2014 IL App (1st) 112466-U

FIFTH Division
June 13, 2014

No. 1-11-2466

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LORENZO LOCKETT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois. No. 10 CR 5791 Honorable Charles P. Burns Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in admitting the two most recent of defendant's prior convictions for impeachment purposes, or in excluding evidence that defendant was not recorded committing additional offenses after a drug sale, and hearsay statements from a police officer. Where defendant's theory was that he was going to his parole office at the time of the offense, it was not error to instruct the jury to consider a prior offense for the issue of his presence. Defendant was not denied a fair trial by the State's remarks that he was in the business of selling drugs, where he was observed selling drugs to multiple individuals. However, it was error to assess a preliminary hearing fee where no hearing took place, and to assess a DNA analysis fee where defendant's profile was already in the system.

¶ 2 Defendant Lorenzo Lockett appeals from a judgment of the circuit court of Cook County finding him guilty of delivery of a controlled substance and sentencing him to eight and a half years' imprisonment. On appeal, he contends that his conviction should be reversed and this cause remanded for a new trial because the trial court erred in allowing the State to impeach him with evidence of prior convictions; in excluding evidence that defendant was not recorded in another investigation and that he previously interacted with one of the officers; and in instructing the jury that his prior convictions were relevant to the issue of his "presence." He further contends that the State improperly commented on facts that were not in evidence, denying him a fair trial. Alternatively, defendant contends that he was denied a fair trial by the cumulative effect of the above alleged errors.

¶ 3 BACKGROUND

¶ 4 Defendant was indicted for the delivery of controlled substances in connection with an incident which occurred in the afternoon of November 13, 2009, on the west side of Chicago. At the beginning of defendant's jury trial, the court addressed his motion *in limine* to bar the State from introducing his prior convictions to impeach his credibility. At that time, defense counsel explained to the court that defendant had two prior convictions for delivery of a controlled substance, one in 2003 and one in 2007; as well as a 2006 conviction for possession of a controlled substance with intent to deliver; and two 2003 convictions for simple possession. Defense counsel argued that the introduction of prior convictions for the same crime of which he was currently charged would carry significant prejudice. The court stated that it must balance certain factors in determining whether the probative value of the testimony outweighs its prejudicial effect, and noted that the jury would get instructions to consider the convictions for the sole purpose of judging the credibility of defendant and not as evidence of guilt. The court then ruled that if defendant chooses to testify, it would allow the State to introduce only the two most recent convictions for impeachment purposes.

¶ 5 The court next addressed the State's motion *in limine* to exclude recordings taken pursuant to an "overhear" investigation, in which officers recorded conversations of individuals selling narcotics near the intersection of Lake and Pulaski, but did not contain evidence of defendant selling any substances. According to the State, the delivery which was the subject of defendant's indictment was also the basis to obtain confidential overhears for future investigations in the area of Lake and Pulaski streets. The State argued that it had no information that defendant was recorded during that investigation, and which rendered the recordings irrelevant to the present case. Defense counsel responded that defendant was not arrested for months after his alleged offense was observed, and that she intended to introduce the overhears to show that, despite lengthy ongoing investigation, the State did not gather any evidence of his involvement in the sale of drugs. The court granted the State's motion to exclude the recordings, finding that the recordings were irrelevant because defendant was never recorded, but stated that defendant could make the argument that nothing happened in defendant's case for several months.

¶ 6 In its opening statement, the State described defendant as a "businessman," whose business was selling drugs in the neighborhood. The State then told the jury that in the afternoon in question, an officer observed defendant conduct several hand-to-hand transactions, and an undercover officer purchased heroin from defendant. However, the State explained that the reason defendant was not arrested on the day of the incident was that "this was part of an ongoing narcotics investigation." The State then asked the jury to "tell this defendant that his business is closed."

