

insufficient evidence to establish the offense of possession of a controlled substance with intent to deliver; (2) his confession that served as the basis of his conviction was unreliable; (3) the admission of inadmissible hearsay regarding the execution of a search warrant; (4) ineffective assistance of trial counsel; and (5) a prejudicial misstatement of the evidence during closing argument. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On October 8, 2009, five police officers executed a search warrant of a third floor apartment located at 8507 North St. Louis Avenue in Skokie. Prior to entering the apartment, a Skokie police detective loudly announced, “Skokie Police, search warrant,” three times. After waiting 15 seconds with no answer, the police commander made the decision to force entry into the apartment to execute the search warrant. A search of the apartment led to the discovery of three separately packaged bags containing a total of 7.1 grams of cocaine. Defendant was arrested for possession of a controlled substance with intent to deliver. The matter proceeded to a jury trial.

¶ 5 After jury selection, defense counsel moved *in limine* to preclude any mention of the search warrant as hearsay. According to the warrant and its accompanying affidavit, a confidential informant conducted four separate drug purchases at the apartment from a man he positively identified as defendant. Defense counsel argued that he would have no way to rebut the information in the search warrant.

¶ 6 The circuit court denied the motion, ruling the State could submit evidence showing that police executed a search warrant and could also “bring out the fact that [defendant] was named as the person to be searched.” Otherwise, the court noted, it would appear the police showed up

at the apartment “out of thin air.” The court held, however, that the State could not elicit any testimony regarding the reasons for the promulgation of the search warrant.

¶ 7 At trial, Skoke Police Officer Garcia testified that, on October 8, 2009, he and his partner, Officer Nelson, were assigned to execute a search warrant of the third floor apartment located at 8507 North St. Louis. Officer Garcia identified a photograph that depicted the apartment building at that location. Once the officers entered into the apartment, Garcia observed defendant and four other adults, Michelle Carson, Tracy Burton, Sonia Burton, and William Kelly, in the living room with a one-month-old baby. Defendant was sitting on a couch with one other person. Officer Garcia temporarily detained all the adults in the living room.

¶ 8 Officer Garcia then proceeded downstairs and met with Detective Caldwell from the canine unit of the Rosemont Police Department. Detective Caldwell conducted a canine search of the apartment, which resulted in the discovery of narcotics behind the couch in the living room. This was the same couch on which defendant was sitting when the officers entered the apartment. After moving the couch away from the wall, the officers found a black handgun, two small plastic bags containing cocaine, and another brown paper bag containing cocaine. Officer Garcia later learned the handgun was a BB gun. Officer Garcia identified a close-up photograph of what was found behind the couch.

¶ 9 On cross-examination, Officer Garcia testified that while searching the apartment for contraband, he also sought proof of defendant’s residency. Defendant’s name was not on any of the mailboxes of the building. Officer Garcia found no mail, such as a gas bill, water bill, or phone bill, in defendant’s name at the apartment. Officer Garcia found nothing showing defendant’s residency at the apartment. The police did not take fingerprints from the bags of cocaine or the BB gun.

¶ 10 Detective Caldwell testified that on October 8, 2009, he met with Officer Garcia at the subject address to conduct a canine search of the third floor apartment. He described how his search dog “immediately started to dig and scratch and attempt to bite the lower left side of the couch” in the living room. He testified that the dog is trained to scratch, dig, or bite at a location where narcotics are detected by odor. Detective Caldwell identified the same photographs as Officer Garcia, including the picture of the gun and cocaine bags found behind the couch. He also identified defendant as someone who he saw in the apartment on the date of the search.

¶ 11 On cross-examination, Detective Caldwell testified that his dog is not trained to do searches of persons and did not do a search of defendant because he would not allow his dog “to scratch or bite a subject.” The dog never made mannerisms toward defendant because he was never close enough to defendant to detect an odor.

