2016 IL App (4th) 140677-U

NO. 4-14-0677

FILED
September 13, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Macon County |
| DEMIQUEL T. SLATER, | ) | No. 13CF850 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Katherine M. McCarthy, |
| | ) | Judge Presiding. |

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, concluding defendant failed to establish he was entitled to a new trial or a remand for further proceedings on his posttrial *pro se* ineffective-assistance-of-counsel claims.

¶ 2 Following an April 2014 trial, a jury found defendant, Demiquel T. Slater, guilty of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d) (West 2012)) and two counts of unlawful communication with a witness (720 ILCS 5/31-4(b) (West 2012)). In June 2014, the trial court sentenced defendant to eight years' imprisonment for the unlawful-possession conviction, to run consecutively to two concurrent three-year prison terms for the unlawful-communication convictions. Defendant appeals, arguing he is entitled to a new trial as (1) defense counsel improperly made the ultimate decision not to tender a jury instruction on the lesser-included offense of simple possession; (2) the trial court improperly

admitted evidence and testimony regarding three incoming text messages; and (3) the State committed prosecutorial misconduct during its closing argument. In the alternative, defendant asserts we should remand for further proceedings on his posttrial *pro se* ineffective-assistance-of-counsel claims as one of his claims demonstrates possible neglect by defense counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Possession of a Controlled Substance With Intent To Deliver

¶ 5 In July 2013, the State charged defendant by information with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)). The State alleged, on or about July 4, 2013, defendant "knowingly and unlawfully possessed with the intent to deliver one or more grams but less than 15 grams of a substance containing cocaine."

¶ 6 B. Defendant's Motion To Suppress Evidence

¶ 7 In November 2013, defendant filed a motion to suppress, requesting the trial court suppress any evidence discovered incident to his arrest. Following a January 2014 hearing, the court denied defendant's motion, finding he failed to demonstrate any constitutional violation.

¶ 8 C. Unlawful Communication With a Witness

¶ 9 In March 2014, the State charged defendant by information with two counts of unlawful communication with a witness (720 ILCS 5/31-4(b) (West 2012)). The State alleged, on February 20 and 21, 2014, defendant instructed Whitney Roberson about the content of her expected testimony with the intent to deter her from testifying fully and truthfully.

¶ 10 D. Defendant's Motion *in Limine*

¶ 11 On April 1, 2014, defendant filed a motion *in limine* requesting the trial court bar the State from introducing any testimony or evidence relating to incoming text messages seized from his cell phone. Defendant argued the messages (1) constituted hearsay, and (2) lacked sufficient indicia of reliability to serve as the basis for an expert opinion.

¶ 12 The State asserted (1) the incoming text messages would not be offered to prove the truth of the matter asserted, that is, the narcotics transactions discussed in the messages occurred, but rather for the limited purpose of explaining a basis its expert used in formulating his opinion as to whether defendant possessed the substance containing cocaine for the purpose of distribution; and (2) its expert would testify the messages were the type of evidence reasonably relied upon by like experts in formulating an opinion. The State noted a jury instruction could be used to instruct the jury as to the limited purpose for which the evidence was offered.

¶ 13 After considering the arguments presented, the trial court denied defendant's motion in part, finding it would allow the State to introduce evidence and testimony relating to only three incoming text messages, sent approximately an hour before defendant's arrest, which had responsive outgoing messages. The court also noted, if requested, it would allow a limiting jury instruction on the purpose for which the evidence was offered.

¶ 14 E. Evidence at Trial

¶ 15 On April 2 and 3, 2014, the trial court held a jury trial. The State elicited testimony from (1) responding police officers Jim Owens and David Hoecker, (2) Roberson, (3) forensic scientist Gary Havey, and (4) Detective David Dailey. Defendant elected not to present evidence. The following is a summary of the testimony elicited and evidence presented.

¶ 16 On July 5, 2013, at approximately 12:30 a.m., Owens and Hoecker were dispatched to 1065 North College Street on "a check the welfare" with information indicating two individuals were arguing near a vehicle, and one of the individuals may have been armed. Owens, the first to arrive, observed a male, later identified as defendant, standing near the front of a vehicle and arguing with a female, later identified as Roberson, who was seated on the ground and leaning against the front side of the vehicle. Owens reported his observations and then exited his vehicle to approach defendant and Roberson. During his approach, Owens observed defendant, after becoming aware of Owens' advancement, place his right hand in his pants pocket, remove it, and make a tossing motion toward the rear of the vehicle.

