2019 IL App (5th) 160241-U

NO. 5-16-0241

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 06-CF-268
	)	
QUINTON JOHNSON,	)	Honorable
	)	Michael D. McHaney,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Boie concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court where the sentencing delay was not so unreasonable as to deprive the court of subject matter jurisdiction; there was no ineffective assistance of counsel where defendant could not demonstrate prejudice based on trial counsel's insufficient performance; there was no cumulative error; posttrial counsel did not render ineffective assistance of counsel; and the court did not abuse its discretion by imposing a 25-year extended-term sentence where the sentence was within the statutory range, and the court properly weighed the factors in aggravation and mitigation.

¶ 2 Following a jury trial, defendant, Quinton Johnson, was convicted in the circuit court of Marion County of unlawful delivery of a controlled substance within 1000 feet of residential property owned, operated, or managed by a public housing agency (720

ILCS 570/407(b)(2) (West 2006)) and sentenced to a 25-year extended-term sentence. Defendant argues on appeal that the delay in the execution of sentence was so unreasonable that it violated his due process rights and deprived the circuit court of subject matter jurisdiction. Defendant also argues that he was deprived of a fair trial because trial counsel was ineffective by failing to object to various trial errors. Next, he asserts that posttrial counsel was ineffective for failing to raise ineffective assistance of trial counsel in the motion for new trial. In the alternative, defendant argues the court abused its discretion in sentencing him to a 25-year extended-term sentence. For the following reasons, we affirm.

¶ 3 I Background

¶ 4 On June 19, 2006, defendant was charged with the unlawful delivery of less than one gram of a controlled substance within 1000 feet of residential property owned, operated, or managed by a public housing agency (720 ILCS 570/407(b)(2) (West 2006)), a Class 1 felony. At defendant's initial appearance, Public Defender Ericka Sanders was appointed to represent him. Shortly thereafter, defendant was released from custody on a recognizance bond but then remanded to the custody of the Illinois Department of Corrections (IDOC) pursuant to an outstanding warrant.

¶ 5 On November 15, 2006, defendant's trial commenced before the Honorable Patrick Hitpas. The State presented Kenny Powell, who testified to the following. Powell voluntarily offered to work as a confidential source for the Centralia Police Department, although Powell was compensated $100 for missing work as a laborer.

¶ 6 On November 15, 2005, Detectives Dan Purcell and Blaine Uhls searched Powell's body and truck before providing him with marked money for a controlled purchase. The detectives installed a concealed surveillance camera in Powell's truck near the driver's side window. Powell then drove to Party House Liquors in Centralia, Illinois, where he met defendant. After Powell parked his truck, defendant approached his driver's side window and asked him "what [he] wanted." Powell responded that he wanted to "purchase $40 worth." During this exchange, it started to rain, so defendant walked under an awning attached to Party House Liquors. Powell exited his truck, walked off camera and the controlled purchase took place. During the controlled purchase, defendant handed Powell a baggie of white powder in exchange for the marked money. Shortly thereafter, Powell met the detectives at a police clubhouse and provided them with the baggie of white powder. The officers removed the camera from Powell's truck and secured the surveillance video. Although Powell did not know defendant prior to the controlled purchase, he identified him in court because he had been able to get a "good look" at defendant when they were within 8 to 10 inches of each other during the purchase.

¶ 7 Next, Detective Purcell testified to the following. On November 15, 2005, he and Detective Uhls arranged a controlled purchase with Powell. Detective Purcell searched Powell's body and truck to ensure that he did not have drugs with him, while Detective Uhls installed a concealed surveillance camera inside Powell's truck. The detectives maintained constant surveillance from an unmarked vehicle while Powell drove to Party House Liquors. Once there, the detectives observed the controlled purchase from a hidden vantage point across the street, although they were unable to identify defendant

from their vantage point. Following the controlled purchase, the detectives followed Powell to a police clubhouse where Detective Uhls recovered the surveillance video from the truck, and Detective Purcell retrieved a baggie of white powder from Powell. Powell's body and truck did not contain the marked money or additional drugs.

¶ 8 Detective Purcell identified the baggie of white powder as the cocaine Powell had purchased from defendant (People's Exhibit 2), and he explained the process he used to identify defendant in the surveillance video (People's Exhibit 1). Specifically, Detective Purcell watched the surveillance video on November 15, 2005, identifying defendant, with whom he had interacted on prior occasions, after pausing the video several times to study the still images. Detective Purcell made a duplicate VHS copy (People's Exhibit 3) before placing the original video into an evidence bag.

¶ 9 Next, Detective Uhls testified to the following. Detective Uhls, who had extensive training and experience using video surveillance equipment, and Detective Purcell worked with Powell to make a controlled purchase in Centralia, Illinois, on November 15, 2005. Powell was under constant surveillance while he drove to Party House Liquors where the detectives then observed the controlled purchase from a hidden vantage point across the street. From this vantage point, however, the detectives were unable to identify defendant because he was partially obstructed by Powell's truck. Despite the obstruction, Detective Uhls explained that there was "no question" that defendant was the individual after studying the surveillance video several times. Moreover, Detective Uhls had several interactions with defendant prior to November 15, 2005.

¶ 10 At the close of evidence, the State's exhibits (People's Exhibits 1, 2, and 3) were admitted into evidence, and defendant stipulated that the alleged controlled purchase had taken place within 1000 feet of residential property owned, operated, or managed by a public housing agency. Additionally, defendant waived any chain of custody issues and stipulated that the substance he allegedly sold to Powell was cocaine. The trial then proceeded to closing arguments.

