No. 1-09-2465

FIFTH DIVISION
May 27, 2011

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07C441048
	)	
TONY CHATMAN,	)	The Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Nathaniel Howse, Jr., concur in the judgment.

HELD: (1) Evidence was sufficient to convict defendant of possession of narcotics with intent to deliver; (2) trial court did not abuse its discretion in denying defendant's request to present a character witness where defendant's reputation for truth and veracity was not relevant to the crime at hand, nor was his character for truth and veracity attacked on cross-examination; (3) the prosecutor conducted a proper cross-examination of defendant and did not commit plain error in closing argument; (4) evidence was clear that trial court considered the presentencing investigation report before sentencing defendant; and (5) defendant's mittimus is modified to correctly reflect his conviction.

ORDER

Following a jury trial, defendant Tony Chatman was found guilty of possession with intent to deliver 15 grams or more but less than one hundred grams of a substance containing

crack cocaine. The trial court sentenced defendant to 8 years' imprisonment. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred where it denied defendant's request to present a character witness; (3) he was denied a fair trial due to prosecutorial misconduct during cross-examination and closing arguments; and (4) the trial court erred during his sentencing hearing. The defendant also contends, and the State properly concedes, that his mittimus should be modified to correctly reflect his conviction. For the following reasons, we affirm defendant's conviction and sentence, and modify his mittimus.

BACKGROUND

Prior to trial, the State filed a motion *in limine* to bar defendant from introducing evidence of his character for truth and veracity. The court held a hearing on the motion, during which defense counsel argued that defendant had the right to present a character witness on his behalf because he anticipated that his character would be attacked by the State presenting conflicting accounts of what happened on the evening in question. The court reserved its ruling until the State rested its case in chief.

The State's case was based primarily upon the testimony of Melrose Park police officer John Schillinger. At trial, Officer Schillinger testified that he, as part of the Village of Melrose Park tactical division, was working with the Maywood Police Department, the Bellwood Police Department, and the U.S. Marshalls on June 30, 2007. Responding to information from an informant, the officers set up a narcotics surveillance at the Lido Motel on Mannheim Road.

This location was known by the officers to be a locale for prostitution and narcotics. There was a parking lot for tractor trailers as well as a lot for cars and trucks next to the motel.

During the surveillance, just after midnight on July 1, 2007, Officer Schillinger observed a Connor's Transportation tractor-trailer pull into the lot beside the motel. The tractor-trailer turned around and parked. Officer Schillinger exited his vehicle and approached the tractor-trailer from the rear part of the trailer. The driver side door opened as Officer Schillinger approached the front of the tractor-trailer. Officer Schillinger testified that, just as defendant began to exit the vehicle with his left leg, Officer Schillinger and defendant made eye contact. Defendant and Officer Schillinger were approximately two to four feet from one another. After making eye contact, defendant dropped a clear plastic bag, which fell to the left side of the driver's seat and landed in the truck's cab. Officer Schillinger admitted at trial that he neglected to include the fact that they made eye contact in his police report. Believing the bag contained narcotics, Officer Schillinger arrested defendant and recovered the bag.

The clear plastic bag contained nine smaller bags, each of which were knotted at the top. Each of the smaller bags contained an eighth of an ounce of crack cocaine, also known as an eight-ball. Officer Schillinger characterized a typical user as carrying one or two rocks of crack cocaine, and explained that thirty-five rocks could be created from each eight-ball. Officer Schillinger, who testified as an expert in the field of narcotics investigations, opined that the items in the bag were worth $1800, were greater than an amount carried for personal use, and were packaged for sale or delivery.

A passenger from the tractor-trailer was also arrested. The passenger, Lamar Jackson,

was transported to the police station for investigation. During transport, he placed a plastic bag filled with five rocks of crack cocaine in the back of the police vehicle.

Melrose Park police lieutenant Steve Rogowski testified that he completed an inventory search of defendant's personal items and recovered $372 in cash and two cellular telephones. Lieutenant Rogowski testified that it would not be unusual for a drug dealer to carry $372 in cash as well as more than one cellular telephone.

The parties stipulated that, if Illinois State Police Crime Lab forensic chemist Debra Magolan were to testify, she would testify that she weighed and tested the rock-like substances retrieved from the vehicle. The contents of the tested items were positive for the presence of cocaine and weighed 29.5 grams.

The State rested. At the close of the State's case, defense counsel again asked the court to rule on whether defendant could present character evidence. Relying on *People v. Reid*, 272 Ill. App. 3d 301 (1995), the court ruled that it would not allow defendant to present the testimony of a character witness.

Defendant testified that, at the time of his arrest, he drove a truck for Connors Transportation. He picked up the truck in Portage, Indiana, at 3:00 p.m. on June 30, and completed a pre-trip safety inspection which included checking the tires, rims, springs, brake equipment, emergency equipment, and fire extinguishers. Although he checked the interior of the cab, he was only looking for the fire extinguishers and other emergency equipment. Defendant was not looking for and did not find narcotics in the truck cab. Defendant testified that he was not the only driver of that particular truck, and that it was driven by other drivers as

well as "spotters" whose job is to move the truck cab to various trailers. Although he had driven the same truck the day before, he had returned it to the trucking agency in Portage at night and then picked it up again approximately 12 hours later. Defendant testified that he was supposed to return the truck to Portage after his shift on the day he was arrested. Before he began the drive back to Portage, however, he called his friend, Jackson.

Defendant picked up Jackson and the two of them went to the Lido Motel in search of prostitutes. Defendant pulled into the parking lot of the Lido Motel, did not see any prostitutes, and turned the truck around to leave. Defendant testified that police officers then rushed at the truck with guns drawn and ordered defendant and Jackson out of the truck. Defendant stated that he exited the truck and the officers entered the truck. Defendant did not see if the officers removed anything from the truck. Defendant testified that he did not have drugs on him, did not put drugs in the truck, and did not buy drugs.