¶ 17 A plastic bag was later discovered near the rear of the vehicle, which contained 10 smaller bags of suspected cannabis and a bag containing 8 individually wrapped packages of suspected crack cocaine. Owens testified the bag was found approximately six feet away, in the direction he had previously seen defendant make the tossing motion. The contents of the bag were determined to consist of 8.05 grams of cannabis and 0.7 grams of a substance containing cocaine. Fingerprints on the bags were unsuitable for comparison. Officers seized a cell phone located in defendant's pants pocket on his body. Defendant did not have currency or a firearm in his possession. Hoecker acknowledged the incident occurred in a high-crime area.

¶ 18 Roberson testified regarding her July 5, 2013, encounter with police officers. Roberson testified she neither possessed nor was aware of who owned the narcotics found by the police. Roberson acknowledged previously speaking with defendant regarding her expected trial testimony. Jail phone recordings between Roberson and defendant were published to the jury.

The recordings disclosed multiple conversations where defendant directed Roberson to "plead the fifth" rather than deny ownership of the narcotics.

¶ 19 Dailey, a qualified expert in the field of narcotics distribution, opined, within a reasonable degree of certainty, the 0.7 grams of crack cocaine was held for purposes of distribution. In making this opinion, Dailey indicated he considered (1) the weight of the narcotics, (2) the packaging of the narcotics, (3) the text messages discussing the transaction of narcotics, and (4) defendant's statement in a jail phone recording indicating he was not fighting whether he was a drug dealer. Dailey also noted the typical method of consuming crack cocaine is through smoking, and defendant did not have a smoking device located on him.

¶ 20 With respect to the weight of the narcotics, Dailey testified the 0.7 grams of crack cocaine presented approximately four dosage units and the 8.05 grams of cannabis presented approximately 16 dosage units. Dailey explained a dosage unit was an amount commonly purchased at one time for consumption. Dailey also testified the 0.7 grams of crack cocaine had an approximate street value of $70 and the 8.05 grams of cannabis had an approximate street value of $80.

¶ 21 As to the text messages, Dailey testified the most common way of arranging a narcotics transaction is through the use of a cell phone, including text messaging. Dailey testified experts in narcotics distribution reasonably rely on the contents of text messages in forming an opinion on the subject. Through his training and experience, Dailey was familiar with terminology used by persons who distribute and consume narcotics. Dailey executed a search warrant on the cell phone seized from defendant following his arrest, which was admitted into evidence. Dailey used his expertise to analyze the terminology used in the text messages

discovered in the cell phone. The State published to the jury photographs of three incoming and three outgoing text messages and elicited testimony from Dailey regarding his opinions as to the meaning of the messages.

¶ 22 An incoming message from the contact "Big raven," dated July 4, 2013, at 10:50 p.m., reads "Need a twenty," which Dailey testified indicated the sender was requesting $20 worth of narcotics. An outgoing message to the contact "Big raven," dated July 4, 2013, at 11:49 p.m., reads "Omw," which Dailey testified indicated "on my way." An incoming message from the contact "Tanisha rayford," dated July 4, 2013, at 10:56 p.m., reads "Can u bring me a dime," which Dailey testified indicated the sender was requesting $10 worth of narcotics. An outgoing message to the contact "Tanisha rayford," dated July 4, 2013, sometime after 11 p.m., reads "Outside," which Dailey testified indicated the sender was outside Rayford's location and was waiting on her to complete the purchase. (The photograph does not clearly depict the exact time the message was sent.) An incoming message from the contact "Tanisha rayford," dated July 4, 2013, at 11:47 p.m., reads "U did say u was gone bring it to me rite," which Dailey testified indicated Rayford was making sure the individual was coming so she could get her fix. An outgoing message to the contact "Tanisha rayford," dated July 4, 2013, at 11:50 p.m., reads "Here," which Dailey testified indicated the individual was at Rayford's location and ready to complete the transaction.

¶ 23 Based on his experience and training, Dailey concluded the text messages were related to the distribution of narcotics. As previously indicated, Dailey used this conclusion as a basis to form his expert opinion defendant held the narcotics for the purpose of distribution.