¶ 7 Defense counsel, in her own opening statement, told the jury that defendant did not commit a crime on the date in question, as he was on his way to an appointment at the time of the alleged incident. She further explained that while the police conducted an investigation that lasted for four months, it obtained no physical evidence of defendant selling drugs. Defense counsel then stated

that the reason why the officers would falsely accuse defendant was that defendant refused to give incriminating information about his cousin as he had done in the past.

¶ 8 After opening statements, the State called Chicago police officers David Bridges, Andre Reyes, Martin Hegarty and Dan O'Brien, all of whom testified that, at the time in question, the Chicago Police Department's Organized Crimes Division was conducting a long-term narcotics investigation at the intersection of Lake and Pulaski. Officer Bridges testified that during those lengthy investigations, members of his team would purchase narcotics from individuals in certain areas, whom they arrested only months later, so as not to deter other narcotic purchases. In the afternoon of the incident, Officer Bridges and his team were investigating the area of Lake and Pulaski. Officer Bridges testified that he acted as the surveillance officer in the area, while Officer Reyes was an undercover officer, and officers O'Brien and Hegarty were enforcement officers. Before driving his unmarked vehicle to Pulaski, just south of Lake street, Officer Bridges handed Officer Reyes four marked $5 bills, which could be used to purchase narcotics and later tracked if recovered.

¶ 9 Upon arriving at his post at about 12:45 pm, Officer Bridges observed defendant standing near a bus stop by the intersection of Lake and Pulaski. Over the next 20 minutes, the officer saw defendant engage in four to six hand-to-hand transactions with four to six unknown individuals, where defendant tendered an unknown item in exchange for money. According to Officer Bridges, he then radioed his team, and described defendant and the transactions he completed, so that Officer Reyes could engage in an undercover buy. Shortly thereafter, Officer Bridges observed Officer Reyes approach and speak to defendant, and saw defendant take money from the undercover officer's hand. Not long after Officer Reyes walked away from defendant, Officer Bridges saw a car pull up and defendant get into the back seat. The car drove passed Officer Bridges, who then radioed his team with a description of the car and followed it until he observed the enforcement officers stop the car and detain

defendant. The officer stated that Officer Reyes then drove by defendant and identified him as the person who sold him narcotics. On cross-examination, Officer Bridges acknowledged that he could not describe the individuals who approached defendant before Officer Reyes, but explained that he was focusing on defendant. The officer further acknowledged that he did not use any recording equipment to take videos or photographs of defendant engaging in those transactions.

¶ 10 Officer Reyes testified that after he received the radio call from Officer Bridges, he walked to the bus stop near Lake and Pulaski, where he found defendant, who matched Officer Bridges' description. The officer wiggled two fingers towards defendant, who responded "saws," which Officer Reyes understood from his experience as the term for a $10 bag of narcotics. Officer Reyes replied "yeah," at which point defendant removed from his right jacket pocket two plastic bags containing heroin and handed them to the officer, who then gave defendant the four marked $5 bills. The officer then walked back to his vehicle and radioed his teammates to describe defendant and inform them of the transaction. About ten minutes later, Officer Reyes received a call from Officers O'Brien and Hegarty, based on which he drove to 4030 West Maypole Street and identified defendant over the radio. The officer further testified that he later identified defendant again in a photo array at the police station, and averred that he had never met defendant before that day. On cross-examination, Officer Reyes acknowledged that he did not observe defendant conduct any other transactions, did not recover prerecorded funds from him, and could not describe the vehicle in which he saw defendant detained.

¶ 11 Officers Hegarty and O'Brien provided consistent accounts of the events on the afternoon of the incident. They both testified that after receiving a radio call from Officer Bridges with a description of defendant and the car in which he was travelling, the officers followed the vehicle, and pulled it over on Maypole Street. According to the officers, defendant exited the vehicle and stood facing away from Officer O'Brien, who found a roll of currency in defendant's right pocket, checked the

serial numbers and, after determining that the defendant had the marked $5 bills used by Officer Reyes, Officer O'Brien placed the funds back in defendant's pocket and released him due to the ongoing investigation. Officer O'Brien obtained defendant's personal information, including his address, and Officer Reyes then drove by and identified defendant. Officers O'Brien and Hegarty stated that there were two white males in the vehicle in which defendant was found, and while they could not describe the other two occupants, the officers explained that they were not subjects of their investigation. Neither officer had ever seen defendant prior to that incident.