On cross-examination, defendant stated that he was delivering laundry to hotels and made several trips between Portage and Chicago on the day he was arrested. Defendant admitted that it was against company policy to have non-employees in his truck while making deliveries, and he knew he was violating company policy by picking up Jackson. He stated that he picked up Jackson on Mannheim Road around 11:30 p.m. Defendant admitted that he was looking for prostitutes even though he was married at the time. Defendant was unaware that Jackson was carrying drugs, but agreed that it was fair to say Jackson had the drugs as "party favors" for the prostitutes. Defendant testified that he usually carried one cellular telephone, but was carrying two cellular telephones that night because one was a company phone that doubled as a two-way

radio so that he could communicate with other drivers as necessary.

At the close of evidence, the court excused the jury and the parties reviewed the jury instructions. During the jury instructions conference, the defense renewed its objection to the court's ruling on the introduction of character witnesses.

After argument by both parties, the court instructed the jury on possession of a controlled substance with intent to deliver, as well as possession of a controlled substance. While deliberating, the jury sent out one question, asking:

> "Is it constructive possession if Chatman is aware of or has drugs on his person inside the truck?"

After consultation with counsel for both the State and defendant, the court responded that the jury had the relevant definitions and should continue to deliberate. The jury found defendant guilty of possession with intent to deliver 15 grams or more but less than 100 grams of a substance containing crack cocaine. The trial court sentenced defendant to eight years' imprisonment.

Defendant appeals.

ANALYSIS

I. Sufficiency of the Evidence

On appeal, defendant first contends that the State failed to prove he was in possession of the narcotics in question. Specifically, defendant argues that his conviction rested on Officer Schillinger's testimony, but: (1) Officer Schillinger was impeached where he admitted that his

police report failed to reflect that he and defendant made eye contact before defendant dropped the narcotics; (2) Officer Schillinger's account of what occurred is contrary to human experience where defendant probably would have had to open the cab door with the same hand that was holding the narcotics; and (3) Officer Schillinger's testimony is "dropsy" testimony, or testimony an officer concocts about a defendant dropping narcotics in plain view in order to "avoid the exclusion of evidence on fourth-amendment grounds." *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004). We disagree.

The issue to be resolved is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact determines the credibility of witnesses and the weight to be given to their testimony, resolves conflicts in the evidence, and draws reasonable inferences from the evidence. We will not substitute our judgment for that of the trier of fact. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

The State must prove three elements in order to find defendant guilty of possession of a controlled substance with intent to deliver: (1) defendant had knowledge of the presence of the narcotics; (2) the narcotics were in the immediate possession or control of defendant; and (3) defendant intended to deliver the narcotics. 720 ILCS 570/401 (West 2008); *People v. Robinson*,

167 Ill. 2d 397, 407 (1995). Our inquiry is specific to the second element: whether the State proved beyond a reasonable doubt that the cocaine was in the immediate possession or control of defendant.

Here, Officer Schillinger testified that he, along with the Maywood Police Department, the Bellwood Police Department, and the U.S. Marshalls, responded to a tip about a tractor trailer, and set up a narcotics surveillance at the Lido Motel. During the surveillance, Officer Schillinger watched a tractor trailer pull into the parking lot next to the Lido Motel and turn around. He could see two men in the truck cab. Defendant was the driver.

Defendant parked his truck between two other trailers. Officer Schillinger exited his vehicle and approached the truck cab from the rear part of the trailer. Officer Schillinger was walking toward the front of the tractor trailer on the driver's side when the driver's door opened. Officer Schilinger saw defendant, who was about to exit the cab of the tractor trailer with his left foot first. After defendant made eye contact with Officer Schillinger, defendant dropped a clear plastic bag which fell to the left side of the driver's seat and landed in the cab. Officer Schillinger did not include in his police report the fact that he and defendant made eye contact.

Suspecting that the clear plastic bag contained narcotics, Officer Schillinger recovered the bag. Defendant was placed under arrest. Officer Schillinger observed that the clear plastic bag had nine smaller bags inside of it that were each knotted off. Officer Schillinger testified that he later learned that each of the smaller bags contained an eighth of an ounce of cocaine, for a total street value of $1,800 worth of crack cocaine. The crack cocaine inside the plastic bags weighed 29.5 grams. In Officer Schillinger's opinion as an expert in the field of narcotics investigations,

the amount of crack cocaine he recovered from defendant was more than an amount for personal use and was packaged for sale and delivery.

Here, when considered in the light most favorable to the State, the evidence in its entirety is sufficient to support a conviction of possession of a controlled substance with intent to deliver. That Officer Schillinger neglected to include a description of his and defendant's eye contact in his police report is of no consequence. First, "[a] police report is meant to be a summary, not a blow by blow chronology of what occurred." *People v. Reed*, 243 Ill. App. 3d 598, 608 (1993). Second, Officer Schillinger did not testify that defendant dropped the bag *because of* or *in response to* making eye contact with him; he merely testified that they made eye contact, and defendant dropped the bag containing narcotics within "two to three" seconds. Defendant's motive for dropping the drugs in plain view is not an element to be proved for the conviction of possession of a controlled substance with intent to deliver. See 720 ILCS 570/401 (West 2008). Moreover, an identification by a single witness, if positive and credible, is sufficient to sustain a conviction. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The jury, which is responsible for evaluating the inferences to be drawn from the evidence, assessing the credibility of the witnesses, determining the weight to be given their testimony, and resolving any evidentiary conflicts, *Ortiz*, 196 Ill. 2d at 259, found Officer Schillinger to be a credible witness. A rational trier of fact could have so found.

