afforded to trial court regarding whether motive to fabricate existed earlier); see also *People v. Williams*, 147 Ill. 2d 173, 227-28 (1991) (affirming *Titone* in that regard); *People v. Gonzalez*, 265 Ill. App. 3d 315, 323-24 (1994) (following *Williams*; where codefendant was charged on cross-examination by defense counsel of fabricating testimony at the defendant's trial based on plea agreement with the State, codefendant's prior consistent statement allowed as rebuttal even though his motive to testify falsely may have existed from start); *People v. Rosario*, 65 Ill. App. 3d 170, 174 (1978) (where defense counsel's cross implied witness testimony was fabricated to gain release from prison so witness could indulge heroin habit, prior consistent statement allowed); see also *People v. Ruback*, 2013 IL App (3d) 110256, ¶¶ 32, 39 (treating charges of recent fabrication and improper motive separately); *but see People v. Grisset*, 288 Ill. App. 3d

No. 1-11-3087

620, 626 (1997) (prior statement cannot be admitted where motive to fabricate existed at time of statement).

¶ 22 Defendant also complains that the court erroneously permitted Balthazar's prior consistent handwritten statement to be entered not just as rehabilitative evidence, but also as substantive evidence. Although defendant objected to the introduction of the prior consistent statement at trial, he did not object to its introduction as substantive evidence. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In fact, defendant stated that if the court were to allow the statement for impeachment purposes, the court should instruct the jury that it be entered as substantive evidence. Defendant also argued in closing that the statement was substantive. Defendant cannot now complain of an alleged error he invited. *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000). Regardless, evidence of a witness's out-of-court identification may be used to corroborate an in-court identification and also as substantive evidence, provided the witness testifies at trial and is subject to cross-examination. 725 ILCS 5/115-12 (West 2012). Under this rule, there was no error in admitting Balthazar's written statement for rehabilitative or substantive purposes because although corroborative hearsay, it constituted an identification of defendant as the offender. See *People v. Beals*, 162 Ill. 2d 497, 508 (1994). Defendant's claim regarding the prior consistent statement fails.

¶ 23 Defendant next contends that the trial court erred in declining to present defendant's proposed non-Illinois Pattern Instruction (IPI) to the jury on "impeachment by omission," which related to the legal effect of the officers having omitted details from their police reports. The State responds that defense counsel made "only a generic oral request, and never submitted a written instruction," and thus the trial court did not err.

¶ 24 Both the accused and the State are entitled to appropriate instructions which present their

No. 1-11-3087

respective theories of the case if those theories are supported by the evidence presented at trial. *People v. Wilson*, 257 Ill. App. 3d 670, 697 (1993). The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence so that the jury can reach the right conclusion under the law and evidence. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). Supreme Court Rule 451(a) (eff. April 8, 2013) provides that IPI instructions should be given unless they do not accurately state the law, and the decision of whether to give a non-IPI instruction is within the sound discretion of the trial court. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). The trial court does not abuse its discretion by refusing to give a non-IPI instruction if there is an applicable IPI instruction or the essence of the refused instruction is covered by other instructions. *People v. Simms*, 192 Ill. 2d 348, 412-13 (2000). For the reasons stated below, there was no error in this case.

¶ 25 First, we cannot say defendant even tendered the desired non-IPI jury instruction. The facts show that after defendant rested his case but before the State called its rebuttal witness, the parties discussed jury instructions with the court. Defense counsel requested an impeachment by omission instruction even though he acknowledged he hadn't had "the chance to prepare one," and, on defense counsel's request, the court granted him 5 or 10 minutes to look up the appropriate instruction. After that period, counsel again asked for "a short break," so he could "craft a very quick instruction." The court responded that it had already given counsel more than the allotted time, but counsel responded he would be "getting an e-mail" on the instruction. The court stated that in the meantime, the case would proceed with the State's rebuttal witness. Following that testimony, as well as closing arguments, the court issued the jury instructions without any objection by the defense, and the jury retired to deliberate. Defense counsel then requested to read the instruction to the court for the record. The court noted defense counsel was

reading the instruction from an email on his cell phone and, when the court asked for a case citation as to the instruction, defense counsel could not provide one. The court then rejected defense counsel's request to give the impeachment instruction to the jury because the case had been pending for 18 months and the written instruction simply was not ready.

