2018 IL App (2d) 160020-U
No. 2-16-0020
Order filed August 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-316
MICHAEL R. RICE JR.,	)	Honorable George D. Strickland,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel was not ineffective for failing to request a limiting instruction as to prior consistent statements and object to the State's references in closing argument: counsel made a reasonable strategic decision to attack the witnesses' credibility by using their statements to show how their stories evolved, and in any event defendant was not prejudiced, as the statements substantively were cumulative of the witnesses' testimony and the instruction would have led the jury to use the statements to bolster the witnesses' credibility; (2) as the trial court imposed a public defender fee without any discussion in open court, it conducted no "hearing" on the fee, and thus we vacated it outright; and (3) defendant was entitled to full credit against various fines, to reflect his time in presentencing custody.

¶ 2 Following a jury trial, defendant, Michael R. Rice Jr., was found guilty of residential burglary (720 ILCS 5/19-3 (West 2014)) and sentenced to 11 years in prison. He raises the following issues on appeal: (1) whether he was denied the effective assistance of counsel where trial counsel failed to offer a limiting instruction as to prior consistent statements that were admitted to rehabilitate two witnesses and where counsel did not object when, according to defendant, the State used the statements as substantive evidence during closing argument; (2) whether the trial court erred by hearing defendant's *pro se* motion for reconsideration of his sentence without first obtaining a waiver of counsel; (3) whether the public defender fee should be vacated; and (4) whether he should be awarded the statutorily required credit against certain fines. For the reasons that follow, we affirm his conviction, vacate the fee, and award the credit.

¶ 3 I. BACKGROUND

¶ 4 On March 11, 2015, defendant, along with Cynthia D. Freeman and Eric R. Rioux, was indicted on one count of residential burglary and one count of theft (*id.* § 16-1(a)(1)(A)). Defendant was also indicted on two additional counts of theft based on having previously been convicted of retail theft and burglary (*id.* § 16-1(a)(1)(A)). The indictment alleged that, on September 12, 2014, defendant, Freeman, and Rioux entered a residence belonging to John Poehler, with the intent to commit a theft, and obtained unauthorized control over guns, ammunition, and U.S. currency belonging to Poehler. Freeman and Rioux each pleaded guilty to theft and received sentences of probation.[1] As a condition of probation, they each agreed to testify against defendant. Both had given written statements at the time of their arrests.[2]

[1] The record reveals that, prior to trial, the State offered defendant, in exchange for his plea of guilty to one count of residential burglary, a sentence of five years in prison, which was one year less than the minimum sentence defendant would face should he be found guilty after

¶ 5 The following transpired at defendant's jury trial. During opening statements, the State told the jury that the evidence against defendant included testimony from Freeman and Rioux. In addition, the State told the jury that it would be hearing from a detective who took an oral statement from defendant wherein defendant admitted to his participation. In response, defense counsel told the jury that Freeman and Rioux were dating and that they received second-chance probation "all in exchange to implicate someone else." She stated: "So they were able to save themselves and escape some of the punishment they would receive if they told on someone else, and that's what this is really about." She asked the jury to "pay very close attention to everyone's statement. [Freeman's], you're going to hear various versions because she tells about three or four different versions." With regard to Rioux's statement, counsel told the jury: "You're going to hear various versions because he gives quite a few versions of the statement, and you're going to hear or see that they wrote a statement or whatever they said about what happened, and I want you to listen to each time the detective speaks to them and how the story changes each time."

¶ 6 Freeman testified that, in November 2014, she lived in McHenry with Rioux, who was her boyfriend, defendant, and defendant's girlfriend, Hannah Morrow. During the first week of September 2014, Freeman was at Poehler's house when Poehler received a phone call from Rioux's father concerning firearm repair. Freeman had met Poehler two years earlier on Craigslist. Freeman had an intimate relationship with Poehler and he provided her with financial

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trial. The trial court confirmed the plea offer with the parties and defendant indicated that he wished to go to trial.

[2] The record reveals that defendant, too, gave a written statement at the time of his arrest. However, prior to trial, defense counsel successfully argued against its admission.

assistance. During the phone call, Freeman observed Poehler remove a gun from his gun safe. She saw that he kept the key to the safe on a shelf. She also knew that he occasionally kept money in the safe. When she returned home from Poehler's house, she told Rioux that, while she was there, his father had called Poehler about firearm repair. Defendant heard what Freeman told Rioux and asked if Poehler had guns in the house. Freeman told him that he did. According to Freeman, defendant said "we should rob him." Freeman "sarcastically" agreed with defendant.

¶ 7 Freeman testified that, sometime later, she, Rioux, Morrow, defendant, and defendant's friend Caitlyn Kelly discussed burglarizing Poehler's house. Defendant and Rioux asked Freeman what Poehler had in his house and where the safe was located. She told them that the safe was located in the back of the house near the bedroom door and that there was a back entrance. The group discussed a plan that involved Freeman contacting Poehler and getting him out of the house.

¶ 8 According to Freeman, a week prior to September 12, the group attempted to execute the plan. Freeman texted Poehler and asked him to meet her for lunch. When Poehler arrived at Culver's in McHenry, Freeman contacted either defendant or Rioux and let them know that she was with Poehler. She received a text back, informing her that Kelly never showed up so they were not going to Poehler's house. After lunch ended, Freeman went home and asked defendant and Rioux what had happened. They told her that Kelly had not answered her phone.