For the same reasons we stated above, we do not credit defendant's argument that the State failed to prove his guilt because Officer Schillinger's testimony was "vague and contrary to human experience" where defendant would have had to open the cab door with his left hand

while he was also likely holding the narcotics in the same hand. There was no testimony at trial that defendant was holding the narcotics in his left hand, nor even testimony regarding with which hand defendant opened the cab door. Moreover, there was no evidence that it would have been impossible for defendant to hold the bag in the same hand with which he opened the door. A rational trier of fact could have found that defendant possessed the crack cocaine.

We are also unpersuaded by defendant's characterization of Officer Schillinger's testimony as incredible "dropsy" testimony. "A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer's discovering the narcotics in an illegal search)." *Ash*, 346 Ill. App. 3d at 816-17. Defendant argues that "it is illogical that [he] would have been holding the drugs in his left hand in these circumstances. Furthermore, dropping the drugs directly in front of a known police officer is entirely inconsistent with the instinct to avoid arrest. If [defendant] possessed the drugs, his impulse would be to avoid getting caught, not to drop them in the open upon seeing an officer standing a few feet away." Defendant fails to cite any Illinois caselaw in which a court has reversed a conviction on the ground that the officer's testimony appears to be "dropsy"testimony.

Defendant attempts to support his position by arguing that the jury question submitted to the court demonstrated that the jury questioned the veracity of Officer Schillinger's testimony. We have no way of knowing what prompts a jury to ask a particular question during deliberations, and certainly no way of predicting that a jury will reach a particular decision based upon the evidence before it, and we will not attempt to do so here.

Defendant also argues two more weaknesses to Officer Schillinger's testimony: that it should have been corroborated and that it was impeached by defendant's own testimony. It is the purview of the jury to assess the witness' credibility. It did so here, and found Officer Schillinger's description of events credible. See *Ortiz*, 196 Ill. 2d at 259. The jury considered all of the evidence presented at trial and concluded that defendant possessed the narcotics in question, and we see no reason to disturb this determination. See *Ortiz,* 196 Ill. 2d at 259.

II. Character Evidence

Defendant's next contention on appeal is that the trial court erred when it denied his request to present a character witness who would have testified to defendant's character for truth and veracity. Specifically, although defendant does not argue that his reputation for truth and veracity is relevant to the crime charged, defendant argues that he was entitled to present supportive character evidence after his character for truth and veracity was attacked on cross-examination. We disagree.

Evidence of a defendant's reputation for honesty is only admissible when it relates to some issue involved in the crime charged or when the defendant's reputation for honesty has first been attacked by the State. *Reid*, 272 Ill. App. 3d at 309, *People v. Krause*, 241 Ill. App. 3d 394, 401 (1993). Evidence of a defendant's reputation for truth and veracity is not admissible just because defendant has testified at trial. *Krause*, 241 Ill. App. 3d at 401. "Only after defendant's credibility has been placed in issue will supporting reputation evidence be warranted. For example, such testimony would be admissible where the State has presented evidence to show

defendant's bad reputation for veracity, impeached defendant with a prior conviction, or attacked his veracity during cross-examination. Mere contradiction of defendant's testimony is not, in itself, sufficient to allow the introduction of supportive reputation testimony." *Krause*, 241 Ill. App. 3d at 401, citing *People v. George*, 67 Ill. App. 3d 102, 108 (1978).

The determination of whether to admit character evidence is within the sound discretion of the trial court. *People v. Batinich*, 196 Ill. App. 3d 1078 (1990). We will not reverse the trial court's decision in this regard absent an abuse of discretion. *Batinich*, 196 Ill. App. 3d at 1085.

Defendant urges us to employ a *de novo* standard of review here, based on its belief that the trial court's ruling was based on a misunderstanding of the law regarding the admission of evidence of character for truthfulness. Specifically, defendant argues that, although the court mentioned both grounds for the admission of character evidence, it "explicitly based its ruling on [*People v. Perez*, 209 Ill. App. 3d 457 (1991),] a case which did not involve an attack on the defendant's credibility." Defendant directs us to the hearing on the motion, where the trial court discussed *Reid* and *Reid*'s analysis of *Perez*, and then stated that, "based upon that case," the court would not allow defendant to bring in character evidence. We disagree with defendant's characterization of the record. As discussed below, it is not clear that the court based its determination on *Perez*. Rather, reading the entirety of the court's ruling, it is just as likely that the court was referring to the salient points of law from the *Reid* case as the *Perez* case, particularly because the court mentioned *Perez* only in the context of the *Reid* court's analysis. We will not disturb the decision of the trial court here absent an abuse of discretion.

Having outlined the main legal principles involved, we now turn to the events which

transpired in this particular case. The State filed a motion *in limine* to bar defendant from introducing evidence of his character for truth and veracity. The motion requested that:

> "[t]he defendant must be prohibited from introducing character evidence of defendant's reputation for truth and veracity, as it is not relevant to his prosecution for the offense of possession of a controlled substance or for the offense of possession of a controlled substance with intent to deliver. A defendant may offer proof of his good character traits to establish that his character traits are inconsistent with the commission of the crime charged. *People v. Petitt*, 245 Ill. App. 3d 132, 148 (1993). Felony drug possession conviction bears little, if any, relation to veracity. *O'Bryan v. Sandrock*, 276 Ill. App. 3d 194, 197 (1995). Defendant is not allowed to bolster defendant's credibility by eliciting opinions on defendant's reputation for truthfulness and veracity if it does not relate to the nature of the crime involved. See *Petitt*, 245 Ill. App. 3d 132."

