2013 IL App (4th) 120677-U

NO. 4-12-0677

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 23, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
TOUSSAINT L. SMITH,	)	No. 11CF682
Defendant-Appellant.	)	
	)	Honorable
	)	Michael R. Roseberry,
	)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding that (1) the State presented sufficient evidence to sustain defendant's conviction for unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)); and (2) the trial court did not commit plain error by (a) allowing the State to recall a witness to testify as part of its case in chief; or (b) failing to *sua sponte* dismiss the charge against the defendant on the ground that the State was engaging in a vindictive prosecution.

¶ 2 In June 2012, a jury found defendant guilty of unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010) (conspiracy to commit controlled substance trafficking (720 ILCS 570/401.1 (West 2010) (more than 1 gram but less than 15 grams of cocaine))). The trial court sentenced defendant to 12 1/2 years' imprisonment.

¶ 3 Defendant appeals, arguing that (1) the State failed to prove him guilty of unlawful drug conspiracy beyond a reasonable doubt, (2) the trial court erred by allowing the

State to recall Agent James Brown to testify as part of its case in chief, and (3) his conviction was the product of a vindictive prosecution. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2011, an Adams County grand jury returned a bill of indictment in Adams County case No. 11-CF-682, charging defendant with unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). The indictment alleged that between March 12, 2011, and March 18, 2011, defendant agreed with another to commit controlled substance trafficking (720 ILCS 570/401.1 (West 2010) (more than 1 gram but less than 15 grams of cocaine)) and provided financing or direction to facilitate the offense.

¶ 6 A. Defendant's Motion To Dismiss

¶ 7 In March 2012, defendant filed a "motion to dismiss for double jeopardy violations" pursuant to section 114-1(a)(2) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-1(a)(2) (West 2010)). In the motion, defendant asserted that he "was first brought to trial for the same conduct on August 16, 2011, and the charges were dismissed by the Trial Court with prejudice." Defendant argued that the double jeopardy clause of the fifth amendment to the United States Constitution (U.S. Const., amend. V), section 10 of article I of the Constitution of the State of Illinois (Ill. Const. 1970, art I, §10), and section 3-4 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/3-4 (West 2010)) prohibited the State from prosecuting him for unlawful criminal drug conspiracy because the charge was based on the same conduct which formed the basis of charges previously dismissed with prejudice in Adams County case No. 11-CF-156.

¶ 8 The State filed a memorandum of law in opposition to defendant's motion,

asserting that defendant was previously charged with four separate counts of unlawful delivery of a controlled substance (720 ILCS 570/401 (West 2010)) in relation to four separate deliveries occurring between March 2, 2011, and March 18, 2011 (Adams County case No. 11-CF-156). In August 2011, the trial court dismissed all charges in that case with prejudice. In the memorandum, the State argued that the offense of unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)), based on an agreement to commit controlled substance trafficking (720 ILCS 570/401.1 (West 2010)), contains different elements than the offense of unlawful delivery of a controlled substance (720 ILCS 570/401 (West 2010)). Accordingly, pursuant to the *Blockburger* test (*Blockburger v. United States*, 284 U.S. 299 (1932)), double jeopardy did not bar a subsequent prosecution for unlawful criminal drug conspiracy.

¶ 9 At an April 2012 hearing on defendant's motion to dismiss, both parties argued their respective positions as to the double jeopardy issue. Defendant offered no other basis for dismissal of the charge. The trial court denied defendant's motion to dismiss, finding that double jeopardy did not bar the prosecution for unlawful criminal drug conspiracy because that offense required proof of different elements than unlawful delivery of a controlled substance.

¶ 10 B. Defendant's June 2012 Jury Trial

¶ 11 At defendant's June 2012 jury trial, the following evidence was presented.

¶ 12 1. *The State's Evidence*

¶ 13 Agent James Brown of the Quincy police department testified that in late February or early March 2011, Tyler Douglas contacted him to offer information about a drug dealer in Quincy. Douglas explained to Brown that his girlfriend, Schavell Holder, had recently been charged with drug offenses and he hoped that the State would reduce the charges against her in

exchange for his assistance. Brown agreed to make Douglas a confidential informant, a status that Brown described as a person the suspect knows and trusts yet who cooperates with law enforcement to investigate the suspect. Brown testified that a typical investigation of a suspected drug dealer often involves multiple covert, police-coordinated drug purchases (controlled buys) using a confidential informant. Brown explained that by executing multiple controlled buys prior to apprehending a suspect, investigators can better understand the scope of the suspect's operation.