¶ 26 Notably, the parties primarily bear the burden to tender desired instructions, and unless a particular instruction is so essential to the case as to affect its outcome, the failure of a party to offer an instruction generally is considered waiver on appeal. *People v. Carel*, 37 Ill. App. 3d 952, 955 (1976); *People v. Jordan*, 247 Ill. App. 3d 75, 93 (1993); see also Ill. S. Ct. Rs. 451(c) and 366(b)(2)(i) (no party may raise on appeal the failure to give an instruction unless the party shall have tendered it). In addition, Supreme Court Rule 451 requires that written instructions be given in criminal cases and contemplates that they submit them to the court in writing. Ill. S. Ct. R. 451(c); 735 ILCS 5/2-1107 (West 2012). Here, defendant's instruction was not properly tendered because it was not prepared in a timely manner in writing with cited authority. He therefore has forfeited his contention on appeal.¹

¶ 27 Even forfeiture aside, however, we would note the instructions given adequately advised the jury of defendant's theory of the case, and the standard IPI instruction 1.02 encompassed witness credibility when omissions occur. The court instructed the jury through IPI 1.02 that they were the only "judges of the believability of the witnesses and of the weight to be given to

¹ It is noteworthy that IPI 3.11 provides: "The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (*acted in a manner*)] that was not consistent with his testimony in this case." (Emphasis added). The court in this case included IPI 3.11 in the jury instructions, but instructed the jury only on the former statement of a witness and not on the former actions of a witness. Defense counsel could have requested that the court instruct the jury on the former actions of the witness, and this instruction would have more pointedly achieved counsel's goal of informing the jury that they could consider Investigator Mack's failure to *act*, or include pertinent information in his police report, in judging his believability as a witness. As with the non-IPI instruction, however, defense counsel did not specifically request that IPI 3.11 include that language, and thus he forfeited the issue. Ill. S. Ct. Rs. 451(c) and 366(b)(2)(I); *Carel*, 37 Ill. App. 3d at 955.

No. 1-11-3087

the testimony of each of them.” The instruction continued: “In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case.” Given this instruction, together with defense counsel’s emphasis on the omissions during cross-examination and closing argument, the jury was able to judge the omissions in the police reports versus the officers’ testimony and weigh the officers’ credibility. *Cf. People v. Foster*, 322 Ill. App. 3d 780, 789-90 (2000) (trial court did not err in denying non-IPI instruction relating to drug addiction of witness where issue was fully before the jury and court instructed jury generally on witness credibility under IPI No. 1.02); see also *People v. Robinson*, 14 Ill. App. 3d 135, 140 (1973) (a court is under no obligation to give more than one instruction on the same subject matter and if an instruction is given which covers the subject as well as the one refused, it is not error to reject the latter). For the aforementioned reasons, defendant’s jury instruction claim fails.

¶ 28 Defendant next contends that certain comments in the State’s closing argument deprived him of his constitutional right to a fair and impartial trial because they were prejudicial in so far as the ASA vouched for the credibility of Balthazar. Although the State argues this contention has been forfeited because defendant did not identify it in his motion for a new trial (see *Enoch*, 122 Ill. 2d at 186), our review of the record reveals otherwise; defendant specifically alleged in his motion for a new trial that the prosecution’s alleged error of vouching for the truthfulness of Balthazar deprived defendant of a fair trial. We thus proceed in our review.

¶ 29 In support of his claim, defendant points to the following comments by the ASA during rebuttal argument. The ASA acknowledged Balthazar was “no angel,” but then asserted, “from the moment she was arrested,” Balthazar said, “I’m gonna tell the truth. I’m gonna cooperate.

And from the very first day that she was arrested on this, that's what she did. She told the police the truth about what happened. And when she stepped into court, she took responsibility." The ASA continued, stating Balthazar took responsibility for the offense by pleading guilty; she testified absent a deal from the State; and in essence she was not getting a better deal in exchange for her testimony.

¶ 30 Although defendant now complains that this prejudiced the jury, generally prosecutors are given wide latitude during closing argument. *People v. Eggert*, 324 Ill. App. 3d 79, 84 (2001). A prosecutor may comment on the evidence and any fair, reasonable inferences it yields, even if such inferences reflect negatively on defendant. *Nicholas*, 218 Ill. 2d at 121. While it is improper for the State to place the integrity of the State's Attorney's office behind the credibility of a witness, the State may discuss the witnesses and their credibility and is entitled to assume the truth of the State's evidence. *People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988); *see also People v. Jackson*, 399 Ill. App. 3d 314, 318 (2010). A prosecutor also may respond to comments advanced by defense counsel that clearly invite a response. *People v. Johnson*, 208 Ill. 2d 53, 113 (2003).