The trial court held a hearing on the motion prior to trial. During the hearing, defense counsel argued that defendant should be allowed to present a character witness on his behalf because his character would be attacked by the State. Defense counsel indicated that he intended to call a witness who would testify to the truthfulness and veracity of defendant. Counsel further argued that defendant would testify in contradiction to the State's witnesses and, as a result, the State

would argue that defendant was lying. Specifically, defense counsel said the State would attack defendant's character in the following manner:

> "[DEFENSE COUNSEL:] "[M]y client and the State are going to be on opposite ends of what happened. The State's witnesses are going to say they saw my client drop some drugs, and my client is going to say he didn't drop the drugs, they weren't his drugs. Now, that right away puts the two factions against each other, and truth and veracity does become important and how it's attacked in this case, the State will get up - - of course, I am reading their minds and they will probably object when they get up on closing arguments and start saying that my client is not to be believed, that he is lying."

The court reserved its ruling until the State rested its case. Trial proceeded. After the State rested, defense counsel again asked the court to rule on whether defendant could call a character witness to testify. The court reviewed *Reid*, 272 Ill. App. 3d 301, noting that:

> "[THE COURT:] Evidence of a good reputation in a community must relate to a particular character trait involved in the offense charged. In this state, character must be proved by general reputation based on the witnesses [*sic*] contact with the defendant's neighbors and associates, not on a witness' personal opinion. Evidence of good reputation for truth and veracity is permissible

only when the credibility of the Defendant has been attacked."

The trial court continued its analysis by reading the *Reid* court's analysis of *Perez*, 209 Ill. App. 3d 457, stating:

> "[THE COURT:] *Perez* was an entrapment case, where the defendant's readiness to violate the law was an issue. Here, evidence of naivete, manipulability, and lack of experience with narcotics would have little or nothing to do with the charge of delivery of a controlled substance. Further, we seriously doubt whether these are the kinds of character traits the law envisions in any case. The defendant testified freely to her mental state and knowledge at the time of the offense. She was allowed to testify to her own truthfulness and honesty in the community. The trial judge properly refused to extend the established boundaries for character evidence."

Immediately after discussing *Perez*, then, in the context of *Reid*, the trial court granted the State's motion to bar defendant from presenting a character witness, stating:

> "[THE COURT:] I mean, based upon that case, the court would not allow any character or evidence in for truth and veracity."

Defendant then testified on his own behalf. The State cross-examined defendant. After defendant testified, defense counsel did not ask the court whether he could present a character

witness on the ground that defendant's character had been attacked on cross-examination. Nor did defendant make an offer of proof as to the potential character witness' testimony.

Initially, the State contends that defendant waived this issue for appeal by failing to make an offer of proof at trial. We disagree. "An offer of proof 'is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced, or where the question itself and the circumstances surrounding it show the purpose and materiality of the evidence.' " *People v. Quinn*, 332 Ill. App. 3d 40, 44 (2002). Here, the nature and character of the evidence sought to be introduced was clear: defense counsel explained that he intended to call a character witness to testify to defendant's truthfulness and veracity, he explained that he expected the character evidence to be admissible when the State attacked defendant's credibility which, he argued, was foreseeable given the anticipated conflicting testimony of the State's witness and defendant. Defense counsel ensured that the court was aware of the nature and character of the character evidence as well as its purpose and materiality. Defendant did not waive this issue for failing to provide a formal offer of proof where none was required.

The trial court did not abuse its discretion in ruling that defendant was not allowed to present evidence of his character for truthfulness and veracity. Defendant argues that he was entitled to present character evidence because the State attacked his credibility by challenging his veracity during cross-examination. According to defendant, the State did so by referring to defendant's testimony as a "story," eliciting that defendant violated company policy by allowing a non-employee to ride in the truck with him, challenging defendant's timeline of events,

insinuating that he lied about finishing his shift before going to the motel, and asking defendant to comment on the courtesy of the officers involved in his arrest. However, defendant fails to show that any of these complained-of actions attacked his reputation for truth and veracity. Rather, this cross-examination was merely an examination of what transpired on the day defendant was arrested. A mere contradiction between the testimony of defendant and Officer Schillinger does not amount to an attack upon defendant's reputation for truth and veracity. See *Krause*, 241 Ill. App. 3d at 401, citing *George*, 67 Ill. App. 3d at 108 ("mere contradiction of defendant's testimony is not, in itself, sufficient to allow the introduction of supportive reputation testimony").

Defendant's reliance on *People v. Falls*, 387 Ill. App. 3d 533 (2008), does not persuade us differently. In *Falls*, this court found error where the trial court did not allow rehabilitative testimony even where defendant's truthfulness was directly attacked during cross-examination on three occasions by prior inconsistent statements. *Falls*, 387 Ill. App. 3d at 349. We found reversible error in *Falls*, where the trial court's error was compounded by another court error in failing to answer a note from the jury regarding a "critical element of the law," and the evidence was closely balanced. *Falls*, 387 Ill. App. 3d at 539. *Falls* is clearly distinguishable from the case at bar, where the State did not attack defendant's truthfulness by impeaching him with a prior inconsistent statement but merely questioned defendant's account of the events which transpired on the day in question.

III. Prosecutorial Misconduct

Next, defendant contends that he was denied a fair trial by the State's "repeated acts of misconduct" during the trial. Specifically, defendant argues that he was prejudiced where: (1) the State asked defendant to comment on the credibility of a State witness; (2) the State misstated the facts in evidence during argument by suggesting defendant's testimony was contradictory; (3) the State argued in closing about the dangers of the drug trade and drug use; and (4) the State argued that the defense was fabricated. We disagree.

