

NOTICE
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2014 IL App (4th) 4120440-U

NO. 4-12-0440

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 25, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JEROME D. LOCKETT,)	No. 11CF100
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Issues defendant asserts of ineffective assistance of counsel are better addressed in a postconviction petition.
- (2) Issues defendant asserts are plain error are not error or, in the case of his assertion the prosecutor erred in arguing police officer witnesses' credibility as police officers, was not reversible error.
- (3) Defendant's extended term sentence of eight years' imprisonment was neither excessive nor an abuse of discretion.
- ¶ 2 Defendant, Jerome D. Lockett, appeals a jury verdict of guilty to two counts of delivery of a controlled substance, less than one gram of cocaine in each case. Defendant argues defense counsel was ineffective for failing to (1) move to suppress a custodial statement given after incomplete *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)); (2) request the jury be instructed on the inherent lack of credibility of confidential informants; (3) present

exculpatory evidence undermining the State's theory as to motive; and (4) object to the State's improper comments during closing argument. He also argued it was plain error for the State, during closing argument, to (1) emphasize the status of its witnesses as experienced police officers and suggest their jobs were at risk in an effort to bolster their credibility; (2) characterize the defense theory as a department-wide conspiracy to "set up" defendant; and (3) urge jurors to not let the defense "distract" or "confuse" them. Finally, defendant argued the trial court abused its discretion by sentencing him to an extended term of eight years in prison. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On February 26, 2011, the State charged defendant with four counts of delivery of a controlled substance. Count I alleged on June 29, 2009, he delivered less than one gram of cocaine (720 ILCS 570/401(d)(i) (West 2008)). Count II alleged on July 3, 2009, defendant delivered less than one gram of cocaine (720 ILCS 570/401(d)(i) (West 2008)). Count III alleged on July 29, 2009, defendant delivered between 1 and 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2008)). Count IV alleged the last transaction occurred within 1,000 feet of a school (720 ILCS 570/407(b)(1) (West 2008)). Prior to trial, the State dismissed count IV.

¶ 5 Defendant's trial began on October 11, 2011. The State's first witness was Christopher Anderson, a paid police informant. Anderson testified he began working as an informant for the Bloomington police department in 2005 or 2006 and had received over \$7,000 for his services. He signed an agreement with the police department he would not use drugs while acting as an informant but "sometimes" he violated this agreement. Anderson had prior convictions for manufacturing a controlled substance, delivery of a controlled substance, and

possession of stolen property in 2005. He had also been convicted of multiple batteries and a burglary. He began using narcotics in 1993 and has had a cocaine addiction since 1998, though he testified he had been "clean" for the previous eight months.

¶ 6 Anderson testified he had known defendant since 2006, when both were working at a grocery store. On June 29, 2009, Anderson told Detective Mike Gray defendant offered him cocaine. In the previous three years since Anderson had known defendant, defendant had never offered to sell him drugs. Anderson went to the police station and called defendant, who agreed to meet him at the Holiday Inn. Gray searched Anderson and drove him to the location. Anderson met defendant behind Gray's car. Anderson could not recall what defendant was wearing or what they said to each other. Anderson gave defendant \$50 or \$100 and received a packet of cocaine. Anderson got back in the car and handed the packet to Gray and they returned to the police station.

¶ 7 On July 3, 2009, Gray contacted Anderson and asked if he would "go out there again." Anderson went to the police station, called defendant, and set up another meeting. Gray drove Anderson to the Holiday Inn. Anderson called defendant to let him know they arrived. Defendant got into the backseat of Gray's car, Anderson handed him money, and defendant handed Anderson a packet of cocaine. Anderson gave Gray the cocaine and they drove back to the police station.

¶ 8 On July 29, 2009, Gray called Anderson and asked if he "wanted to do it again." Gray wanted Anderson to purchase \$200 worth of cocaine, but when Anderson called defendant, he did not have cocaine to sell. Eventually, defendant agreed to meet Anderson at Walgreens. Gray drove Anderson to Walgreens and parked near a van. Anderson got out of Gray's car and

got into the van. Defendant gave Anderson cocaine in exchange for \$200. Defendant also gave Anderson a compact disc (CD) case. Anderson got back into Gray's car and gave him the cocaine.