¶ 9 Freeman testified further that, on September 12, when she returned home from work, defendant, Rioux, and Kelly told her that they wanted to make another attempt at burglarizing Poehler's home. She told them that she did not want to because she had met with Poehler just 30 minutes earlier. Ultimately, she agreed to contact Poehler. She texted him and told him that

something was wrong with her car and that she was stuck at a store. Poehler agreed to come help her. Defendant, Rioux, and Kelly got some bags and put gardening-type gloves into the bags. Defendant and Rioux told Freeman that they were bringing gloves so that they would not leave fingerprints. Freeman left to go to Meijer in McHenry. Rioux had told her that, when she arrived, she should pull the battery cable from her battery. When Freeman arrived at Meijer, she waited in her car for Poehler. When he arrived, Freeman texted defendant to let him know that they could go to Poehler's house. Poehler fixed her battery and, while doing so, discovered that the car needed oil. They sat in the car for awhile, and then Poehler left to go to a gas station to buy oil. Freeman went into the store and contacted defendant, who told her that they were done. When she returned to her car, Poehler had already left, and she went home.

¶ 10 Freeman testified that she did not see Rioux until the next morning and that she did not see defendant for another day or two. However, Freeman spoke with Rioux over the phone that evening. Rioux told her that he was with defendant and that they were at Sonny Flores's house to sell the firearms that they had removed from Poehler's safe. Later, during a conversation between herself, defendant, Rioux, and Morrow, Freeman learned that defendant and Rioux had easily entered Poehler's home through an unlocked door and that they were in and out in five minutes. Defendant and Rioux took about $1200 in cash from the safe. She did not know how much money they made from the sale of the guns. She and Rioux received about $1200 for their participation. Defendant received about $400.

¶ 11 Freeman testified further that she was charged with respect to her involvement in the case. She pleaded guilty to theft and was placed on probation. As part of her plea agreement, she agreed to testify truthfully in this case.

¶ 12 On cross-examination, counsel asked, "You told this story a few times, correct? Did you tell it a few times?" Freeman respond that she had. She agreed that she had told her story twice to Lake County Sheriff's Detective Jacob Novak and also when she pleaded guilty. She also agreed that she had provided a written statement. Freeman agreed that, in prior statements, she never mentioned anything about a bag with gloves in it. She also agreed that when she gave her plea she had stated that she met Poehler three years ago. She denied ever telling Novak that Poehler paid her $300 per week. She agreed that Poehler had paid her a total of $12,000 since she met him. She met him in November 2012 and saw him off and on over a two-year period. With regard to the failed attempt to enter Poehler's home, Freeman agreed that, in her written statement, she never stated that it failed because Kelly did not show up. She testified that her written statement "wasn't very detailed." She did, however, tell Novak.

¶ 13 On redirect examination, Freeman testified that, in November 2014, a Lake County sheriff's deputy came to her house and questioned her about the burglary because Poehler thought it suspicious that she had contacted him twice on that day. At that time, she denied that she had anything to do with it. Freeman was later arrested on February 5, 2015, for the burglary. She spoke with Novak late that evening or very early the next day. Freeman told Novak what had happened but she left out a lot of details. She then provided him with a written statement, again leaving out a lot of details because she was "half asleep." At that time, she was not promised any plea deal. She pleaded guilty on July 6, 2015.

¶ 14 On recross-examination, Freeman agreed that one of the conditions of her probation was that she testify truthfully against defendant.

¶ 15 Following Freeman's testimony, the State sought to admit People's exhibit No. 19 into evidence as a prior consistent statement. Defense counsel objected, arguing that she did not raise an inference of recent fabrication. The court disagreed and allowed the statement into evidence.

¶ 16 Freeman's statement, which is contained in the record, generally provided as follows. Freeman had a personal relationship with Poehler. In September or October 2014, she was living with Rioux, Morrow, and defendant. She was at Poehler's house when he received a call from Rioux's father. When she got home, she told Rioux that his father had called Poehler about gun repair. Defendant heard her talking. One day, defendant decided that they should " 'hit a lick.' " The plan was for Freeman to distract Poehler while defendant, Rioux, and Kelly went to his house. She went to Meijer and called Poehler to fix her car. When Poehler arrived, she texted defendant and told him that she was with Poehler. Defendant, Rioux, and Kelly went to Poehler's house, walked through the door, and took guns, cash, and ammunition. She did not know what happened after that, other than that the guns were sold by defendant. She and Rioux received $1000.

¶ 17 Rioux testified that the plan to burglarize Poehler's home originated in early September 2014 when Freeman returned from Poehler's house and told Rioux and defendant that Poehler had shown her some guns in his collection and that she knew where he kept the key to his safe. Because he was interested in guns, Rioux asked Freeman about the types of guns that Poehler had. Defendant mentioned that he knew people who would be interested in buying them. Morrow was present during this conversation. Defendant suggested that Kelly would be able to drive them to Poehler's house. They decided that Freeman would meet Poehler for dinner while Rioux, defendant, and Kelly would break into Poehler's house.