Initially, we note that defendant has waived this issue by failing to include it in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (Failure to properly preserve an alleged error by both an objection at trial and a written post-trial motion constitutes a procedural default of that error on review). Defendant admits that he failed to properly preserve this issue for appeal, but urges us to consider it as plain error on the basis that the evidence was closely balanced. 134 Ill. 2d R. 615; *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (plain error rule permits consideration of errors even though technically waived for review where the evidence is closely balanced or where the claimed error is of such magnitude that there is a substantial risk that the defendant was denied a fair and impartial trial). We first consider whether any error occurred at all. *People v. Durr*, 215 Ill. 2d 283, 299 (2005). If an error is deemed to have occurred, we turn to the prongs of the plain error analysis.

a. Cross-Examination

Defendant contends that he was denied a fair trial where the State improperly asked him to comment on the credibility of Officer Schillinger's testimony. Specifically, defendant argues

that asking defendant to "assess the courtesy of the officers who were involved in his arrest" was improper, as it was "clearly intended to buttress the credibility of the arresting officers." We disagree.

"[T]he purpose of cross-examination is to introduce matters which explain, modify, or discredit any of the evidence introduced on direct examination." *People v. Adams*, 111 Ill. App. 3d 658, 664 (1982). The trial court has wide discretion regarding the manner and scope of cross-examination, and we will only disturb the trial court's determination where there is a clear abuse of discretion. *People v. Tolbert*, 323 Ill. App. 3d 793, 807 (2001). Nonetheless, "it is improper to ask a criminal defendant to opine regarding the truthfulness of other witnesses because such questions invade the jury's function of determining for itself the credibility of the witnesses." *Tolbert*, 323 Ill. App. 3d at 807.

Here, during cross-examination, the State elicited that the tractor-trailer which defendant was driving at the time of arrest was supposed to be returned to the company's lot in Portage, Indiana. The comments defendant complains of are:

> "[THE STATE:] Mr. Chatman, isn't it in fact true that after you were surprised by the police officers, that they even contacted your employer to have someone come and pick up the rest of your load and deliver it?
>
> [DEFENDANT:] The truck had to go back to the company. Someone came to pick the truck up and take it back to the company.

> [THE STATE:] So, Mr. Chatman, isn't it fair to say the officers were courteous enough to call your employer to let them come and have someone else deliver the load?
>
> [DEFENDANT:] I am not sure. I'm not sure if they were courtesy [*sic*] enough, but someone came to pick the truck up, to pick up the transportation, after my job was done."

This line of questioning was not improper. The prosecutor did not ask defendant to testify to whether he believed Officer Schillinger had been dishonest in his testimony, nor whether he thought Officer Schillinger was a dishonest person. Rather, the prosecutor elicited facts pertaining to what transpired after defendant's arrest to paint a broad picture of events so that the jury could properly determine the credibility of the witnesses. We find no error here.

b. Closing Arguments

Next, defendant contends he was deprived of a fair trial where the prosecutor misstated the facts during closing arguments. Specifically, defendant argues that the prosecutor incorrectly stated that defendant changed his testimony during cross-examination regarding where he said the drugs were located.

A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006). Remarks made during closing

arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990). The character and scope of closing argument are left largely to the discretion of the trial court, and we will not disturb its decision absent an abuse of that discretion. See *People v. Aleman*, 313 Ill. App. 3d 51, 66-67 (2000). We will only reverse a conviction on the ground of improper argument if the challenged comments constituted a material factor in the conviction, without which the jury might have reached a different verdict. See *Aleman*, 313 Ill. App. 3d at 66-67. "The dispositive question in the case at bar, therefore, is whether the prosecutor's argument resulted in substantial prejudice to defendant and constituted a material factor in his convictions without which the jury's verdict might have been different." *Aleman*, 313 Ill. App. 3d at 67. Here, contrary to defendant's assertions, we do not believe the complained-of comments deprived defendant of a fair trial or constituted such factor that the jury would have reached a different verdict in the absence of those comments. Accordingly, we find no plain error.

The complained-of comment was:

> "[THE STATE:] [Defendant] inspected that truck. Checked the spring, checked the wheels, checked the tires and even looked into the cab for a fire extinguisher and safety equipment, but he didn't see the cocaine. He says it must have been behind the seat in his cab. Well, it depends on who asked him, since his credibility is at issue here. Defense counsel asked him where the

> cocaine was, and he said it was behind the seat. State's Attorney asked him where the cocaine was. He said he didn't know. He just heard the police officer say it was in the cab * * *."

Our review of the record shows that defendant did not, in fact, change his testimony to this extent regarding his knowledge of the location of the drugs inside the cab. On direct examination, defendant discussed his routine pre-trip safety inspection of the truck, which included looking inside the cab for the fire extinguisher and emergency flashers. When defense counsel asked him about the search conducted by the arresting officers, defendant stated that he "didn't see if [the officers] took anything from the truck." However, he learned that they discovered narcotics in the vehicle. Defendant denied any knowledge of the drugs, and on direct examination was not asked to speculate on their location in the cab. On cross-examination, however, defendant testified that he inspected the interior of the truck for emergency equipment that day but did not see any drugs in the truck, but testified:

> "[STATE'S ATTORNEY:] Then they searched the contents of the cab, and then you later learned these drugs just happened to be in the cab?
>
> [DEFENDANT:] That's what the police said, the drugs were in the cab."