¶ 9 Detective Gray testified he was a sergeant with 23 years of experience with the Bloomington police department. On June 29, 2009, Anderson contacted him with the name of a potential cocaine dealer. Gray used Anderson as a confidential informant in 20 to 30 cases over the course of several years. Gray watched Anderson make a telephone call but he could not hear the party on the other end. Gray then drove Anderson to the Holiday Inn. Gray did not strip search Anderson so it was possible Anderson had cocaine someplace on his body. Gray stated he "usually" searches the pockets and shoes of his informants.

¶ 10 Upon arriving at the motel, Anderson made another telephone call and Gray drove to the back side of the motel. Gray saw defendant approach on foot and Anderson got out of the car and met defendant behind it. Anderson got back in the car and handed Gray a packet of suspected cocaine. Gray placed the suspected cocaine into an evidence bag, labeled it, sealed it, and put it "into a cabinet in the marijuana leaf identification room in the crime lab." At the police station, Gray searched Anderson and asked for his account of the transaction.

¶ 11 On July 3, 2009, Anderson arranged another meeting with defendant. Gray could not recall whether he contacted Anderson first. Gray drove Anderson to the Holiday Inn. They parked in the same location and defendant entered the car. Defendant asked Gray to drive to the front of the hotel. As he drove, Gray observed Anderson hand defendant \$100 in exchange for a bag of cocaine. Gray stopped the car and defendant exited. Anderson handed Gray the packet of cocaine. Gray added he searched Anderson before and after the sale.

¶ 12 On July 29, 2009, Gray and Anderson attempted to set up another buy but defendant did not have any cocaine. Gray testified defendant eventually obtained cocaine from one of his sources because he arranged a meeting at Walgreens. Gray drove Anderson to Walgreens and parked next to a van. Anderson exited the car and entered the van. Gray saw him speak to defendant. Anderson exited the van, entered Gray's car, and handed Gray a packet of cocaine. Gray stated he did not observe Anderson "doing any funny business" during any of the transactions.

¶ 13 On cross-examination, Gray admitted his police report did not indicate he personally observed any of the transactions but reported only what Anderson told him. Gray explained he did not include his own observations because what "Anderson told me was exactly what I seen." Gray also testified he saw the July 29 transaction through his rearview mirror but did not document it in his report. Gray then acknowledged his account was "similar" to Anderson's and the "majority" of it was consistent. He did not hear any conversations between Anderson and defendant.

¶ 14 Gray did not recover any of the money he provided to Anderson to purchase the narcotics. He did not send the packets he received from Anderson for fingerprint analysis. His report did not indicate Anderson received a CD case on July 29, 2009.

¶ 15 Police officers testified to the chain of custody for the packets of cocaine. A forensic scientist testified he tested the contents of the packets and they contained small amounts of cocaine. Detective Kevin Raisbeck testified he conducted surveillance of a "controlled crack cocaine purchase" on June 29, 2009. He went to the Holiday Inn with a video camera and filmed several people walking in the area, one of whom was identified as defendant. He did not see or

film defendant entering the parking lot of the Holiday Inn.

¶ 16 Detective Todd McClusky testified he filmed defendant on July 3, 2009. The video showed defendant exiting an apartment marked "212," which McClusky identified as an apartment on Valley View Drive. The recording showed a man, whom McClusky identified as defendant, walk to a vehicle parked outside and have a conversation with an occupant who was not Anderson. A van was parked in the lot as well and McClusky identified it as similar to the van he saw defendant drive on July 29, 2009. After the video showed defendant having a conversation, defendant walked out of sight. The recording stopped. When it restarted, defendant was shown returning to apartment 212. McClusky testified he did not see defendant meet with Anderson or Gray.

¶ 17 On February 9, 2010, McClusky conducted a videotaped custodial interrogation of defendant. Over defense objection, the State played it for the jury. The defense objection was based on the fact the video contained admissions to other crimes, not the charged offenses. The State argued the interview was admissible to show knowledge about drug dealing. The trial court overruled the objection, finding the evidence admissible to show knowledge and motive and agreed to a defense request to instruct the jury as to the limitations of the video's admission.

¶ 18 In the video, McClusky entered the interview room and stated: "Real quick we got to go through this stuff" before informing defendant of his right to remain silent and his right to an attorney. McClusky asked defendant if he understood and he nodded. McClusky began questioning defendant, who admitted he generally bought an eighth of an ounce of cocaine, cut it up, and sold it to three to five people on weekends. He stated he never sold crack cocaine. Defendant explained he began selling when he was looking for work. The trial court instructed

the jury the video was admitted for the purpose of showing motive.