¶ 31 Viewing the ASA's comments in the context of the entire closing argument, as we must, it is apparent that the ASA was not vouching for the credibility of Balthazar or expressing his personal opinion; rather, he was responding to defense counsel's claim that Balthazar was lying and providing an argument based on the evidence presented. *See Jackson*, 399 Ill. App. 3d at 318; *People v. Bailey*, 249 Ill. App. 3d 79, 82-84 (1993); *People v. Cox*, 197 Ill. App. 3d 1028, 1041 (1990); *cf. People v. Schaefer*, 217 Ill. App. 3d 666, 668-69 (1991) (plain error where prosecutor stated during closing argument that based on prosecutor's professional experience he essentially knew the State's witness was telling the truth). Even assuming, *arguendo*, that these

No. 1-11-3087

statements exceeded the scope of proper commentary, we cannot say the comments resulted in substantial prejudice, *i.e.* that the comments were a material factor in defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). This is especially true where the judge instructed the jury that opening statements and closing arguments are not evidence and any statements made that are not based on the evidence should be disregarded. Accordingly, we reject defendant's contention that the State's rebuttal argument deprived him of his constitutional right to a fair and impartial trial.

¶ 32 Defendant next contends that the trial court erred in denying defense counsel's motion for a mistrial following the State's alleged introduction of other crimes evidence, which is generally inadmissible. See *People v. Hall*, 194 Ill. 2d 305, 339 (2000). The facts underlying this claim are as follows. On redirect, the ASA asked Investigator Mack about the November 30 drug transaction with Balthazar. Investigator Mack explained that during that transaction, Balthazar exited his car, Investigator Mack lost sight of her, and when she returned, she had drugs. Investigator Mack stated he did not know who Balthazar was meeting with that day, and the ASA then inquired, "And so that person could have been Sergio, is that correct?" The court sustained defense counsel's objection to this question. In a side-bar, defense counsel requested a mistrial because the question introduced proof of other crimes, but the court denied the oral motion. The court then instructed the jury that the attorneys' questions are not evidence and "[w]hatever was said by way of the question should be stricken from your mind also." The court asked whether the jury understood and would follow the law, then the case proceeded.

¶ 33 A trial court has broad discretion to determine the propriety of declaring a mistrial, and a mistrial should generally be declared only as the result of some occurrence at trial of such character and magnitude that the party seeking it is deprived of his right to a fair trial. *Hall*, 194

No. 1-11-3087

Ill. 2d at 341.

¶ 34 Here, the State's hypothetical question implying that defendant might have been involved in a drug transaction was clearly improper, but it was not so prejudicial that it deprived him of a fair trial. Generally, if a timely objection is made at trial to improper interrogation, the court can, by sustaining the objection or instructing the jury to disregard the question and answer, usually correct the error. *Hall*, 194 Ill. 2d at 342; see also *People v. Buress*, 259 Ill. App. 3d 217, 224 (1994), 274 Ill. App. 3d 164 (defendant seeking mistrial must also show any damage could not have been remedied by admonitions and instructions). This was just such a case. The court immediately sustained defendant's objection and essentially admonished the jury to disregard the State's suggestive question, to which Investigator Mack never gave an answer. The trial court also instructed the jury at the end of the trial to disregard questions to which objections were sustained. Under these circumstances, we hold that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. See *Buress*, 259 Ill. App. 3d at 225-26, and cases cited therein.

¶ 35 Defendant finally contends his sentence is "manifestly disproportionate to the nature of the offense and to his personal background and potential for rehabilitation." Defendant additionally contends the trial court failed to consider statutory sentencing factors. The State responds that defendant failed to include his sentencing transcript in the record on appeal, and thus, the record is insufficient for us to review his claim. We agree. Defendant bears the burden of providing a sufficiently complete record on appeal and any doubts arising from an incomplete record will be construed against him. *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010). Sentencing is a matter within the discretion of the trial court to which we ascribe great deference (see *People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), yet because defendant has not provided

No. 1-11-3087

this court with the record delineating the trial court's reasons for imposing the sentence, we cannot adequately review his sentencing contentions. We would further note that defendant was found guilty of delivery of 100 grams or more but less than 400 grams of cocaine, a Class X felony carrying 9 to 40 years' imprisonment (720 ILCS 570/401(a)(2)(B) (West 2012)); as such, his 14-year sentence falls within the permissive statutory range and is presumptively correct. See *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010); *People v. Tye*, 323 Ill. App. 3d 872, 890 (2001). With nothing to rebut this presumption, we affirm defendant's sentence. See *Tye*, 323 Ill. App. 3d at 890.

¶ 36 In reaching this conclusion, we also reject defendant's argument that his 14-year sentence is excessive because it is disparate with Balthazar's 7-year sentence imposed on her guilty plea. Even though defendant forfeited this issue by failing to include his sentencing transcript and that of Balthazar's in the record on appeal, and also by failing to raise the issue in his motion attacking the sentence after trial, we note that because Balthazar pleaded guilty and defendant did not, the 7-year sentencing disparity does not prove defendant's sentence was excessive. See *People v. Morales*, 339 Ill. App. 3d 554, 562 (2003) (holding codefendant's sentence following plea agreement cannot be compared to sentence imposed after trial).

¶ 37 CONCLUSION

¶ 38 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 39 Affirmed.