¶ 11 The State asserted that reasonable doubt did not mean "beyond all doubt" or "any shadow of a doubt, just beyond a reasonable doubt." Defense counsel did not object.

¶ 12 Defense counsel's closing argument emphasized perceived weaknesses by the State's witnesses in identifying defendant. First, defense counsel argued that Powell's identification of defendant was motivated by his desire to receive compensation as a confidential source. Next, defense counsel commented, without objection by the State, that she could not see any facial features when viewing the video, and the surveillance video was of such poor quality that the detectives were unable to identify defendant. In support, defense counsel stated that the video showed "some guy" in a hat walk up to Powell's truck for about two seconds in the pouring rain. As such, the detectives would have needed "bionic eyes" or "special equipment" to identify someone on the video, and there was no testimony of that nature. Defense counsel also commented, without objection by the State, that she could not see any facial features when viewing the video. Because the evidence demonstrated reasonable doubt, defense counsel requested a not guilty jury verdict.

¶ 13 On rebuttal, without objection, the State made the following remarks:

> "You heard from the officers who are trained, know how to make identifications, knew the defendant enough times to be able to recognize him and have an opportunity to study the tape. They could identify him. Not only them, Mr. Powell could identify him."

Additionally, the State argued that the witnesses were certain defendant sold cocaine to Powell in the surveillance video. Thus, the State posited that "there is no doubt at all. Do your job and find the defendant guilty."

¶ 14 After deliberations, the jury found defendant guilty, and the circuit court entered a judgment of conviction. The sentencing hearing was scheduled for January 3, 2007.

¶ 15 On December 15, 2006, defense counsel filed a motion for a new trial, alleging that the State had failed to prove defendant guilty beyond a reasonable doubt. Shortly thereafter, defense counsel filed a motion to continue sentencing and requested additional time to contact possible mitigating witnesses based on a conversation with defendant on December 30, 2006. The circuit court continued the sentencing hearing and issued a writ for IDOC to transport defendant to the next hearing.

¶ 16 On January 25, 2007, the sentencing hearing was continued until March 2, 2007, because defendant failed to appear. It is unclear from the record on appeal whether defendant was released from IDOC prior to the January 25, 2007, setting. Although the circuit court issued a writ on December 15, 2006, for IDOC to transport defendant to the sentencing hearing, there is no corresponding continuance order in the record or transcript of proceedings.

¶ 17 On February 22, 2007, defense counsel filed a motion to withdraw, claiming defendant had filed a complaint with the Attorney Registration and Disciplinary Commission. Defense counsel also stated that she was unaware of defendant's address while he was on parole from IDOC.

¶ 18 On March 2, 2007, defendant failed to appear at the sentencing hearing. The circuit court granted defense counsel's February 22, 2007, motion to withdraw. The State requested, and the circuit court granted, a motion for a warrant for his failure to appear. More than three years later, defendant was taken into custody on March 5, 2010, and Public Defender Tim Huyett was appointed to represent him.

¶ 19 On March 16, 2010, defendant was put on notice that his sentencing hearing was scheduled for April 27, 2010, and that an updated presentence investigation report (PSI) would be prepared. The sentencing hearing was later continued to May 3, 2010.

¶ 20 On May 3, 2010, Judge James Harvey convened the sentencing hearing.[1] At the start of the hearing, defense counsel requested the circuit court hear the December 15, 2006, motion for a new trial before proceeding to sentencing. Defense counsel informed the court that, because he did not represent defendant at trial, he needed additional time to review the trial transcript before proceeding on the motion for a new trial. The court continued the sentencing hearing and agreed to hear defendant's motion for a new trial on a separate date. The State suggested that the court set the case for status on Judge Michael McHaney's docket on May 24, 2010, "to make sure we are getting what we need, and it doesn't fall through the cracks." At defense counsel's request, the court

[1]The trial judge, the Honorable Patrick Hitpas, retired prior to defendant's 2010 arrest.

reduced defendant's bond over the State's objection. The following day, defendant was released from custody on the reduced bond, with special conditions, instructing defendant to reside in Marion County with his father and remain on electronic home confinement until sentencing.

¶ 21 On May 24, 2010, a status hearing was held. The motion for a new trial was set for hearing on June 29, 2010, before Judge Harvey. At defendant's request, the sentencing hearing was continued.

¶ 22 On June 29, 2010, the hearing on the motion for a new trial was continued to permit defense counsel time to review the November 15, 2005, surveillance video. The hearing on the motion was set for July 14, 2010.

¶ 23 On July 1, 2010, defendant was arrested for domestic violence involving his father. The following day, the circuit court set defendant's bail at $50,000. Public Defender Huyett was appointed to represent defendant on the domestic violence charge, which was added to the July 14, 2010, setting. The charge was later dismissed.

¶ 24 On July 14, 2010, defense counsel confirmed receipt of the November 15, 2005, surveillance video but requested additional time to prepare for the sentencing hearing. The motion for a new trial was continued until August 25, 2010.

¶ 25 On August 25, 2010, the circuit court granted defense counsel's request for leave to amend the motion for a new trial and indicated that it needed time to review the trial transcript and the November 15, 2005, surveillance video. Defense counsel agreed that the amended motion, once filed, would be heard on September 23, 2010.