¶ 19 On cross-examination, McClusky testified after the interview he asked defendant to become an informant. He did not ask defendant about the charged offense because he did not want him to discover the identity of his informant.

¶ 20 The State rested and defendant did not put on any evidence. In closing argument, the State argued the first buy was for a "real small" bag of cocaine. The prosecutor admitted Anderson was probably not somebody he "would leave my daughter with," and warned the jury the defense would argue he should not be trusted. "But when you hear the testimony of now[-] Sergeant Gray, somebody that's been an officer for over 20 years and was a vice narcotics detective for seven and a half, when you hear the testimony of that person who watched this happen in a matter of minutes and said there was no movement nor opportunity for Chris Anderson to pull any [']funny business['] here, you're left with the only thing that common sense can conclude."

¶ 21 The defense argued Anderson was not trustworthy and Gray had been impeached with his reports which indicated his knowledge of the events was derived completely from Anderson's debriefing. The State responded, "The argument that you were just offered says that several Bloomington Police Departments [*sic*] of multiple years' experience, one a sergeant, pay an individual a considerable amount of money to set up this defendant for this much cocaine, less than a gram." The State stressed defendant sold "not a lot of cocaine" and "if this is a big elaborate lie, why just this? *** This isn't a bunch of cops risking to lose their job over tiny amounts of cocaine." The State highlighted the videotaped statement of defendant where he explained he sold drugs when he was not employed, arguing it bolstered Anderson's testimony

because it showed why Anderson did not receive an offer of drugs from defendant while they worked together. Responding to the attacks on Gray's credibility, the prosecutor urged the jury not to "be confused" or "distracted by these things."

¶ 22 The jury began deliberations. The jury sent out a note asking what Gray testified he saw on June 29, 2009. The jurors were told to rely on their recollections. The jury then sent out a note saying it had reached a verdict on count II but was at an "impasse" as to counts I and III. The trial court instructed the jury to continue deliberations. The jurors later asked for a case log used to refresh an officer's recollection, and the court instructed them they could not receive items not admitted into evidence. The jury then indicated it reached a verdict on two counts and several jurors had headaches and they wanted to go home.

¶ 23 The jury began deliberations again the following day. After about 1 1/2 hours, they sent out a note saying they were deadlocked. The defense moved for a mistrial. The parties eventually agreed to accept a verdict on counts I and II and declare a mistrial on count III. The jury returned guilty verdicts on counts I and II.

¶ 24 On January 5, 2012, the trial court heard and denied a posttrial motion. The court then proceeded to a sentencing hearing. In aggravation, the State asked the court to consider the evidence it presented in support of count III. It then conceded defendant "doesn't necessarily have a terrible record" but noted he had previously served eight years on a Class X drug charge which "did nothing to correct his conduct" and asked the court for an extended-term sentence of 10 years. The defense asked for a term of probation, noting defendant's slim record, which included no violent crimes. Defendant spoke in allocution and accepted full responsibility for his actions.

¶ 25 The trial court found defendant was on probation for a Class 2 retail theft at the time of the instant offenses and considered the evidence presented in support of count III and the "seriousness of these offenses." The court noted defendant was eligible for an extended term based on a 1999 Class 1 felony conviction. The court then sentenced defendant to concurrent terms of eight years for each offense. This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Ineffectiveness of Trial Counsel

¶ 28 1. *Failure To File Motion To Suppress on Grounds of Violating Miranda*

¶ 29 Defendant argues, first, his trial counsel was ineffective because he failed to file a motion to suppress the videotaped statement defendant gave to Detective McClusky on the basis McClusky failed to advise him anything he said would be used against him in court. Although counsel argued the statement should not be allowed in court as it was inadmissible evidence of other crimes, he made no effort to suppress the statement on the grounds of failing to provide complete *Miranda* warnings. To prove prejudice with regard to failure to seek suppression of evidence, defendant must show a reasonable probability (1) the motion would have been granted and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Bew*, 228 Ill. 2d 122, 128-29, 886 N.E.2d 1002, 1006 (2008).