¶ 14 Shortly after agreeing to act as a confidential informant, Douglas notified Agent Brown that he could buy ecstasy pills from defendant at defendant's apartment in Quincy. On March 2, pursuant to Brown's instructions, Douglas contacted defendant and agreed to purchase ecstasy from him. Brown drove Douglas in an undercover police vehicle to a location approximately one or two blocks away from defendant's apartment. As with every controlled buy, another agent accompanied Brown and Douglas (that agent's identity does not appear in the record). Following the procedures typical of a controlled buy, Brown provided Douglas with $80 in prerecorded United States currency to purchase six ecstasy pills from defendant. Brown equipped Douglas with a video camera disguised as a key chain accessory and searched him to ensure that he did not possess any drugs or unaccounted-for currency. Douglas exited the vehicle and walked through an alleyway to defendant's apartment.

¶ 15 Douglas testified that he knocked on defendant's door and defendant let him inside. Defendant's girlfriend, Layla Findley, was sitting on the couch next to defendant. Defendant removed six green pills from a plastic bag and gave them to Douglas in exchange for the $80 in currency. Douglas left the apartment and walked back to Agent Brown's vehicle, at

which point he gave the pills and video-recording device to Brown.

¶ 16 At trial, the jury viewed the approximately 11-minute video recording, which contained no audio. The video began with Douglas exiting Brown's vehicle and continued without interruption until Douglas returned to Brown's vehicle. In a dimly lit portion of the video from inside the apartment, a bald, African-American male can be seen sitting on a couch with his hand inside a plastic sandwich bag. Douglas identified defendant as the man reaching into a bag of ecstasy pills.

¶ 17 On March 14, Douglas informed Agent Brown that he could buy crack cocaine from defendant. Brown encouraged Douglas to inquire of defendant about purchasing 3.5 grams, a larger quantity than Douglas would typically purchase. Douglas contacted defendant, who told Douglas that he did not want to sell 3.5 grams at once because he would make more money selling smaller individual quantities. That same day, Douglas and the agents executed another controlled buy. Again, the same procedures were followed. Brown searched Douglas, then gave him $100 in prerecorded currency for the purchase of 1 gram of crack cocaine. Douglas went into defendant's apartment and returned to Brown's vehicle with a bag containing a substance that appeared to Brown to be crack cocaine. Subsequent tests performed by a drug chemist at the Illinois State Police crime lab confirmed that the substance contained cocaine. Although Brown testified that the device on Douglas's key chain was recording during the controlled buy, he could not identify any individuals from the recording. The recording was not shown to the jury.

¶ 18 Later in the day on March 14, defendant called Douglas and offered to sell him additional crack cocaine. Defendant explained to Douglas that he was now willing to sell the remainder of his supply because he planned to send Findley to St. Louis, Missouri, to purchase a

new supply of crack cocaine. At approximately 6 p.m., Brown provided Douglas with $200 in prerecorded currency to purchase 2 grams of crack cocaine from defendant. Again, the same procedures were followed. When Douglas returned to Brown's vehicle from defendant's apartment, Douglas handed Brown two plastic bags containing an off-white chunky substance. (Subsequent tests showed that the substance in one of the bags contained cocaine, but the substance in the other bag did not.)

¶ 19 In the early morning hours of March 15, based on Douglas's information that Findley would be traveling to St. Louis to purchase more crack cocaine, Agent Brown went to the area outside defendant's apartment and attached a global positioning system (GPS) tracking device on the underside of Findley's car. Brown testified that Internet software allowed him to monitor the location of the device on a digital map, which he did during the afternoon and evening of March 15.

¶ 20 Findley testified that she agreed to travel to St. Louis on March 15 to purchase crack cocaine for her and defendant to sell in Quincy. Defendant provided her with $200 for that purpose. The State introduced into evidence transcripts of text messages sent to and from Findley's cellular phone on March 15. The pervasive use of slang and abbreviations in the text messages required Findley and Agent Brown to translate them for the jury. In the afternoon and evening of March 15, Findley sent and received text messages to and from several phone numbers with area codes corresponding to the city of St. Louis and its suburbs. Findley testified that most of her text message conversations that afternoon and evening were directed toward purchasing crack cocaine. Brown corroborated that testimony based upon his understanding of the drug slang contained in the text messages.