We find that the State did, in fact, confuse the evidence in closing argument, as the defendant on cross-examination testified that the police said the drugs were in the cab, rather than that the drugs actually were in the cab. Nonetheless, we find that this error did not

substantially prejudice defendant. The jury heard the entirety of the evidence and was instructed by the court that closing arguments do not constitute evidence. Moreover, the complained-of remark was not serious enough to constitute a material factor in defendant's conviction. See *Aleman*, 313 Ill. App. 3d at 66-67 (we will only reverse a conviction on the ground of improper argument if the challenged comments constituted a material factor in the conviction, without which the jury might have reached a different verdict). The jury heard defendant on direct examination, cross-examination, and on re-direct deny that he possessed drugs or knew the drugs were in his truck before the police arrested him. Moreover, after the State made the comment in closing argument, defense counsel cleared up any confusion that may have resulted by clarifying for the jury during his closing argument that defendant actually said, " 'I don't know where the drugs in that car was [*sic*].' He told you he thought the drugs were found in the back. He was not sure." In addition, the State's entire argument and their theory of the case was that Officer Schillinger's testimony was credible and defendant's testimony was incredible. For example, Officer Schillinger testified that he saw defendant drop the bag containing crack cocaine, while defendant testified that he knew nothing about the bag of cocaine. When we consider this remark in the context of the entirety of arguments by both defense counsel and the State, we see no prejudice to defendant. See *Coleman*, 201 Ill. App. 3d at 807 (remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom).

c. Arguments Regarding the Effects of the Drug Trade

Defendant next contends that the prosecutor went beyond permissible argument when he discussed the evils of the drug trade. According to defendant, this discussion "encourage[d] the jury to decide the case based on fear and emotion." We disagree.

Prosecutors are allowed to argue the evils of drug abuse and the need to punish drug dealers. *People v. Harris*, 129 Ill. 2d 123, 159 (1989), *Reid*, 272 Ill. App. 3d at 310. Our supreme court has recognized that a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of the judicial process as to support reversal under the plain error doctrine. See *People v. Johnson*, 208 Ill. 2d 53, 63 (2004). It is not misconduct, however, for a prosecutor to argue the evil results of crime. *Harris*, 129 Ill. 2d at 159 ("It is entirely proper for the prosecutor to dwell upon the evil results of crime and to urge the fearless administration of the law"). We also recognize that, although courts have expressed discomfort at such arguments when they go too far, this court as well as our supreme court have repeatedly upheld similar arguments. *Harris*, 129 Ill. 2d at 159, *People v. Lopez*, 10 Ill. 2d 237 (1957), *Reid*, 272 Ill. App. 3d at 310, citing *People v. Loferski*, 235 Ill. App. 3d 675, 680 (1992).

Here, the State began its closing argument with the following:

> "[THE STATE:] Oxycontin, cocaine, crack, heroine, there are all controlled substances that are illegal for ones use without legal justification this contrary to what some people believe drug possession and use is not a victimless crime [*sic*]. It not only devastates a user. They become an addict, but their families, their

neighbors, their communities, and their coffers to do these drugs is expensive. What motivates people like defendant to sell them? They cost money.

[DEFENSE COUNSEL:] Judge, I'm objecting to this line of argument. My client has been charged with possession and possession with intent, not things that occur with people who use drugs.

[THE COURT:] The objection is overruled. He's charged with possession with intent to deliver.

[THE STATE:] Which is why people like the defendant are motivated to sell drugs, but what happens to the person who uses the drugs after they are caught? That's when we all become victims. That's when the addict - -

[DEFENSE COUNSEL:] Objection to that argument. That's inflammatory.

[THE COURT:] It's overruled.

[THE STATE:] Once the coffers are drained, the addict is looking for the next hit, the next high, he steals, breaks into automobiles, breaks into homes, robs people, any way to get money to keep that high going. It also destroys communities, contributes to urban blight [.]"

Defendant argues both that the comments were inflammatory and that the judge's overruling of the comments only served to exacerbate the error of the State's arguments. We disagree. These arguments were relevant to defendant's motive for being at the Lido Motel with a bag of cocaine. Moreover, they were apparently intended to persuade the jurors to convict in order to prevent further crime in general as well as further crime by this defendant. This court as well as our supreme court has repeatedly held that the type of argument complained of here is proper. Accordingly, defendant's argument that the comments were singularly and cumulatively erroneous is without merit.

d. Arguments Suggesting that the Defense was Fabricated

Next, defendant contends that he was prejudiced where the prosecutor improperly suggested in his rebuttal argument that the defense was fabricated. We disagree.

The complained-of arguments are the following:

> "[THE STATE:] Ladies and gentlemen * * * what you should know, from all of the evidence, the totality of all the circumstances is yes, [defendant] had the drugs in his hands. The fact that they were just in the truck and he didn't know about it is ridiculous. Ridiculous. He ran an inspection of the truck, drove the truck from Indiana, and now, it's been in Chicago. The fact that he says they weren't there. No, it doesn't make sense. Use your common [sense]."

Defendant also complains of the following comment:

> "[THE STATE:] The way [the drugs] are packaged, the fact that it is the Lido Motel, that fact that this is known for crime, the fact that this is known for prostitution, the fact that he should have headed home to his wife, the fact that he should have brought the truck back to Indiana, the fact that the police were there conducting surveillance in a high-drug-and-crime area, the fact that he had two phones, the fact that he did have some cash on him, the reasonable inference to be drawn from all of these facts is the defendant, Tony Chatman, pulled into the parking lot, the Lido Motel to deliver all of those drugs. That's the only logical explanation to be drawn from all this, ladies and gentlemen of the jury, the fact that the defense comes up with that he didn't know it was in there, it didn't happen, he didn't have it, that the officers didn't see it, think about that when you go back there."

Specifically, defendant takes issue in the first example with the prosecutor's statement that, '[t]he fact that they were just in the truck and he didn't know about it is ridiculous. Ridiculous." In the second example, defendant takes issue with the statement, "the defense comes up with" that defendant did not know the drugs were there. These statements, argues defendant, "blatantly suggested" that defendant and his attorney fabricated his defense.

The credibility of a witness is a proper subject for closing argument. *People v.*

Townsend, 136 Ill. App. 3d 385, 394 (1985). It is proper to comment on the implausibility of a defendant's theory of defense. *People v. Cloutier*, 156 Ill. 2d 483, 508-09 (1993).