¶ 30 It is questionable whether the outcome of the trial was affected by the admission of defendant's videotaped statement. In any case, it is an argument better made in a postconviction proceeding where a complete record can be made. See *People v. Holloman*, 304 Ill. App. 3d 177, 186, 709 N.E.2d 969, 975 (1999). Absent a motion to suppress, it is unlikely the State would have garnered its resources to prove the propriety of the officer's actions in

regard to *Miranda* warnings. Further, whether to file a motion to suppress evidence is traditionally a matter of trial strategy, an area left to counsel's discretionary judgment. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925, 728 N.E.2d 695, 702 (2000). The record is devoid of factual findings on either the propriety of *Miranda* warnings given or trial-strategy choices by defense counsel. Therefore, we decline to review this issue on direct appeal. See *People v. Durgan*, 346 Ill. App. 3d 1121, 1142-43, 806 N.E.2d 1233, 1250 (2004).

¶ 31 2. *Failure To Ask for Jury Instruction on Credibility of Paid Informant*

¶ 32 Defendant then argues his trial counsel was ineffective for failing to ask for a jury instruction on the lack of credibility of the testimony of a paid informant. Anderson testified he made over \$7,000 making "controlled buys" for the Bloomington police department over several years. He was paid at least \$250 per transaction. Defendant points to the testimony of Detective Gray, who stated he searched Anderson prior to the transactions in question, but he did not ensure Anderson was not hiding drugs on his person. Defendant contends his guilt or innocence turned on the credibility of the informant. Therefore, defense counsel should have requested a jury instruction informing the jury testimony of informants should be viewed with special caution.

¶ 33 Generally, juries should be instructed using relevant Illinois Pattern Jury Instructions (IPI). *People v. Rodriguez*, 387 Ill. App. 3d 812, 822, 901 N.E.2d 927, 937 (2008). Where the facts of a particular case render a standard instruction inadequate and the jury will not be instructed on the defendant's theory of the case, relevant pattern instructions should be modified. *People v. Sims*, 265 Ill. App. 3d 352, 362, 638 N.E.2d 223, 230-31 (1994).

¶ 34 There are no standard IPI instructions dealing specifically with paid-informant

witnesses. While federal courts have found the use of paid informants raises credibility concerns (*On Lee v. United States*, 343 U.S. 747, 757 (1952)), and this inherent unreliability of informant testimony has compelled several federal circuit courts to hold an "informant instruction" is always mandatory (*United States v. Luck*, 611 F.3d 183, 187 (4th Cir. 2010)), Illinois courts have not found the same.

¶ 35 The question of the credibility of government informant witnesses is the same for the jury as it is for any other witness. *People v. Manning*, 182 Ill. 2d 193, 210, 695 N.E.2d 423, 431 (1998). Illinois Pattern Instruction, Criminal, No. 1.02 (4th ed. 2000) (IPI Criminal No. 1.02), a general instruction on credibility, covers the jury's determination of a witness's credibility. IPI Criminal 1.02 (4th ed. 2000) provides the jury should take into account a witness's "interest, bias, or prejudice" and "the reasonableness of his testimony considered in the light of all the evidence in the case." The evidence in this case includes the fact Anderson was paid to conduct transactions with defendant. The credibility of an informant's testimony is determined under the general standards set forth by IPI Criminal No. 1.02. Just as the trial judge would not abuse his discretion by refusing to give a non-IPI instruction if the issue is covered by other instructions (*People v. Buck*, 361 Ill. App. 3d 923, 942-43, 838 N.E.2d 187, 203 (2005)), defense counsel is not ineffective for failing to submit a non-IPI instruction covered by other instructions. Specifically, defense counsel is not ineffective in failing to tender non-IPI instructions on an informant's credibility. See *People v. O'Brien*, 74 Ill. App. 3d 256, 260, 392 N.E.2d 967, 970 (1979).

¶ 36 3. *Failure To Present Evidence of Defendant's Employment*

¶ 37 Defendant next contends his counsel was ineffective for failing to present

evidence of defendant's employment at the time of the alleged transactions. The State argued defendant's statements about drug dealing go to the motive of the defendant because he said he was supporting family members through drug dealing when he was looking for work. The State also elicited testimony from Anderson defendant never offered to sell him drugs while they worked together. When defense counsel objected to the admission of defendant's videotaped statement and the State argued the statement went to motive, defense counsel stated defendant was employed at the time of the alleged transactions and he would present evidence of defendant's employment. The defense rested without presenting any evidence; however, the presentence report indicated defendant was employed as a laborer with Tinch Construction from April 7, 2008, to October 1, 2009, covering the time of the alleged offenses in this case.