¶ 18 According to Rioux, about a week prior to September 12, 2014, they made their first attempt to burglarize Poehler's home. Freeman met Poehler for dinner, while Rioux, defendant, and Kelly went to Poehler's house. Kelly drove them to the house; there was no issue with respect to her transportation. Once at the house, Rioux and defendant went to the back door, but it was locked and they were unable to break the glass. Rioux returned home. He did not know where defendant and Kelly went.

¶ 19 After the first attempt, Rioux, defendant, Freeman, and Morrow decided to make a second attempt. They decided that Freeman would distract Poehler, while Kelly drove defendant and Rioux to the house and acted as a lookout. Freeman called Poehler and told him that she had an issue with her car. Rioux, defendant, and Kelly went to Poehler's house, bringing along an assortment of tools and rubber gloves. When they arrived, Kelly parked across the street and changed her license plates to dealer plates. Defendant went to Poehler's door to see if anyone was there, while Rioux waited in Kelly's vehicle. Defendant signaled Rioux to grab the bag of tools and go to the back door. Rioux and defendant found the back door unlocked and entered. Defendant went directly to the shelf in the pantry where they were told the safe key was located. Defendant shuffled a few cans around but was unable to find the key. Defendant then went to the bedroom. Rioux began to move some cans around on the pantry shelf and was able to locate the key and unlocked the safe. Defendant went to the bedroom and found a pistol and a shotgun. Rioux removed about six guns, magazines, and $1200 from the safe. Defendant went through the drawers and closets in the bedroom. Rioux also looked in the closets and found a few cans of ammo. They wrapped the guns in bedding. Using a walkie-talkie, defendant contacted Kelly and told her to pull the car into the driveway because they had a lot of stuff to carry out. It took

two trips to the car by each man to load up all the ammo cans and firearms. They were in the house for about five minutes. Rioux, defendant, and Kelly split the $1200 evenly.

¶ 20 After leaving Poehler's house, they went to Flores's house where they met Flores and John Mally. Mally purchased one of the guns and left. Rioux, Kelly, defendant, and Flores went upstairs to Flores's neighbor's apartment where they waited for a buyer to show up. They were waiting for about half an hour when Freeman arrived. She stayed for a couple of hours and then left. Eventually, someone named "Little Man" or "Lid" arrived and purchased all of the guns and some of the ammunition, paying about $1000. In addition, defendant was given about two grams of cocaine and Rioux was given about half an ounce of cannabis. Kelly drove Rioux home, and defendant stayed at the apartment.

¶ 21 In November 2014, a Lake County sheriff's deputy arrived at Rioux's home and questioned him about the burglary. Rioux denied having any knowledge of it. Rioux was arrested on February 6, 2015, and charged in connection with the burglary. In July 2015, Rioux pleaded guilty to theft in exchange for two years' probation. He also agreed to testify truthfully against defendant.

¶ 22 On cross-examination, Rioux agreed that he did not mention the bag of tools or gloves when he wrote his statement or when he pleaded guilty. He also agreed that, in his written statement, he stated that when they entered the house he went to the pantry and defendant went to the bedroom. He testified that defendant went to the pantry first but that he never mentioned that in his written statement. He also agreed that, in his written statement, he never mentioned that he had been paid in cannabis. Rioux also agreed that, prior to his testimony, he never mentioned wrapping the guns in a blanket.

¶ 23 On redirect, Rioux testified that he was not offered any type of deal prior to giving his written statement. Rioux identified People's exhibit No. 21 as the four-page handwritten statement that he provided to Novak. Over defense counsel's objection, the court admitted the statement, finding that it was admissible to rebut the inference of recent fabrication.

¶ 24 Rioux's written statement, which is contained in the record, provided generally as follows. On one occasion, he went to Poehler's house with defendant and Kelly. They attempted to break the back-door glass but were unable to do so and left. They returned about a week later. Defendant told Freeman to meet with Poehler to get him out of the house and to call him once she saw Poehler. Rioux, defendant, and Kelly went to Poehler's house. Kelly parked across the street and changed her license plates to fake dealer plates. Defendant went to the house to see if anyone was home. When defendant gave Rioux the all-clear, Rioux joined defendant. They entered through an unlocked back door. Defendant went to the bedroom while Rioux searched for the safe key. Defendant found two guns while Rioux opened the safe. They removed the guns from the safe and wrapped them in a blanket. They looked around and found "ammo" and "mags" for the guns. They radioed Kelly to park in the driveway. Rioux and defendant made two trips each to load everything into the car. They drove to Flores's house. Although defendant did not want Rioux to be there when the guns were sold, Rioux went with him to Flores's house. They met with Flores and Mally. Defendant made a deal with Mally for one of the guns and received cash. Mally still owed Rioux $100. Mally left and everyone went upstairs to see "Vince." After about 30 minutes, Freeman joined them. She never saw the guns and left at about 9 p.m. "Lil Man/Lid" arrived. "Justin" arrived at 1 a.m. They wanted one of the guns but defendant told them that it was all or nothing. They agreed to a price of $1100 plus two grams of cocaine for defendant. Lil Man left for 30 minutes and then returned and paid

them. They helped load the guns into his car and he left. Rioux used the money for rent and food.