¶ 24 The State published to the jury statements made by defendant to a third party through jail phone recordings. In the recordings, defendant (1) acknowledged the State possessed a cell phone with text messages implying he was drug dealer, and (2) asserted he would not fight whether he was a drug dealer but only whether he possessed the drugs that were found.

¶ 25 On this evidence, the State rested.

¶ 26 F. Jury-Instruction Conference

¶ 27 At the jury-instruction conference the trial court questioned defendant about whether he intended to refrain from tendering a limiting instruction on the purpose for which the text messages were offered. Defendant indicated his decision to refrain from tendering such an instruction was a matter of trial strategy.

¶ 28 G. Jury Verdict

¶ 29 Following closing arguments, the jury found defendant guilty of one count of possession with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2012)) and both counts of unlawful communication with a witness (720 ILCS 5/31-4(b) (West 2012)). The State later moved to amend the possession charge to conform with the evidence presented and indicate defendant was found guilty of possession with intent to deliver a controlled substance containing less than 1 gram of cocaine (720 ILCS 570/401(d) (West 2012)). The trial court granted the State's motion over no objection.

¶ 30 H. Defendant's Posttrial Motions

¶ 31 On April 23, 2014, defendant filed a *pro se* motion raising multiple claims of ineffective assistance of counsel.

¶ 32 In May 2014, defendant, through counsel, filed a motion for a new trial. Defendant alleged the trial court erred by (1) admitting evidence and testimony regarding the three incoming text messages, and (2) allowing the State to argue police officers are amongst the most credible witnesses.

¶ 33 I. Hearings on Posttrial Motions and Sentencing

¶ 34 In June 2014, the trial court held hearings on defendant's posttrial motions and sentencing. Following its preliminary inquiry into defendant's *pro se* claims of ineffective assistance, as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny, the court found no basis to support defendant's claims and declined to appoint new counsel. The court further denied defendant's motion for a new trial and sentenced him to eight years' imprisonment for the unlawful possession conviction, to run consecutively with two concurrent three-year prison terms for the unlawful-communication convictions.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues he is entitled to a new trial as (1) defense counsel improperly made the ultimate decision not to tender a jury instruction on the lesser-included offense of simple possession; (2) the trial court improperly admitted evidence and testimony regarding the three incoming text messages; and (3) the State committed prosecutorial misconduct during its closing argument. In the alternative, defendant contends we should remand for further proceedings on his posttrial *pro se* ineffective-assistance-of-counsel claims as one of his claims demonstrates possible neglect by defense counsel.

¶ 38 A. Lesser-Included Jury Instruction

¶ 39 Defendant contends, under *People v. Brocksmith*, 162 Ill. 2d 224, 642 N.E.2d 1230 (1994), we must remand for a new trial as the record conclusively establishes defense counsel improperly made the ultimate decision not to tender a jury instruction on the lesser-included offense of simple possession. In response, the State asserts, citing *People v. Williams*, 275 Ill. App. 3d 242, 655 N.E.2d 997 (1995), we should reject defendant's argument as the record is insufficient to warrant reversal under *Brocksmith*.

¶ 40 In *Brocksmith*, 162 Ill. 2d at 229-30, 642 N.E.2d at 1233, our supreme court held the ultimate decision of whether to submit a jury instruction on a lesser-included offense lies with a defendant. That decision, however, necessarily "partakes of, and is unavoidably intertwined with, strategic trial calculations, matters within the sphere of [defense] counsel." *People v. Medina*, 221 Ill. 2d 394, 406, 851 N.E.2d 1220, 1226 (2006). In order to make an intelligent and informed decision, a defendant requires the advice of counsel to aid in evaluating the evidence and to apprise the defendant of any potential conflicts with the defense strategy pursued to that point in the trial. *Id.* Accordingly, where no lesser-included-offense instruction is tendered, we must presume the decision not to tender the instruction was the defendant's, after due consultation with defense counsel. *Id.* at 409-10, 851 N.E.2d at 1229.

