2012 IL App (1st) 101257-U

FIFTH DIVISION
February 3, 2012

No. 1-10-1257

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	08 CR 17751
	)	
SHAWN JENKINS,	)	
	)	Honorable
Defendant-Appellant.	)	Nicholas Ford,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

O R D E R

¶ 1 HELD: Defendant was proven guilty beyond a reasonable doubt of armed habitual criminal and possession of controlled substance; the trial court did not err in denying defendant's motion to suppress evidence; the defendant was not denied his right to a fair trial due to prosecutorial misconduct; defendant forfeited his argument that the trial court failed to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007); defendant's conviction for armed habitual criminal does not violate the ex post facto clause of the constitution; the trial court improperly sentenced defendant to a term of six years for his possession of cannabis conviction; and the mittimus incorrectly listed the offenses for which defendant was convicted.

¶ 2 Following a jury trial, defendant Shawn Jenkins was found guilty of the offense of armed

habitual criminal, possession of cannabis and possession of a controlled substance. The trial court subsequently sentenced defendant to a term of 20 years for the offense of armed habitual criminal and two 6-year terms for each possession conviction, to be served concurrently.

¶ 3 Defendant appeals, arguing that (1) the State failed to prove him guilty beyond a reasonable doubt because there was no evidence that defendant exercised immediate and exclusive control over the basement where firearms were recovered and the testimony regarding the location of the third firearm and heroin was unbelievable; (2) the trial court erred in denying defendant's motion to suppress because the evidence seized from basement was outside the scope of the search warrant; (3) defendant was denied a fair trial due to multiple instances of prosecutorial misconduct; (4) the trial court failed to comply with Supreme Court Rule 431(b) (Ill. St. C. R. 431(b) (eff. May 1, 2007)); (5) defendant's conviction for violating the armed habitual criminal statute violated the *ex post facto* clause of the United States Constitution; (6) the trial court erred in imposing a Class X sentence for defendant's Class 4 cannabis conviction; and (7) the mittimus misidentifies defendant's convictions.

¶ 4 In April 2009, defendant filed a motion to suppress evidence illegally seized during a search of defendant's residence. Defendant attached the search warrant to his motion. It stated that the premises to be searched was "5428 W. Rice, 1st floor, a red and tan home located in the City of Chicago, IL, County of Cook." Defendant's motion contended that the police officers exceeded the scope of the search warrant by searching the basement of his residence. The trial court conducted a hearing in May 2009 and the following evidence was presented.

¶ 5 Deborah Talbert testified that she was employed as an investigator with the Cook County

public defender's office. In October 2008, Talbert received an assignment to go to a house located at 5428 West Rice in Chicago. She went up a set of stairs to the porch area and then went in the front door. Talbert stated that she entered a common hallway. She described the house layout as to the right, there was a door to the first floor apartment and on the left is a set of stairs leading to the second floor apartment. Talbert also described a third door to the basement as being "probably five feet away from the first floor apartment." Talbert testified that there is one mailbox on the porch for the building.

¶ 6 Officer Sal DiFranco testified that on August 29, 2008, he conducted a search at 5428 West Rice pursuant to a search warrant. Officer DiFranco stated that he was not part of the entry team, but the plan was for the officers to announce their office and if no response, make a forced entry. The team made a forcible entry into the building. Officer DiFranco was on the surveillance team and entered a minute or two later. The officer heard gunshots and broke surveillance. The shots were fired at a pitbull dog that ran toward the officers entering the residence. The dog ran from the open door to the basement. Officer DiFranco described the building as a residence that appears to be a single family home, but it is actually a two-unit apartment building. He stated that there are three levels in the building.

¶ 7 When Officer DiFranco entered the building, he went into the foyer area and observed police officers and several male and female subjects. He estimated that 10 officers were part of the team and approximately 10 individuals were detained at the residence. Officer DiFranco stated that because of the number of people present, it was not possible to do a systematic search from the entry point. Once the people were detained, the officers were able to do a systematic

search. Defendant was located in the first floor apartment.

¶ 8 Officer DiFranco entered the first floor apartment. He went into a common area space. In that room, Officer DiFranco observed a green bag next to a weightlifting bench. Officer DiFranco looked into the green bag and saw green plant material, suspect cannabis, packing material, and a scale. Later, Officer DiFranco entered the kitchen area. A blue bag was recovered in the kitchen, but Officer DiFranco did not recover it. Officer DiFranco held the blue bag because it contained a handgun, live rounds, and white rock-like substance later determined to be heroin. In the bedroom, the officers found proof of residency for defendant with a Comcast cable bill with defendant's name on it and a prescription label with defendant's name.

¶ 9 When Officer DiFranco exited the first floor apartment, he saw a staircase going down as well as a staircase in the foyer going up. Officer DiFranco stated that the officers did not go up the staircase to the second floor. Officer DiFranco testified that he went down to the basement level. From the basement, the officers recovered additional bags of suspect cannabis, two firearms, and boxes of Dormin and Sleepinal sleeping aids. The officer testified that Sleepinal and Dormin are often used as cutting agents to be mixed with heroin in order for the seller to make more money. The two firearms were recovered from the overhead air ducts.

¶ 10 Officer DiFranco identified several photograph exhibits. He testified that the blue bag was photographed on a ledge near the basement stairs. He stated that the blue bag was not recovered there, but was found in the kitchen. Officer DiFranco explained that the bag was handed to him because there were so many people around and the bag had a gun in it. There were people in the basement and after the officers detained those people, he went to the

basement. When he went down to the basement, he sat the bag there and left it. He admitted that "it was a mistake what I did, that I left it there."

¶ 11 The defense then rested on the motion.

¶ 12 Sergeant Kevin Johnson testified on behalf of the State that he assisted in the execution of a search warrant on August 29, 2008, at 5428 West Rice. Sergeant Johnson identified a photograph of a pitbull with a litter of puppies, which he stated was taken in the basement. Sergeant Johnson stated that defendant signed a legal notice for animal impoundment.

¶ 13 Sergeant Johnson stated that he supervised the recovery of items from the house. He entered "seconds or minutes" after the entry team went into the residence.