¶ 12 Officers O'Brien and Hegarty went to defendant's address at the end of their investigation, about a month and a half after the incident, at which time defendant's uncle directed the officers to another address and Officer Hegarty left his card with his name and number in case defendant wanted to turn himself into the police. The officers then obtained a warrant for defendant's arrest.

¶ 13 Officer McNicholas testified that on March 12, 2010, he arrested defendant pursuant to the warrant. Lastly, Francis Manieson, an expert from the Illinois Police Crime Laboratory, testified that he analyzed the contents of two plastic bags submitted by Officers Reyes and O'Brien, and determined that they tested positive for the presence of heroin.

¶ 14 Defendant's uncle, Ronald Dates, testified for the defense. Dates testified that defendant lived with him at 4006 West Adams Street in 2009 and 2010, and that two officers went to his house and left a card for defendant as early as July 2009. According to Dates, five officers went to his house in September 2009 looking for defendant, but only looked outside the house. In March 2010, the same two officers who had come to his house in July 2009 returned with defendant's wallet and arrested him. Dates believed that one of those officers was Officer Reyes.

¶ 15 Defendant testified on his own behalf that he moved into his uncle's house in October 2009, and stated that he knew Officer Reyes from the time the officer worked in the area 4 gang unit,

and that he detained defendant in 2004, and that in 2006, the officer repeatedly hassled defendant and other individuals for information on violent gang crimes. Defendant further stated that at around 1 pm on the afternoon of the alleged incident, he was travelling to his parole office at Grand and Drake, and explained that at that time, he was on parole for manufacturing and delivery and was on daily reporting requirement. According to defendant, he was waiting for the bus near Jackson Street, and remembered the events of that date because he tested positive for marijuana and was almost sent to prison. Defendant denied being near the corner of Lake and Pulaski on November 13, 2009, and denied ever selling narcotics to Officer Reyes.

¶ 16 He further stated that he entered a drug program on December 1, 2009, but left two days later to go the hospital for an injury and instead went home, where Officer Reyes waited for him with his sergeant. The State objected to counsel's questioning regarding the content of defendant's conversation with the officers, and at a side bar outside the presence of the jury, defense counsel argued that defendant believed he had been framed in retaliation for his refusal to give the officers incriminating information about his cousin. When the court asked defense counsel whether the officers specifically told defendant that they would "put a case" on him or the conversation was "just his state of mind," counsel responded that, according to defendant, the officers explicitly stated that they were going to put a case on him. When asked what the officers told him, defendant stated that they were conducting a large narcotics investigation and, believing defendant's cousin KB was involved, the officers asked for information on KB's operations. Asked what the officers told defendant about his case, defendant replied only "help me help myself." The court found that what the officers allegedly told defendant did not mean that defendant might be arrested as the officers try to gather information, and the conversation was all, therefore, hearsay. When defense counsel argued that it fell under an exception to the hearsay rule because it showed the officers' motive to arrest defendant, she also explained that defendant had

previously given information on that same cousin in 2004. The court noted that there was no collateral proof of any prior incidents where defendant acted as an informant, and, finding that the conversation that defendant had with the officers in December 2009 did not fall into any exceptions to the hearsay rule, sustained the State's objection.

¶ 17 In rebuttal, Officer Reyes testified that he had been assigned to his current unit since 2005 and, as he had already stated during the State's case-in-chief, that he had never met defendant before November 13, 2009. The officer explained that since he worked as an undercover officer, it was essential to protect his identity, and he would not attempt to buy drugs from someone who he had met before. Officer Reyes denied going to defendant's uncle's house in July, 2009 or March 2010, and denied meeting with defendant in December 2009. The officer acknowledged that in 2004, he was a member of the area 4 gang unit and was not undercover.