¶ 41 At trial, defense counsel highlighted (1) the police officers did not observe defendant toss anything, (2) the narcotics were found in a high-crime area, (3) the narcotics were found in the early morning hours after Fourth of July celebrations, and (4) Roberson was seated on the ground where the narcotics were located. During his preliminary *Krankel* hearing, defendant asserted: "I asked [defense counsel] to educate the jury that they could find me guilty

on a lesser charge [of] simple possession." In responding to defendant's assertion, defense counsel indicated:

> "[W]e had played—I guess played with the idea of doing that. However, as the [c]ourt recalls, our entire defense in this case *** was that [defendant] never possessed the drugs, that they weren't his. Um—so, I found it best that we don't, you know, spend our entire trial trying to convince the jury that he never had these drugs, the drugs weren't his, essentially that they were Roberson's drugs *** but, at the end of the trial, say, 'But if you think that he did possess them, then you can convict him of Simple Possession."

¶ 42 In *Williams*, 275 Ill. App. 3d at 246-47, 655 N.E.2d at 1000, the court rejected the defendant's argument he was entitled to a new trial under *Brocksmith*. The court distinguished *Brocksmith*, noting there it was uncontested and the record showed defense counsel improperly made the ultimate decision to tender a lesser-included jury instruction. *Id.* at 246, 655 N.E.2d at 1000 (citing *Brocksmith*, 162 Ill. 2d at 227, 642 N.E.2d at 1231). The *Williams* court found, unlike *Brocksmith*, the record failed to conclusively establish defense counsel made the ultimate decision not to tender a lesser-included jury instruction. The court stated: "We could just as well assume from this record that trial counsel consulted fully with his client and assessed the risks of tendering or not tendering the instruction, and that the defendant made the ultimate decision after weighing his lawyer's advice." *Id.* at 247, 655 N.E.2d at 1000.

¶ 43 We agree with the State and find the record does not conclusively establish defense counsel, rather than defendant, made the ultimate decision not to tender the lesser-

included jury instruction for simple possession. At most, defendant's posttrial statement indicates he wanted the instruction and asked defense counsel for it. Defense counsel's posttrial statement indicates he discussed tendering the instruction with defendant but found it best not to tender the instruction after attempting to convince the jury the narcotics did not belong to defendant. Like *Williams*, we could just as well assume from the record defendant made the ultimate decision not to tender the instruction following counsel's consultation and discussion of the risks of tendering the instruction. We decline to reverse a jury verdict where the record does not conclusively establish defense counsel, rather than defendant, made the ultimate decision not to tender a lesser-included instruction.

¶ 44 B. Incoming Text Messages

¶ 45 Defendant asserts the trial court committed reversible error by allowing the State to introduce evidence and testimony regarding the three incoming text messages. Specifically, defendant asserts (1) the State failed to properly authenticate the messages; and (2) the messages constituted hearsay and did not qualify for admission under Illinois Rule of Evidence 703 (eff. Jan. 1, 2011).

¶ 46 1. *Standard of Review*

¶ 47 The admissibility of evidence rests with the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12, 998 N.E.2d 1247; see also *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 38, 25 N.E.3d 1189 (reviewing an authentication challenge to the trial court's admission of text messages for an abuse of discretion); *People v. Williams*, 238 Ill. 2d 125, 136, 939 N.E.2d 268, 274 (2010) (reviewing a foundational challenge to the trial court's admission of expert testimony

for an abuse of discretion). An abuse of discretion will be found only where the trial court's evaluation is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 182, 788 N.E.2d 707, 721 (2003).

¶ 48 2. *Authentication*

¶ 49 Defendant contends the trial court abused its discretion by admitting the photographs of the three incoming text messages as the State failed to properly authenticate the messages. Defendant acknowledges he has forfeited his contention of error by failing to object at trial and include his objection in a posttrial motion but requests we review his claim for plain error or, alternatively, as a claim of ineffective assistance of counsel.

¶ 50 "The plain-error doctrine is a limited and narrow exception to the general rule of procedural default." *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). "Under the plain-error doctrine, this court will review forfeited challenges 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; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. As a matter of practice, reviewing courts typically undertake a plain-error analysis by first determining whether the record indicates clear or obvious error occurred. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). Defendant maintains it is clear or obvious the trial court abused its discretion by admitting the photographs of the three incoming messages without proper authentication.