¶ 12 Officer Nelson testified that he was part of the team that conducted a search warrant at the property on October 8, 2009. He inventoried the items found during the search and field tested the white powder substance in the plastic bags, which tested positive for cocaine. He placed the cocaine in an envelope, noting the date and time of recovery, location of recovery, the contents within, his name and star number, defendant’s name, and the offense.

¶ 13 Officer Nelson identified defendant as the person he interviewed at the police department following the search. Officer Garcia also was present for the interview. Officer Nelson advised defendant of his *Miranda* rights. Defendant agreed to speak to Officer Nelson. During their conversation, defendant explained that he had a one-month-old baby whom he was having difficulty supporting. Carson was the mother of the child. He began to sell cocaine because he could not find work. Defendant stated that he had bought a quarter ounce to a half ounce of powder cocaine, breaking it up into grams or half grams, which he would sell for \$25 or \$50, and

that was the cocaine recovered from behind the couch. Defendant told the officers that the cocaine was his and belonged to no one else in the apartment. On cross-examination, Officer Nelson testified that defendant did not provide a written statement. According to Officer Nelson, “Nothing prevented us from doing that. It’s just we didn’t.” On redirect examination, Officer Nelson testified that the oral statement defendant provided was included in the written police report.

¶ 14 Monica Kinslow of the Illinois State Police Division of Forensic Services testified that she weighed each bag of cocaine individually. The total weight of the three bags was 7.1 grams. Preliminary and confirmatory tests both showed that the contents of each bag contained cocaine.

¶ 15 Following this testimony, defense counsel moved to quash the arrest and suppress evidence for lack of probable cause. Outside the presence of the jury, the circuit court heard additional testimony from Officer Nelson regarding the confidential informant’s four prior purchases of cocaine from defendant. The court denied the motion to quash arrest and suppress evidence, finding the State established that defendant was regularly selling cocaine from the apartment, the most recent sale occurring two days prior to the execution of the search warrant.

¶ 16 After the jury retired to deliberate, it submitted the following four questions for the circuit court:

“Was Allen Strong the target of the search warrant, or was it to search the apartment?

Was Allen Strong a target of an ongoing investigation when the warrant was issued?

What was the cause of the issued search warrant?

If this is not his residence, was his primary residence searched?”

¶ 17 After receiving these questions, the judge and defense counsel discussed how to respond. The judge noted, “[t]here’s no evidence of any of these four questions that came out.” Defense counsel agreed. The circuit judge suggested resubmitting Illinois Pattern Jury Instructions, Criminal, No. 1.01 (4th ed.2000), instructing the jury to only consider the evidence, which consists of the witness testimony and exhibits. Defense counsel stated he had no objection.

¶ 18 The jury returned a guilty verdict for possession of more than one gram but less than 15 grams of cocaine with intent to deliver. The circuit court sentenced defendant to five years in prison. Defendant timely appeals.

¶ 19 ANALYSIS

¶ 20 Defendant seeks a reversal of his conviction, arguing: (1) the State failed to prove the three elements required to establish possession of a controlled substance with intent to deliver; (2) his alleged confession was unreliable because it was produced under suspect circumstances; (3) the circuit court erred by allowing the State to elicit that the police were at the apartment to execute a search warrant and that defendant was the target of the search; (4) ineffective assistance of trial counsel for failing to have the jury instructed that it could not consider the contents of the search warrant as substantive evidence; and (5) a misstatement of the evidence during closing argument constituted prosecutorial misconduct. We address each of these arguments in turn.

¶ 21 Sufficiency of the Evidence for Possession with Intent to Deliver

¶ 22 Defendant contends that the drugs in this case were found in an apartment among several adults. He argues there were two people sitting on the couch behind which the drugs were

found. According to defendant, no evidence in the apartment indicated that he actually possessed the drugs, as they were not found on his person, the canine did not detect any odor on him, and his fingerprints were not recovered from the drugs. With no evidence of actual possession, defendant asserts the State was required to prove constructive possession and failed to do so. He also contends that none of his acts, declarations, or conduct suggested that he had any knowledge of the cocaine behind the couch. There was no evidence of any sudden, furtive movements when police entered the apartment. Defendant also contends the State failed to submit evidence that he controlled the area where the drugs were found. With no evidence linking defendant to the residence, he argues the State did not prove that he had control or possession of the cocaine. Finally, defendant asserts there was no evidence recovered from the apartment that would indicate an intent to deliver the drugs. The cocaine was not packaged for sale and police found no large amounts of cash, beepers, or scanners.

