2018 IL App (1st) 160336-U
No. 1-16-0336

SECOND DIVISION
September 28, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No.14CR11710
	)	
CHAUNCY ROBY,	)	
	)	The Honorable
Defendant-Appellant.	)	Michael B. McHale,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* defendant's conviction for the offense of possession of a controlled substance with intent to deliver affirmed where the State proved the elements of the offense beyond a reasonable doubt, he received effective assistance of trial counsel, and the State did not deliver an improper and prejudicial rebuttal argument; defendant's 10-year sentence affirmed where it fell within the applicable statutory sentencing range and was not excessive.

¶ 2 Following a jury trial, defendant Chauncy Roby was convicted of possession of a controlled substance with intent to deliver and sentenced to 10 years' imprisonment. On appeal, defendant challenges his conviction and the sentence imposed thereon, arguing: (1) the State

failed to prove his guilt of the offense beyond a reasonable doubt; (2) he was denied his constitutional right to effective assistance of trial counsel; (3) the State's rebuttal argument amounted to prosecutorial misconduct; and (4) the 10-year sentence imposed upon him by the circuit court is excessive. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On June 2, 2014, police officers observed defendant attempt to effectuate a suspected narcotics transaction, stopped him, and recovered 4 small bags containing of suspected heroin on his person. Defendant was then arrested and charged with possession of a controlled substance with intent to deliver.

¶ 5 At trial, Chicago Police Officer Aaron Acevedo, a member of the 11th District's tactical team unit assigned to investigate activities related to gangs, narcotics, and violence, testified that he encountered defendant on June 2, 2014, at approximately 2:20 p.m. in the area of Madison and Homan. At that time, he and three other members of the tactical team were patrolling the area in an unmarked squad car with the vehicle's windows lowered. Officer Acevedo was seated in the backseat of the squad car when he heard defendant, who was standing approximately 25 feet away on the north side of Madison Street, yelling, "blows, blows," which he recognized to be "a street term for the sale of heroin." Defendant appeared to be directing his words to another man who was walking towards him. Upon making these observations, Officer Acevedo exited the squad car, approached defendant, and placed him in handcuffs for "soliciting unlawful business." Another officer detained Frank Edwards, the man who had been walking toward defendant when defendant was advertising "blows." Edwards was not arrested; rather, he was

subjected to a field interview and his information was memorialized in a "contact card" before he was permitted to leave the scene.

¶ 6 After handcuffing defendant, Officer Acevedo testified that he performed a custodial search of defendant's person. During that custodial search, Officer Acevedo recovered "a piece of plastic" containing "four small ziplock bags that contained suspect heroin" from defendant's right rear pants pocket. The four small bags were "black tinted" bearing a logo of "goldish skulls" and measured "about one inch square." The packaging of the bags was "consistent with street sale narcotics." Officer Acevedo also recovered $67 in "paper U.S. currency" from defendant's person as well. Defendant was subsequently transported to the 11th District police station for processing. Upon arriving at the station, Officer Acevedo turned over the four bags of suspected heroin to his partner, Officer Ryan McCarthy, who inventoried the items in accordance with standard police protocol.

¶ 7 On cross-examination, Officer Acevedo acknowledged that he did not observe an actual transaction take place between defendant and Edwards. That is, defendant never exchanged any items with Edwards. Moreover, he did not observe defendant engage in an actual transaction with any other individual before he was arrested.

¶ 8 Officer McCarthy corroborated the details provided by Officer Acevedo regarding the circumstances that led to defendant's arrest, including the fact that defendant was overheard yelling "blows, blows" in the area of Madison and Homan at approximately 2:20 p.m. on June 2, 2014. Officer McCarthy further confirmed that defendant "appeared" to be "shouting in the direction of" Frank Edwards. Finally, Officer McCarthy confirmed that Officer Acevedo provided him with the narcotics that were recovered from defendant's person and that he processed and inventoried the four baggies in accordance with police protocol. That is, he used

the department's computer to generate a specific inventory number for the narcotics and placed the baggies in a narcotics recovery bag that was then "heat sealed and dropped into a safe."