¶ 14 In rebuttal, the defense recalled Officer DiFranco. Officer DiFranco testified that he did not go in the area where the pitbull litter was, but stated that it was the back of the first floor in an enclosed porch.

¶ 15 Following arguments, the trial judge denied defendant's motion to suppress evidence. The judge found that "in light of the conduct of the officers, that they are reasonable in believing that area below the first floor was also part of the first floor apartment, and for those reasons, I don't believe that officers exceeded the scope of the search allowable under law."

¶ 16 The following evidence was presented at defendant's March 2010 jury trial.

¶ 17 Officer Michael Marose testified that on August 29, 2008, he was assigned to gang investigations and was part of the Chicago anti-gun enforcement team. That day, he was assigned to help execute a search warrant at 5428 West Rice. Officer Marose stated that upon arrival, the officers went to the door, knocked loudly and announced police. No one answered

the door so another officer used a ram to force entry of the main door. When he entered the residence, Officer Marose observed defendant standing in the foyer next to a doorway. At that time, a pit bull ran from a doorway and acted in an aggressive manner, causing the officer to put the dog down. Officer Marose identified defendant in court.

¶ 18 After entry was made into the residence, a number of civilians were detained. Officer Marose then searched the kitchen. He found a blue duffle bag which contained a blue-steel Colt .32-caliber semi-automatic handgun with eight live rounds. He recovered the bag and gave it to Officer DiFranco, who held onto the bag for safekeeping. A short time later, Officers Marose and DiFranco looked more thoroughly through the blue bag and recovered a smaller red bag with four shotgun shells and a clear plastic baggie containing suspect heroin.

¶ 19 On cross-examination, Officer Marose stated that the entrance to the basement was in the common hallway and separate and apart from the entrance to the first-floor apartment. Officer Marose also admitted that the inventory forms for items recovered from the blue bag indicated that the bag was found on the ledge next to the basement stairs. On redirect, Officer Marose clarified that he found the blue bag in the kitchen and the inventory forms contain a "clerical mistake." He stated that he did not prepare the inventory forms.

¶ 20 Officer Russell White, Junior, testified that he is assigned to the Chicago anti-gun enforcement team. On August 29, 2008, he was assigned to assist in the execution of a search warrant at 5428 West Rice. He was part of the initial entry team. Once he entered the residence, Officer White searched a bedroom. He recovered three proofs of residency for defendant from the top of the dresser. Officer White stated that he recovered prescription sheets from

Walgreen's, dated July 17, 2008, addressed to defendant at 5428 West Rice. He also found a letter from Comcast to defendant at 5428 West Rice, dated August 13, 2008, and a Comcast bill, dated August 6, 2008, addressed to defendant at that address. On cross-examination, Officer White admitted that no guns, drugs or cash was recovered from the bedroom.

¶ 21 Sergeant Mark Richards testified that on August 29, 2008, he was assigned to help execute a search warrant at 5428 West Rice. Sergeant Richards was not part of the entry team and entered the residence approximately two to three minutes after the initial entry. He entered the residence, he was in a foyer and assisting the officers in securing several individuals, including defendant. He identified defendant in court.

¶ 22 Sergeant Richards then went down into the basement. He gained access from an open door through the foyer. When asked by the prosecutor if the basement door was "actually inside that first-floor apartment," the sergeant answered yes. Sergeant Richards described the basement as approximately 10 feet by 10 feet. Sergeant Richards testified that he recovered two firearms from inside the duct work on the ceiling. He stated that he could reach into the duct and the firearms were approximately a foot back inside the duct work. He did not need to stand on anything to reach the firearms, he was able to reach into the duct. He recovered a blue-steel .32-caliber semi-automatic handgun and a stainless steel .32-caliber revolver. Sergeant Richards also found boxes of Dormin and Sleepinal, cutting agents. He described a cutting agent, such as Dormin and Sleepinal, as having the same consistencies of heroin and is used to extend the volume of heroin for resale.

¶ 23 On cross-examination, Sergeant Richards admitted that he did not interview any of the

civilians at the residence. He also did not recall which of the detained individuals he searched. He stated that he did not enter the first-floor apartment through the entry door in the hallway. He walked through the main hallway to the basement. Sergeant Richards stated that he found the guns in three minutes. He noted a purse and flip-flop sandals in a photograph exhibit of the basement. On redirect, Sergeant Richards testified that he focused on the duct work because it was a typical hiding spot for contraband.

¶ 24 Officer DiFranco testified that on August 29, 2008, he was working in the gang intelligence unit and was assigned to execute a search warrant at 5428 West Rice. He was not part of the initial entry team, but instead entered the residence approximately a minute later. When he entered the residence, he observed a deceased dog in the hallway as well as other police officers and civilians. He identified defendant in court.

¶ 25 Officer DiFranco stated that he was informed by another officer that a firearm had been recovered and he then proceeded to the kitchen. The officer handed him a blue bag. Officer DiFranco said that he was the affiant of the search warrant so he was acting in a supervisory role. Officer Marose gave the blue bag to Officer DiFranco. A short time later, Officer DiFranco was able to search the blue bag with Officer Marose while they were in the kitchen. In addition to the firearm, they recovered shotgun shells and a small, rock-like substance suspect heroin. Officer DiFranco identified the blue bag in photographs. He noted that the bag was not photographed in the kitchen, but instead was photographed on the staircase down to the basement. Officer DiFranco testified that the blue bag was not recovered on the staircase.

¶ 26 Officer DiFranco stated that there were other items not recovered in the search because

the police officers only recover items pertinent to the case. He said that contact cards were made for each of the individuals in the residence, but the police only arrested defendant. Officer DiFranco gave defendant his *Miranda* rights.

¶ 27 At that point, the following colloquy occurred.

> "PROSECUTOR: Did he, in fact, give a statement to you?
>
> OFFICER DiFRANCO: No.
>
> PROSECUTOR: He did not give a statement to you?
>
> OFFICER DiFRANCO: No.
>
> DEFENSE COUNSEL: Judge, objection.
>
> THE COURT: That's sustained.
>
> Folks, you cannot consider the fact that the defendant did not make a statement in this case. That's an execution of his constitutional right."