¶ 21 Defendant exchanged text messages with Findley while she was attempting to purchase crack cocaine in St. Louis on March 15. At 7:43 p.m., defendant sent Findley a text message that read, "U lookin dear?" Findley replied, "Ya had to wait for dude to re up bout to b good boo." Findley explained that she understood "U lookin" as defendant asking her if she was still looking for crack cocaine to purchase. In her reply, she told defendant that she had to wait for the person she planned to buy from ("dude") to purchase more crack cocaine ("re up") and then she would be able to buy the crack cocaine from him ("b good").

¶ 22 Two hours later, Findley was still in St. Louis waiting to purchase crack cocaine. She sent a text message to defendant, which read, "Babe i dont like this!!!!" She and defendant then exchanged the following text messages:

"DEFENDANT: 'If u still waitin jus leave baby'

FINDLEY: 'Y n b empty handed.....no'

DEFENDANT: 'Yea. But we cant afford to get jacked' "

Findley testified that she was reluctant to leave St. Louis without having purchased crack cocaine. She interpreted defendant's last text message to mean that the two of them could not afford to get robbed ("jacked").

¶ 23 Findley was ultimately unable to purchase crack cocaine in St. Louis on March 15. However, close to midnight on her drive home to Quincy, she made contact with an acquaintance in Hannibal, Missouri, who sold her 3 grams of crack cocaine for $150.

¶ 24 Meanwhile, using GPS tracking software, Agent Brown was in Quincy monitoring Findley's location as she neared the border of Missouri and Illinois. Brown contacted Trooper Matt Harris of the Illinois State Police and asked him to watch for Findley's car crossing the U.S.

Route 36 bridge from Missouri into Illinois.

¶ 25 In the early morning hours of March 16, Trooper Harris saw Findley's bright orange Chevrolet Impala cross the bridge from Missouri into Illinois. Harris used his police radio to inform Trooper Steve Schuwerk of the Illinois State Police that he was following Findley's vehicle and to ask Schuwerk to take over the pursuit.

¶ 26 Trooper Schuwerk, who had his drug-detection dog in his vehicle, took over for Trooper Harris and initiated a traffic stop of Findley's car after she failed to operate her turn signal more than 200 feet before an intersection. Findley initially provided Schuwerk with a false name and claimed that she was on her way to the hospital because her son had been in an accident. Findley eventually admitted that she was lying, and she provided Schuwerk with her real name. Schuwerk learned that Findley's license was suspended and he placed her under arrest. When Findley exited her vehicle, Schuwerk noticed that her belt was undone and the zipper on her pants was open. Schuwerk used his drug-detection dog to perform an investigatory sniff of Findley's vehicle. The dog alerted to the presence of narcotics, focusing particular attention on the driver's seat. The search of Findley's car, however, did not yield any narcotics.

¶ 27 Findley testified that she inserted the crack cocaine she purchased in Hannibal, Missouri, into her vaginal cavity after realizing that she was being followed by police but before she was stopped. Findley was subjected to a strip search, but not a cavity search, at the Adams County jail. The crack cocaine was not discovered. After she bonded out of jail on March 17, Findley gave the crack cocaine that she had hidden in her vaginal cavity to defendant.

¶ 28 Douglas testified that defendant called him during the afternoon of March 17 to inform him that he was in possession of more crack cocaine to sell. Douglas told this to Agent

Brown, who arranged a controlled buy to take place the next day.

¶ 29 On March 18, Douglas contacted defendant to purchase more crack cocaine. The agents followed the same procedures as with the previous controlled buys. Agent Brown searched Douglas, then gave him $100 in prerecorded bills to purchase 1 gram of crack cocaine from defendant. Douglas returned to Brown's vehicle with one gram of a substance that later tested positive for the presence of cocaine. Shortly thereafter, Brown transported Douglas to the Adams County State's Attorney's office, where he completed an affidavit to be used in applying for a search warrant of defendant's apartment.