¶ 18 The parties stipulated that defendant had a prior conviction from 2007 for the manufacturing and delivery of heroin, and one from 2005 for possession of a controlled substance. During closing arguments, the prosecutor stated that defendant was doing his "work" when he sold narcotics to Officer Reyes, that he took his "tools" with him on that day and "set up shop" at the bus stop. She further stated that if the police had arrested defendant that same day, drug sales would have temporarily stopped at that location, but that defendant would have been replaced by another dealer after one or two days. The State then asked the jury to "tell defendant that he is no longer open for business." Before deliberations, the court gave the jury limiting instructions which stated, *inter alia*, that evidence of defendant's prior convictions may be considered "only as it may affect his believability," that "[t]his evidence has been received on the issue of defendant's presence," and must not be considered as evidence of his guilt.

¶ 19 The jury found defendant guilty of delivery of a controlled substance, and the court sentenced him to eight and a half years' imprisonment. Defendant was given credit for 483 days served before sentencing and assessed fines and fees in the amount of $1,835, which included a $20 preliminary hearing fee and a $200 for the taking, analysis and indexing of his DNA by the Illinois State Police.

¶ 20 After the filing of defendant's appeal from that judgment, this court granted defendant's motion for partial summary disposition, granting him 28 additional days for presentencing custody. We now turn to defendant's remaining contentions on appeal.

¶ 21 ANALYSIS

¶ 22 Defendant first contends that his conviction should be reversed and this cause remanded for a new trial because the trial court erred in allowing the State to impeach defendant with his prior convictions, and in not allowing defendant to introduce any testimony that defendant was not recorded during the overhear investigation, or the officers' conversation with him in December 2009. Defendant maintains that since one of the two prior convictions that were introduced to impeach him was for the same offense for which he was on trial, the risk of prejudice by the jury outweighed the probative value of those convictions. With respect to the evidence that he was not recorded during the ongoing investigation, defendant argues that he was entitled to introduce such evidence to diminish the erroneous implication of the State's opening statement suggesting that defendant was a career drug dealer. Further, with regard to the evidence that the officers told him to help himself by providing information about his cousin, defendant contends that such testimony was not hearsay, but was offered to prove Officer Reyes' state of mind and motive to arrest defendant.

¶ 23 The State initially responds that defendant forfeited each of those arguments by failing to raise them in his motion for a new trial. Defendant acknowledges his forfeiture, but argues that this court should nevertheless review those issues under the plain error doctrine, which permits a reviewing

court to consider unpreserved error where either: (1) the evidence is so closely balanced that the error alone may have caused the scales of justice to tip against defendant; or (2) where a clear error occurred that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). Defendant bears the burden of persuasion in either instance. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Before conducting plain error review, we must first determine whether any error occurred at all (*People v. Thompson*, 238 Ill. 2d 596, 613 (2010)), and thus review the trial court's evidentiary rulings for abuse of discretion. See *People v. Harvey*, 211 Ill. 2d 368, 392 (2004) (reviewing courts will not disturb an evidentiary ruling absent an abuse of discretion); *People v. Melton*, 2013 IL App (1st) 060039, ¶ 17 (trial court's decision to enter a defendant's prior conviction for the purpose of impeachment will not be disturbed absent an abuse of discretion).

¶ 24 With respect to defendant's contention that the trial court erred in allowing the State to introduce two of defendant's prior convictions, it is well established that evidence that a witness has been convicted of a crime, for the purpose of attacking his credibility, is admissible only if the crime: (1) was punishable by death or imprisonment for more than one year; or (2) involved dishonesty or a false statement, regardless of punishment; unless (3) in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 520, 516 (1971). While defendant does not dispute that the two convictions introduced to impeach him fell within the first category, but argues that the danger of unfair prejudice in entering convictions for similar crimes for which he was on trial outweighed their probative value. In doing so, defendant notes that one of the prior convictions was for possession of a controlled substance, and the other, more recent conviction was for manufacture and delivery of heroin, and maintains that such evidence pressured the jury into believing that if he delivered heroin before, he likely did it again.