The trial judge then asked the jury if they "will *** follow that along with all the other law I give you in this case," the judge then noted on the record that everyone nodded.

¶ 28 On cross-examination, Officer DiFranco stated that the individuals in the residence were detained for the officers' safety. Officer DiFranco was asked about the proper procedure for recovering evidence, and he admitted that the evidence from the blue bag "was preserved but not the way we should do it." He explained that the firearm and heroin were recovered from the blue bag, but they should have contacted an evidence officer when it was found in the kitchen. Officer DiFranco testified that the blue bag "got moved to the basement staircase because [he]

made an error." Officer DiFranco stated that other than moving the blue bag from the kitchen to the basement, the evidence was properly preserved. He said that he did not fill out an inventory form in this case, but his name was put on the inventory because he was the case officer.

¶ 29 Officer DiFranco also stated that the basement has a separate entrance from the first-floor apartment. He admitted that older mail addressed to someone other than defendant was found in the apartment, but was not recovered for evidence. He further testified that his name was listed on contact cards for the detained individuals because he was the case officer, but he did not complete the cards personally. Officer DiFranco admitted that he never saw defendant in the basement or the kitchen.

¶ 30 Officer Jacinta O'Driscoll testified that she was assigned to the Chicago anti-gun enforcement team. On August 29, 2008, she was assigned to assist on a search warrant at 5428 West Rice. Officer O'Driscoll was assigned to the rear of the house for security purposes and did not enter the residence until everyone was secured, which was several minutes later. She was asked to pat down two females. She took one of the women into the sitting room of the apartment and observed a green bag on the floor near a weight machine. She stated that the bag was open and she could see a plastic bag with a green, leafy substance, suspect cannabis. She also found several smaller Ziplock bags that are used for packing narcotics and a scale in the green bag. Officer O'Driscoll also testified that she transported other items recovered from the residence to the police station.

¶ 31 Lenetta Watson testified that she was employed as a forensic scientist in the area of drug chemistry with Illinois State Police at the forensic science center. Watson was qualified as an

expert in the area of drug chemistry. Watson stated that she weighed and tested the substance suspected to be cannabis and the result was positive for the presence of cannabis. She testified that her expert opinion with reasonable scientific certainty was that the recovered item was 101.4 grams of plant material containing cannabis. Watson also tested the recovered item that was suspected heroin. She weighed the substance and then performed two tests. The tests indicated the presence of heroin. Her expert opinion was that the recovered item was 24.3 grams of a powder containing heroin.

¶ 32 Following Watson's testimony, the State presented a stipulation that defendant had two felony convictions which were qualifying felony offenses for the armed habitual criminal statute. The State then rested its case. Defendant moved for a directed finding, which the trial court denied.

¶ 33 Shirlita Matthews testified for the defense. She stated that she lived in the first-floor apartment located at 5428 West Rice from late 2007 until June 2008. She said that she was "going with someone that was staying there." When she moved in, defendant lived there with Javon Churchill. While she lived there, defendant slept in the bedroom and she and Churchill slept in the dining room, which was converted to a bedroom. She testified that when she lived there she did not see any drugs or guns. She moved out because she and Churchill ended their relationship. At the time she moved out, defendant and Churchill were living in the apartment.

¶ 34 The defense rested following Matthews' testimony.

¶ 35 Following deliberations, the jury found defendant guilty of the offense of armed habitual criminal, possession of a controlled substance and possession of cannabis. At the subsequent

sentencing hearing, the trial court sentenced defendant to a term of 20 years for the armed habitual criminal conviction and six year terms for each of the drug convictions. The sentences were to be served concurrently.

¶ 36 This appeal followed.

¶ 37 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of the offense of armed habitual criminal and the possession of heroin because the State did not present evidence to prove that he constructively possessed heroin or a gun. Defendant further contends that the evidence presented did not establish that he exercised control over the basement and that the testimony regarding the recovery of the blue bag from the kitchen was unbelievable. The State maintains that the evidence clearly proved defendant guilty beyond a reasonable doubt for all of his convictions.

¶ 38 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 39 The reviewing court must carefully examine the record evidence while bearing in mind

that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 280. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Cunningham*, 212 Ill. 2d at 280. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 40 The majority of defendant's argument concerns the lack of evidence presented by the State to establish that he had constructive possession over the basement. Though two guns were recovered from the basement, the evidence presented to prove defendant guilty of the offense of armed habitual criminal and possession of heroin were recovered from the first-floor apartment, not the basement. One handgun and the heroin were discovered inside a blue bag that Officers Marose and DiFranco testified was recovered in the kitchen of the first-floor apartment. Defendant argues that this testimony was "unbelievable" because the officers were impeached and there were errors made in the recovery. While the errors made by the officers can affect the credibility, the testimony from Officers Marose and DiFranco was not unbelievable.

¶ 41 Officer Marose testified that he found the blue bag in the kitchen. He observed a gun in the bag and handed it to Officer DiFranco to hold for safekeeping. Officer DiFranco was the affiant of the search warrant and acted in a supervisory role during the search of 5428 West Rice.

It was reasonable for Officer Marose to hand the bag to a supervising officer while the numerous civilians in the apartment were detained. Later, both officers searched the bag and found shotgun shells and a plastic bag with heroin. During the search, Officer DiFranco placed the blue bag on a ledge for the basement stairs. The blue bag was photographed for evidence while it was on the ledge, not where it was found in the kitchen. Also, the inventory form stated that the blue bag was found on the ledge. However, both Officer Marose and Officer DiFranco testified that this was an error. Officer Marose called it a "clerical mistake." Officer DiFranco specifically stated that he made an error and the evidence "was preserved but not the way we should do it." He said that he should have contacted an evidence officer when the blue bag was found in the kitchen. He admitted that he did not follow procedure, but testified that other than moving the bag, the evidence was preserved.