¶ 30 Meanwhile, master sergeant Robert Short and special agent Jacob Vahle of the Illinois State Police maintained surveillance of defendant's apartment. Short testified that he saw Findley leave defendant's apartment shortly after the controlled buy and walk to a grocery store approximately a block away. Short followed Findley into the grocery store and placed her under arrest. He searched her person and found $10 composed of two $5 bills. The serial numbers on the bills matched the serial numbers of bills provided to Douglas for use in the controlled buy.

¶ 31 Defendant also left the apartment. Special Agent Vahle arrested defendant and conducted a search of his person, which revealed $90 composed of bills with serial numbers matching the bills provided to Douglas for use in the controlled buy.

¶ 32 Police executed a search warrant for defendant's apartment and discovered, among other things, (1) a police scanner, (2) a digital scale, (3) several plastic sandwich bags with the corners cut off, and (4) a small plastic "corner cut [B]aggie" that contained cocaine residue and appeared to have been tied in a knot at some point. Brown testified that police scanners can be used to monitor police radio traffic. According to Brown, drug dealers often place small units of

narcotics into the corner of a sandwich bag, tie a knot in the bag to seal the narcotics in the corner, and cut away the rest of the bag to make for smaller packaging.

¶ 33 Agent Brown testified that after each controlled buy involving Douglas and defendant, he would take the drugs from Douglas and place them in an Illinois State Police evidence bag, which he would then label and place into the evidence vault at the West Central Illinois Task Force office in Quincy. Another llinois State Police trooper testified that he served as evidence custodian at the vault and he sent the evidence bags labeled by Brown to the Illinois State Police crime lab in Springfield. A drug chemist testified that she received the evidence bags and tested their contents for the presence of narcotics.

¶ 34 On the third and final day of trial, after eight witnesses had testified for the State following Agent Brown's opening testimony but before the State had rested, the State orally sought leave to recall Brown to offer testimony clarifying the chain of custody of three of the State's exhibits. The trial court determined that Brown had not benefitted from any knowledge of the other witnesses who testified and allowed the State to recall Brown, who testified over defendant's objection.

¶ 35 2. *Defendant's Evidence*

¶ 36 After the State rested, defense counsel informed the trial court that his office had been contacted that morning by Ericka Batsell, who claimed that she had been in jail with Findley and had information contradicting Findley's testimony. The court allowed Batsell to testify over the State's objection.

¶ 37 Batsell testified that she was defendant's cousin and friends with Findley. According to Batsell, while she and Findley were incarcerated in the Adams County jail in April

2011, Findley told her that she borrowed $500 from her mother to purchase crack cocaine in St. Louis on March 15, 2011. Batsell explained that Findley decided to testify falsely against defendant because she was upset with defendant for cheating on her, and she also wanted to receive a lesser sentence so that she could be released earlier and see her sick mother before she died.

¶ 38 On cross-examination, Batsell testified that she did not come forward with her information until the final day of defendant's trial because she did not have transportation. She also thought that she would be subpoenaed to testify, although she admitted that she had not told defendant or anyone else what Findley had allegedly told her. Batsell also admitted that she and defendant exchanged letters after defendant's arrest but prior to the trial.

¶ 39 Defendant also called Agent Brown, who testified, in pertinent part, that Findley provided him with contradictory stories during interviews shortly after her arrest.

¶ 40 3. *Verdict and Sentence*

¶ 41 On this evidence, the jury found defendant guilty of unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). In July 2012, the trial court sentenced defendant to 12 1/2 years' imprisonment.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 Defendant argues that (1) the State failed to prove him guilty of unlawful drug conspiracy beyond a reasonable doubt, (2) the trial court erred by allowing the State to recall Agent James Brown to testify as part of its case in chief, and (3) his conviction must be reversed as the product of a vindictive prosecution. We disagree and affirm.

¶ 45 A. The State Presented Sufficient Evidence To Sustain Defendant's Conviction

¶ 46 Defendant contends that the State failed to present sufficient evidence to sustain his conviction for unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). We note that defendant, citing his failure to include this claim in a posttrial motion, urges us to review the claim under the plain-error doctrine. However, "when a defendant makes a challenge to the sufficiency of the evidence, his or her claim is not subject to the [forfeiture] rule and may be raised for the first time on direct appeal." *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). Accordingly, we review defendant's claim on the merits without addressing the plain-error doctrine.