¶ 26 On September 8, 2010, defense counsel filed the amended motion for a new trial, claiming the State had failed to disclose Powell's prior convictions in pretrial discovery. Defense counsel argued that defendant was denied a fair trial because he could have used Powell's prior convictions as impeachment evidence at trial.

¶ 27 On September 23, 2010, Judge Harvey recused himself following defendant's request to call his original public defender, Ericka Sanders, as a witness. Judge Harvey explained that it would be improper for him to judge the credibility of Sanders, a newly appointed judge.

¶ 28 In November 2010, defense counsel filed a second amended motion for a new trial. Shortly thereafter, defendant posted bond and was released from custody.

¶ 29 On April 12, 2011, the circuit court held a hearing on defendant's second amended motion for a new trial. Sanders testified to the following. Sanders could not recall whether the State had tendered Powell's criminal history before trial, although Sanders was aware of Powell's prior felony convictions from previous cases. She admitted that she never investigated whether Powell was a drug addict. Moreover, Sanders specifically chose not to file a motion to admit Powell's prior convictions as impeachment evidence because the convictions were more than 10 years old, thus, too remote in time to be admitted.

¶ 30 Following Sanders' testimony, the circuit court adjourned and allowed both parties 21 days to submit written memorandums addressing the evidentiary questions raised during the hearing. The court also set a May 11, 2011, telephone conference to discuss

the anticipated memorandums and to "figure out the next step." On April 21, 2011, the State filed its memorandum, but defense counsel failed to file a timely memorandum.

¶ 31 On June 27, 2011, a minute record was entered vacating Public Defender Huyett's appointment and appointing Public Defender Steve Quinn to represent defendant. The minute record also reflects that a telephone conference was "TO BE SCHEDULED BY [QUINN], & S/A & CLERK TO JUDGE PAISLEY." (Emphasis in original.)

¶ 32 On May 4, 2012, a minute record reflects that both parties were notified that a telephone conference was scheduled for May 15, 2012, with Judge Bradley Paisley. On May 15, 2012, following the telephone conference, the case was continued in order to allow defense counsel an opportunity to obtain defendant's case file from the public defender's office and meet with defendant. The circuit court scheduled a June 15, 2012, telephone status conference.

¶ 33 On June 15, 2012, the telephone status conference was held. Defense counsel requested additional time to interview potential witnesses. Consequently, another telephone conference was scheduled for August 13, 2012.

¶ 34 The record reflects that no further action occurred until April 28, 2015, nearly three years later, when defendant appeared in custody on two multi-count misdemeanor charges for various domestic violence offenses. Shortly thereafter, Public Defender Quinn's appointment was vacated, and Public Defender Craig Griffin was appointed to represent defendant. An appearance date combined with the previous cases was set for May 7, 2015.

¶ 35 On May 7, 2015, Public Defender Griffin was present with defendant, who was in custody. Defendant made a motion for bond reduction, but the circuit court denied the motion. The court ordered the transcript of proceedings from the April 12, 2011, hearing on defendant's second amended motion for a new trial. A pretrial conference was set for June 18, 2015, but defense counsel requested additional time because he had not received the transcript. A pretrial conference was set for July 2, 2015.

¶ 36 On July 2, 2015, defendant's pending misdemeanor charges were resolved. Defendant entered a guilty plea to the April 28, 2015, charge of domestic battery, in exchange for the dismissal of all other pending charges and an agreed sentence of two years' probation. Defendant was released from custody, and the December 15, 2006, motion for a new trial was set for a status hearing on August 27, 2015.

¶ 37 On August 27, 2015, defense counsel filed a memorandum addressing the evidentiary questions, which was ordered to be submitted within 21 day of the April 12, 2011, proceeding. During the status hearing, defense counsel conceded that it was defendant's burden to show that trial counsel was ineffective for failing to investigate Powell's drug-related history. Defense counsel also identified two witnesses who would testify that they had used drugs with Powell in 2006. By agreement of the parties, the motion for a new trial was set to resume on October 29, 2015.

¶ 38 On September 30, 2015, defense counsel filed a third amended motion for a new trial, alleging that (1) the State had failed to disclose Powell's felony convictions prior to trial; (2) the State had failed to prove defendant guilty beyond a reasonable doubt; and

(3) trial counsel was ineffective for not investigating Powell's drug history or objecting to the lay opinions of Detectives Purcell and Uhls.

¶ 39 On October 29, 2015, a hearing on defendant's second amended motion for a new trial, originally commenced on April 12, 2011, resumed. Defense counsel requested, over the State's objection, that the circuit court allow presentation of evidence regarding claims of error raised in the third amended motion for a new trial. The court indicated that it would hear the evidence and take the State's objection under advisement.

¶ 40 During the hearing, defense counsel presented the testimony of Lindle Tarlton, who testified that he had known Powell for more than 30 years. According to Tarlton, approximately 10 years earlier in 2005 or 2007, he had observed Powell purchasing drugs "in a couple of drug houses." Tarlton was familiar with Powell, as he recalled seeing Powell again in 2009 or 2010. On cross-examination, however, Tarlton could not remember when he observed Powell before 2009 or 2010, but he believed it was "probably closer to 2005." Following argument, the circuit court took the motion for a new trial under advisement.

¶ 41 On January 21, 2016, the circuit court denied defendant's request for a new trial. The court then set the sentencing hearing for April 14, 2016, but subsequently continued it to allow defense counsel additional time to review the PSI with defendant.