¶ 42 Based on this evidence, a rational trier of fact could have found defendant guilty of the offense of armed habitual criminal and possession of heroin. The evidence necessary to prove these charges was recovered from the kitchen in the first-floor apartment. The blue bag containing a loaded firearm, shotgun shells and a bag of heroin was recovered by Officer Marose in the kitchen. While the proper procedure was not adhered to by the officers, both officers stated that the blue bag was recovered in the kitchen and the contents were preserved. The jury heard the officers' testimony, including the errors in the recovery of the blue bag. It was the jury's responsibility to weigh the evidence and assess the credibility of the witnesses. The officers' testimony was not so improbable or unsatisfactory to create a reasonable doubt of defendant's guilt. We need not determine whether defendant had constructive possession of the

basement because the evidence to support his convictions was recovered from the first-floor apartment. The State established that the loaded firearm and heroin were recovered from an apartment in which defendant resided. Accordingly, we find that defendant was proved guilty beyond a reasonable doubt of the offense of armed habitual criminal and possession of heroin.

¶ 43 Next, defendant contends that the trial court erred in denying his motion to suppress evidence. Specifically, defendant argues that (1) he had a reasonable expectation of privacy in the basement; (2) the police exceeded the scope of the search warrant and no exception applied; and (3) the failure to suppress evidence recovered from the basement prohibited the jury from determining whether defendant had exclusive control over the basement and whether the blue bag was found in the first-floor apartment or the basement. The State maintains that the trial court did not err in denying defendant's motion to suppress evidence and the jury was not prevented from considering defendant's control over the basement and the location of the blue bag as these issues were part of the trial.

¶ 44 In reviewing a trial court's ruling on a motion to suppress, this court applies a *de novo* standard of review. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); see also *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, findings of historical fact will be reviewed only for clear error and the reviewing court must give due weight to inferences drawn from those facts by the fact finder. *Ornelas*, 517 U.S. at 699. Accordingly, we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress. *Sorenson*, 196 Ill. 2d at 431.

¶ 45 Initially, the State points out that defendant never argued that he had a reasonable expectation of privacy in the trial court and this new basis cannot be raised on appeal. Rather, defendant's motion to suppress and his arguments at the hearing centered on whether the police officers exceeded the scope of the search warrant when they searched the basement. Defendant attempts to avoid forfeiture by arguing that he presented evidence at the hearing to establish his reasonable expectation of privacy in the basement. Despite defendant's use of the evidence presented, defendant never asserted before the trial court that he had a reasonable expectation of privacy.

¶ 46 "[T]he relevant inquiry is whether the person claiming the protections of the fourth amendment had a legitimate expectation of privacy in the place searched." *People v. Johnson*, 237 Ill. 2d 81, 90 (2010). "Factors relevant in determining whether a legitimate expectation of privacy exists include the individual's ownership or possessory interest in the property; prior use of the property; ability to control or exclude others' use of the property; and subjective expectation of privacy." *Johnson*, 237 Ill. 2d at 90. It is defendant's burden as the person challenging the search to establish a legitimate expectation of privacy existed for the basement. *Johnson*, 237 Ill. 2d at 90. In the trial court, defendant never argued that any of these factors established that he had a legitimate expectation of privacy in the basement. Rather, his sole basis for the motion to suppress was that the police officers exceeded the scope of the search warrant.

¶ 47 "Generally, a reviewing court will not consider a claim of an illegal search and seizure unless it was first presented to the trial court." *People v. Bui*, 381 Ill. App. 3d 397, 405 (2008). To preserve an issue for review, defendant must both object at trial and in a written posttrial

motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Since defendant never asserted that he had a reasonable expectation of privacy before the trial court, he has forfeited this claim on appeal. See *Bui*, 381 Ill. App. 3d at 405; *People v. McCarty*, 223 Ill. 2d 109-110 (2006).

¶ 48 We note that the evidence recovered to support defendant's convictions was not found in the basement. The heroin, cannabis and one firearm were recovered by the police in the first-floor apartment. Even if the trial court erred in denying defendant's motion to suppress, the evidence forming the basis of defendant's convictions of armed habitual criminal, possession of heroin and possession of cannabis would not have been suppressed.

¶ 49 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause." *Johnson*, 237 Ill. 2d at 89 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). "The fourth amendment requires that only two matters be particularly described in a warrant: ' "the place to be searched" ' and ' "the persons or things to be seized." ' " *Bui*, 381 Ill. App. 3d at 410 (quoting *United Stated v. Grubbs*, 547 U.S. 90, 97 (2006)). "A search warrant is sufficiently descriptive if it enables a police officer executing the warrant, with reasonable effort, to identify the persons or places to be searched." *Bui*, 381 Ill. App. 3d at 410.

¶ 50 Defendant contends that the police exceeded their search warrant by searching the

basement which was not identified in the search warrant. The search warrant stated that the premises to be searched was "5428 W. Rice, 1st floor, a red and tan home located in the City of Chicago, IL, County of Cook." The trial court made several factual findings based on the particular circumstances of this case. The court noted only two doorbells, one for the first-floor unit and one for the second floor, and one mailbox. The trial court also pointed out that when the police forcibly entered the residence, a pitbull ran at them from the basement. Further, the basement door was unlocked. The trial judge found that the basement was above-grade and in his view, "the search warrant might have even allowed for the search of the basement because it is part of the first floor. It is not a basement in the sense that it was more than 50 percent below grade, which is how the City of Chicago determines whether or not the square footage within that dwelling be relevant for purposes of zoning." The judge then concluded that the basement "was an area utilized by the first floor residence."

¶ 51 The trial judge continued

> "And we've got people down there, too, and it's very important to note that these officers just didn't go in there willie nillie and search the entire building, which would have been great evidence of the fact that they were exceeding the scope. ***
>
> All these things point to the reasonableness of the officers' view that the area below the first floor was also part of the first floor apartment, dogs inside and out, narcotics inside and out, people upstairs and downstairs, no search of the second floor, only

> two bells at the exterior of the residence indicating that certainly obviously the people in the second floor didn't have domain over that basement area, and that – if they did have domain over the basement area, the dog both inside and out would lead one to the conclusion that – it is strong evidence that was an area used by the first floor apartment, and the fact that it is barely a basement anyway, and then the fact that it is a totally unkept, unmaintained area of the apartment, I think the search was within the scope of the authority granted to them by the search warrant by her honor, Judge Champis. The officers upon entering could have had no knowledge of the fact that this was some separate segregated unit that exceeded their scope of authority, and they obviously were aware there would be portions of the apartment or house that were because they didn't search the second floor."