¶ 25 In determining whether the probative value of a witness' prior convictions outweighs the risk of prejudice, courts consider " 'the nature of prior crimes, *** the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for the truth in a particular case for the jury to hear defendant's story than to know of a prior conviction.' " *Montgomery*, 47 Ill. 2d at 518 (quoting Fed. R. Evid. 609 advisory committee notes). However, the trial court is not required to specify the factors considered as long as it applies a balancing test. *Melton*, 2013 IL App (1st) 060039, ¶ 17 (citing *People v. Washington*, 55 Ill. 2d 521, 523-24 (1973)). While this court has previously noted that prior convictions of crimes that are the same or similar to those for which defendant is on trial should be admitted sparingly (*People v. Pruitt*, 165 Ill. App. 3d 947, 952 (1988)), our supreme court has later explicitly held that similarity alone does not mandate exclusion of the prior conviction (*People v. Atkison*, 186 Ill. 2d 450, 463 (1999)). In fact, it is not an abuse of discretion for a trial court to allow a defendant's prior convictions, even for the same crime for which he is on trial, if it indicates that it applied a balancing test pursuant to *Montgomery* (*People v. Mullins*, 242 Ill. 2d 1, 18 (2011)) and instructs the jury to consider the convictions only for impeachment purposes (*Atkison*, 186 Ill. 2d at 463).

¶ 26 As noted above, the trial court in this case stated that it must balance certain factors to determine whether the probative value of defendant's convictions outweighed the potential prejudice against him, then allowed only the two most recent of defendant's five prior convictions for impeachment purposes only. Furthermore, the court instructed the jury that those convictions were to be considered in determining defendant's credibility as a witness, not his guilt of the crime for which he was on trial.[1] Under these circumstances, there is no reason to find that the trial court failed to apply the balancing test in determining that the probative value of defendant's two most recent convictions was not

[1] We note that the trial court also instructed to jury to consider evidence of defendant's prior offence in determining the issue of his presence at the scene, which was likewise proper, as shall be discussed below.

outweighed by their possible prejudicial effect and, therefore, it did not abuse its discretion in allowing the State to introduce those convictions to impeach defendant's credibility. See, *e.g.*, *Mullins*, 242 Ill. 2d at 18-19 (the fact that the trial court barred defendant's earlier convictions and allowed only the more recent ones shows the court's exercise of discretion and attempt to minimize any risk of prejudice).

¶ 27 Defendant's reliance on *People v. Siebert*, 72 Ill. App 3d 895, 903 (1979) for the proposition that defendant's two most recent convictions were unduly persuasive because they suggested a pattern of behavior is unpersuasive. While the prior conviction of the defendant in *Siebert*, 71 Ill. App 3d at 903, had been for selling drugs within two weeks of the sale for which he was on trial, defendant's prior conviction in this case was for a sale of narcotics that took place at least two years before the one for which he was on trial, and does not suggest a pattern of behavior as the conviction in *Siebert*.

¶ 28 Next, with regard to defendant's contention that the trial court improperly excluded the results of the overhear investigation, he maintains that once the State elicited testimony that the undercover buy was part of a long-term drug trafficking investigation, defendant was entitled to introduce evidence that he was not recorded selling drugs on any other occasions under the doctrine of curative admissibility. Defendant argues that he was unduly prejudiced by the testimony regarding a long-term investigation in that area, combined with the State's remarks during opening statement that defendant was in the business of selling drugs, which then opened the door to evidence that would show that the officers collected no additional evidence against him during their long investigation.