¶ 42 On May 26, 2016, the sentencing hearing took place. Defense counsel moved to continue the sentencing hearing, so he could review two "letters from community individuals" that he had received "within the last 24 hours." The State objected, asserting that further delay was unwarranted because defendant was late for the last setting and

failed to meet with defense counsel before the current setting. The circuit court denied defendant's motion, and the case proceeded to sentencing. At the start of the hearing, the State indicated that the PSI should have included defendant's June 27, 2011, conviction for aggravated battery (11-CF-99) where he pled guilty in exchange for time served with 30 months of probation.[2] Without objection, defense counsel included the two "community letters" to the PSI.

¶ 43 Defendant testified to the following on his own behalf. Defendant was 33 years old and employed by Earn Fair. Defendant and other individuals had started a foundation in 2010 that partnered with a youth center to sponsor free events for area children. The events included Halloween and Christmas parties, various sports camps and back to school engagements to provide children with school supplies. As vice president of the organization, defendant organized volunteer groups and requested donations.

¶ 44 In addressing his failure to appear at the second scheduled sentencing hearing on March 2, 2007, defendant testified on cross-examination that he had resided in Indiana from January 2007 to March 2010. More than three years later, after the March 2, 2007, sentencing hearing, defendant was arrested and taken into custody on March 5, 2010.

¶ 45 Following argument, after the circuit court considered the PSI, defendant's statement in allocution, the two community letters submitted by defense counsel, the cost of incarceration, and the factors in mitigation and aggravation, the court sentenced

[2]Because the record on appeal does not include the common law file for 11-CF-99, we omitted defendant's June 27, 2011, conviction, as listed in the PSI, from the recitation of facts.

defendant to an extended-term sentence of 25 years' imprisonment. Shortly thereafter, defendant filed a motion to reconsider sentence.

¶ 46 At a hearing on June 2, 2016, defense counsel argued that the circuit court had failed to consider all mitigating factors and had not made a proper finding before imposing an extended-term sentence. Moreover, defense counsel asserted that defendant had demonstrated rehabilitation at the sentencing hearing.

¶ 47 In response, the State argued that defendant was extended-term eligible because he had been convicted of a Class X felony within a 10-year period prior to the sentencing hearing. Specifically, on December 12, 2001, defendant was convicted and sentenced for a Class X controlled substance delivery within 1000 feet of a school or park. He was later released on parole just six months before he delivered a controlled substance within 1000 feet of a residential public housing property in the instant case. The State also asserted that defendant had absconded for three years, from January 2007 to March 2010, which caused sentencing delays. Thus, the State maintained that considering the tolled periods, the May 26, 2016, sentencing date was within the 10-year time frame required for an extended-term sentence. Lastly, the State argued that defendant's efforts to demonstrate his rehabilitative potential were undercut because he had been convicted of aggravated battery on June 21, 2011, while awaiting sentence and, although he had successfully completed probation, he was later convicted of domestic battery on April 28, 2015.

¶ 48 Prior to ruling on June 2, 2016, the circuit court pointed out that even though the probation department had scheduled defendant's presentence interview appointments to accommodate his work schedule, defendant had missed all three appointments.

Additionally, the court noted that defendant had reoffended while on parole, absconded for three years, and committed new offenses while awaiting sentencing. Consequently, the court denied defendant's motion to reconsider sentence. Defendant filed a timely appeal.

¶ 49 II. Analysis

¶ 50 Defendant argues that the delay in the execution of sentence was so unreasonable that it violated his due process rights and deprived the circuit court of subject matter jurisdiction. Defendant also argues that trial counsel rendered ineffective assistance of counsel by failing to object to various trial errors. Because of the cumulative effect of these errors, he contends that he was denied a fair trial. Next, he asserts that posttrial counsel was ineffective for failing to raise ineffective assistance of trial counsel in the motion for a new trial. In the alternative, he argues that the court abused its discretion by imposing a 25-year extended-term sentence. We address his contentions in turn.

¶ 51 A. Delay in the Execution of Sentence: Subject Matter Jurisdiction

¶ 52 The State initially argues that defendant forfeited this issue by failing to raise it before the sentencing court. Forfeiture notwithstanding, the State further argues that the delays were not unreasonable because they were caused by defendant. In response, defendant argues that the delay deprived the sentencing court of subject matter jurisdiction, which cannot be waived by the parties. We agree with defendant that subject matter cannot be waived.

¶ 53 "Subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties." *Bradley v. City of Marion*, 2015 IL App (5th) 140267, ¶ 13. In addition, we also

have an independent obligation to consider matters that go to the jurisdiction of the circuit court. *Id.* Accordingly, we will address whether the circuit court was deprived of subject matter jurisdiction after the entry of the conviction due to delays in the execution of sentence.

¶ 54 "For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Betterman v. Montana*, 578 U.S.___, ___, 136 S. Ct. 1609, 1612 (2016). Our supreme court has declared that posttrial activity, including the imposition of sentence, may not be indefinitely postponed, because public policy and the effective enforcement of the criminal law require reasonable administrative promptness where specific time limitations are not imposed. *People ex rel. Houston v. Frye*, 35 Ill. 2d 591, 593 (1966). In Illinois, it is well established that an undue delay between the entry of judgment and the execution of the sentence deprives the sentencing court of jurisdiction. See *id.*; *People v. Sanders*, 131 Ill. 2d 58, 63 (1989); *People ex rel. Rudin v. Ruddell*, 46 Ill. 2d 248, 249 (1970). Whether a given period of delay is so unreasonable that it deprives a court of its authority to proceed is dependent in substantial measure upon the circumstances. *Frye*, 35 Ill. 2d at 593. However, a delay is not unreasonable if it is caused by defendant. *Sanders*, 131 Ill. 2d at 63-64.