¶ 47 1. *Standard of Review*

¶ 48 When presented with a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)). "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Bush*, 214 Ill. 2d 318, 326, 827 N.E.2d 455, 460 (2005). This standard applies in all criminal cases, regardless of the nature of the evidence. *Id.*

¶ 49 2. *Elements of the Offense and the State's Burden of Proof*

¶ 50 The indictment alleged that defendant committed unlawful criminal drug

conspiracy in that he, with the intent that the offense of controlled substance trafficking (720 ILCS 570/401.1 (West 2010)) be committed, agreed with another to bring more than 1 gram but less than 15 grams of cocaine into Illinois for purposes of delivery, and provided financing or direction to another to facilitate the offense. Section 401.1(a) of the Act sets forth the elements of controlled substance trafficking, as follows:

> "Except for purposes as authorized by this Act, any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver a controlled substance other than methamphetamine or counterfeit substance in this or any other state or country is guilty of controlled substance trafficking." 720 ILCS 570/401.1(a) (West 2010).

¶ 51 "To establish a *prima facie* case of conspiracy, the State must prove that two or more persons intended to commit a crime, that they engaged in a common plan to accomplish the criminal goal and that an act or acts were done by one or more of them in furtherance of the conspiracy." *People v. Garth*, 353 Ill. App. 3d 108, 121, 817 N.E.2d 1085, 1096 (2004) (citing *People v. Melgoza*, 231 Ill. App. 3d 510, 521, 595 N.E.2d 1261, 1270 (1992)). "Mere knowledge of or acquiescence in an illegal act neither constitutes conspiracy nor suffices to give rise to an inference of conspiracy." *People v. Testa*, 261 Ill. App. 3d 1025, 1027-28, 633 N.E.2d 1361, 1364 (1994). However, conspiracy need not be proved by an express agreement. *People v. McChristian*, 18 Ill. App. 3d 87, 91, 309 N.E.2d 388, 391 (1974). "Because of the clandestine nature of conspiracy, the courts have permitted broad inferences to be drawn from the

circumstances, acts and conduct of the parties." *Garth*, 353 Ill. App. 3d at 121, 817 N.E.2d at 1096. "The existence of an agreement between coconspirators to do a criminal act may be inferred from all of the surrounding facts and circumstances, including the acts and declarations of the accused." *Id*.

¶ 52 3. *The State's Evidence*

¶ 53 Defendant asserts that the State's evidence failed to prove the existence of an agreement between defendant and Findley to commit controlled substance trafficking. However, Findley testified that defendant provided her with $200 to purchase cocaine in Missouri, which she and defendant planned to sell together in Illinois. Findley's testimony was consistent with the remainder of the State's evidence. The evidence relating to the four separate controlled buys clearly established that defendant was in the business of selling drugs, including crack cocaine. According to Douglas's testimony, on March 14, 2011, the day before Findley undisputedly went to Missouri, defendant told Douglas that Findley would be traveling to Missouri to buy crack cocaine, which defendant would then be able to sell to Douglas.

¶ 54 The testimony of the officers involved in the traffic stop and arrest of Findley in the early morning hours of March 16, 2011, corroborated Findley's testimony that she successfully purchased crack cocaine in Missouri and brought it into Illinois, secreting it inside herself prior to being arrested. On March 17, 2011, after Findley was released from custody at the Adams County jail, defendant informed Douglas that he was now in possession of crack cocaine to sell. Following a controlled buy the next day, defendant was found in possession of the prerecorded bills Douglas used to purchase the crack cocaine. Nothing uncovered during the search of defendant's apartment suggested that defendant and Findley maintained separate drug-

dealing operations.

¶ 55 Perhaps most important, the text messages exchanged between defendant and Findley showed that defendant knew what Findley was doing during her trip to Missouri. In one text message, defendant wrote to Findley, "we cant afford to get jacked." Findley and Agent Brown testified that "jacked" was slang for being robbed. Defendant's use of the word "we" provided evidence of a mutual enterprise between himself and Findley, and the jury could reasonably conclude from this and other evidence that defendant provided direction or financing to Findley to buy crack cocaine in Missouri and bring it into Illinois. Viewing the evidence as a whole and allowing all reasonable inferences in favor of the prosecution, we conclude the State presented sufficient evidence to sustain defendant's conviction for unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)).