¶ 9 Naeemah Powell, a forensic scientist employed at the Illinois State Police Forensic Science Center, testified that she is responsible for testing evidence submitted by various agencies for the possible presence of controlled substances. She received the four baggies of suspected heroin seized from defendant's person in a heat-sealed narcotics evidence bag and was assigned to analyze the contents. After opening the sealed evidence bag, Powell confirmed that the contents of the bag matched the inventory description. She then began to analyze the four baggies and the substances contained therein. Powell first weighed the contents of the four baggies and found the total weight of the powder contained in those baggies to be 1.6 grams. She explained her process as follows: she "place[d] all of the items which there were four in this case on the balance and then [she] remove[d] the powder from each bag into their individual weight boats and then [she] place[d] the empty bag back on the balance. That gave [her] the weight of the actual powder."

¶ 10 After ascertaining the weight of the powder, Powell then sought to identify the nature of the substance. The "four items *** were [then] tested for the possible presence of a controlled substance." She first conducted a preliminary analysis of the powder using a color test, which involves applying chemicals to an unknown substance and observing whether the substance will change color, thereby indicating the presence of a controlled substance. The color test that she conducted in this case "indicated there was a possible presence of heroin." Powell then "move[d] on to a confirmatory test." Specifically, she utilized a GC-MS gas chromatography-mass spectrometry test to analyze the powder. The "confirmatory test confirmed the presence of heroin in the sample" from the four baggies. After confirming the presence of heroin "contained

in the[] four items," she "placed each item into its own individual bag," placed the four baggies "into an outer bag," and placed everything into the evidence bag, which was then heat-sealed. Based on the results of her testing, Powell opined that "there was heroin contained in th[ose] four items."

¶ 11 After presenting the aforementioned testimony, the State rested its case-in-chief. Defense counsel moved for a directed verdict, arguing that the State failed to present evidence to "support the element of intent" necessary to prove the charge of possession of a controlled substance with intent to deliver. The circuit court denied defense counsel's motion. Defendant then elected to testify. He admitted that he was in possession of "drugs" on June 2, 2014, and explained that he had just purchased drugs on Madison Street, a "known drug area," and was walking home when Chicago police officers "jumped out" of a vehicle and apprehended him. The officers then asked him if he had "anything on" him. Defendant admitted that he did and he "handed" the four bags of heroin he was carrying on his person to the authorities. Defendant expressly denied that he yelled "blows" and further denied that he intended to sell drugs that day. Instead, he explained that he made his living as a "hairstylist" and conducted business out of his home.

¶ 12 On cross-examination, defendant admitted that he had purchased drugs on Madison Street on "hundreds" of prior occasions because the quality of the heroin sold in that area was known to be "good." He denied, however, that he had ever heard anyone yelling "blows, blows" in that area and stated that he was not familiar with that terminology. Defendant also admitted that he purchased five bags of heroin on June 2, 2014. He stated that he immediately snorted one of the bags and put the remaining four bags in his underwear. Defendant did not know the name of the individual from whom he purchased the five bags of heroin on that date, but described the seller

as a stocky African American male with wavy hair. The seller was approximately 5'9'' and was wearing a grey hooded sweatshirt.

¶ 13 Following defendant's testimony, defense counsel rested his case and the parties delivered closing arguments. The jury commenced deliberations after receiving a series of instructions and ultimately returned with a verdict finding defendant guilty of the charged offense of possession of a controlled substance with intent to deliver.