¶ 25 Poehler testified that he met Freeman through a Craigslist ad in December 2012. The nature of their relationship was "[i]ntimacy for cash." Prior to September 12, 2014, Poehler owned six guns, four or which he kept in a gun safe. He also kept loaded magazines and $1200 in the safe. He kept a key to the safe on a nearby pantry shelf, in between two tuna cans. He also had two other guns and ammunition in his bedroom.

¶ 26 At approximately 5:15 p.m. on September 12, he received a text message from Freeman saying that her car would not start. He testified that he had last spoken to her two days earlier. Poehler drove to the Meijer store in McHenry and saw Freeman. She entered his car to warm up. He opened the hood of her car and found that the battery cable was loose. After fixing the cable, they sat in his car and talked for about 45 minutes. Eventually, Freeman got in her vehicle and left. Poehler when home. When he arrived, he discovered that he had been burglarized and called the police. The guns in his bedroom were missing, along with guns, ammunition, and money from his safe.

¶ 27 Novak testified that, in October 2014, he was assigned to conduct a follow-up investigation concerning the burglary. He met with Poehler to see if he had any additional information concerning the burglary or if he had any suspects in mind. Based on that meeting, Novak went to Freeman's apartment and spoke with Freeman and Rioux. After speaking with them, the case was closed due to an absence of evidence. In December 2014, Novak was contacted by a McHenry police officer and told that Kelly, who was in custody on an unrelated matter, had given him information relating to the burglary. Novak spoke with Kelly and

determined that Freeman, Rioux, and defendant had been involved with the burglary. Novak also recovered some of Poehler's property from Kelly's house.

¶ 28 Novak testified that Freeman and Rioux were in custody on February 6, 2015. He first interviewed Freeman. She made an oral statement and then a written statement. He did not promise her anything in exchange for her statement. He did not tell her to implicate defendant or suggest that defendant was involved. Novak identified People's exhibit No. 19 as Freeman's statement. Novak then went to speak with Rioux, who was being held in a separate interview room. Rioux gave an oral and a written statement. Novak did not promise Rioux anything in exchange for his statement. He did not tell him to implicate defendant or suggest that defendant was involved. Novak identified People's exhibit No. 22 as Rioux's statement.

¶ 29 Novak testified that defendant was arrested on February 13, 2015. According to Novak, defendant told him the following during his interview. Defendant, Freeman, and Rioux learned that Poehler had guns, ammunition, and money inside his home. They devised a plan to burglarize the home. On an unknown date in September, defendant, Rioux, and Kelly went to Poehler's home and attempted to enter it but it was secure and they were unable to do so. They came up with another plan to get Poehler out of the house. On the second attempt, Poehler was called away by Freeman. Defendant, Rioux, and Kelly went to Poehler's house. Defendant and Rioux entered the home through an unlocked rear door. Once inside, they located guns, ammunition, and cash. They put the guns and ammunition in Kelly's car and drove to Flores's apartment. Flores facilitated the sale of a gun to Mally. Another individual, known as "Lid," purchased rifles and rifle ammunition for over a thousand dollars. In addition to the money, they also received cocaine and cannabis. Defendant later identified "Lid" in a photo lineup.

¶ 30 During closing arguments, the State commented: "What you are here to do today is to look at the testimony of the witnesses, look at the evidence that's been presented in the form of photographs and statements and decide whether or not this defendant committed these crimes." In addition, the State later commented on defendant's interview with Novak, stating: "[Defendant] wouldn't know the details that Detective Novak said that he said which were corroborated by [Rioux's] statement about them going through an unlocked back door, about them getting the key for the safe, about getting access to the safe, about getting the ammunition out of the bedroom, the types of guns, about how much money was taken from the safe. The defendant told Detective Novak all that."

¶ 31 Defense counsel argued in closing that Freeman and Rioux were not credible. She argued that neither witness's statement mentioned the bag with the gloves in it. She argued that they were prepped on the issue in order to explain away the absence of fingerprints at the scene. She emphasized the fact that one witness referred to the gloves as gardening gloves whereas the other referred to them as latex gloves, which showed that they did not get their stories straight.

¶ 32 The jury found defendant guilty, and on December 22, 2015, the trial court sentenced defendant to 11 years in prison.

¶ 33 On January 4, 2016, defendant filed a *pro se* motion, "through his attorney," for reconsideration of his sentence, arguing that his sentence was excessive. The parties appeared in court the next day. At the outset, defense counsel stated: "And, your Honor, in regards to the motion to reconsider sentence I do notice that it says through his attorney ***. That's not correct. This is [defendant's] motion. I have not adopted it. I have not even seen it. I think he was doing that as a form, but it's not through me." The court asked counsel if she wanted

defendant to address the motion, and counsel responded: "Yes. It's not my motion." The court then told defendant: "All right, sir. You can say what you want to support [your] motion."

¶ 34 Defendant began to speak and then asked if he could speak with counsel "real quick." The trial court allowed defendant to speak with counsel. Thereafter, counsel advised the court that defendant questioned whether he was eligible for Class X sentencing if he was convicted of his first Class 2 felony when he was 17. Counsel asked the court for time to look into the issue. The court explained that defendant was Class X eligible because he had been charged with that felony as an adult, but it stated that it would give counsel time to look into the matter if she desired. The court then asked defendant: "Is there anything you wish to say to your Motion to Reconsider?" Defendant then argued that his sentence was excessive. In so doing, he stated: "[T]his whole motion took me off guard. I was not super prepared, but I just feel the 11 years that you imposed was excessive." The court asked the State if it had a response and the State indicated that it did not. Thereafter, the court explained the reasoning for the sentence and denied defendant's motion.