¶ 51 "For the purpose of establishing a proper foundation for admissibility, text messages are treated like any other form of documentary evidence." *Watkins*, 2015 IL App (3d) 120882, ¶ 36, 25 N.E.3d 1189. To lay a proper foundation for the admission of documentary evidence, the document must be identified and authenticated. *People v. Chromik*, 408 Ill. App. 3d 1028, 1046, 946 N.E.2d 1039, 1055 (2011). To authenticate a document, Illinois Rule of Evidence 901(a) (eff. Jan. 1, 2011) requires the proponent to present evidence sufficient to demonstrate the document is what the proponent claims it to be. *Chromik*, 408 Ill. App. 3d at 1046, 946 N.E.2d at 1055. Documentary evidence may be authenticated by either direct or circumstantial evidence. *Watkins*, 2015 IL App (3d) 120882, ¶ 37, 25 N.E.3d 1189; Ill. R. Evid. 901(b) (eff. Jan. 1, 2011).

¶ 52 After the proponent of the document produces its evidence of authentication, the trial court serves a limited screening function to decide whether the evidence, viewed in the light most favorable to the proponent, "is sufficient for a reasonable juror to conclude that authentication of the particular item of evidence is more probably true than not." *Watkins*, 2015 IL App (3d) 120882, ¶ 36, 25 N.E.3d 1189; see also Ill. R. Evid. 104(b) (eff. Jan. 1, 2011). A finding of authentication does not preclude the opponent of documentary evidence from contesting its genuineness; it merely indicates sufficient evidence was introduced to justify the presentation of the documentary evidence to the trier of fact. *Watkins*, 2015 IL App (3d) 120882, ¶ 36, 25 N.E.3d 1189.

¶ 53 The State introduced the photographs of the three incoming text messages for the limited purpose of explaining a basis its expert witness relied upon in formulating his opinion defendant's possession was for the purpose of distribution. The State introduced evidence

indicating (1) the incoming and outgoing messages related to narcotics distribution, (2) the messages were sent approximately an hour before defendant's arrest from a cell phone found on defendant's person in his pocket, and (3) defendant later acknowledged the police had his cell phone in custody and it contained text messages. We find the trial court did not abuse its discretion by concluding sufficient evidence of authentication was presented for the limited purpose for which the evidence was introduced. Any vagueness in the messages, absence of phone records, or lack of testimony from the authors of the messages were matters properly addressed during cross-examination and closing argument.

¶ 54 We find defendant's reliance on *Watkins* and *State v. Harris*, 358 S.W.3d 172 (Mo. Ct. App. 2011), unpersuasive, as both are factually distinguishable. In *Watkins*, 2015 IL App (3d) 120882, ¶¶ 38-39, 25 N.E.3d 1189, (1) the incoming text messages were found on a cell phone located in a common area of a residence with multiple inhabitants, one of whom was discovered to have narcotics packaged for delivery on his person; and (2) the messages were introduced to show the defendant had used the cell phone and, by implication, to show a connection between the defendant and the narcotics found near the cell phone. In *Harris*, 358 S.W.3d at 176, the proponent of the incoming text messages sought to introduce them for the purpose of establishing the true identities of the authors of those messages. Defendant further invites us to consider the Pennsylvania Superior Court's authentication discussion in *Commonwealth v. Koch*, 39 A.3d 996, 1002-06 (2011). We decline defendant's invitation as the Pennsylvania Supreme Court subsequently rejected the superior court's findings (*Commonwealth v. Koch*, 106 A.3d 705 (2014), which the State highlights and defendant fails to address in his reply brief.

¶ 55 We likewise find no merit in defendant's ineffective-assistance-of-counsel claim. To demonstrate ineffective assistance of counsel, a defendant must show defense counsel's performance was deficient and a reasonable probability exists, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Having concluded the trial court did not abuse its discretion in finding the State presented sufficient evidence of authentication, defense counsel's failure to object on these grounds cannot constitute deficient performance or result in prejudice to defendant. Defendant's ineffective-assistance-of-counsel claim must also fail.

¶ 56 3. *Hearsay*

¶ 57 Defendant asserts the trial court abused its discretion in admitting expert testimony regarding the three incoming text messages because the messages constituted hearsay and did not qualify for admission under Illinois Rule of Evidence 703 (eff. Jan. 1, 2011).

¶ 58 Defendant contends the trial court abused its discretion by allowing the State's expert to read the contents of the incoming text messages to the jury as the messages constituted inadmissible hearsay. Defendant maintains the significance of the messages rested solely in their substantive content.