¶ 29 However, our supreme court in *People v. Manning*, 182 Ill. 2d 193, 216-17 (1998), noted that the doctrine of curative admissibility does not allow a party to introduce inadmissible evidence merely because the opposing party introduced evidence on the same subject, and only goes as far as necessary to protect a party from undue prejudice. The parties do not appear to dispute that the recordings from the overhear investigation taken only after the date of the incident involving defendant

were not relevant to the issues at trial, especially considering that defense counsel was allowed to elicit testimony that the testifying officers did not observe defendant selling drugs on other days. She did, in fact, elicit the acknowledgment that the officers were involved in a long-term investigation at that very intersection, and yet there were no photographs or videos of defendant engaging in the sale of narcotics. Furthermore, the State's remarks that defendant was in the business of selling drugs were consistent with Officer Bridges' testimony that he observed defendant sell narcotics to six other individuals before the undercover sale to Officer Reyes. Accordingly, the trial court did not abuse its discretion in excluding the overhear investigation from evidence.

¶ 30 Turning to defendant's contention that the trial court improperly excluded defendant's testimony to his alleged conversation with Officer Reyes on December 3, 2009, defendant argues that his testimony is not hearsay because it was offered to prove the officer's state of mind. Hearsay evidence, which is inadmissible unless it falls within an exception to the rule against hearsay, consists of testimony or written evidence presented in court of a statement made outside of court which is offered to prove the truth of the matter asserted in that statement. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001).

¶ 31 In the instant case, defendant would have testified that Officer Reyes asked him for information that would lead to the conviction of defendant's cousin, and that defendant should "help [him]self" by doing so. Such testimony, according to defense counsel, was offered to show that Officer Reyes was biased against defendant, and had a reason to falsely accuse him, due to his failure to provide incriminating information on his cousin. However, defendant was questioned outside the presence of the jury, and the statement that he related to the judge falls short of showing bias or motive on the officer's part, and, at best, shows merely that defendant was asked for information about his cousin. Thus, defendant's claim that it showed motive to falsely testify against defendant is speculative, and the trial court did not abuse its discretion in excluding that testimony. See, *e.g.*, *People v. Whalum*, 2012 IL

App (1st) 110959, ¶ 24 (court did not abuse its discretion in not allowing counsel to pursue a line of question to show a police officer's racial bias where there was no evidence on the record that a traffic stop was racially motivated).

¶ 32 Defendant's reliance on *People v. Averhart*, 311 Ill. App. 3d 492 (1999) is unpersuasive because defendant in that case did not offer his prior acquittal to prove that he was not guilty of the crime for which he was previously charged, but to show the impact of that finding on the officer who had testified against him. Having concluded that the trial court did not err in excluding Officer Reyes' statements as hearsay, we find that defendant's argument that the trial court denied him the right to present a defense is similarly misplaced. *C.f.*, *People v. Quick*, 236 Ill. App. 3d 446, 453 (1992) (excluding out-of-court statements that were crucial to defendant's theory of defense was a constitutional violation, but only where such statements were not, in fact, hearsay.)

¶ 33 Alternatively, however, defendant contends that, if the issues above are not reviewable under plain error, this cause should nevertheless be remanded to the trial court because his trial counsel was ineffective in failing to preserve those issues for review. To prevail on a claim of ineffective assistance of counsel, defendant must show that his attorney's performance fell below an objective standard of reasonableness, and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052, 2064 (1984). Defendant's failure to establish either prong of this test is fatal to his claim (*People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994)), and, thus, a reviewing court need not determine whether defense counsel's performance was reasonable before examining whether defendant suffered prejudice as a result of the alleged deficiency (*Strickland*, 466 U.S. at 697). Having determined, as discussed above, that the trial court did not commit error in: (1) allowing the State to introduce defendant's two most recent convictions for impeachment purposes; (2) excluding evidence of an overhear investigation which did not record

defendant's offense; and (3) excluding testimony as to what Officer Reyes stated to defendant as hearsay, we now conclude that defendant did not suffer prejudice due to his trial counsel's failure to preserve those issues for review.

¶ 34 Next, defendant contends that he was denied a fair trial due to the State's remarks that he was a businessman who sold drugs for a living because those were comments based on facts that were not in evidence and eluded to offenses unrelated to the charges for which he was on trial. The State correctly responds that, as was the case with defendant's previous arguments, this issue was forfeited due to defendant's failure to object at trial to any of the prosecution's remarks. See *People v. Nelson*, 235 Ill. 2d 386, 436-37 (2009). As noted above, however, we now turn to whether any error occurred at all.