¶ 14 Defendant's posttrial motion was denied and the cause subsequently proceeded to a sentencing hearing. At the hearing, the parties presented evidence in aggravation and mitigation and defendant delivered a statement in allocution. In aggravation, the State cited defendant's criminal history, which included 6 prior felony convictions, and informed the court that defendant was "Class X by background" and subject to the mandatory Class X sentencing range of 6 to 30 years' imprisonment. Defense counsel, in turn, presented mitigating evidence, citing defendant's "strong family relationships," his previous work history, his lack of gang affiliation, and his acknowledged problems with substance abuse. After hearing the evidence presented by the parties, the court sentenced defendant to 10 years' imprisonment.

¶ 15 Defendant's motion to reconsider his sentence was denied. This appeal followed.

¶ 16 ANALYSIS

¶ 17 Sufficiency of the Evidence

¶ 18 On appeal, defendant first contests the sufficiency of the evidence. Specifically, he argues that the "State failed to prove beyond a reasonable doubt that the entire 1.6 grams of substance [he] possessed actually contained heroin."

¶ 19 The State responds that "the prosecution clearly established beyond a reasonable doubt that the forensic chemist tested the contents of each of the bags of heroin, that the contents of each bag tested positive for heroin, and the weight of the heroin was 1.6 grams."

¶ 20 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, the court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 58; *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). This standard is applicable to all criminal cases regardless of the nature of the evidence at issue. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 21 To sustain a conviction for an offense involving a controlled substance, it is axiomatic that the State must prove that the substance at issue is, in fact, a controlled substance. *People v. Woods*, 214 Ill. 2d 455, 466 (2005); *People v. Clinton*, 397 Ill. App. 3d 215, 220 (2009). Moreover, when a defendant is charged with a specific amount of an illegal drug with intent to deliver and there is a lesser included offense of possession of a smaller amount of a controlled

substance, the weight of the substance is considered to be an essential element of the crime that must also be proved beyond a reasonable doubt. *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996); *Clinton*, 397 Ill. App. 3d at 220. Proof of the nature of a substance may be established though chemical testing and expert testimony. *People v. Ortiz*, 197 Ill. App. 3d 250, 255 (1990); *People v. Hanna*, 296 Ill. App. 3d 116, 121 (1998). In many cases, an expert is not required to test every sample seized in order to render an opinion as to the makeup of the substance as a whole. *Jones*, 174 Ill. 2d at 429; *Clinton*, 397 Ill. App. 3d at 220-21. Rather, "[r]andom testing of samples in order to infer 'the makeup of the substance as a whole' is proper if the seized samples are sufficiently homogenous." *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40 (quoting *Jones*, 184 Ill. 2d at 429). When, however, the samples are not sufficiently homogenous, a portion from each container, packet, or sample must be tested in order to ascertain the nature of the contents. *Jones*, 174 Ill. 2d at 429; see also *People v. Adair*, 406 Ill. App. 3d 133, 140 (2010) ("When distinct samples are seized, a representative sample from each distinct sample must be tested to conclusively determine the chemical composition of that sample").

¶ 22 Here, there is no dispute that the heroin at issue was contained in four distinct small ziplock baggies. As such, forensic scientist Naeemah Powell was required to test a portion of each baggie in order to properly identify the nature of the substance recovered from defendant's person. See, *e.g.*, *Jones*, 174 Ill. 2d at 429 (finding that five separate packets containing a white rocky substance were not sufficiently homogenous to permit random testing and concluding that the chemist was required to test a sample from each packet). Defendant argues that Powell's testimony is insufficient to establish that she, in fact, did so. We find defendant's argument unavailing.