¶ 52 Since we accord great deference to the trial court's factual findings, we accept the trial court's finding that the basement was an extension of the first-floor apartment. Though the basement was not accessible from within the first-floor apartment, the police did not have to force entry to search the basement because it was unlocked and guarded by a pitbull which ran toward the police. We point out that a litter of pitbull puppies was in an enclosed porch off the first-floor apartment. People were found in both the first-floor apartment and the basement. The heroin was found in defendant's apartment, but cutting agents often used with heroin were

recovered in the basement. Based on the record before us, we affirm the trial court's denial of defendant's motion to suppress evidence and find that the police did not exceed the scope of the search warrant when they searched the basement of the residence.

¶ 53 Defendant next asserts that he was denied due process and the right to a fair trial because of a pattern of prosecutorial misconduct. Specifically, defendant argues that (1) the State elicited and repeated incorrect testimony regarding the basement entrance and the moving of the blue bag; (2) the State repeatedly elicited improper opinion testimony suggesting that the police believed that defendant possessed the contraband; (3) the State improperly vouched for the credibility of the police witnesses; (4) the State violated defendant's due process rights and privilege against self-incrimination by eliciting testimony regarding defendant's postarrest silence; (5) the State repeatedly elicited irrelevant and prejudicial testimony suggesting that defendant was a gang member; and (6) the cumulative effect of these errors denied defendant a fair trial.

¶ 54 The State first responds that all of the claims of prosecutorial misconduct, except for the claim relating to defendant's postarrest silence, are forfeited because defendant did not object at trial or raise them in a posttrial motion. As we previously noted, to preserve an issue for review, defendant must both object at trial and in a written posttrial motion (*Enoch*, 122 Ill. 2d at 186) and the failure to do so operates as a forfeiture as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). "To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007).

¶ 55 However, defendant asks this court to review this issue as plain error. Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 56 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that both prongs of the plain error rule apply in this case because the evidence was very closely balanced and he was denied a substantial right as the prosecutors' errors deprived him of a fair trial. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43. We will review the claims to determine if there was any error before considering it under plain error.

¶ 57 "Defendant faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). Generally, a prosecutor is given wide latitude in closing arguments, although their comments must be based on the facts in evidence or upon reasonable inferences drawn

therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, "comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 58 Defendant first contends that the State elicited incorrect testimony about the location of the basement entrance and repeated this inaccuracy in closing arguments. During Sergeant Richards' testimony, the prosecutor asked if the entrance to the basement was "actually inside that first-floor apartment," the sergeant answered yes. In a follow-up question, the prosecutor asked if it was correct that "how one would gain access to the basement apartment is through the first-floor apartment," which the sergeant responded yes. However, Sergeant Richards further testified that he never entered the first-floor apartment, he only entered the basement. Later, in closing arguments, the prosecutor stated

> "The two guns that were recovered by Sergeant Richards, these two guns are in a vent in a basement that is connected to the first floor. Sergeant Richards accesses this basement by going through an open door that is in the first-floor apartment where the defendant is. *** That basement is part of that first-floor apartment where the defendant lives ***."

¶ 59 While Sergeant Richards did answer the prosecutor's questions that the basement entrance was inside the first-floor apartment, the photographic evidence and additional witnesses described the layout of the residence such that the basement entrance was accessible from the common hallway outside the first-floor apartment. Further, the evidence at trial did not establish that the duct work in the basement was connected to the first floor. Nevertheless, any error in the prosecutor's questions or remarks during closing arguments is insufficient to constitute plain error. The prosecutor's comments were not so egregious as to have caused substantial prejudice against defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments. The heroin, cannabis and one firearm were recovered from the first-floor apartment. We cannot disturb the jury's verdict unless the complained-of comments are so prejudicial that the result of the trial would have been different absent these comments. The absence of these comments would not have changed the verdict. Accordingly, defendant has failed to show how these comments constituted plain error.

¶ 60 Defendant also asserts that the prosecutor improperly mischaracterized the testimony regarding the blue bag. During closing arguments, the prosecutor stated

> "You heard from Officer DiFranco who stated that the bag that was recovered from the kitchen had been moved to the basement stairs so it could be photographed. There's nothing improper about that. The bag was simply moved from the kitchen to an area where it could be photographed. Completely proper. There's nothing improper with regards to that."

¶ 61 The State concedes that this comment was "a minor misstatement" as Officer DiFranco did not testify that the blue bag was moved for it to be photographed. Rather, Officer DiFranco testified that he erred in moving the blue bag from the location it was recovered, the kitchen, and it was on the ledge to the basement stairs when the evidence photograph was taken. While this comment was inaccurate and error by the prosecutor, we find that this comment did not create such prejudice as to influence the jury's verdict under either prong of plain error. This claim fails.

¶ 62 Defendant next argues that the State erred by eliciting improper opinion testimony suggesting that the police believed defendant, rather than anyone else, possessed the contraband. Specifically, defendant points to questions posed to Officers Marose and DiFranco by the prosecutor asking how many people they arrested that day and who was arrested. Both officers answered that one person was arrested and that person was defendant. "As a general rule, a witness' opinion is not admissible in evidence because testimony must be confined to statements of fact of which the witness has personal knowledge." *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001). In *Crump*, the prosecutor asked a police officer if he had "reason to believe that the defendant in this case committed this offense," and the officer responded in the affirmative. *Crump*, 319 Ill. App. 3d at 540. That question specifically asked the officer's opinion as to the defendant's guilt or innocence. In contrast, the prosecutor in the present case asked factual questions of the officers: how many people were arrested and who was arrested. These are facts, as defendant was the only individual arrested that day. Neither police officer offered any opinion as to defendant's guilt or innocence on the charges at trial. Accordingly, there was no error by the

prosecutor in asking fact-based questions of the officers. Since there was no error, defendant's plain error argument is without merit.