¶ 23 The State responds the evidence at trial showed that defendant was within immediate proximity of three bags of cocaine. Defendant was seated closest to the narcotics when the police arrived. Defendant admitted the cocaine belonged to him and that he was selling it to support his infant child. According to the State, the evidence was sufficient to establish all three elements of possession of a controlled substance with intent to deliver.

¶ 24 When presented with a challenge to the sufficiency of the evidence, this court must determine “ ‘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. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the

trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. In essence, this court will not reverse a conviction unless the evidence is “so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant’s guilt.” *Id.* at 209.

¶ 25 To prove the offense of possession of a controlled substance with intent to deliver, the State must prove the defendant: (1) had knowledge of the presence of narcotics; (2) had possession or control of the narcotics; and (3) intended to deliver them. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 13 (citing 720 ILCS 570/401 (West 2008)). Defendant challenges sufficiency of the evidence for all three elements.

¶ 26 Knowledge is usually proven by circumstantial evidence because it can rarely be established by direct proof. *People v. Sanchez*, 375 Ill. App. 3d 299, 301 (2007). Knowledge may be proven by presenting sufficient evidence from which a jury may reasonably infer that the defendant knew of the controlled substance’s existence at the place officers found it, including acts, conduct, or statements of the defendant, and the surrounding facts and circumstances. *Id.*

¶ 27 Here, the State presented evidence that defendant confessed to his knowledge of and intent to deliver the cocaine found during the search. Defendant told Officer Nelson that he sold cocaine to support his one-month-old baby. He confessed the cocaine found in the apartment belonged to him and no one else in the apartment. The police found 7.1 grams of cocaine behind a couch within immediate proximity to where he was sitting, which corroborates his confession. Exhibits presented to the jury showing photographs of the living room filled with baby paraphernalia further corroborated defendant’s motive to sell the cocaine.

¶ 28 Our courts have repeatedly held that “a confession is the most powerful piece of evidence the State can offer, and its effect [on the trier of fact] is incalculable.” *People v. R.C.*, 108 Ill. 2d

349, 356 (1985); see also *People v. St. Pierre*, 122 Ill. 2d 95, 114 (“Confessions carry ‘extreme probative weight’ ”); *People v. Clay*, 349 Ill. App. 3d 24, 30 (2004) (“confessions frequently constitute the most persuasive evidence against a defendant”). This court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Viewing the evidence in the light most favorable to the State, we find the jury may reasonably have inferred that defendant knew of the existence of cocaine at the location where it was found.

¶ 29 Possession can be actual or constructive. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Actual possession is proven by testimony that shows the defendant exercised some form of dominion over the contraband, such as trying to conceal it or throwing it away. *Id.* It does not require present personal touching of the illicit material. *People v. Clark*, 173 Ill. App. 3d 443, 451 (1988).

¶ 30 The State was not required to prove actual possession when constructive possession could be inferred from the facts. *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998). Possession can be constructive where it is established that the defendant knew of the presence of the substance and that it was in his exclusive and immediate control. *People v. Jones*, 295 Ill. App. 3d 444, 453 (1998). Our supreme court has held:

“In reviewing a conviction for possession of a controlled substance, the dispositive issue is not whether a defendant had control over the place where the drugs were found, but whether the defendant had possession of the drugs themselves. Proof that a defendant had control over the premises where the drugs were located can help resolve this issue because it gives rise to an

inference of knowledge and possession of the drugs [citation], but it is not a prerequisite for conviction. Indeed, not only does a defendant not need to control the premises, he does not even need to have actual, personal, present dominion over the drugs themselves. [Citation.] Constructive possession may exist even where an individual is no longer in physical control of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession.”