¶ 59 "The hearsay rule generally prohibits the introduction of an out-of-court statement offered to prove the truth of the matter asserted therein." *Williams*, 238 Ill. 2d at 143, 939 N.E.2d at 278; Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Underlying facts and data used in formulating an expert opinion, however, may be disclosed by an expert witness, not for the truth of the matter asserted, but for the purpose of explaining a basis for his or her opinion. *Williams*,

238 Ill. 2d at 143, 939 N.E.2d at 278; *People v. Lovejoy*, 235 Ill. 2d 97, 143, 919 N.E.2d 843, 868 (2009); Ill. R. Evid. 703 (eff. Jan. 1, 2011).

¶ 60 The State sought to introduce the content of the text messages for the limited purpose of explaining a basis its expert used in formulating his opinion as to whether defendant's possession was for purposes of distribution. The State noted a limiting instruction could be used to instruct the jury as to the limited purpose for which the evidence was being offered. The trial court allowed the State to introduce the evidence for this limited purpose, noting, if requested, it would submit a limiting jury instruction. Defendant ultimately elected not to submit a limiting jury instruction as a matter of trial strategy. We find the trial court did not abuse its discretion in concluding the text messages were nonhearsay when offered for the limited purpose of explaining the expert's opinion.

¶ 61 Defendant further argues the trial court abused its discretion by allowing the State to introduce expert testimony based on "unreliable information that cannot be reasonably relied upon by an expert as a basis for formulating an opinion." Defendant highlights (1) the authors of the incoming text messages were unknown; (2) the text messages lacked detail and specificity; and (3) the State's expert had no personal knowledge of the content of the messages as he never spoke with defendant or the unknown authors of the messages.

¶ 62 In *Wilson v. Clark*, 84 Ill. 2d 186, 193, 417 N.E.2d 1322, 1326 (1981), our supreme court, in addressing an earlier version of Rule 703 of the Federal Rules of Evidence (Fed. R. Evid. 703), found "the key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable." Information upon which an expert bases his or her opinion is reliable "if it is the type of data reasonably

relied upon by experts in the particular field." *People v. Houser*, 305 Ill. App. 3d 384, 394, 712 N.E.2d 355, 362 (1999); see also Ill. R. Evid. 703 (eff. Jan. 1, 2011) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

¶ 63 Defendant attempts to distinguish the "inherently reliable" medical records typically addressed by our courts from the "unreliable" incoming text messages. See *Williams*, 238 Ill. 2d at 136-39, 939 N.E.2d at 274-75; *People v. Sutherland*, 223 Ill. 2d 187, 281-82, 860 N.E.2d 178, 238 (2006). We find defendant's assessment unconvincing. The State cites persuasive federal authority finding no abuse of discretion in allowing expert testimony based on similar underlying data or information. In *United States v. Leeson*, 453 F.3d 631, 636-38 (4th Cir. 2006), the defendant argued the district court abused its discretion in admitting an expert opinion based on statements by inmates in a mental health facility where the government failed to establish (1) such information was reasonably relied upon by experts in the field, and (2) its expert was in a position to determine whether the inmates were trustworthy sources of information. The *Leeson* court rejected defendant's arguments, finding (1) the expert testimony alone sufficiently established such information was reasonably, albeit cautiously, relied upon by like experts in forming an opinion; and (2) the expert's ability to evaluate whether the inmates were trustworthy sources of information was a matter properly addressed during cross-examination and closing argument. *Id.* at 637-38; see also *United States v. Rollins*, 862 F.2d 1282, 1292-93 (1988) (finding the government established information from informants about

the meaning of specific code words is the type of evidence ordinarily relied upon by experts in the narcotics field); *United States v. Garcia*, 447 F.3d 1327, 1336-37 (2006) (finding the government established information from debriefing of suspected drug traffickers is the type of information reasonably relied upon by drug enforcement officers in forming an opinion about the use of coded language by drug traffickers).

¶ 64 Dailey, a qualified expert in the field of narcotics distribution, testified narcotics transactions are commonly arranged by text message. Through his training and experience, Dailey was familiar with terminology used by persons who distribute and consume narcotics. Dailey testified experts in narcotics distribution reasonably rely on text messages in forming an opinion on the subject. Dailey used his expertise to analyze the terminology used in the text messages. Based on his experience and training, Dailey concluded the three incoming text messages were related to the distribution of narcotics. Dailey used this conclusion as a basis to form his expert opinion defendant held the discovered narcotics for the purpose of distribution.