¶ 35 Defendant timely appealed.

¶ 36 II. ANALYSIS

¶ 37 Defendant argues that trial counsel rendered ineffective assistance in failing to request a limiting instruction regarding Freeman's and Rioux's prior consistent statements and in failing to object when, according to defendant, the State used the statements as substantive evidence during closing argument. In response, the State contends that defense counsel's conduct was a reasonable strategy to establish that the witnesses were incredible given that, although the statements were not inconsistent with their trial testimony, the witnesses' stories changed and became more detailed as they retold them to favor the State. Alternatively, the State argues that,

even counsel's conduct was objectively unreasonable, defendant was not prejudiced as a result. We agree with the State on both points.

¶ 38 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A defendant meets this burden by establishing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In ruling on a claim that counsel was ineffective, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. We must examine the entire record to determine if, under all of the circumstances, counsel's performance was ineffective. *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1987).

¶ 39 As a general rule, a prior consistent statement of a witness is inadmissible for the purpose of corroborating the witness's trial testimony. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52. This is because it is likely to unfairly enhance the witness's credibility with the trier of fact solely because the statement has been repeated. *Id.* There are, however, two exceptions to the rule: (1) where the prior consistent statement rebuts a charge that the witness is motivated to testify falsely, and (2) where the prior consistent statement rebuts an allegation of recent fabrication. Ill. R. Evid. 613(c) (eff. Jan. 6, 2015); *Donegan*, 2012 IL App (1st) 102325, ¶ 52. However, once admitted, the statement may be used only to rehabilitate the witness and not as substantive evidence. *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 49. When a prior consistent statement is admitted, "an instruction from the court instructing the jury of its limited rehabilitative purpose is proper." *People v. Lambert*, 288 Ill. App. 3d 450, 458 (1997). The Illinois Pattern Jury Instructions contain no instruction regarding prior consistent statements, but the First District has recommended the following instruction:

> " 'Members of the Jury, the prior statement of [witness's name] has been admitted for the limited purpose of rebutting a charge that (1) [his/her] [testimony is a recent fabrication] or (2) [he/she] [had a motive to testify falsely]. It may be considered only as it may or may not bear upon the believability of [witness's name]. It cannot be considered by you as independent proof that the defendant committed the crime alleged.' " *People v. Smith*, 362 Ill. App. 3d 1062, 1083 (2005).

A similarly-worded instruction was reviewed with approval by this court in *People v. Antczak*, 251 Ill. App. 3d 709, 719 (1993):

> " 'Members of the Jury, the testimony of this witness has been admitted for a limited purpose.

It may be considered with all the other facts and circumstances in the case *only as it may or may not bear upon the believability of the witness*, ***.

It is not to be considered by you as independent proof that the defendant made the admissions to the crime alleged.' " (Emphasis in original.)

¶ 40 Here, defendant does not dispute that Freeman's and Rioux's prior consistent statements were properly admitted under Rule 613(c) to rebut the inference of recent fabrication arising from their plea deals. Defendant instead argues that counsel performed unreasonably by failing to request a limiting instruction similar to those suggested in *Smith* and *Antczak* and that he was prejudiced by counsel's unreasonable performance. Defendant's argument fails both prongs of *Strickland*.

¶ 41 First, considering the entire record, we cannot say that defense counsel's performance was objectively unreasonable. Defense counsel was defending a case in which defendant confessed to his participation in the crime. (Indeed, as already noted, counsel successfully argued against the admission into evidence of defendant's written confession.) Defendant's version of the events, as testified to by Novak, was not inconsistent with Freeman's and Rioux's version. When faced with the admission of statements implicating defendant from two coparticipants in the offense, it was not unreasonable to pursue a defense that capitalized on those statements by arguing that Freeman and Rioux were incredible because their statements became increasingly more detailed by the time of trial. In opening statements, defense counsel told the jury to "pay very close attention to everyone's statement. [Freeman's], you're going to hear various versions because she tells about three or four different versions." With regard to Rioux's statement, counsel told the jury: "You're going to hear various versions because he gives quite a few versions of the statement, and you're going to hear or see that they wrote a

statement or whatever they said about what happened, and I want you to listen to each time the detective speaks to them and how the story changes each time." Although the written statements were not necessarily inconsistent with the trial testimony, it was not objectively unreasonable for counsel to establish that the trial testimony was arguably better for the State in that it was more detailed and that therefore the witnesses could not be believed. For instance, during cross-examination, counsel brought up the fact that neither written statement mentioned the gloves that were mentioned when the witnesses testified at trial. In closing argument, counsel explained why that might be, *i.e.*, that the witnesses were prepped by the State on an issue that would help its case. Based on the foregoing, we find that counsel's use of the prior consistent statements was a reasonable strategy to establish that Freeman and Rioux were incredible, given that their trial testimony was more detailed and more favorable to the State than their written statements.