People v. Adams, 161 Ill. 2d 333, 344-45 (1994).

¶ 31 To determine whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant’s guilt. *People v. Smith*, 191 Ill. 2d 408, 413 (2000). “Mere access by other persons to the area where drugs are found is insufficient to defeat a charge of constructive possession.” *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Hiding or disposing of the drugs to avoid detection does not constitute abandonment. *Adams*, 161 Ill. 2d at 345.

¶ 32 In this case, defendant confessed to possession of the cocaine. Defendant told Officers Garcia and Nelson that the cocaine was his and belonged to no one else in the apartment. The jury could have concluded based on the witness testimony and the confession that, even though defendant was no longer in physical control of the drugs when the police entered the apartment, he once had physical control of the drugs with intent to exercise control in his own behalf. The officers found the cocaine immediately behind the couch where defendant was sitting. No other

person in the apartment obtained possession and no evidence was presented to show defendant abandoned the drugs.

¶ 33 It is not this court's role to reweigh the evidence or make credibility determinations. Defendant's confession was corroborated by the overall evidence and, viewing that evidence in the light most favorable to the State, we cannot say that it was so improbable or unsatisfactory that there is a reasonable doubt regarding the jury's conclusion as to defendant's guilt. See, *e.g.*, *People v. Feazell*, 248 Ill. App. 3d 538, 546 (1993) (although there was testimony that other people had access to an apartment where drugs and weapons were found, evidence, including the defendant's admissions to ownership of the drugs and weapons, was sufficient to establish constructive possession and to support convictions for possession with intent to deliver and unlawful use of weapons).

¶ 34 Direct evidence of intent to deliver is rare, and intent is most often proven by circumstantial evidence. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). A reviewing court examines the nature and quantity of circumstantial evidence to determine if it supports an inference of intent to deliver. *Id.* at 408. Factors relevant to this inquiry include: (1) whether the quantity of drugs possessed is too large to reasonably be viewed as being for personal consumption; (2) the degree of drug purity; (3) the possession of any weapons; (4) possession and amount of cash; (5) possession of police scanners, beepers, or cellular telephones; (6) possession of paraphernalia commonly associated with drug transactions; and (7) the manner in which the drug is packaged. *Id.* Our supreme court has made clear that these factors are merely examples of the "many different factors that have been considered by Illinois courts as probative of intent to deliver" (*Robinson*, 167 Ill. 2d at 408), but this list is not "exhaustive" or "inflexible." *People v. Bush*, 214 Ill. 2d 318, 327 (2005). "*Robinson* also expressly allows for

the consideration of other, unspecified factors by stating that, '[i]n light of the numerous types of controlled substances and the infinite number of potential factual scenarios in these cases, there is no hard and fast rule to be applied in every case.' ” *Bush*, 214 Ill. 2d at 327 (quoting *Robinson*, 167 Ill. 2d at 414). When a defendant possesses narcotics within the range of personal use, “the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver.” *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007).

¶ 35 Defendant here argues that none of the *Robinson* factors were present in his case. Defendant relies on *People v. Nixon*, 278 Ill. App. 3d 453, 457-58 (1996), which found no intent to deliver 6.6 grams of cocaine packaged in four separate bags. Three police officers testified before the jury that the amount of cocaine they found was more than an individual would generally possess for personal use. The *Nixon* court found this testimony was insufficient to support a conclusion of possession with intent to deliver “when no other evidence of intent to deliver or additional corroborating testimony about drug dealing was presented to the jury other than the defendant’s mere possession of a small quantity of drugs.” (Emphasis omitted.) *Id.* at 458-59.

¶ 36 In this case, defendant’s confession serves as the additional factor showing an intent to deliver. The jury heard testimony from Officer Nelson that, in the presence of Officers Nelson and Garcia, defendant explained that he had a one-month-old baby which he was having difficulty supporting. He began to sell cocaine because he could not find work. Defendant bought a quarter ounce to a half ounce of powder cocaine, breaking it up into grams or half grams, which he would sell for \$25 or \$50, and that was the cocaine recovered from behind the

couch. Moreover, the police found a gun next to the cocaine, which later was determined to be a BB gun.