¶ 35 Prosecutors are afforded wide latitude during closing arguments, which must then be considered in the context of the argument as a whole. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007); *People v. Evans*, 209 Ill. 2d 194, 225 (2004). A reviewing court will find reversible error based upon improper prosecutorial remarks only "if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial 'that real justice [was] denied or that the verdict of the jury may have resulted from error.' " *People v. Jones*, 156 Ill. 2d 225, 247-48 (1993) (quoting *People v. Yates*, 98 Ill. 2d 502, 533 (1983)). In doing so, we review the scope and character of prosecutorial remarks allowed at trial for abuse of discretion. *People v. Aleman*, 313 Ill. App. 3d 51, 66-67 (2000).

¶ 36 In the context of remarks made during trial of a defendant charged with the sale of narcotics, this court has found that there is nothing improper in describing such a defendant as someone who is in the business of selling drugs, even if he was observed selling drugs on only one occasion, since is it reasonable to infer that his purpose was to make money. See *People v. Willis*, 409 Ill. App. 3d 804, 812-13 (2011) (remarks that defendant went to work each day and set up shop to sell drugs next to a school was proper where defendant was selling drugs at that spot when arrested, and did not prejudice

defendant by implying past and future conduct that was not in evidence); see also *Melton*, 2013 IL App (1st) 060039, ¶ 23-24 (prosecutor's comments that defendant was selling drugs as though he were at a Jewel or Dominick's were not improper where they related back to a police officer's testimony that buyers were lined up to purchase drugs from defendant). Here, as we noted above, the prosecutor's comments in opening and closing arguments that defendant was a businessman in the trade of selling drugs, and asking the jury to tell him that he is closed for business, related to the testimony that he sold drugs at the bus stop at Lake and Pulaski, presumably to earn money from the sales. Likewise, remarks that if defendant had been arrested on the day that he was observed selling drugs, the drug trade would have "dried up" at that location was consistent with the testimony that the officers were conducting a long-term investigation at that particular area. Thus, those remarks were based on evidence and we, therefore, find no error in the prosecutor's comments.

¶ 37 Defendant next contends that the trial court erred in instructing the jury that his prior convictions were relevant to "the issue of defendant's presence," when they should have been introduced for the sole purpose of impeaching his testimony. According to defendant, such an instruction suggested to the jury that since defendant sold drugs on a prior occasion, he must have been present at the bus stop where Officer Reyes claimed to have purchased narcotics from him. The State responds, and we agree, that defendant not only forfeited this argument by failing to object at trial or in a posttrial motion, but also agreed with the jury instruction based on his defense that he could not have been at the location described by Officers Reyes and Bridges because he was on his way to see his parole officer at the time of the offense. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) ("[t]o permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend all notions of fair play and encourage defendants to become duplicitous.") [Internal citations omitted].

¶ 38 Forfeiture aside, however, jury instructions are justified if "some evidence" in introduced to support it, and we review such instructions for abuse of discretion. *People v. Adams*, 394 Ill. App. 3d 217, 231 (2009) (quoting *People v. Mohr*, 228 Ill. 2d 53, 65 (2008)). Furthermore, it is well established that while evidence of a defendant's prior crimes is inadmissible to show his propensity to offend again, such evidence is admissible where it is independently relevant to a contested issue in the case. *People v. Allen*, 1 Ill. App. 3d 197, 200-01 (1971). Although evidence of other crimes carries a risk that the jury will use to infer propensity, the best way to address that problem is with the use of limiting instructions. *People v. Jackson*, 357 Ill. App. 3d 313, 321 (2005).