¶ 55 Whether a trial court violated due process rights is a question of law that is reviewed *de novo*. *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 21. When considering a due process violation claim, courts generally focus on four factors: "(1) the

length of the delay; (2) the reason for the delay; (3) the defendant's responsibility to assert his right; and (4) the resulting prejudice to the defendant." *People v. Sistrunk*, 259 Ill. App. 3d 40, 54 (1994); see also *United States v. Sanders*, 452 F.3d 572, 577 (6th Cir. 2006) (finding that a majority of circuits use these four factors in determining claims of delay between trial and sentencing: "See, *e.g.*, *United States v. Reese*, 568 F.2d 1246, 1253 (6th Cir. 1977); *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987); *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976)."). A defendant's failure to request a sentencing hearing is merely a factor to consider when determining whether a delay in sentencing is unreasonable. *People v. Williams*, 309 Ill. App. 3d 1022, 1025 (2000). We will consider each factor in turn.

¶ 56 a. Length of Delay

¶ 57 In the present case, the time period that elapsed between the entry of judgment of conviction and the execution of sentence was more than 9½ years. During that period, there was inactivity in the case for nearly three years from June 15, 2012, to April 28, 2015. This court has found a due process violation for significantly less delay. See *People v. Jones*, 4 Ill. App. 3d 907, 908 (1972) (two years and eight months between final judgment and sentencing). Thus, we are of the opinion that a delay of more than 9½ years, including the nearly 3 years of inactivity, implicates due process.

¶ 58 b. Reason for Delay

¶ 59 Contrary to defendant's assertion, the record amply demonstrates that the sentencing delay was primarily caused by defendant. Although the circuit court timely set the matter for sentencing, defense counsel caused the initial delay in order to contact

mitigating witnesses before the sentencing hearing. Additionally, defendant failed to appear at two scheduled sentencing hearings, which resulted in the initial three-year delay. Moreover, after defendant was arrested on March 5, 2010, which ended the three-year delay, Public Defender Huyett continued the sentencing hearing while the motion for new trial was pending, which was subsequently amended two times.

¶ 60 The next delay occurred at the start of the hearing on the motion for a new trial on April 12, 2011, when the matter was subsequently held in abeyance for the parties to file legal memorandums within 21 days of the proceedings. The record reflects that the State timely complied, but defense counsel did not. Additionally, without explanation in the record, the matter was not reset for hearing until April 28, 2015, when defendant appeared in court while in custody for multiple misdemeanor charges. Between April 28, 2015, and August 27, 2015, defendant was assigned a new public defender and had pretrial conferences continued in June and July of 2015. On August 27, 2015, defense counsel filed a memorandum addressing the evidentiary questions raised during the April 12, 2011, proceeding. During the August 27, 2015, pretrial conference, defense counsel delayed the matter until October 29, 2015, when the hearing on the motion for new trial resumed. After the circuit court denied defendant's motion for a new trial, the sentencing hearing was set for April 14, 2016. Defense counsel, once again, requested and was granted a continuance to review the PSI with defendant, which delayed the sentencing hearing until May 26, 2016.

¶ 61 Based on the foregoing, at least 6 of the 9½ years from the entry of the judgment of conviction to the imposition of a sentence were directly caused by defendant. Although

defendant asserts that "no hearings were held and no sentence imposed between the June 15, 2012, [telephone conference] and the April 28, 2015, [appearance date]," and that this delay was caused "without fault of the defendant," we note this three-year delay is unexplained in the record. The last continuance order, prior to this three-year period, however, was granted by the circuit court on April 12, 2011, to allow the parties an opportunity to file memorandums. The State filed a timely memorandum, but defense counsel did not. Thus, we cannot say this delay was caused "without fault of the defendant," when defense counsel's failure to timely file memorandum contributed to the overall confusion and resulting delay.

¶ 62 c. Assertion of Right

¶ 63 Defendant specifically requested that his sentencing hearing be delayed until his motion for a new trial was resolved. Therefore, the record affirmatively demonstrates that defendant acquiesced in the delay and that further proceedings were indeed contemplated. Even after the unexplained three-year delay, defendant continued to pursue alleged trial errors, which resulted in further delays in sentencing. We also note that defendant never requested the circuit court to set the matter for sentencing, and he made no complaint prior to this appeal that his sentencing hearing had been unreasonably delayed.

¶ 64 d. Resulting Prejudice

¶ 65 We note that defendant does not argue on appeal that he was prejudiced by the delay. Even if he did, we are of the opinion that the sentencing delay did not prejudice him. In fact, defendant argued at sentencing that he had rehabilitated himself since the commission of the offense at issue. Thus, it appears from the record that defendant

attempted to benefit from the lengthy sentencing delay in hopes that he would receive a lighter sentence—a common defense strategy.

¶ 66 In light of the above four factors, we cannot find that the sentencing delay was so unreasonable that it deprived the circuit court of subject matter jurisdiction. Instead, we conclude that defendant primarily caused the delay through multiple continuances, his failure to appear at two sentencing hearings, and the contemplation of additional proceedings. Moreover, defendant failed to assert his right to prompt sentencing, and the record does not support a finding that defendant was prejudiced by the delay.