Here, viewing the totality of the opening and closing arguments, it is clear that the prosecutor was simply arguing that defendant's testimony and the theory of defense was incredible based upon the evidence presented at trial. Rather than stating that defendant purposely concocted a false defense, the prosecutor merely argued that the evidence presented by the State contradicted the evidence presented by defendant. Because Officer Schillinger and defendant had such differing testimony regarding what transpired on the night in question, it was apparent to the jury that one of them must have been untruthful in his testimony. Defense counsel's theory of defense was based entirely on defendant's testimony that he did not know the drugs were in the vehicle. Accordingly, it was not improper to argue that defendant's testimony and defense counsel's theory of defense were untruthful where the State's witness testified that the drugs were in defendant's actual possession before he dropped them in plain view. We find no error here.

Moreover, the prosecutor's argument was in response to defense counsel's argument in which he stated:

> "[DEFENSE COUNSEL:] I agree with the State's attorney, one of the other issues that you have to resolve in this particular case is the issue of credibility. Who do you believe? Because you have a contrary story, you have the police officer saying one thing that he saw my client drop the evidence and my client saying he

didn't see the evidence in his truck. You have to evaluate that."

"[W]here the complained-of remarks are in response to opposing counsel's own statements contradicting the credibility of a witness, there is no prejudicial error." *People v. Love*, 377 Ill. App. 3d 306, 314 (2007). Here, defense counsel's argument invited response by challenging Officer Schillinger's credibility. It was proper for the prosecutor to respond to defense counsel's own statements contradicting the credibility of a witness by suggesting that it was defendant's testimony, rather than Officer Schillinger's, that was untruthful.

Defendant's reliance on *People v. Abadia*, 328 Ill. App. 3d 669 (2001), to support his argument does not persuade us differently, as *Abadia* differs vastly from the case at bar. In *Abadia*, the prosecutor argued that it took "four years for two teams of defense attorneys to come up with and concoct the various theories and ideas of what might have happened and what they wished the evidence would show . . . apparently they sit around and fantasize a whole bunch of theories impossibilities [*sic*] of what could have happened[.]" *Abadia*, 328 Ill. App. 3d at 680. In *Abadia*, defense counsel made more than 30 objections to the rebuttal closing argument alone, and the *Abadia* court quoted 22 excerpts of objectionable statements regarding defendant's purportedly fabricated defense made by the prosecutor during the rebuttal argument. *Abadia*, 328 Ill. App. 3d at 681-83. The *Abadia* defendant did not testify or put on evidence. *Abadia*, 328 Ill. App. 3d at 683. The court determined that the evidence at trial did not support the prosecutor's charge of fabrication. *Abadia*, 328 Ill. App. 3d at 683. *Abadia* is inapposite to the case at bar, where the complained-of statements were of a character that did not suggest defendant and his attorney had concocted a defense together. Rather, the prosecutor was simply reminding the jury

that the two versions of the events they had been presented contradicted one another, and suggesting that the jury choose to believe Officer Schillinger's testimony over that of defendant.

Here, contrary to defendant's assertions, we do not believe the complained-of comments deprived defendant of a fair trial or constituted such factor that the jury would have reached a different verdict in the absence of those comments. Accordingly, we find no plain error.

IV. The Sentencing Hearing

Next, defendant contends that the trial court erred in sentencing defendant where it failed to read or consider the presentence investigation report as required by section 5-3-1 of the Unified Code of Corrections, 730 ILCS 5/5-3-1 (West 2008). Defendant asks that we vacate his sentence and remand the case for re-sentencing.

Defendant has forfeited this issue for review by failing file a written post-sentence motion. *People v. Byrd*, 285 Ill. App. 3d 641, 651 (1996) (to preserve a sentencing issue, a defendant must file a written post-sentencing motion and object to any sentencing issues at the time of the sentencing hearing), *Enoch,* 122 Ill. 2d at 186.

Defendant, relying on *People v. Childress*, 306 Ill. App. 3d 755 (1999), argues that forfeiture does not apply here because a court's failure to comply with section 5-3-1 need not be raised in a post-sentencing motion to preserve the issue for review. *Childress*, however, is factually distinct from the case at bar, where the *Childress* defendant actually did file a post-sentencing motion to preserve the issue for review, alleging that his sentence was excessive. *Childress*, 306 Ill. App. 3d at 777. In *Childress*, the Second District of this court remanded for

re-sentencing where the trial court, in violation of section 5-3-1, neither *ordered nor considered* a presentence investigation report. The *Childress* court relied upon *People v. Youngbey*, 82 Ill. 2d 556 (1980), in which our supreme court held that a defendant does not have the right to waive the *preparation* of a presentence investigation report. Our supreme court in *Youngbey* gave no indication that a defendant cannot, by failing to file a motion to reconsider sentence, waive the issue on appeal of whether the court properly *considered* the presentence investigation report. Accordingly, *Childress* is distinct from the case at bar. We review this issue for plain error. 134 Ill. 2d R. 615; *Herron,* 215 Ill. 2d at 186-87. "In the context of a sentencing hearing, we will review an error that is not properly preserved as plain error where the evidence is closely balanced or the error is so fundamental that it may have deprived the defendant of a fair sentencing hearing." *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). We first consider whether any error occurred at all. *Durr*, 215 Ill. 2d at 299.

Section 5-3-1 of the Unified Code of Corrections provides, in relevant part:

> "Presentence Investigation. A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court." 730 ILCS 5/5-3-1 (West 2008).