¶ 37 Based on the amount of cocaine found in the apartment within the proximity of defendant, the presence of a weapon found next to the drugs, and defendant's confession, the jury was permitted to draw all reasonable inferences from the evidence in this case, including that defendant intended to sell the contents of the three packages of cocaine found behind the couch. Viewing the evidence in the light most favorable to the State, nothing precludes such an inference and, therefore, we have no basis for reversing defendant's conviction on this point.

¶ 38 Reliability of Defendant's Confession

¶ 39 Defendant next argues his alleged confession was unreliable because it was contradicted by the evidence. According to defendant, because no scales or baggies were found in the apartment, it would not have been possible for him to break up the cocaine into grams and half grams to sell those portions. Defendant also argues his confession is suspect because it was not recorded or memorialized in some way. In addition, defendant asserts the confession did not satisfy the *corpus delicti* rule.

¶ 40 As to unreliability, defendant cites the concurring opinion in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (Kozinski, J., concurring), an Arizona death penalty case, in support of his defense. There, the concurring justice noted there was no physical evidence linking the defendant to the crime. The concurring justice was troubled by the interrogating detective's "unorthodox interrogation methods," which included obtaining confessions from people who were intoxicated, hospitalized, and on pain medication. *Milke*, 711 F.3d at 1023. The interrogating detective also had a practice of disregarding the right to remain silent when invoked by suspects. *Id.* No other officer was present for the interrogation, no one watched through a

two-way mirror, and no hidden camera or microphone captured what happened inside the interrogation room. *Id.*

¶ 41 Decisions from lower federal courts are not binding on this court. *People v. Johnson*, 408 Ill. App. 3d 107, 118 (2010) and, in any event, the facts are distinguishable in this case. Defendant provided a statement to Officer Nelson, in the presence of Officer Garcia, after he was properly given his *Miranda* rights. There is no indication of any abusive interrogation tactics or evidence that Officer Nelson's testimony was untruthful.

¶ 42 Furthermore, we are not persuaded by defendant's contention that Officer Nelson's testimony regarding his confession is unreliable because he did not memorialize the confession. Officer Nelson explained that, although nothing prevented him from memorializing defendant's statement, it was included in the police report. More importantly, the jury was aware that defendant's confession to Officer Nelson was not memorialized, and it was the jury's function to determine the weight to be given to that testimony. *Evans*, 209 Ill. 2d at 211. We will not reverse defendant's conviction simply because he alleges Officer Nelson was not a credible witness. *Id.* (stating that reversal is not warranted simply because the defendant alleges that a witness was not credible).

¶ 43 Next we address defendant's contention that the State failed to satisfy the *corpus delicti* rule. The *corpus delicti* of an offense is simply the commission of a crime, which (along with the identity of the offender) is one of two propositions the State must prove beyond a reasonable doubt. *People v. Lara*, 2012 IL 112370, ¶ 17. As a general rule, the *corpus delicti* cannot be proven solely by a defendant's admission, confession, or out-of-court statement alone; rather, the State must also provide independent corroborating evidence. *Id.* (citing *People v. Sargent*, 239 Ill. 2d 166, 183 (2010)). The *Lara* court further explained:

“To avoid running afoul of the *corpus delicti* rule, the independent evidence need only *tend to show* the commission of a crime. It need not be so strong that it alone proves the commission of the charged offense beyond a reasonable doubt. If the corroborating evidence is sufficient, it may be considered, together with the defendant’s confession, to determine if the State has sufficiently established the *corpus delicti* to support a conviction.” (Emphasis in original.) *Id.* ¶ 18.