¶ 67 B. Ineffective Assistance of Counsel

¶ 68 We now turn our attention to defendant's claims of ineffective assistance of counsel. Defendant argues that trial counsel rendered ineffective assistance of counsel by failing to object to three improper statements that the State made during closing and rebuttal arguments. Specifically, defendant asserts that the State improperly stated in closing argument that reasonable doubt does not mean "beyond all doubt" or "any shadow of a doubt, just beyond a reasonable doubt." Additionally, defendant argues that the State improperly argued in rebuttal that Detectives Purcell and Uhls were "trained, know how to make identifications," and "I posit there is *no doubt* at all. Do your job and find the defendant guilty." (Emphasis added.) In response, the State argues that these statements, in context, do not rise to the level of reversible error because the statements were proper, based on reasonable inferences from the evidence or invited by defense counsel. We address each statement in turn.

¶ 69 The sixth amendment of the United States Constitution (U.S. Const., amend. VI) guarantees a criminal defendant effective assistance of counsel. *People v. Simms*, 192 Ill. 2d 348, 402 (2000) (citing *People v. Hattery*, 109 Ill. 2d 449, 460-61 (1985)); see also Ill. Const. 1970, art. I, § 8. "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). The purpose of this guarantee is to ensure that a criminal defendant receives a fair trial. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004).

¶ 70 We evaluate claims of ineffective assistance of counsel under the two-prong test enunciated by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) he was prejudiced by that deficient performance. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 123 (citing *Strickland*, 466 U.S. at 687-88). To satisfy the deficient performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

¶ 71 Our supreme court has noted that the analysis for an ineffective assistance of counsel claim based on an evidentiary error is similar to the analysis for first-prong plain error "insofar as a defendant in either case must show he was prejudiced." *People v. White*, 2011 IL 109689, ¶ 133. "To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the

proceeding would have been different." *Banks*, 2016 IL App (1st) 131009, ¶ 123. A reviewing court " 'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice *** that course should be followed.' " *Albanese*, 104 Ill. 2d at 527 (quoting *Strickland*, 466 U.S. at 697). Questions of ineffective assistance of counsel are reviewed *de novo*. *People v. Demus*, 2016 IL App (1st) 140420, ¶ 27.

¶ 72 Prosecutors have a great deal of latitude during opening and closing arguments. *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 36. However, a prosecutor must not misstate the law or facts of the case. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 29. It is also improper for a prosecutor to vouch for the credibility of a witness or to express a personal opinion, although a prosecutor may comment on the strength of its evidence. *Deramus*, 2014 IL App (1st) 130995, ¶ 51. In determining whether a prosecutor's comments in closing arguments were improper, a reviewing court must view the alleged improper remarks in their entirety and in context. *Id.* ¶ 36. "Generally, where an improper comment is brief, isolated, and occurs in the context of proper arguments, it will not be deemed prejudicial." *Id*. ¶ 61. A prosecutor's improper remarks will not be considered reversible error unless they constitute a material factor in defendant's conviction or result in substantial prejudice to the accused, such that the verdict would have been different had they not been made. *People v. Simmons*, 342 Ill. App. 3d 185, 190 (2003).

¶ 73 First, defendant argues that trial counsel was ineffective for failing to object when the State remarked in closing argument that reasonable doubt does not mean "beyond all

doubt" or "any shadow of a doubt, just beyond a reasonable doubt." Defendant argues that the State improperly defined its burden of proof to the jury by explaining what reasonable doubt was *not*, which impermissibly reduced its burden. In support, defendant relies on *People v. Howell*, 358 Ill. App. 3d 512, 518 (2005), and *People v. Jones*, 241 Ill. App. 3d 228, 233-34 (1993), where courts ruled similar statements improper.

¶ 74 A review of these cases demonstrates a lack of support for defendant's argument because neither the court in *Howell* nor the court in *Jones* determined that the State's remarks rose to the level of reversible or plain error because the defendant could not show substantial prejudice. *Howell*, 358 Ill. App. 3d at 524 ("an attempt [to define reasonable doubt] is reversible error only if it causes a defendant substantial prejudice"); *Jones*, 241 Ill. App. 3d at 234 (although comments were improper, the defendant was not deprived a fair trial so as to invoke the plain error doctrine).

¶ 75 Moreover, this court in *People v. Gray*, 80 Ill. App. 3d 213, 218-19 (1979), did not find reversible error after reviewing a preserved challenge to the State's use of similar language in closing argument. In *Gray*, this court upheld the defendant's conviction after the circuit court overruled defense counsel's objection to the State's remark in closing argument that " 'the court will instruct you that the State has the burden of proving the Defendant guilty, beyond a reasonable doubt. Now, that instruction does not say that the State has the burden of proving the defendant guilty, *beyond all doubt.*' " (Emphasis added.) *Id.* Although this comment was determined improper under a harmless error analysis, reversible error was not found because the comment was not likely to mislead

the jury and the error was not compounded by the court giving an improper jury instruction. *Id.*

¶ 76 Similar to *Gray*, here, we are of the opinion that the State's remarks were improper because neither the circuit court nor counsel should attempt to define reasonable doubt for the jury. See *People v. Ellis*, 134 Ill. App. 3d 924, 926 (1985). However, we believe the State's remarks presented only a slight impropriety and were not prejudicial, given the isolated nature of the remarks. See *Deramus*, 2014 IL App (1st) 130995, ¶ 36. Likewise, we believe the State diminished the error by stating in rebuttal, in response to defendant's challenge to the identification evidence, "I posit there is no doubt at all." In light of the foregoing, we conclude defendant cannot show that the verdict would have been different had the above statement not been made.