¶ 23 At trial, Powell testified that she commenced her analysis by removing the powder from each of the four baggies and placing them into individual weight boats. After ascertaining the total weight of the powder to be 1.6 grams, she then sought to identify the nature of substance contained in the "four items." Powell testified that she performed preliminary and confirmatory tests. Her testing "confirmed the presence of heroin in the sample," which was the "sample from those four baggies." In response to additional questioning about the "tests that [she] performed on this exhibit and those *four baggies*," Powell testified that she "came to the conclusion that there was heroin contained in these *four items*" (Emphasis added.) After she completed her analysis, Powell testified that she "placed each item into its own individual bag." Such testimony indicates that she kept the contents of each package separate and allows for the inference that she did not comingle the contents of the four baggies during her analysis of the weight and nature of the powder. See *Harden*, 2011 IL App (1st) 092309, ¶ 43. Although perhaps not explicitly stated, Powell's testimony also supports an inference that she tested each of the four samples. *Id*. (rejecting the defendant's argument that the forensic scientist's testimony was insufficient to establish that the contents of the 20 packets recovered from the defendant's person was cocaine simply because the scientist did not explicitly testify that he tested each of the 20 packets where the scientist's testimony as a whole allowed for the inference that he did so). Notably, defense counsel did not object to or otherwise challenge Powell's testimony and methodology at trial. To the extent that there is any ambiguity regarding Powell's methodology, we note that a reviewing court " 'will not presume that an improper procedure was performed' " as the matter is one that is best left to the trier of fact. *Id*. (quoting *People v. Miller*, 218 Ill. App. 3d 68, 673 (1991)). Ultimately, viewing Powell's testimony in the light most favorable to the prosecution (*Ward*, 215 Ill. 2d at 322), we find that the jury could have

reasonably concluded that Powell tested a sample from each of the four baggies recovered from defendant and concluded that those baggies contained 1.6 grams of heroin.

¶ 24 In so finding, we are unpersuaded by defendant's reliance on *Jones*, 174 Ill. 2d. 427 and *Clinton*, 391 Ill. App. 3d 215. In *Jones*, the defendant was arrested for the possession of five separate packets containing a white rocky substance that the police believed was a controlled substance. *Id*. at 428. The State then selected two of the five packets to test and those packets tested positive for cocaine. *Id*. The remaining three packets were not tested, but were simply weighed. *Id*. The court found that this procedure was improper given that the packets were not homogenous and concluded that no inference could be drawn concerning the composition of the three packets not tested. *Id*. at 429-430. Similarly, in *Clinton*, the chemist testified that he tested only six of the thirteen packets seized from the defendant. *Clinton*, 387 Ill. App. 3d at 222. The chemist further testified that he comingled the mixture of the six packets prior to conducting any testing. *Id*. This procedure was likewise found to be improper. *Id*. at 223-24. Here, unlike *Jones* and *Clinton*, there is no such explicit admission by Powell that she failed to test each of the four baggies recovered from defendant or that she comingled the contents prior to conducting her analysis. See, *e.g.*, *Harden*, 2011 IL App (1st) 092309, ¶ 42 (finding the holdings in *Jones* and *Clinton* inapposite where the scientist provided no such "explicit" admission that testing was conducted on only a portion of the total number of items recovered from the defendant). Rather, as set forth above, we conclude that Powell's testimony, when viewed in the light most favorable to the State, supports the finding that she tested each bag individually for the presence of narcotics. We therefore reject defendant's challenge to the sufficiency of the evidence.

¶ 25 Ineffective Assistance of Counsel

¶ 26 Defendant next argues that he was denied his constitutional right to effective assistance of trial counsel. Specifically, he argues that his attorney was ineffective for failing to tender a jury instruction on the lesser included offense of possession with intent to deliver less than one gram of heroin.

¶ 27 The State responds that defendant "cannot establish that his trial counsel was ineffective for failing to request a lesser included jury instruction where there was no evidence to support it and it would have contradicted defendant's own trial testimony."