¶ 44 In *People v. Parich*, 256 Ill. App. 3d 247, 248 (1994), the defendant appealed his conviction for the same offense as at issue here. There, the defendant challenged whether the State presented sufficient independent evidence to corroborate his confession that he bought an “eight-ball” of cocaine, divided it into six baggies containing one-half gram, and sold one of the bags. The defendant admitted to the officers that he intended to sell the cocaine for \$40 per bag. The police found seven baggies of cocaine in the defendant’s front pocket and one baggie in his back pocket. On appeal, the defendant argued the State failed to establish the *corpus delicti* of the offense apart from the confession.

¶ 45 The *Parich* court affirmed the conviction, concluding the independent evidence sufficiently corroborated the confession because it overwhelmingly established that the defendant possessed cocaine with the intent to deliver. *Id.* at 250. The court found the independent evidence sufficiently corroborated the confession so that it could be considered together with the confession to establish the *corpus delicti*. *Id.*

¶ 46 In this case, defendant argues that because no scales or baggies were found in the apartment, there is no independent evidence corroborating his confession that he intended to sell

the cocaine in grams or half grams. The evidence found in the apartment, however, belies this contention and supports defendant's confession.

¶ 47 First, the cocaine was found individually packaged into three separate bags. Although there was no testimony as to whether the amount of cocaine recovered was inconsistent with personal consumption, when a small amount of narcotics is recovered, "the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show an intent to deliver." *Blakney*, 375 Ill. App. 3d at 559. Here, the additional factor was the presence of a weapon. See, e.g., *People v. Stone*, 244 Ill. App. 3d 881 (1993) (26.2 grams of cocaine recovered with a large amount of cash and a fully loaded automatic assault rifle); *People v. Pavone*, 241 Ill. App. 3d 1001 (1993) (14.02 grams of cocaine, packaged in 38 individual packets, found along with a sifter instrument and a .357 revolver); *People v. Robinson*, 233 Ill. App. 3d 278 (1992) (28.2 grams of cocaine recovered, along with a scale, a large amount of money, guns, ammunition, pagers, and drug records); *People v. Marshall*, 165 Ill. App. 3d 968 (1988) (13.88 grams of cocaine recovered, along with marijuana, plastic bags, measuring spoons, a scale, \$600 in cash, and a handgun). Second, photographs of the living room showed an abundance of baby paraphernalia, which supports defendant's confession that he was selling cocaine to support his one-month-old baby. When police entered the apartment to execute the search warrant, they found a one-month-old baby, along with defendant and Carson, the mother of the child.

¶ 48 Based on the above, a rational trier of fact could infer that the independent evidence sufficiently corroborated defendant's confession. Given these facts, we hold that the State's independent evidence "*tend[ed] to show* the commission of a crime." (Emphasis in original.)

Lara, 2012 IL 112370, ¶ 18. Thus, the State proved the *corpus delicti* beyond a reasonable doubt.

¶ 49 Admission of the Existence of a Search Warrant

¶ 50 Defendant next contends the circuit court erred by allowing the State to inform the jury that police were at the apartment to execute a search warrant and that he was the target of the search. Defendant argues the admission of the search warrant was inadmissible hearsay and prejudicial because it bore on whether he possessed the drugs found in the apartment and intended to deliver them. Defendant asserts the jury relied on the improperly admitted contents of the search warrant, evidenced by four jury questions submitted during deliberations regarding the execution of the search warrant. Defendant acknowledges this issue is not properly preserved for review, but argues the error is not subject to forfeiture under the plain error doctrine because the evidence was closely balanced.

¶ 51 The State responds the circuit court properly limited evidence of the search warrant for purposes of explaining the officers' presence and ensuing investigation. The State argues no evidence of the search warrant's contents was presented at trial. The State asserts the plain error doctrine does not apply where there was overwhelming evidence of defendant's guilt through his proximity to the cocaine and his admission to the officers that he was selling cocaine.

¶ 52 We initially address whether this issue is forfeited on appeal. The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either: "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Supreme Court Rule 615(a) states:

“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Ill. S. Ct. R. 615(a).