¶ 77 Next, defendant argues that trial counsel was ineffective for failing to object to the State's remark in rebuttal that Detectives Purcell and Uhls were "trained, know how to make identifications." In support, defendant argues that trial counsel acted "unreasonably" by not objecting because this statement was "an erroneous addition to a critical fact not admitted into evidence." In turn, the State argues that this statement did not constitute reversible error because it was proper. Although we conclude that this statement was improper, it did not constitute reversible error.

¶ 78 In the present case, defense counsel devoted most of her closing argument to addressing perceived weaknesses in witness testimony regarding defendant's identification. Specifically, after first addressing Powell's testimony, defense counsel argued that the surveillance video was of such poor quality that the detectives could not

have identified defendant. In support, defense counsel asserted that the video showed "some guy" in a hat walk up to Powell's truck for about two seconds in the pouring rain. She commented that the detectives would have needed "bionic eyes" or "special equipment" to identify someone on the video. There was no testimony to that nature. Defense counsel also commented, without objection by the State, that she could not see any facial features when viewing the video. Thus, defense counsel attempted to call into question the testimonies of Powell and Detectives Purcell and Uhls regarding their reliance on the surveillance video in identifying defendant.

¶ 79 It was in this context that the State retorted in rebuttal argument:

> "You [the jury] heard from the officers who are trained, know how to make identifications, knew the defendant enough times to be able to recognize him and have an opportunity to study the tape. They could identify him. Not only them, Mr. Powell could identify him."

The State did not explain or elaborate on the detectives' training. Moreover, in both opening and closing arguments, the State stressed that the detectives testified to multiple prior interactions with defendant, which allowed them to identify defendant as they paused and studied the video.

¶ 80 After a careful review of the record and consideration of the State's statement in rebuttal, we cannot conclude that the remark was so significant that it constituted a material factor in defendant's conviction or resulted in substantial prejudice to defendant. Thus, we conclude defendant cannot show that the verdict would have been different had the above statement not been made.

¶ 81 Lastly, defendant argues that trial counsel was ineffective for failing to object when the State instructed the jurors: "I posit there is no doubt at all. Do your job and find the defendant guilty." Defendant argues that courts have found similar remarks, specifically, "do your job," to be in error and that trial counsel's failure to object had been unreasonable. See *United States v. Young*, 470 U.S. 1, 18 (1985) ("The prosecutor was also in error to try to exhort the jury to 'do its job'; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice ***."); *People v. Peete*, 318 Ill. App. 3d 961, 970-71 (2001) (holding that the prosecutor's argument that " 'on this evidence I would suggest your job is to find this defendant' " guilty should "not be repeated on remand"). The State maintains that the remark was proper. Again, while we agree with defendant that the remark was improper, we do not find that the result of the proceeding would have been different had counsel made a timely objection.

¶ 82 "Generally, where an improper comment is brief, isolated, and occurs in the context of proper arguments, it will not be deemed prejudicial." *Deramus*, 2014 IL App (1st) 130995, ¶ 61. Here, trial counsel ended closing argument by stating:

> "Detective Purcell and Detective Uhls also testified they didn't see everything that went on, and everything that went on, according to [Powell], wasn't on the videotape. So what does that take us back to? The testimony of one guy [Powell] who was paid to do a job and who wants to get paid again. And that's why he is here to testify in court. And that *** is why he happened to identify *** this guy sitting at the table again who happens to be charged with selling drugs to him. That, ladies and gentleman, *is reasonable doubt* and I ask that you find [defendant] not guilty." (Emphasis added.)

On rebuttal, the State declared the following:

> "And I'll leave you with this. [Trial counsel] is the defendant's attorney, she doesn't want to see him on that tape. Of course she doesn't see any facial features, she doesn't want to. But what she thinks she can see, what I think I can see, what the judge may think he can see is irrelevant. What's relevant is the evidence presented in this case. Three witnesses have testified there is *no doubt* in their minds it was this defendant that sold him that cocaine." (Emphasis added.)

The State finally stated: "I posit there is *no doubt* at all. Do your job and find the defendant guilty." (Emphasis added.)

¶ 83 In this context, we agree with the State that this remark does not instruct the jury that their job is to find defendant guilty. Rather, the State plainly stated that "[w]hat's relevant is the evidence presented in this case," from which the State posits "there is no doubt at all" as to defendant's guilt. Based on this, we cannot conclude that defendant has proven that this challenged remark caused juror confusion or misled the jury. Therefore, defendant cannot show prejudice or that the verdict would have been different had the above statement not been made.

¶ 84 Accordingly, we conclude defendant has failed to prove trial counsel was ineffective for failing to object to three separate remarks in closing and rebuttal arguments where defendant cannot demonstrate that, but for counsel's insufficient performance, the result of the proceeding would have been different. As such, defendant's claims of ineffective assistance of counsel fail.