¶ 28 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). " 'In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL

App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reviewing court must consider the attorney's overall performance when determining whether counsel's conduct prejudiced the defendant. *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984); *In re Denzel W.*, 237 Ill. 2d 285, 299 (2010); *People v. Roper*, 116 Ill. App. 3d 821, 825-26 (1983). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 29 As a threshold matter, we note that the decision whether or not to tender a lesser included offense jury instruction is considered to be one of trial strategy that has no bearing on the competency of trial counsel. *People v. Rhodes*, 386 Ill. App. 3d 649, 653-54 (2008). Nonetheless, a defendant is generally entitled to a lesser included offense if there is any evidence tending to prove the lesser offense rather than the greater offense (*People v. Scott*, 256 Ill. App. 3d 844, 850 (1993)) and an attorney may be deemed ineffective for failing to request a lesser included offense instruction if the evidence presented at trial supports a lesser included offense that corresponds to the defense theory advanced at trial (*People v. Gallagher*, 2012 IL App (1st) 101772, ¶ 29). That is because "where defense counsel argues a theory of defense but then fails to offer an instruction in support of that theory of defense, the failure cannot be called trial strategy ***." *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997).

¶ 30 At trial, the jury received instructions related to the offense of possession with intent to deliver a controlled substance weighing between 1 and 15 grams. Moreover, in accordance with the defense theory of the case that defendant lacked intent to deliver heroin, the jury also

received an instruction on the lesser included offense of simple possession of a controlled substance. Defendant, however, suggests on appeal that the jury should have been provided with a third instruction on the lesser included offense of possession with intent to deliver less than one gram of a controlled substance and that his attorney was ineffective for failing to request such an instruction.

¶ 31 We disagree that counsel's representation in this vein amounted to ineffective assistance of counsel. At trial, defendant conceded that he was in possession of heroin but testified that he was simply a drug user, not a drug seller, and lacked any intention to sell the heroin. In support of this theory, defense counsel did not challenge Naeemah Powell's analysis of the substance recovered from defendant or her conclusion that the packets recovered from defendant contained 1.6 grams of heroin. Instead, counsel repeatedly disputed defendant's intent to sell and ensured that the jury received an instruction that corresponded to the defense theory: simple possession of a controlled substance. An instruction on the offense possession with intent to sell less than one gram of heroin was not supported by the evidence and would have been inconsistent with defendant's testimony and inconsistent with the theory of defense advanced at trial. Therefore we are unable to conclude that counsel's decision not to request such an instruction was unreasonable and constituted ineffective assistance of counsel.

¶ 32 Prosecutorial Misconduct

¶ 33 Defendant next contests the propriety of the State's rebuttal argument. Specifically, he argues that the State "improperly argued" that Frank Edwards, the man stopped by police along with defendant, was defendant's "buyer." He contends that the State's characterization of Edwards was not supported by the evidence and amounted to prosecutorial misconduct.

¶ 34 The State responds that defendant's claim of prosecutorial misconduct lacks merit where the prosecutor's rebuttal argument was a reasonable inference based on the testimony of the officers who arrested defendant and was an appropriate response to defense counsel's characterization of the evidence in her closing argument.

¶ 35 As a threshold matter, defendant acknowledges that this contention of error was not included in his posttrial motion and was thus not properly preserved for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a post-trial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim); see also *People v. Glasper*, 234 Ill. 2d 173, 203 (2009) (finding that the defendant forfeited his claims of prosecutorial misconduct where he failed to object to the purportedly improper statements made by the State in rebuttal argument and did not include those contentions of error in his posttrial motion). The plain error doctrine, however, provides a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565; *People v. Rinehart*, 2012 IL 111719, ¶ 15. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him. *Sargent*, 239 Ill. 2d at 189-90. Keeping this standard in mind, we turn now to evaluate the merit of defendant's claim.

¶ 36 Generally, prosecutors are afforded wide-latitude during closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001); *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009). Accordingly, a " 'defendant faces a substantial burden in attempting to achieve reversal [of his conviction] based upon improper remarks made during closing arguments.' " *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010) (quoting *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002)). When delivering closing arguments, prosecutors may comment on the evidence as well as any reasonable inferences that the evidence may support, even if those inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To be proper, however, the inferences must be reasonable and based on the facts and circumstances proven during the trial. *Gutierrez*, 402 Ill. App. 3d at 895; *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). In addition, in rebuttal argument, the State is permitted to respond to arguments made by defense counsel that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000); see also *Glasper*, 234 Ill. 2d at 204 ("Statements will not be held improper if they were provoked or invited by the defense counsel's argument").