¶ 38 Counsel may be held to be ineffective for failing to present exculpatory evidence corroborating the defense presented at trial. See *People v. Tate*, 305 Ill. App. 3d 607, 612, 712 N.E.2d 826, 829-30 (1999). However, decisions on what evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. Whether the failure in this case to present evidence of defendant's employment was a matter of trial strategy cannot be determined from the record and is better suited to be pursued in a postconviction petition.

¶ 39 4. *Failure To Object to Certain of the State's Remarks During Closing Argument*

¶ 40 Defendant contends the State attempted to bolster the credibility of its police witnesses by arguing they should be believed due to their status as police officers. Defense counsel did not object to the prosecutor's statements. Defendant argues the failure to object was prejudicial because this case hinged on the credibility of witnesses.

¶ 41 Generally, the decision whether to object to closing argument is a matter of trial strategy and does not establish ineffective assistance of counsel. *People v. Beard*, 356 Ill. App. 3d 236, 244, 825 N.E.2d 353, 361 (2005). However, a police officer's testimony is to be judged the same as any other witness. *People v. Rogers*, 172 Ill. App. 3d 471, 476, 526 N.E.2d 655, 660 (1988). A prosecutor may not argue a witness is more credible because of his status as a police officer. *People v. Fields*, 258 Ill. App. 3d 912, 921, 631 N.E.2d 303, 309 (1994). Additionally, the prosecution may not extol an officer's experience or assert the officer would not lie merely to convict a particular defendant. *People v. Gorosteata*, 374 Ill. App. 3d 203, 219, 870 N.E.2d 936, 950 (2007).

¶ 42 As will be seen below, the prosecutor's closing argument in this case was not plain error and, thus, it was merely trial strategy for defense counsel to forego objecting to his comments in this case and counsel was not ineffective.

¶ 43 B. Plain Error

¶ 44 1. *Arguments as to Credibility of Police Officers*

¶ 45 Defendant next argues it was plain error for the State to include in its closing argument statements urging the jury to consider police-officer witnesses more credible because they would not risk their jobs by lying. Whether statements from a prosecutor are so egregious they warrant a new trial is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

¶ 46 Defendant acknowledges he failed to preserve this alleged error in closing argument for appellate review because defense counsel did not object to the comment at trial or raise the issue in a posttrial motion. See *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d

403, 412 (2010). Defendant argues, however, the alleged error should be reviewed for plain error as it is error for a prosecutor to argue a police officer is more credible because of his status as a police officer, as we noted earlier. See *Fields*, 258 Ill. App. 3d at 921, 631 N.E.2d at 309. The first step of inquiry under plain-error review is to determine if the challenged comments constituted error. See *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). In this case, our supreme court has found, while a prosecutor's comments regarding a police officer's credibility in a similar situation are not proper, they do not constitute plain error and are not inflammatory enough to tip the scales of justice where the evidence was not closely balanced. *People v. Adams*, 2012 IL 111168, ¶¶ 21-23, 962 N.E.2d 410.

¶ 47 In this case, the prosecutor argued, while Anderson might not be the most credible witness as he was a paid informant, drug addict, and convicted felon, the police officers who testified and corroborated his testimony were credible because they were experienced police officers. The prosecutor further stated it would defy "common sense" to conclude a bunch of police officers got together to make up a big story. The prosecutor added, "This isn't a bunch of cops risking to lose their job over tiny amounts of cocaine."

¶ 48 The evidence in this case was not closely balanced. Anderson's testimony was un rebutted and in some cases supported by the testimony of the police officers. In particular, Officer Gray testified he observed the drug transactions in at least two of the three instances and one occurred in the backseat of his car.

¶ 49 In *Adams*, the supreme court found a prosecutor's statements during closing argument, testifying police officers' testimony should be believed because they would not risk their credibility, jobs, or freedom by lying on the witness stand, were improper. *Id.* ¶ 20, 926

N.E.2d 410. However, it went on to find comments such as these not inflammatory enough to have threatened to tip the scales of justice against the defendant where the evidence was not closely balanced and the jury had been properly instructed counsel's arguments were not evidence and the jurors were the judges of the witness's credibility. *Id.* ¶¶ 22, 23, 962 N.E.2d 410. In addition, any error in the prosecutor's comments did not rise to the level of affecting the fairness of the defendant's trial and the integrity of the judicial process. *Id.* ¶ 24, 962 N.E.2d 410.