¶ 56 B. The Trial Court Did Not Commit Plain Error by Allowing the State To Recall Agent Brown

¶ 57 Defendant next asserts that the trial court erred by allowing the State to recall Agent Brown to testify. Because defendant failed to preserve this claim of error for appeal by including it in a posttrial motion, he urges us to review it as plain error.

¶ 58 To preserve a claim of error for review, defense counsel must object at trial and raise the issue in a posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009). The plain-error doctrine allows a court to disregard a defendant's forfeiture and address the merits of the alleged error in two situations:

> " '(1) [A] clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of

> justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

The usual first step of plain-error review is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Accordingly, we turn to the trial court's decision to allow the State to recall Agent Brown to testify.

¶ 59 The trial court may allow the recall of a witness to prove matters inadvertently omitted previously or to adduce additional testimony. *People v. Thompson*, 57 Ill. App. 3d 134, 142, 372 N.E.2d 1052, 1059 (1978). In *People v. Clark*, 178 Ill. App. 3d 848, 853, 533 N.E.2d 974, 978 (1989), the court explained the standard applicable to a trial court's decision to allow the State to recall a witness, as follows:

> "The recall of the witness in order to allow the State to elicit further testimony during its case in chief is within the sound discretion of the trial court where the testimony does not contradict the witness' earlier testimony and the defendant has ample opportunity to cross-examine the witness and is not prevented from preparing his case to counter the additional testimony."

¶ 60 Here, prior to resting its case, the State sought leave to recall Agent Brown. Out

of the presence of the jury, the State explained that Brown's additional testimony would clarify certain issues regarding the chain of custody of three of the State's exhibits obtained during the search of defendant's apartment. Specifically, Brown would testify that in July 2011, he removed two separate evidence bags (People's exhibits Nos. 14 and 16) from a larger paper bag (People's exhibit No. 15) so that they could be sent to the Illinois State Police crime lab for testing. Defendant objected, but declined to present an argument against recalling Brown.

¶ 61 The trial court permitted the State to recall Brown, finding that Brown did not gain any benefit from the testimony of the witnesses who testified after him. Brown's additional testimony was consistent with the State's representations. He explained his July 2011 handling of People's exhibits Nos. 14, 15, and 16, including the procedures he followed to keep the evidence secure and to document the chain of custody. Brown did not testify about anything else. The court invited defense counsel to cross-examine Brown regarding this additional testimony, but defense counsel declined to do so.

¶ 62 In his brief to this court, defendant seems to characterize Agent Brown's additional testimony as "rebuttal" evidence. However, because the State presented Brown's additional testimony as part of its case in chief, the factors enumerated in *Clark* control. Based on our review of the record, we agree with the trial court's determination that Brown's additional testimony did not contradict his earlier testimony but merely added to it. The court gave defendant the opportunity to cross-examine Brown, which defendant declined, and nothing suggested that Brown's additional testimony prevented defendant from preparing his case. Accordingly, the trial court was well within its discretion to allow the State to recall Brown. Because we find that the court did not err by allowing the State to recall Brown, we need not

proceed further through the plain-error analysis.

¶ 63 C. Defendant's Conviction Does Not Require Reversal as the Product of a Vindictive Prosecution

¶ 64 Finally, defendant argues that his conviction must be reversed because he was subjected to a vindictive prosecution. As the basis for his claim, defendant alleges that the State previously charged him with four counts of unlawful delivery of a controlled substance (720 ILCS 570/401 (West 2010)) in Adams County case No. 11-CF-156. Those four counts were based on the four controlled buys involving defendant and Douglas in March 2011, as described in the background section of this order. In August 2011, the trial court in case No. 11-CF-156 dismissed all four counts with prejudice, citing the State's discovery violations. Because those charges were dismissed with prejudice, defendant asserts that the State was barred from prosecuting him for unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)) in relation to his March 2011 drug-related conduct.

¶ 65 Although defendant filed a motion to dismiss in this case, his only basis for that motion was double jeopardy (U.S. Const., amend. V; Ill. Const. 1970, art I, §10; 720 ILCS 5/3-4 (West 2010)). He never argued that the trial court should dismiss the charge on the grounds of vindictive prosecution. In fact, defendant failed to raise his vindictive prosecution claim before or during trial or in a posttrial motion. Despite this forfeiture, defendant contends that we should review his claim under the plain-error doctrine.