¶ 37 To evaluate a defendant's allegation of prosecutorial misconduct during closing argument, a reviewing court will consider the closing argument as a whole and evaluate the challenged comments in the context in which they were delivered. *Glasper*, 234 Ill. 2d at 204; *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Reversal is warranted only if the prosecutor's comments resulted in "substantial prejudice" to the defendant. *Wheeler*, 226 Ill. 2d at 123; *People v. Walton*, 376 Ill. App. 3d 149, 160 (2007). Substantial prejudice exists when it can be determined that the improper remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123; *Gutierrez*, 402 Ill. App. 3d at 895.

¶ 38 At trial, Officers Acevedo and McCarthy testified that they observed defendant standing on Madison Avenue and heard him yelling, "blows, blows," street terminology associated with the sale of heroin. The officers further testified that defendant appeared to be directing his statements towards a person later identified as Frank Edwards. At the time that defendant was vocalizing, Edwards was approximately 15 feet away from defendant and was walking towards defendant. The defense strategy at trial was to dispute the State's charge that defendant had ever intended to sell the packets of heroin that were recovered from his person. In support of the defense theory, defense counsel argued during closing argument that the officers were "overly aggressive in trying to clean up Madison Avenue," an area known for narcotics transactions, and as a result, stopped both defendant and Edwards simply because of their presence in the area. Defense counsel argued that it was "not believable" that defendant had been yelling "blows" and categorized Edwards as "just a person walking down the street," not someone looking to purchase heroin. In support of her characterization of Edwards, defense counsel emphasized that the officers never actually observed a transaction occur between defendant and Edwards and that police never recovered narcotics from Edwards.

¶ 39 In its rebuttal argument, the State disputed defense counsel's characterization of defendant as a mere narcotics purchaser; rather, the State argued that the evidence established that defendant was "in the business of selling drugs" and that he was intending to sell heroin to Edwards at the time that police heard him yelling "blows, blows" in Edwards's direction. Upon review, we do not find that the State's commentary amounted to prosecutorial misconduct. The statements regarding Edwards as the intended purchaser of the heroin recovered from defendant's person was both a reasonable inference based on the evidence as well as a proper response to arguments made by defense counsel. See, *e.g.*, *Perry*, 224 Ill. 2d at 347 (it is proper

for the State to comment on the evidence and any reasonable inferences that the evidence may support during closing argument); *Hall*, 194 Ill. 2d at 346 (the State is permitted to respond to arguments made by defense counsel during rebuttal argument). Given that the State's comments were invited by defense counsel and were reasonable in light of the facts presented at trial, we necessarily reject defendant's argument of prosecutorial misconduct. Ultimately, "[h]aving found no error, there can be no plain error." *Bannister*, 232 Ill. 2d at 79.

¶ 40 Sentence

¶ 41 Finally, defendant challenges the propriety of his 10-year sentence. He argues that the sentence imposed upon him by the circuit court is "excessive" given the fact that he "was convicted of possessing a small, personal amount of heroin, never completed an actual [drug] transaction, and had a felony history more than 15 years old."

¶ 42 The State responds that the "trial court properly exercised its discretion by thoroughly considering the relevant and proper factors in aggravation and mitigation, before imposing a sentence within the applicable range." As such, the State submits that defendant's 10-year sentence should be affirmed.