¶ 42 Moreover, even if counsel's failure to request the limiting instruction (and object to the State's references in closing argument) was objectively unreasonable, defendant suffered no prejudice. Defendant generally asserts that he was prejudiced because Freeman's and Rioux's testimony was crucial to the State's case. To be sure, without the limiting instruction, the jury might have considered Freeman's and Rioux's statements for their substance. However, Freeman's and Rioux's statements substantively were cumulative of their testimony. See *People v. Ashford*, 121 Ill. 2d 55, 72 (1988) (even if prior consistent statement was erroneously admitted as substantive evidence, any error would have been harmless where the statement was cumulative). In fact, as already noted, the statements, though consistent with their testimony, were much less detailed. Further, Freeman's and Rioux's testimony was not the only testimony presented. Novak testified that he interviewed defendant and that defendant admitted to the crime. Defendant claims that the failure to request the instruction was prejudicial because

Freeman's and Rioux's credibility was questionable. But, had the jury received a limiting instruction, the instruction would have informed the jury that it may consider the statements "only as [they] may or may not bear upon the believability of [Freeman and Rioux]." See *Antczak*, 251 Ill. App. 3d at 719. Given the consistencies between the statements and the testimony, the jury certainly would have used the statements to strengthen Freeman's and Rioux's credibility and thus bolster their testimony. Thus, to the extent that the jury considered the statements substantively, they were cumulative; and, conversely, had the limiting instruction been given, the statements would have bolstered the witnesses' testimony. As a result, we cannot say that there is a reasonable probability that the result of defendant's trial would have been different had the instruction been given.

¶ 43 The cases relied on by defendant to support his claim of prejudice are unpersuasive. First, defendant directs our attention to *People v. Smith*, 139 Ill. App. 3d 21 (1985). In that case, the court found that the improper admission of a prior consistent statement was reversible error in a murder case, where the testimony came from the only eyewitness to the shooting, the credibility of the witness was at issue because he was an admitted drug dealer who waited nine months to come forward, the State mentioned the statement in closing argument, and the statement bore directly on the issue of the defendant's guilt. *Id.* at 34. According to defendant, those same concerns are present here. However, in *Smith*, unlike here, the prior consistent statement was not admissible for *any* purpose. *Id.* at 33. Thus, the admission of the prior consistent statement improperly bolstered the credibility of a crucial witness. *Id.* Here, however, the very purpose of admitting the prior consistent statements (and the effect of the jury instruction) was necessarily to enhance Freeman's and Rioux's credibility by rebutting the inference that they were testifying falsely.

¶ 44 Defendant also relies on *People v. Randolph*, 2014 IL App (1st) 113624. There, citing *Smith*, the court found that it was reversible error for the State to bolster the testimony of two police officers with erroneously-admitted prior consistent statements because the State's case hinged on the testimony of these officers. *Id.* ¶ 21. Again, as in *Smith*, and unlike the present case, the prior consistent statements were not admissible for any purpose and thus, although the court also noted that the State improperly invited the jury to consider the statements substantively and that no limiting instruction was given, it was the improper bolstering that resulted in reversible error. *Id.* ¶¶ 20-21.

¶ 45 The third case relied on by defendant to support his claim of prejudice is *Lambert*, which was decided by this court. In that case, the defendant, along with five codefendants, including Lucio Flores and Antowan Lambert, was charged with the October 1993 murder of Anthony Doss. Flores and Lambert testified against the defendant as the only eyewitnesses tying the defendant to Doss's murder. Flores testified that, in January 1994, he had given a written statement to the police about Doss's death. Flores also testified that, in exchange for his testimony, the State agreed to accept a plea to lesser charges and a sentence of probation. *Id.* Lambert testified that, in January 1994, he had given a written statement to the police about Doss's death, but only after being told that other individuals had talked and after being told of the possible penalties he faced. Lambert testified that, in exchange for his testimony, the State agreed to accept a plea to lesser charges and a sentence of 7½ years. *Lambert*, 288 Ill. App. 3d at 452.

¶ 46 At the close of the State's case, the State read Flores's and Lambert's written statements to the jury. Defense counsel objected, arguing that the statements were not admissible as prior consistent statements and that, even if they were, they should not be read to the jury. The State

argued that the written statements were admissible as substantive evidence. The trial court asked the State if it " 'really want[ed] to do it,' " given the closeness of the case, and advised the State that it " 'may be putting reversible error into' " the case. *Id.* at 452-53. The court further warned the State: " 'I think you are gilding the lily. I think there's a possibility of reversible error. And I just think that you, you are treading on thin ice and I would caution you very seriously.' " *Id.* at 453. Nevertheless, despite its misgivings, the court denied the defendant's objection and admitted the written statements as substantive evidence, stating: " 'You [the State] understand you are playing with fire. That's the only thing I am telling you. But if you want it done, it's your case, God bless you.' " *Id.* The defendant was found guilty and appealed.