Our supreme court has noted the importance of a sentencing court having the most thorough information possible regarding the defendant's life and characteristics. *People v. Jackson*, 149 Ill. 2d 540, 547-48 (1992), citing *People v. Adkins*, 41 Ill. 2d 297, 301 (1968). The trial court may appropriately consider the defendant's credibility, demeanor, general moral character,

mentality, social environment, habits, and age when sentencing a defendant. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Evidence of past criminal conduct is relevant information at sentencing. *Jackson*, 149 Ill. 2d at 548. "The source and type of information that the sentencing court may consider is virtually without bounds." *People v. Rose*, 384 Ill. App. 3d 937, 941 (2008). In determining the propriety of a sentence, the reviewing court should not focus on a few words by the trial court, but should consider the record as a whole. *People v. Estrella*, 170 Ill. App. 3d 292 (1988). Where mitigating evidence is presented to the trial court, it is presumed, absent some indication other than the sentence itself to the contrary, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). When determining the propriety of a particular sentence, we cannot substitute our judgment for that of the trial court simply because we would weigh the sentencing factors differently. *Fern*, 189 Ill. 2d at 53. A reviewing court will reverse the trial court's sentencing determination only where the trial court has abused its discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2008). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004).

The sentencing range for a Class X felony is 6 to 30 years' imprisonment. 730 ILCS 5/5-8-1 (West 2008). Defendant was sentenced to eight years' imprisonment.

Our review of the record on appeal reveals that the sentencing court considered the presentencing investigation report. The trial court ordered a presentence investigation report on July 29, 2009. The presentence investigation report was then prepared. On August 28, 2009, the

trial court held a hearing on defendant's motion for a new trial, followed by a sentencing hearing. Before the hearing on the motion, defense counsel informed the court that was not going to argue on the motion because he had argued thoroughly at trial, but asked for extra time to read the presentence investigation report. The court passed the case.

The case was later recalled, and the court heard and denied the motion for a new trial. The sentencing hearing began immediately thereafter. The prosecutor began his argument:

> "[THE STATE:] Judge, in aggravation, the presentencing
> investigation shows the defendant's history starting in 1977. . ."

The prosecutor then summarized defendant's history according to the presentence investigation report, including five felony convictions. Defendant had a 1977 burglary conviction for which he received probation, a 1980 burglary conviction for which he received two years' imprisonment, a 1992 possession of controlled substance conviction for which he was given probation that was terminated satisfactory, a 1994 retail theft conviction for which he was sentenced to 21 days' imprisonment, a 1995 retail theft conviction for which he received probation that was terminated unsatisfactory. Defendant also had a DUI conviction from 1995 an another retail theft conviction in 1996. The State asked the court for an "appropriate" sentence, and informed the court that the range is 6 to 30 years.

Defense counsel then presented three letters to the court on defendant's behalf, as well as the testimony of Reverend Walter Griesmeyer. The court indicated that it had read Reverend Griesmeyer's letter. It also indicated that it had received other letters on behalf of defendant, including a letter from defendant, a letter from Broadview Missionary Baptist Church, "some

other thing off the internet," and "some other letters." The following interaction then took place:

> "[DEFENSE COUNSEL:] Thank you very much, Judge. You read the presentence report?
>
> [THE COURT:] I didn't have the presentence report.
>
> * * *
>
> [THE COURT:] Are there any changes you wish to make to the presentence?
>
> [DEFENSE COUNSEL:] No, Judge."

The court then invited defendant to make a statement. Defendant did so. Defense counsel then began his argument by saying, "Judge, all I'd like to say is that you have read the presentence report. You've read the comments from his friend, and I realize that he has an extensive record." Defense counsel asked the court to sentence defendant to the minimum of six years' imprisonment.

The court then made its ruling:

> "[THE COURT:] As both attorneys have stated, this is a class X sentence, nonprobationable, minimum was 6, maximum of 30, followed by three-years' mandatory, supervised release. The defendant has, according to what I have here, five previous felony convictions. However, the last - - taking into account his background, I also take into account the fact that his last conviction was in '96, which is approximately 10 or 11 years from the time of

> this offense. However, considering the facts of the case, he has a substantial amount of drugs in his possession, which he may have been going to share it with other people. The court would find that the appropriate sentence in this case, taking into account the fact that he hasn't had a conviction for over ten years, the minimum sentence is not appropriate. I will sentence him to eight years in the Illinois Department of Corrections."

From this record, we are confident that the trial court had the presentence investigation report in its possession during the sentencing hearing. That it stated–in the past tense--that it "didn't have the presentence report" is of no consequence where the court clearly had the report at the time of sentencing. Defendant isolates this particular statement made by the court and uses it, in isolation, to infer that the trial court failed to read, consider, or even possess the presentence investigation report. In actuality, the only reasonable conclusion we can come to from our review of the record is that, at the time of the sentencing hearing, the trial court had the presentence investigation report in front of it but, at some time previous to the hearing, it did not. On the day of sentencing, the trial court asked defendant if he wanted to make any changes to the presentencing investigation report. Moreover, defense counsel specifically stated in his argument for mitigation that the court had read the report. In sentencing defendant, the court said, "according to what I have here," and then proceeded to list defendant's convictions. The court considered the report in accordance with the statute.

Based on this record, which establishes that the trial court reviewed defendant's pre-

sentence investigation report, considered appropriate mitigating and aggravating factors, and sentenced defendant to a term within the permissible sentencing range, we find that the trial court did not abuse its discretion.

V. Mittimus

Lastly, defendant contends and the State properly agrees that the mittimus should be modified to correctly reflect the offense of which defendant was convicted. We agree and, pursuant to our authority under Supreme Court Rule 615(b)(1), order the clerk of the circuit court to correct the mittimus. 134 Ill. 2d R. 615(b)(1); People v. McCray, 273 Ill. App. 3d 396, 403 (1995). Specifically, the mittimus should be corrected to reflect defendant's single conviction of possession with intent to deliver 15 grams or more but less than 100 grams of a substance containing cocaine.

CONCLUSION

For the aforementioned reasons, we affirm the judgment of the circuit court of Cook County and correct the mittimus.

Affirmed; mittimus corrected.