¶ 43 The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To find the proper balance, the trial court must consider a number of aggravating and mitigating factors including: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). The court, however, need not explicitly

analyze each relevant factor or articulate the basis for the sentence imposed. *People v. Averett*, 381 Ill. App. 3d 1001, 1021 (2008); *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). Moreover, because the trial court is in the best position to weigh these factors, the sentence that the trial court imposes is entitled to great deference and will not be reversed absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). Indeed, a reviewing court will not reweigh the factors in reviewing a defendant's sentence and may not substitute its judgment for the trial court merely because it could or would have weighed the factors differently. *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007). Ultimately, when a sentence falls within the statutory guidelines, it is presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010); *Ramos*, 353 Ill. App. 3d at 137.

¶ 44 Defendant was convicted of possession of controlled substance within intent to deliver 1 gram or more but less than 15 grams of any substance containing heroin, or an analog thereof, a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2014). Because of defendant's criminal history, however, he was subject to mandatory sentencing as a Class X offender to a "determinate sentence of not less than 6 years and not more than 30 years imprisonment."[1] 730 ILCS 5/5-4.5-25 (West 2014). There is no dispute the 10-year sentence imposed upon defendant by the circuit falls within the permissible statutory range and is thus presumed proper. *Gutierrez*, 402 Ill. App. 3d at 900; *Ramos*, 353 Ill. App. 3d at 137.

[1] In defendant's appellate brief, he incorrectly identifies 4-years' imprisonment as the minimum mandatory sentence permitted under the mandatory Class X sentencing guidelines. Defendant, however, identifies the correct minimum mandatory Class X sentence in his reply brief: 6 years' imprisonment.

¶ 45 Although defendant attempts to categorize his latest conviction as a relatively non-serious offense that did not justify a departure from the Class X minimum sentence, it is apparent from the record that the court considered the circumstances of the crime as well as the aggravating and mitigating factors presented by the parties when imposing defendant's 10-year sentence. The court explained its rationale as follows:

> "Okay. After weighing the factors in mitigation and aggravation, reading the PSI, listening to all the arguments of the attorneys and statement of [defendant], I find that [defendant] has two violent felonies in his background. I acknowledge they're older, but they're still substantial. He has a long drug history as well.
>
> He says he is not a dealer, he's only a user. However, the testimony was clear that you were out there dealing and the jury believed the officers that you were dealing. You might also be an addict, but you're also a dealer according to the verdict.
>
> Heroin ruins lives. It's taken a large chunk of yours already. You need something to wake you up. The minimum certainly isn't appropriate here just based on your background. You can get up to 30 years on this case, and I'm going to be generous and give you 10, 10 years IDOC."

¶ 46 After reviewing the record, we find that defendant has failed to rebut the presumption of propriety afforded to his sentence and has failed to establish that the circuit court abused its discretion and imposed an excessive sentence. In so finding, we are unpersuaded by defendant's reliance on pretrial plea negotiations to support his argument that the 10-year sentence the circuit court ultimately elected to impose is excessive. The record established that prior to trial, the State offered defendant a plea deal wherein he would plead guilty to simple possession of a controlled substance, a Class 4 felony, in exchange for a sentence of 3-years' imprisonment.

Defendant was admonished of the benefits of the deal as well as the inherent uncertainties associated with a trial, however, he ultimately elected to reject the State's proffered plea deal and proceed to trial.

¶ 47 It is well-recognized that "it is proper to grant dispositional concessions to defendants who plead guilty since the public interest in the effective administration of justice is served." *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 60. When, however, a defendant rejects a plea deal with the accompanying dispositional concessions and is convicted following a trial, the circuit court is not bound by the sentence discussed during plea negotiations and may impose a more severe sentence as long as the more severe sentence is not imposed simply as a means to punish the defendant for exercising his constitutional right to be tried before an impartial judge or jury. *People v. Ward*, 113 Ill. 2d 516, 526 (1986); *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962). Here, there is no evidence that the circuit court's decision to sentence defendant to 10-years' imprisonment was informed by a desire to punish defendant for failing to plead guilty. Accordingly, defendant's 10-year sentence is affirmed.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court is affirmed.

¶ 50 Affirmed.