¶ 85 C. Cumulative Error

¶ 86 Defendant also contends that the cumulative effect of these errors denied him a fair trial and that posttrial counsel was ineffective for failing to raise a claim of

ineffective assistance in the motion for a new trial. Defendant argues that a reasonable probability existed that he would not have been convicted had counsel timely objected to the State's improper statements, and therefore, posttrial counsel should have raised a claim of ineffective assistance of counsel in the motion for a new trial based on trial counsel's failures to object at trial. We disagree.

¶ 87 Cumulative error is applicable only where errors that are not individually considered sufficiently grave to entitle the defendant to a new trial cumulatively "create a pervasive pattern of unfair prejudice to defendant's case." *People v. Mendez*, 318 Ill. App. 3d 1145, 1154 (2001) (citing *People v. Blue*, 189 Ill. 2d 99, 139 (2000)). Here, we find defendant has not established cumulative error. As stated above, we concluded that the State's three challenged remarks were isolated and deemed not prejudicial. As a result, no cumulative error exists. Based on a review of the entirety of the record, we cannot conclude that these errors represent a pervasive pattern of unfair prejudice to defendant's case. As such, defense counsel was not ineffective for failing to object at trial. In light of this, defendant's argument that posttrial counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel is without merit.

¶ 88 D. Excessive Sentence

¶ 89 Lastly, defendant presents an alternative argument that the circuit court abused its discretion in imposing a 25-year extended-term sentence. We disagree. Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) authorizes a reviewing court to reduce the punishment imposed by a circuit court. However, "because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider

factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age," substantial deference is given. *People v. Snyder*, 2011 IL 111382, ¶ 36. A "reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We presume a court has considered all relevant factors in mitigation, and that presumption cannot be overcome without affirmative evidence that the sentencing court failed to consider all factors presented before it. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). Absent some contrary indication, other than the sentence itself, we presume the court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. A sentence within statutory range will not be disturbed on review unless it is manifestly disproportionate to the nature of the case. *People v. Kerkering*, 283 Ill. App. 3d 867, 872 (1996). It is well settled that a circuit court's sentencing decision will not be disturbed upon review absent an abuse of discretion. *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 15; *Stacey*, 193 Ill. 2d at 209; *People v. Steffens*, 131 Ill. App. 3d 141, 151 (1985).

¶ 90 Here, due to defendant's criminal record, the parties do not dispute that the 25-year extended-term sentence was presumptively valid, as it was within the statutory range. See 730 ILCS 5/5-4.5-30(a) (West 2008) ("The sentence of imprisonment for an extended term Class 1 felony *** shall be a term not less than 15 years and not more than 30 years."); see also 730 ILCS 5/5-5-3.2(b)(1) (West 2004) (the court may impose an extended-term sentence "[w]hen a defendant is convicted of any felony, after having been previously convicted *** of the same or similar class felony or greater class felony, when

such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody"); *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27 (sentence within statutory range is presumptively valid).

¶ 91 When imposing defendant's sentence, the circuit court stated that it had considered the PSI, defendant's statement in allocution, two community letters submitted by defense counsel, the cost of incarceration, factors in mitigation and aggravation, and all arguments presented by the State and defense counsel. The record established that defendant's criminal history—a factor in aggravation—included a prior conviction for the same offense but with a larger quantity of cocaine. The prior conviction was a Class X felony on December 12, 2001, rather than a Class 1 in the case at issue. The record also established that defendant served a seven-year prison sentence and was on mandatory supervised release for only six months before committing the present offense. Defendant then absconded after posting bond on the present offense for three years from January 2007 to March 2010. After he was apprehended and then released on bond, defendant continued to engage in criminal activity. In particular, while on bond, at which time his motion for a new trial and sentencing hearing were pending, defendant was convicted of aggravated battery on June 27, 2011, and completed a term of probation. He was also convicted of domestic battery in April 2015 and placed on probation.

¶ 92 Although defendant argues that his sentence was disproportionate to the seriousness of the offense and fails to reflect his rehabilitative potential and cost of incarceration, the record demonstrates that the circuit court weighed the seriousness of the offense before imposing a 25-year extended-term sentence. Contrary to defendant's

arguments, the record shows that the court considered the evidence of defendant's rehabilitative potential before sentencing. As noted above, we presume that the sentencing court properly considered all mitigation evidence. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. While a defendant's potential for rehabilitation must be considered, a court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). The court indicated that it had considered defendant's rehabilitative testimony and the two community letters submitted by defense counsel, but also noted that defendant did not contribute to the PSI, had failed to attend several presentence interview appointments that had been specifically arranged to accommodate his work schedule, and was convicted of a violent offense less than one year before his sentencing hearing.

¶ 93 In light of the above, defendant cannot show that the circuit court abused its discretion in imposing his sentence and failing to consider mitigating factors. Furthermore, given defendant's criminal history, we cannot say that the court's imposition of sentence was manifestly disproportionate to the nature of the case. *Kerkering*, 283 Ill. App. 3d at 872.

¶ 94 III. Conclusion

¶ 95 The judgment of the circuit court of Marion County is affirmed where the sentencing delay was not so unreasonable as to deprive the court of subject matter jurisdiction; there was no ineffective assistance of counsel where defendant could not demonstrate prejudice based on trial counsel's insufficient performance; there was no cumulative error; posttrial counsel did not render ineffective assistance of counsel; and

the court did not abuse its discretion by imposing a 25-year extended-term sentence where the sentence was within the statutory range, and the court properly weighed the factors in aggravation and mitigation.

¶ 96 Affirmed.