¶ 53 Defendant seeks to proceed under the first prong of the plain error doctrine. The threshold step in any plain error analysis, however, is to determine whether an error occurred in the first place. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). If there is no error, there can be no plain error. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005); see also *People v. Keene*, 169 Ill. 2d 1, 17 (1995) (“[I]f in the end, the error is found not to rise to the level of a plain error as contemplated by Rule 615(a), the procedural default must be honored”). Accordingly, before we can address defendant’s claim of plain error, we must decide whether any error occurred.

¶ 54 Our courts have repeatedly held, “the existence of a search warrant can be properly admitted for the limited purpose of explaining the conduct of police officers.” *People v. Virgin*, 302 Ill. App. 3d 438, 445 (1998); see also *People v. Freeman*, 241 Ill. App. 3d 682, 689 (1992); *People v. Rivera*, 182 Ill. App. 3d 33, 38 (1989). Evidence of the contents of a search warrant may prejudice a defendant where the evidence is inadmissible hearsay. *People v. Janis*, 240 Ill. App. 3d 805, 811 (1992). This court has also found that repeated references to the contents of a search warrant, which continued even after the circuit court sustained objections to them, did not rise to the level of plain error. *People v. Marshall*, 165 Ill. App. 3d 968, 978-79 (1988); see also *Janis*, 240 Ill. App. 3d at 812.

¶ 55 Here, defense counsel moved *in limine* to preclude any mention of the search warrant as hearsay. Defense counsel argued he would have no way to rebut the information in the search warrant. The circuit court denied the motion, allowing the State to submit evidence showing that

the police executed a search warrant and that defendant was named as the person to be searched. The judge stated that he wanted to prevent the inference that police acted in illegal fashion by showing up at the apartment “out of thin air.” See *Rivera*, 182 Ill. App. 3d at 38.

¶ 56 During its opening statement, the State told the jury that police officers conducted the execution of a search warrant at 8507 St. Louis and that “[t]he target of that search warrant is [defendant].” Thereafter, police officers testified regarding their execution of the search warrant but, contrary to defendant’s argument, the contents of the search warrant were never revealed to the jury. Evidence of the search warrant was limited to mere mention of its existence as foundation for each officer’s presence at the third floor apartment and the basis for conducting a search of the apartment and defendant. Indeed, the judge and defense counsel confirmed this fact when the jury submitted its four questions regarding the substantive contents of the search warrant during deliberations. Defense counsel agreed with the judge that “no evidence whatsoever” concerning the substance of the search warrant was presented to the jury.

¶ 57 The record supports that evidence of the existence of the search warrant was properly admitted by the circuit court for the limited purpose of explaining the conduct of police officers. *Janis*, 240 Ill. App. 3d at 811; *Rivera*, 182 Ill. App. 3d at 38. We find no error occurred.

¶ 58 Alleged Ineffective Assistance of Counsel

¶ 59 Defendant next alleges his trial counsel was ineffective for failing to have the jury instructed that it could not consider the contents of the search warrant as substantive evidence. According to defendant, the questions submitted by the jury during deliberations illustrated the confusion and focus on the prejudicial contents of the search warrant instead of evidence relating to the elements of the offense. Defendant argues trial counsel had an obligation to offer an instruction that would refocus the jury on the proper evidence.

¶ 60 The State responds trial counsel rendered effective assistance by agreeing with the circuit court to redirect the jury's attention to the evidence admitted at trial, rather than the impermissible factual circumstances that formed the basis for the search warrant. The State contends the circuit court properly redirected the jury's focus to the evidence that was admitted and, therefore, trial counsel's consent to this correct decision cannot amount to ineffective assistance.

¶ 61 Both the federal and state constitutions guarantee to criminal defendants the right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, Art. I, § 8. To establish a claim of ineffective assistance of counsel, a defendant must show both a deficiency in counsel's performance and prejudice resulting from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*). In other words, under *Strickland*, in order to prevail on a claim of ineffective assistance, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance so prejudiced the defense as to deny defendant a fair trial. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (citing *Strickland*, 466 U.S. at 687).