¶ 65 We find the trial court did not abuse its discretion by allowing Dailey's expert opinion based on the three incoming text messages as (1) experts in the field reasonably relied on text messages in formulating an opinion; and (2) Dailey's interpretation of the content of the messages was based on his experience and training. *C.f. Houser*, 305 Ill. App. 3d at 394-95, 712 N.E.2d at 362. Again, we find any vagueness in the messages or lack of testimony from the authors of the messages as matters properly addressed during cross-examination and closing argument.

¶ 66 Even if, *arguendo*, we found the trial court abused its discretion in allowing the State to introduce evidence or testimony regarding the three incoming text messages, we would

find any such error harmless. Defendant contends the three incoming text messages were the only significant factor the State's expert relied upon to formulate his opinion, and his opinion was the only evidence the State offered to prove intent to distribute. We disagree. In addition to the text messages, Dailey testified his opinion was based on (1) the weight of the narcotics, (2) the packaging of the narcotics, and (3) defendant's statement indicating he was not fighting whether he was a drug dealer. In addition to the expert opinion, the jury also had before it substantive evidence of the weight and packaging of the narcotics to assist it in determining whether defendant's possession was for the purpose of distribution.

¶ 67 C. Closing Argument

¶ 68 Defendant contends we must remand for a new trial as the State committed prosecutorial misconduct during its closing argument. Specifically, defendant asserts the State improperly (1) argued the responding officers were extremely credible because they were police officers; and (2) replayed five jail phone recordings, placing an undue emphasis on the contents of the conversations contained therein.

¶ 69 1. *Standard of Review*

¶ 70 "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128, 792 N.E.2d 1163, 1210 (2001). As previously indicated, an abuse of discretion will be found only where the trial court's evaluation is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Donoho*, 204 Ill. 2d at 182, 788 N.E.2d at 721. Whether a prosecutor's comments in closing argument were so egregious as to warrant a new trial is a legal

issue, which we review *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

¶ 71 2. *Credibility of Police Officers*

¶ 72 In closing argument, defendant highlighted a discrepancy between Owens' and Hoecker's testimony as to which officer actually discovered the narcotics. Defendant suggested the officers' inability to recall this crucial detail raised doubt as to their ability to recall other relevant details. In its rebuttal argument, the State first attempted to clarify any discrepancy in the officers' testimony. It then argued:

> "Police officers, they're out there doing their job. They're responding to a call. They're trying to maintain the security of the scene for the individuals involved, for themselves, and for the community in general. They have no personal investment in the outcome. They're not personally involved with anyone in this case. They are extremely credible witnesses because they don't know anyone. They're just there doing their job."

Defendant objected to the State's argument on the basis the credibility of the witnesses was a matter for the jury to decide. The trial court overruled defendant's objection, finding the State could properly argue what it believed the credibility shows. The State continued:

> "They are among the most credible witnesses because once they finish handling this situation, they're off and they have to go do another one, and another one, and another one. They handle

hundreds and thousands of these types of calls in the years of their career. This is just one part, of one day, on the job for them."

¶ 73 Defendant asserts the trial court abused its discretion by allowing the State to argue the responding officers were extremely credible because they were police officers. In response, the State argues (1) defendant has forfeited his argument; (2) the prosecutor's remarks appropriately addressed defendant's suggestion the officers had bias; and (3) even if the prosecutor's "commentary phrased with generalization and hyperbole may have been ill-advised, defendant fails to establish that real justice was denied." Forfeiture aside, we find defendant has failed to demonstrate reversible error.