¶ 50 The jurors in the instant case was also instructed counsel's arguments were not evidence and they were the judges of witness credibility. While the prosecutor's arguments in regard to the credibility of police officers were improper, they do not amount to plain error.

¶ 51 *2. Characterization of Defense Arguments as Attempt To Confuse Jury*

¶ 52 Defendant also argues the State improperly argued in rebuttal defendant's attempted impeachment of Officer Gray was an attempt to confuse or distract the jury. Defense counsel had used Gray's police report to impeach his testimony he actually witnessed the transactions. Gray had stated he accepted the informant's version of what happened and wrote that in his police report. He also stated, however, he would have added his own observations if they contradicted anything the informant said. In closing argument, defense counsel highlighted Gray's testimony he simply accepted the informant's testimony.

¶ 53 A prosecutor commits misconduct when he accuses defense counsel of "attempting to create reasonable doubt by confusion, misrepresentation, or deception." *People v. Johnson*, 208 Ill. 2d 53, 82, 803 N.E.2d 405, 422 (2003). Defendant argues the prosecutor's comments here denigrated his defense as a mere distraction and acted as a tacit attack on defense

counsel as someone out to confuse the jury.

¶ 54 Defendant did not preserve this alleged error by objecting at trial or raising the issue in a posttrial motion. As we noted earlier, failing to object to closing argument is often a matter of trial strategy. *Beard*, 356 Ill. App. 3d at 244, 825 N.E.2d at 361. Further, it does not rise to plain error where the evidence, as here, is not closely balanced.

¶ 55 C. Extended-Term Sentence Not an Abuse of Discretion

¶ 56 Defendant received a sentence of eight years on each of the two counts on which he was convicted, to be served concurrently. Each of these offenses was a Class 2 felony normally punishable by probation or three to seven years in prison. 720 ILCS 570/401(d) (West 2008); 730 ILCS 5/5-4.5-35(a), (d) (West 2008). Defendant concedes a trial court does have the discretion to sentence a defendant to an extended term of between 8 and 14 years because of a prior conviction of an equal or greater class felony within 10 years of his current conviction. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). However, defendant argues an extended term was not justified in this case where the period between convictions was over nine years and no violence was involved in the current offenses or in defendant's criminal history.

¶ 57 A sentence will be reversed on appeal when it constitutes an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). An abuse of discretion occurs when a trial court imposes a sentence manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000). That did not occur in this case.

¶ 58 Defendant was convicted of a drug offense of an equal or greater class in 1998. Time served on an offense is not included when calculating the time between convictions (730

ILCS 5/5-5-3.2(b)(1) (West 2008)). The time in this case was a little over nine years between convictions. Defendant was eligible for an extended-term sentence. While defendant is correct no violence was involved in this or any of his previous convictions, an extended-term sentence was still warranted.

¶ 59 At sentencing the trial court considered the presentence report. According to the report, defendant's prior criminal history included a charge of possession of marijuana resulting in 18 months' confinement and a bad-conduct discharge from the Air Force in 1996. This was followed by his conviction in 1998 for the Class 2 felony of manufacture/delivery of greater than 15 and less than 100 grams of cocaine, possession of cannabis greater than 2.5 and less than 10 grams, which resulted in a prison sentence of eight years and a \$5,045 fine. Finally, defendant was convicted in 2008 of a Class 4 felony of retail theft greater than \$150 and was sentenced to 30 months' probation, 180 days in jail with 174 days stayed, and restitution of \$19,246.84. While on probation, defendant was not in compliance as he was unsuccessfully discharged from drug treatment and had a positive drug screen on May 4, 2009, resulting in 30 days in jail. He had another positive drug screen on November 30, 2009, and failed to report for drug treatment and was sentenced to 144 days in jail. The offenses for which he was convicted in this case occurred during the time he was on probation.

¶ 60 The trial court noted it took under consideration the fact defendant took responsibility for his actions in allocution, but these were his third and fourth felonies and he was already on felony probation when they occurred. Further, the court noted there was also evidence at trial of another delivery where defendant was not convicted. Although defendant had already served an eight-year sentence on a drug offense similar to this one, he did not seem

to learn anything from his experience. Thus, the court gave him the minimum extended term sentence allowable by sentencing him to concurrent eight year terms. The trial court did not abuse its discretion in this case.

¶ 61

III. CONCLUSION

¶ 62 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.

¶ 63 Affirmed.