¶ 63 Defendant next asserts that the State improperly vouched for the credibility of the police witnesses during closing arguments by repeatedly asserting that the police witnesses testified credibly. The State maintains that the prosecutors never vouched for anyone's credibility, but properly argued that the officers' testimony was credible and consistent.

¶ 64 "It 'is well established that a prosecutor may not argue that a witness is more credible because of his status as a police officer.' " *People v. Gorosteata,* 374 Ill. App. 3d 203, 219 (2007) (quoting *People v. Fields,* 258 Ill. App. 3d 912, 921 (1994)). However, the credibility of a witness is a proper subject for closing arguments if it is based on the evidence or inferences therefrom. *Gorosteata,* 374 Ill. App. 3d at 223.

¶ 65 Defendant points to five instances in closing arguments in which the prosecutor argued that the State's witnesses had testified credibly: "Today, you heard credible and consistent testimony from a variety of officers"; "You heard from credible officers in this case starting with Officer Marose"; "All of our officers testified clearly and *** credibly in this case"; "Again, you heard credibly from the forensic scientist who stated there was approximately 24 grams of heroin in this case"; and "You've heard all the evidence in this case, the credible testimony from the officers."

¶ 66 Defendant asserts that these statements "impermissibly suggested that State witnesses were especially credible because of their professions." We disagree. The prosecutor did not argue that the witness testimony was credible because of a particular profession. Rather, the

prosecutor commented on the evidence and remarked that the officers and forensic scientist had given credible testimony. There is nothing in these comments to suggest that the jury was encouraged to believe any of the State's witnesses solely because of their profession as a police officer or forensic scientist. We find no error in these comments.

¶ 67 Defendant also contends that the prosecutor repeatedly elicited irrelevant and prejudicial testimony suggesting that defendant was a gang member. The State maintains that the prosecutor never elicited gang evidence. Defendant complains that when the prosecutor asked the testifying police officers where they were assigned in August 2008, several responded that they were assigned to a gang investigations team or organized crime division. Defendant argues that these responses prejudiced defendant. We are not persuaded.

¶ 68 Gang-related evidence "may be admitted so long as it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect." *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). However, in this case, the State never introduced any evidence that defendant was involved with a gang. The fact that the officers who assisted in the execution of a search warrant were assigned to gang investigations would not warrant a conclusion that the defendant was involved with gangs, except by remote inference and speculation. No other mention was made of gangs during the trial. We therefore would hesitate to consider this oblique and tangential reference to gangs to be erroneous such as to invoke plain error analysis. However, even if erroneous, it would be harmless and nonprejudicial, considering the substantial body of evidence introduced by the State to establish defendant's guilt.

¶ 69 We now turn to the claim of prosecutorial misconduct that was preserved for appeal.

Defendant argues that his due process rights and privilege against self-incrimination were violated because the State elicited testimony regarding his postarrest silence. The State maintains that the prosecutor was not attempting to elicit testimony regarding defendant's postarrest silence.

¶ 70 During the State's direct examination of Officer DiFranco, the prosecutor asked the officer about defendant's arrest. The officer stated that he gave defendant his *Miranda* rights. The following colloquy then occurred.

> "PROSECUTOR: Did he, in fact, give a statement to you?
>
> OFFICER DiFRANCO: No.
>
> PROSECUTOR: He did not give a statement to you?
>
> OFFICER DiFRANCO: No.
>
> DEFENSE COUNSEL: Judge, objection.
>
> THE COURT: That's sustained.
>
> Folks, you cannot consider the fact that the defendant did not make a statement in this case. That's an execution of his constitutional right."

The trial judge then asked the jury if they "will *** follow that along with all the other law I give you in this case," the judge then noted on the record that everyone nodded.

¶ 71 Later in the defense's cross-examination of Officer DiFranco, a sidebar was held. Initially, the sidebar was called because the defendant's attorney wanted to question the officer about one of the detained individuals who was on electronic monitoring. During the sidebar,

defense counsel asked for a mistrial based on the testimony that defendant was given his *Miranda* rights and made no statement. The following discussion took place.

> "THE COURT: You're correct, it was an appropriate objection. I sustained the objection, I took curative efforts, made inquiry of individual jurors if they could consider the fact that the defendant chose to remain silent. It pertains to his guilt or innocence. The jurors stated they could follow the law along with all other law I give in the case. The objection is fully appropriate.
>
> [Prosecutor], that was inadmissible. The question shouldn't have been made.
>
> PROSECUTOR: I know that.
>
> ***
>
> PROSECUTOR: I did have a good-faith basis for asking that question.
>
> THE COURT: What was it?
>
> PROSECUTOR: That there was an oral statement that he said that he lived there.
>
> THE COURT: What, that copper didn't give it to you?
>
> PROSECUTOR: Yeah.
>
> THE COURT: Has it been tendered?
>
> PROSECUTOR: Yes.

THE COURT: I'm still sustaining the objection.

PROSECUTOR: But I did have a good-faith basis.

THE COURT: You did have a good-faith basis. Apologize."

¶ 72 Defendant contends that the State impermissibly commented on his postarrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). "There the Supreme Court held that since a defendant's silence after being informed of his right to remain silent is 'insolubly ambiguous', and in light of the implied assurance given in the *Miranda* warnings that silence will carry no penalty, 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.' " *People v. Bock*, 242 Ill. App. 3d 1056, 1072 (1993), quoting *Doyle*, 426 U.S. at 617-18. The Illinois Supreme Court has held that it is error to comment on a defendant's postarrest silence, even if he did not remain silent yet did not incriminate himself. See *People v. Herrett*, 137 Ill. 2d 195, 214 (1990). However, the *Herrett* court went on to say that "a comment upon a defendant's post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive the defendant of a fair trial." *Herrett*, 137 Ill. 2d at 215.

¶ 73 Here, the prosecutor indicated that she had a good faith basis in asking Officer DiFranco about defendant's postarrest silence. She informed the trial court that defendant had told the officer that he lived at the residence, which had been tendered to the defense. The defense raised no further objection. The supreme court has held that *Doyle* violations are subject to a harmless error analysis. *People v. Hart*, 214 Ill. 2d 490, 517 (2005).