¶ 66 Because defendant does not point to any specific error the trial court committed as it relates to this claim, we construe defendant's argument to be that the court erred by failing to *sua sponte* find that the defendant was being subjected to a vindictive prosecution and dismiss

the charges against him. See *People v. Hall*, 311 Ill. App. 3d 905, 911, 726 N.E.2d 213, 218 (2000) (the remedy for a vindictive prosecution is dismissal of the criminal charges against defendant). As earlier noted, the usual first step in plain-error analysis is to determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413.

¶ 67 "A prosecutor's discretion to charge is broad, and in some circumstances the prosecutor may file additional and harsher charges against a defendant." *Hall*, 311 Ill. App. 3d at 911, 726 N.E.2d at 218. "In general terms, a prosecution is vindictive and violates due process if undertaken '[t]o punish a person because he has done what the law plainly allows him to do.' " *Id*. (quoting *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488 (1982)).

¶ 68 Defendant contends that he is "entitled to a presumption of prosecutorial vindictiveness because the conspiracy charge[] was filed after the disposition of the prior case, and did not occur in the pre-trial stage." The court in *People v. Rendak*, 2011 IL App (1st) 082093, ¶ 16, 957 N.E.2d 543, explained the applicability of the presumption of prosecutorial vindictiveness, as follows:

> "Presumptions of vindictiveness, however, only exist in a very narrow set of circumstances. Ordinarily, a presumption of prosecutorial vindictiveness exists where a prosecutor brings additional charges and more serious charges against a defendant after the defendant has successfully overturned a conviction, effectively subjecting the defendant to greater sanctions for pursuing a statutory or constitutional right."

"[N]o such presumption adheres in the pretrial setting, where the prosecutor has broad discretion

in charging a defendant." *Hall*, 311 Ill. App. 3d at 911, 726 N.E.2d at 218.

¶ 69 As *Rendak* and *Hall* make clear, the presumption of prosecutorial vindictiveness applies only "where a prosecutor brings additional charges and more serious charges against a defendant after the defendant has successfully overturned a conviction." *Rendak*, 2011 IL App (1st) 082093, ¶ 16, 957 N.E.2d 543. Because defendant was never brought to trial on, or convicted of, the offenses charged in case No. 11-CF-156, the presumption of prosecutorial vindictiveness does not apply.

¶ 70 "When the presumption is not applicable, 'a defendant in an appropriate case might *prove objectively* that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.' " *Hall*, 311 Ill. App. 3d at 911-12, 726 N.E.2d at 218 (quoting *Goodwin*, 457 U.S. at 384) (emphasis added in *Hall*). The court in *Hall* described the defendant's burden of establishing a claim of prosecutorial vindictiveness as follows:

> "[D]efendant bears the burden of production and persuasion in seeking to prove a claim of actual prosecutorial vindictiveness, which means a defendant not only must produce objective evidence that the prosecutor had some animus or retaliatory motive, but also must produce objective evidence that tends to show the prosecution would not have occurred absent that motive." *Hall*, 311 Ill. App. 3d at 913, 726 N.E.2d at 219.

¶ 71 Of course, because defendant in this case did not raise the issue of prosecutorial vindictiveness in the trial court, he presented no evidence in support of the claim. We note that

in defendant's brief to this court, he relies entirely on the facts contained in the State's memorandum of law, filed in response to defendant's motion to dismiss on double jeopardy grounds, to support his claim of vindictive prosecution. The State's memorandum of law provides the only information in the record relating to the charges in Adams County case No. 11-CF-156. Taking the facts in the State's memorandum as true, they fall well short of demonstrating a vindictive motive behind the State's decision to charge defendant with criminal drug conspiracy.

¶ 72 The record, on its face, provides no objective evidence demonstrating that defendant was subjected to a vindictive prosecution. Defendant bases his claim entirely on the fact that the State brought the charge in this case after the trial court dismissed the charges in the previous case with prejudice. This is not enough to demonstrate prosecutorial vindictiveness. Because the law clearly places the burden on the defendant to advance and prove a claim of prosecutorial vindictiveness with his own evidence, we find no error in the trial court's failure to *sua sponte* raise the issue and dismiss the charges against defendant. Finding no error, we need not proceed with the plain-error analysis.

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 75 Affirmed.