¶ 47 On appeal, this court found that, although Flores's and Lambert's statements would have been admissible for rehabilitative purposes (to rebut the inference that Flores had a motive to testify falsely (*id.* at 454-57) and to rebut the inference that Lambert's testimony was recently fabricated (*id.* at 453-54)), the trial court's admission of the statements as substantive evidence was reversible error. *Id.* at 457-64. In doing so, we noted that "Lambert's and Flores' testimonies were the *only* evidence that directly linked the defendant to the crime" and that the State "repeatedly emphasized" the statements during closing argument. (Emphasis in original.) *Id.* at 461. We added, however, that the trial court had "abdicated its role by allowing the prosecutor to enter the evidence substantively." *Id.* at 462. We explained:

> "The job of the trial court is to rule on questions of law, not to grant absolution to attorneys to disregard rules of evidence. The trial court judge's statement indicates that he failed to realize that the evidentiary rulings were *his*, not the prosecutor's. *** This may be a case of first impression, as this may be the first case in which a court completely abdicated its role in presiding over a trial. *** As the reviewing court in this

> case, we are required to reverse regardless of the weight of the evidence. [Citations.] If we were to rule otherwise, we would be derelict in assuring that each defendant is given a fair trial. The failure to enforce the law invites anarchy. *** Given the totality of the presentation of this case, we have serious doubts that the integrity of the judicial system would be upheld if we affirmed the verdict on the theory of a lack of prejudice. Nothing less than the integrity and reputation of the judicial process, as well as the defendant's due process rights, are at stake." (Emphasis in original.) *Id.* at 462-63.

¶ 48 Thus, *Lambert* is easily distinguishable. We first observe that here Freeman's and Rioux's testimony was not the *only* evidence that linked defendant to the crime, as Novak testified that defendant confessed. Further, the State here did not "repeatedly emphasize" Freeman's and Rioux's prior statements; although the State referred generically to "photographs and statements," it specifically mentioned only Rioux's statement and did so only once. But most significantly, the trial court here did not "abdicate[] its role by allowing the prosecutor to enter the evidence substantively." *Id.* at 462. Indeed, in overruling defendant's objections, the court specifically admitted the statements for their proper purpose. We thus have none of the *Lambert* court's "serious doubts that the integrity of the judicial system would be upheld if we affirmed the verdict on the theory of a lack of prejudice." *Id.* at 463.

¶ 49 Defendant next contends that the case must be remanded for new post-sentencing proceedings, because the trial court forced him to proceed *pro se* on the motion to reconsider his sentence without obtaining a waiver of counsel. In response, the State argues that defendant was not entitled to file the motion, because he was represented by counsel, and, in any event, that defendant was aided as necessary by counsel in the presentation of his motion. The State argues

further that, even if we were to find that defendant did represent himself on the motion, "under these circumstances, failure to give Rule 401(a) admonishments is not fatal."

¶ 50 "A defendant is entitled to the representation of counsel at all critical stages of a criminal prosecution, and this important right will not be taken away unless affirmatively waived by a defendant." *People v. Burton*, 184 Ill. 2d 1, 22 (1998). A motion to reconsider a sentence is a critical stage of a criminal proceeding, for which a defendant is entitled to counsel. *People v. Brasseaux*, 254 Ill. App. 3d 283, 288 (1996). A criminal defendant also has the right to self-representation, but such representation must be preceded by a knowing, voluntary, and intelligent waiver of counsel. *People v. Baker*, 92 Ill. 2d 85, 90-91 (1982). "It is 'well settled' that waiver of counsel must be clear and unequivocal, not ambiguous." *People v. Baez*, 241 Ill. 2d 44, 116 (2011). The right to counsel is fundamental and will not be lightly deemed waived. *People v. Robertson*, 181 Ill. App. 3d 760, 763 (1989). "When a defendant with a sixth amendment right to counsel has not made a knowing and voluntary waiver of that right, that person's proceeding without counsel (at a critical stage) is a sixth amendment violation." *People v. Vernón*, 396 Ill. App. 3d 145, 152 (2009).

¶ 51 First, we note that defendant did not raise this issue below and thus has forfeited it. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Nevertheless, he argues that it is reviewable under the plain-error doctrine. The plain-error doctrine allows a reviewing court to consider unpreserved error where either (1) a clear or obvious error occurs and the evidence is so closely balanced that such error threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and is so serious that it affects the fairness of the defendant's trial and challenges the

integrity of the judicial process, regardless of the closeness of the evidence. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The deprivation of the right to counsel, in the absence of an effective waiver, is plain error. *Vernón*, 396 Ill. App. 3d at 150.

¶ 52 As the State observes, because defendant was represented by counsel, he was not entitled to file his own motion to reconsider his sentence, and the court would have been fully entitled to strike it. See *People v. Serio*, 357 Ill. App. 3d 806, 815 (2005). For that reason, the court's invitation of defendant's argument on the motion, and its willingness to rule on its merits, were purely gratuitous. (We note that the better course would have been to strike defendant's motion and to allow defendant to consult with counsel concerning his desire to move for reconsideration of his sentence.) In any event, we further agree with the State that defendant did not present his motion without the benefit of counsel. Although counsel made clear that the motion was defendant's own, defendant consulted with counsel almost immediately after starting his argument. Counsel then presented to the court defendant's question about his Class X eligibility, which the court answered. Defendant then argued that his sentence was excessive. Clearly, though this was a critical stage of the proceedings, defendant's counsel acted as standby counsel, and "[r]equiring a defendant to proceed *pro se* with standby counsel is not a waiver within the meaning of Rule 401(a) because the defendant has the benefit of standby counsel for advice and consultation." *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 43. As defendant did not actually waive counsel, he did not invalidly do so. There was no error as to defendant's motion.