¶ 74 The supreme court "has recognized at least five factors for a court to consider in

determining whether a *Doyle* violation is harmless beyond a reasonable doubt: (1) the party who elicited the testimony about defendant's silence; (2) the intensity and frequency of the references to the defendant's silence; (3) the use that the prosecution made of defendant's silence; (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction; and (5) the quantum of other evidence proving the defendant's guilt." *Hart*, 214 Ill. 2d at 517-18 (citing *People v. Dameron*, 196 Ill. 2d 156, 164 (2001)).

¶ 75 In the present cases, the five factors favor a finding that any alleged *Doyle* violation was harmless error. While the State elicited the testimony about defendant's silence, the intensity and frequency was limited to two consecutive questions and no further references were made by the prosecution during trial. Moreover, as the sidebar indicated, the prosecutor was not seeking to elicit testimony about defendant's silence, but sought to have Officer DiFranco testify that defendant had not remained silent by admitting that defendant lived at the residence. Further, the trial court sustained defendant's objection and immediately gave a curative instruction. Finally, there was substantial evidence presented at trial to prove defendant's guilt. Based on our consideration of these factors, we conclude that defendant's alleged *Doyle* violation amounted to harmless error.

¶ 76 Since we have found that defendant's claims of prosecutorial misconduct were either not error, harmless error or forfeited, we decline to hold that the cumulative effect of these claims deprived defendant of a fair trial.

¶ 77 Next, defendant contends that he is entitled to a new trial because the trial court violated Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) by failing to ask the

prospective jurors whether they understood the reasonable doubt standard and to allow for individual responses. Defendant maintains that this issue has been preserved because he objected to the trial court's Rule 431(b) questioning during *voir dire* and raised it in his motion for a new trial.

¶ 78 Rule 431(b) provides:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 79 However, as the State correctly points out, the objection raised by defendant did not address a violation of Rule 431(b), in particular a failure to question the venire about reasonable

doubt, but instead defendant's objection concerned a request to examine the prospective jurors individually about the Rule 431(b) principles. Further, in his motion for a new trial, defendant asserted that "[t]he Court did not appropriately and fully ask each of the jurors their ability to follow the *Zehr* principles during voir dire." This claim corresponds with the objection made in the trial court. At no time did defendant raise a specific objection before the trial court that the questioning related to the reasonable doubt principle was inadequate.

¶ 80 As pointed out above, to preserve an issue for review, defendant must both object at trial and in a written posttrial motion (*Enoch*, 122 Ill. 2d at 186) and the failure to do so operates as a forfeiture as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). "A specific objection at trial forfeits all grounds not specified." *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). "An issue raised by a litigant on appeal does not have to be identical to the objection raised at trial, and we will not find that a claim has been forfeited when it is clear that the trial court had the opportunity to review the same essential claim." *Lovejoy*, 235 Ill. 2d at 148 (citing *People v. Mohr*, 228 Ill. 2d 53, 65 (2008)). Defendant contends that his objection was similar enough to that raised on appeal that the trial court could have corrected the error. Specifically, defendant argues that if the trial court had questioned the prospective jurors individually, then the reasonable doubt principle would "likely" have been adequately addressed. We are not persuaded.

¶ 81 Defendant did not object to the trial court's questioning as to any specific principle and a request to question the venire individually would not have given the trial court the opportunity to correct the current objection raised by defendant. The supreme court held in *People v. Thompson* that a trial court’s failure to comply with Rule 431(b) is subject to the rule of forfeiture and must

be objected to during jury selection and raised in a posttrial motion and that such an error does not constitute plain error under the second prong, absent a showing that a juror was biased. *People v. Thompson*, 238 Ill. 2d 598, 612-15 (2010). Defendant did not raise an objection as to the trial court's questions regarding reasonable doubt and, therefore, defendant has forfeited his challenge as to the trial court's Rule 431(b) questioning of the venire.

¶ 82 In his reply brief, defendant asks this court to consider this issue under the first prong of the plain error review because the evidence was closely balanced. Nevertheless, based on our discussion of the facts of this case and the entire record before us, we cannot say that the evidence was closely balanced. Therefore, defendant has forfeited his claim of error under Supreme Court Rule 431(b).

¶ 83 Defendant next asserts that his conviction for violating the armed habitual criminal statute violates the *ex post facto* clause of the Illinois and United States Constitutions because the offense increased the punishment for conduct that occurred before the effective date of the legislation creating the offense. The State responds that defendant's claim fails because "Illinois courts have consistently and correctly affirmed the constitutionality of the [armed habitual criminal statute] and denied defendants' *ex post facto* challenges." See *People v. Bailey*, 396 Ill. App. 3d 459 (2009); *People v. Leonard*, 391 Ill. App. 3d 926 (2009); *People v. Davis*, 405 Ill. App. 3d 585 (2010); *People v. Adams*, 404 Ill. App. 3d 405 (2010); *People v. Thomas*, 407 Ill. App. 3d 136 (2011); *People v. Ross*, 407 Ill. App. 3d 931 (2011); *People v. Coleman*, 409 Ill. App. 3d 869 (2011)

¶ 84 " '[A]ll statutes are presumed to be constitutional, and the burden of rebutting that

presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation.' " *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005) (quoting *People v. Greco*, 204 Ill. 2d 400, 406 (2003), citing *People v. Sypien*, 198 Ill. 2d 334, 338 (2001)). Further, a court, whenever reasonably possible, must construe a statute to uphold its constitutionality. *Dinelli*, 217 Ill. 2d at 397. We review the constitutionality of a statute *de novo*. *Dinelli*, 217 Ill. 2d at 397.