¶ 62 To show counsel's performance was objectively unreasonable, a defendant must overcome the "strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). To show prejudice, a defendant must show a reasonable probability, *i.e.*, "a probability sufficient to undermine confidence in the outcome," that, but for defense counsel's deficient performance, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Failure to show either deficient

performance or sufficient prejudice defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 687. Matters of trial strategy typically do not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). Whether defendant received ineffective assistance of counsel is a mixed question of fact and law. *Strickland*, 466 U.S. at 698. We thus defer to the circuit court's findings of fact, but review *de novo* the ultimate legal issue of whether counsel's omission supports an ineffective assistance claim. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004).

¶ 63 Here, defendant failed to meet the first prong of *Strickland*. The whole premise of defendant's argument on this issue is that the circuit court improperly admitted the substantive contents of the search warrant. As we found previously, the court properly admitted limited evidence of the search warrant for purposes of explaining the officers' presence at the apartment and the ensuing investigation. The jury had already received explicit instructions on the definition and elements of the charged offense. The court determined and defense counsel agreed that the written instructions answered the jury's questions. Therefore, defense's counsel consent to the court's decision to instruct the jury to "reread the instructions and continue your deliberations" was not objectively unreasonable. See *People v. Averett*, 237 Ill. 2d 1, 25 (2010) (trial counsel was not objectively unreasonable by failing to object to the circuit court's response to the jury's question seeking clarification of the charges). Accordingly, defendant has not established a viable ineffective assistance claim.

¶ 64 Alleged Prosecutorial Misconduct During Closing Argument

¶ 65 In his final argument, defendant contends that the State misstated the evidence during closing argument by telling the jury that defendant provided his confession to both Officer Garcia and Officer Nelson. Defendant argues this was improper because Officer Garcia never

testified that he heard defendant make such a statement. Defendant asserts the State's unfair bolstering of the evidence amounted to prosecutorial misconduct and requires a new trial. Defendant acknowledges this issue is not properly preserved for review, but argues the error is not subject to forfeiture under the plain error doctrine and requests our review.

¶ 66 The State responds it properly commented on the evidence during closing argument. According to the State, Officer Nelson's testimony formed a proper evidentiary basis for closing argument. Officer Nelson testified that both he and Officer Garcia were present when defendant confessed to possession of cocaine with intent to deliver. The State argues this testimony was based on proper evidentiary foundation and did not amount to any form of prosecutorial error.

¶ 67 We initially review defendant's claim to determine if there was any error before considering it under plain error. The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). The State may respond to comments by the defense that clearly invite a response. *People v. Armstrong*, 183 Ill. 2d 130, 146 (1998). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993).

¶ 68 We agree with the State that Officer Nelson properly testified that defendant confessed in the presence of both police officers. The fact that Officer Garcia did not provide testimony

regarding the confession does not mean that the State committed prosecutorial misconduct during closing argument by discussing Officer Nelson's properly admitted testimony. Furthermore, the fact that Officer Nelson recorded the confession in his police report also was properly admitted testimony and defendant has not demonstrated any prejudicial error as a result of this comment.

¶ 69 Finally, the jury was instructed that closing arguments are not evidence and to disregard any comment not based upon the evidence, and defendant has provided nothing to counter the presumption that the jury followed the circuit judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. Since we cannot hold that the comments resulted in such substantial prejudice to defendant that the verdict would have been different absent those remarks, the State did not commit reversible error. *Hudson*, 157 Ill. 2d at 441.

¶ 70 CONCLUSION

¶ 71 We affirm defendant's conviction and sentence. Sufficient evidence established that defendant committed the offense of possession of a controlled substance with intent to deliver pursuant to section 401(c)(2) of the Illinois Criminal Code of 1961 (720 ILCS 570/401(c)(2) (West 2008)). The confession that served as the basis of his conviction is reliable. The circuit court properly allowed the State to elicit limited evidence of a search warrant in defendant's name. Trial counsel rendered effective assistance of counsel. The State did not commit prosecutorial misconduct by making prejudicial statements during closing argument.

¶ 72 Affirmed.