¶ 53 Defendant next argues that the $750 public defender fee must be vacated outright, because it was imposed without the requisite hearing. In response, the State concedes that the fee must be vacated, but it argues that, because the court held a hearing, albeit an insufficient one, the case should be remanded for a proper hearing.

¶ 54 Although defendant did not raise this issue below, we may consider the issue as forfeiture does not apply. See *People v. Hardman*, 2017 IL 121453, ¶ 49 (the defendant's failure to object to the imposition of the public defender fee at sentencing hearing did not result in forfeiture); *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 ("where a trial court imposes this fee without following the appropriate procedural requirements, application of the forfeiture rule is inappropriate"). This issue is a question of law, and we review it *de novo*. *People v. Caballero*, 228 Ill. 2d 79, 82 (2008).

¶ 55 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2016)) authorizes the trial court to order a criminal defendant for whom counsel has been appointed to pay a reasonable amount to reimburse the county or the state. However, prior to ordering reimbursement, the trial court must conduct a hearing, within 90 days of sentencing, regarding the defendant's financial resources. *Id.*; *People v. Daniels*, 2015 IL App (2d) 130517, ¶ 25. The hearing must not be conducted in a perfunctory manner. *People v. Somers*, 2013 IL 114054, ¶ 14. Instead, "the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances." *Id.* Where the trial court conducts a timely hearing, but one that is insufficient to comply with the requirements of section 113-3.1(a) of the Code, the proper remedy is to vacate the public defender fee and remand for a proper hearing on the defendant's ability to pay. *Id.* ¶¶ 14-18. The fee must be vacated outright only where there was no hearing whatsoever. *Daniels*, 2015 IL App (2d) 130517, ¶¶ 29-30.

¶ 56 Recently, the supreme court made clear that, as long as " 'some sort of a hearing' " took place within the statutory time period, the proper remedy is a remand. *Hardman*, 2017 IL 121453, ¶ 70; see *Somers*, 2013 IL 114054, ¶ 15. The supreme court clarified that " 'some sort

of a hearing' encompasses a proceeding that meets the ordinary definition of hearing." *Hardman*, 2017 IL 121453, ¶ 66. A hearing is a "judicial session usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying." Black's Law Dictionary 836 (10th ed. 2014); see *Hardman*, 2017 IL 121453, ¶ 64.

¶ 57 Defendant contends that, here, the trial court failed to conduct any hearing at all on the public defender fee and thus the fee must be vacated outright. We agree. At the close of defendant's sentencing hearing, the trial court stated: "By the way, the Court does find the amount of court costs of $1,406, so that is imposed." On that same day, exhibit A was filed, listing the fines and court costs, including the public defender fee. Although the public defender fee was included in the total costs of $1406 imposed by the trial court, there was no mention of the public defender fee at any time during the sentencing hearing. And despite the State's claim that the parties were present when exhibit A was filed, exhibit A was not mentioned during the sentencing hearing and nothing indicates that it was filed while the parties were present. Given that the fee was assessed without some sort of hearing, it must be vacated outright.

¶ 58 Last, defendant argues that he is entitled to full credit against certain fines imposed. Under section 110-14(a) of the Code (725 ILCS 5/110-14(a) (West 2016)), a defendant who is incarcerated on a bailable offense and does not supply bail, and against whom a fine is levied in connection with the offense, shall be allowed a credit of $5 for each day, upon his application. An application for monetary credit under section 110-14(a) of the Code may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997).

¶ 59 Defendant argues that, as he was incarcerated for 314 days, certain fines imposed upon him are subject to credit under section 110-14(a) of the Code. The State concedes that defendant is entitled to full credit against the following fines, and we agree: (1) the $20 specialty court

charge (55 ILCS 5/5-1101(d-5) (West 2014)) (see *People v. Smith*, 2013 IL App (2d) 120691, ¶ 16); (2) the $10 drug court charge (55 ILCS 5/5-1101(f) (West 2014)) (see *Smith*, 2013 IL App (2d) 120691, ¶ 16); (3) the $100 county assessment (55 ILCS 5/5-1101(c) (West 2014)[3]) (see *Smith*, 2013 IL App (2d) 120691, ¶ 17); (4) the $12 state police operations charge (705 ILCS 105/27.3a(1.5) (West 2014)) (see *Smith*, 2013 IL App (2d) 120691, ¶ 16); (5) the $10 state police services charge (730 ILCS 5/5-9-1.17(b) (West 2014)) (see *Smith*, 2013 IL App (2d) 120691, ¶ 16); and (6) the $10 Children's Advocacy Center charge (55 ILCS 5/5-1101(f-5) (West 2014)) (see *Smith*, 2013 IL App (2d) 120691, ¶ 16). Thus, we amend the judgment to reflect full credit against the above fines, totaling $162.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm the judgment of the circuit court of Lake County as modified and we vacate the $750 public defender fee. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 62 Affirmed as modified in part and vacated in part.

[3] The sentencing order indicates that the charge was assessed under both subsection (a) and subsection (c) of section 5-1101 of the Counties Code. However, subsection (a) applies to traffic offenses only and authorizes the imposition of a charge between $5 and $30 (55 ILCS 5/5-1101(a) (West 2014)). Subsection (c) authorizes a $50 charge for "a felony" (*id.* § 5-1101(c)(1)), which is what the trial court assessed here.