¶ 85 "Both the Illinois and United States Constitutions prohibit *ex post facto* laws. Ill. Const.1970, art. I, §16; U.S. Const., art. I, §9, cl. 3; §10, cl. 1. An *ex post facto* law is one that (1) makes criminal and punishable an act innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the law; or (4) alters the rules of evidence to require less or different evidence than required when the crime was committed." *Leonard*, 391 Ill. App. 3d at 931. The Third District in *Leonard* noted that "[w]hen challenged as violating *ex post facto* prohibitions, recidivist statutes in this state have consistently been found constitutional on the basis that they punish a defendant for a new and separate crime, not for the earlier offense committed before the statute was enacted." *Leonard*, 391 Ill. App. 3d at 931. The *Leonard* court observed that under these recidivist statutes, the prior offenses are only an element of the new crime *Leonard*, 391 Ill. App. 3d at 931.

¶ 86 Here, defendant argues that since one of his prior convictions occurred prior to the effective date of the enactment of the armed habitual criminal statute, August 2, 2005, he is being punished for an act that predated the statute's enactment. Defendant asserts that the armed

habitual criminal statute, as applied to him, violates the *ex post facto* clause because it changes the legal consequences of the acts that resulted in his first qualifying conviction. We disagree.

¶ 87 The *Leonard* court found that the defendant had ample warning before committing the new offense and he was not being punished for his prior offenses, but instead was being punished for the new crime of possessing a firearm after having been convicted of three of the statute's enumerated offenses. *Leonard*, 391 Ill. App. 3d at 931-32. This same conclusion has been reached in several other appellate decisions. See *Bailey*, 396 Ill. App. 3d at 464 ("We find no reason to depart from the holding of our sister court on this issue. It is clear to us that, contrary to defendant's contention here, the armed habitual criminal statute does not punish him for the drug offenses he committed in 1997 before the statute's effective date but, rather, properly punishes him for, as he himself points out, the new and separate crime he committed in 2006 of possessing firearms while having already been convicted of two prior enumerated felonies, an offense of which he had fair and ample warning."); *Adams*, 404 Ill. App. 3d at 413; *Davis*, 405 Ill. App. 3d at 596; *Thomas*, 407 Ill. App. 3d at 141; *Ross*, 407 Ill. App. 3d at 944; *Coleman*, 409 Ill. App. 3d at 880.

¶ 88 Defendant contends that these decisions conflict with *People v. Dunigan*, 165 Ill. 2d 235 (1995), and we should follow the reasoning in *Dunigan*. The supreme court in *Dunigan* held that the Habitual Criminal Act (Ill. Rev. Stat. 1989, ch. 38, par. 33B-1 *et seq.* (now 720 ILCS 5/33B-1 *et seq.* (West 2008))) did not violate *ex post facto* principles because it only enhanced the sentence for a new crime. *Dunigan*, 165 Ill. 2d at 240-44. However, the court in *Leonard* addressed this contention, finding that the *Dunigan* court did not hold that "habitual criminal

legislation cannot include prior convictions as elements of an offense; they merely indicated that the statute in question *** was a sentencing enhancement, not a substantive offense." *Leonard*, 391 Ill. App. 3d at 932; see also *Dunigan*, 165 Ill. 2d at 242. In contrast, under the armed habitual criminal statute, defendant is being punished for his new offense, not his prior convictions. *Leonard*, 391 Ill. App. 3d at 932.

¶ 89 We see no reason to depart from the holdings of *Leonard*, *Bailey*, *Adams*, *Davis*, *Thomas*, *Ross*, and *Coleman*. Accordingly, defendant's *ex post facto* challenge fails.

¶ 90 Next, defendant asks this court to remand his case to the trial court for resentencing on his conviction for possession of cannabis. The trial court sentenced defendant to a term of six years' imprisonment for this conviction. "It is a well-settled principle of law that a void order may be attacked at any time or in any court, either directly or collaterally." *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). A sentencing judge cannot impose a penalty not otherwise allowed by the sentencing statute in question. *People v. Harris*, 203 Ill. 2d 111, 116 (2003).

¶ 91 Here, defendant was convicted of possessing more than 30 grams but not more than 500 grams of a substance containing cannabis, a Class 4 felony. See 720 ILCS 550/4(d) (West 2008). The sentencing range for a Class 4 felony is not less than one year and not more than three years. 730 ILCS 5/5-4.5-45(a) (West 2010). Accordingly, a sentence of six years exceeds the sentence allowed under the statute. The State concedes that the case should be remanded for resentencing on defendant's conviction for possession of cannabis, but notes that a lesser sentence does not alter the time defendant will serve as this sentence is served concurrently with his 20-year term for his conviction for the offense of armed habitual criminal. Regardless of the time defendant

will serve in prison, defendant's sentence of six years was not allowed under section 5-4.5-45(a) and we remand this case to trial court for resentencing on defendant's conviction for possession of cannabis.

¶ 92 Finally, defendant asks this court to order a correction to the mittimus because the mittimus incorrectly names the offenses for which defendant was convicted. The mittimus lists defendant's conviction as armed habitual criminal, a Class X felony (720 ILCS 5/24-1.7(a) (West 2008)), manufacture or delivery of 15 grams or more but less than 100 grams of heroin, a Class X felony (720 ILCS 570/401(a)(1)(A) (West 2008)), and manufacture or delivery of 30 grams or more but less than 500 grams of cannabis, a Class 3 felony (720 ILCS 550/5(d) (West 2008)). The statute and offense is correct for armed habitual criminal. However, both the statutes, offenses, and classes for the drug convictions are incorrect. The State concedes these errors and ask this court to correct the mittimus to reflect the correct offenses for which defendant was convicted.

¶ 93 Under Supreme Court Rule 615(b)(1), this court has the authority to order a correction of the mittimus. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999). Accordingly, we order the mittimus to be corrected and reflect the offenses for which defendant was convicted: armed habitual criminal a Class X felony (720 ILCS 5/24-1.7(a) (West 2008)); possession of a substance containing heroin, more than 15 grams but less than 100 grams, a Class 1 felony (720 ILCS 570/402(a)(1)(A) (West 2008)); and possession of cannabis, more than 30 grams but less than 500 grams, a Class 4 felony (720 ILCS 550/4(d) (West 2008)).

¶ 94 Based on the foregoing reasons, we affirm defendant's conviction, remand for sentencing

on defendant's conviction for possession of cannabis, and the mittimus is corrected as ordered.

¶ 95 Affirmed in part; remanded in part; mittimus corrected.