¶ 39 As noted above, defendant in this case testified that at the time of the alleged sale to Officer Reyes, he was waiting for a bus to see his parole officer because he had been recently released from jail for manufacturing and delivery. During closing arguments, defense counsel noted that defendant admitted to being on parole, which is why he remembered his whereabouts on the date of the offence. Thus, the trial court's instruction that evidence of defendant's prior offence was received on the limited issue of defendant's presence was supported by defendant's testimony, since defendant's presence at the time of the offense was a contested issue in this case. In light of the independent relevance of defendant's prior crime, we conclude that the trial court did not abuse its discretion in issuing that instruction. See *Allen*, 1 Ill. App. 3d at 201 (test of admissibility is that of "independent relevance to an issue in the case).

¶ 40 Next, defendant contends, alternatively, that if no individual error warrants reversal, he was, nevertheless, denied a fair trial by the cumulative effect of: (1) the court's error in admitting his prior convictions for impeachment purposes; (2) the improper exclusion of curative testimony that he was not recorded in the overhear; (3) the violation of his right to present a defense by excluding Officer Reyes' hearsay statement; (4) the State's improper remarks; and (5) the court's incorrect limiting

instruction. We note that while individual errors at trial may not require reversal, those same errors, when considered together, may have the cumulative effect of denying defendant a fair trial. *People v. Spieght*, 153 Ill. 2d 365, 376 (1992). However, having rejected defendant's claims of error above, we now conclude that he is not entitled to a new trial on the basis of cumulative error. See, *e.g.*, *People v. Hall*, 194 Ill. 2d 305, 350-51 (2000) (defendant was not denied a fair trial by the cumulative effect of his alleged errors where most of his claims were rejected by this court and the others were forfeited and not reviewed under plain error).

¶ 41 Lastly, defendant contends, and the State does not dispute, that we should vacate the $20 preliminary hearing fee and $200 DNA fee and award him $1,035 against his fines for time served in presentencing custody. We note that the propriety of the imposition of fines and fees by the trial court is a question of law, which we review *de novo*. *In re Estate of Dierkes*, 191 Ill. 2d 326, 330 (2000).

¶ 42 While the trial court charged defendant a $20 preliminary hearing fee under section 2002.1(a) of the Illinois Counties Code (55 ILCS 5/4-2002.1(a) (West 2010)), it is undisputed that defendant was indicted and, therefore, did not receive a probable cause hearing. See *People v. Smith*, 236 Ill. 2d 162, 174 (2010) (preliminary hearing fee was improperly charged where probable cause hearing was never conducted). Similarly, the $200 DNA analysis fee pursuant to section 5-4-3(j) of the Illinois Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) was improperly imposed because defendant had been previously convicted of felonies and his DNA profile was already in the Illinois State DNA database.[2] See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011) (it is improper to charge a DNA fee to a defendant whose DNA profile has already been analyzed and indexed as a result of a prior felony conviction).

[2] We take judicial notice of a report from the Illinois State Police which indicates that, as a result of one of defendant's prior felony convictions, his DNA profile is now part of that database.

¶ 43 Furthermore, both parties correctly note that defendant spent 511 days in presentencing custody between his arrest on March 12, 2010 and his sentencing date on August 5, 2011. Pursuant to section 110-14 of the Illinois Code of Criminal Procedure, 725 ILCS 5/110-14 (West 2010)), defendant is allowed a $5 credit for each day of incarceration, not to exceed the amount of his fines. However, of the $2,555 credit that he accrued in those 511 days, he may only apply them towards the $1000 Controlled Substances fine, the $30 Children's Advocacy Center fine, and the $5 Drug Court fine. 55 ILCS 5/5-1101(f), (f-5) (West 2010); 720 ILCS 570/411.2(a) (West 2010). Thus, defendant is entitled to a credit in the amount of $1,035 towards the assessments against him. Accordingly, after subtracting the preliminary hearing and DNA analysis fees of $220 from the $1,835 that was assessed against defendant, and applying defendant's credit of $1,035, the remaining fines and fees amount to $580.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, we order that the fines and fees order be modified to reflect the accurate amount of the assessment as $580, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 46 Affirmed as modified.