¶ 74 "Prosecutors are afforded wide latitude in closing argument and may comment on the evidence and any fair, reasonable inferences it yields." *People v. Curry*, 2013 IL App (4th) 120724, ¶ 73, 990 N.E.2d 1269. Prosecutors may comment on a witness's credibility " 'only if the remarks are fair inferences from the evidence.' " *People v. Young*, 2013 IL App (2d) 120167, ¶ 37, 997 N.E.2d 285 (quoting *People v. Barraza*, 303 Ill. App. 3d 794, 797, 708 N.E.2d 1256 (1999)). Ordinarily, a defendant cannot assert error where the prosecutor's remarks are invited or provoked by the defendant's argument. *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 420 (2009). However, while "[c]hallenging a witness's credibility may invite a prosecutor to respond, *** it does not give the prosecutor *carte blanche* to make up evidence during closing argument." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 47, 972 N.E.2d 1272. While a prosecutor may argue the credibility of police officer witnesses, in doing so, the prosecutor may not argue the witness is more credible merely because of his or her status as a police officer. *People v. Adams*, 2012 IL 111168, ¶ 20, 962 N.E.2d 410. On review, we must consider any

challenge made to remarks during closing argument in the context of the entire closing argument. *Caffey*, 205 Ill. 2d at 131, 792 N.E.2d at 1212.

¶ 75 Placing the complained-of remarks in context, we conclude the prosecutor sought, on rebuttal, to rehabilitate the responding officers' credibility, which had been put in question by defense counsel during his closing argument. However, we find the prosecutor's remarks transformed permissible advocacy into improper remarks regarding the inherent credence owed a police officer's testimony. *C.f. Curry*, 2013 IL App (4th) 120724, ¶¶ 34-36, 84, 990 N.E.2d 1269. Although improper, after reviewing the entirety of the closing argument and the evidence presented, we find defendant has failed to demonstrate reversible error.

¶ 76 Reversible error will be found only where "the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009). During closing argument, defendant relied positively on the officers' testimony to highlight (1) the officers did not observe him toss anything, (2) the narcotics were found in a high-crime area, (3) the narcotics were found in the early morning hours after Fourth of July celebrations, and (4) Roberson was seated on the ground next to the drugs. The improper remarks were a minor part of an extensive and detailed argument by the State. Following closing arguments, the jury was given (1) Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000), instructing it was to determine the weight to be given to the testimony of the witnesses; and (2) Illinois Pattern Jury Instruction, Criminal, No. 1.03 (4th ed. 2000), stating closing arguments are not evidence and any statement or argument made not based on the evidence presented should be disregarded. See *Adams*, 2012 IL 111168, ¶ 23, 962 N.E.2d 410. The State further presented significant

circumstantial evidence of defendant's possession from his attempt to convince Roberson to "plead the fifth" rather than deny owning or possessing the narcotics. Based on our review of the entirety of the closing argument and the evidence presented, we find defendant has failed to demonstrate real justice was denied.

¶ 77 3. *Jail Phone Recordings*

¶ 78 In its closing argument, the State replayed five jail phone recordings. Two recordings related to the possession charge and three of the recordings related to the unlawful-communication charges. The duration of the recordings were short and coupled with extensive closing argument.

¶ 79 Defendant asserts the trial court abused its discretion by allowing the State to replay the jail phone recordings, placing an undue emphasis on the contents of the conversations contained therein. Defendant acknowledges he has forfeited his contention of error by failing to object at trial and include his objection in a posttrial motion but requests we review his claim for plain error. In response, the State argues defendant has failed to establish clear or obvious error.

¶ 80 In *People v. Gross*, 265 Ill. App. 3d 74, 76-77, 637 N.E.2d 789, 791-92 (1994), the court rejected the defendant's argument the trial court abused its discretion by allowing the State to replay videotape excerpts in closing argument, finding the limited excerpts were appropriately allowed for the purpose of summary. *C.f. People v. Ammons*, 251 Ill. App. 3d 345, 347-48, 622 N.E.2d 58, 60 (1993) (finding reversible error where the State was allowed to replay an entire 18-minute audiotape, dramatically overemphasizing its credibility). Like *Gross*, we find replaying the short jail phone recordings as part of an extensive closing argument did not

place an undue emphasis on the evidence. Defendant has failed to demonstrate clear or obvious error occurred.

¶ 81 D. Preliminary *Krankel* Finding

¶ 82 Defendant asserts we should remand for further proceedings on his posttrial *pro se* ineffective-assistance-of-counsel claims as one of his claims demonstrates possible neglect by defense counsel. Specifically, defendant contends defense counsel failed to subpoena the dispatch records, which demonstrates possible neglect, and the trial court's contrary finding was manifestly erroneous.

¶ 83 Under *Krankel* and its progeny, when a defendant raises a colorable *pro se* posttrial claim of ineffective assistance, the trial court must conduct an inquiry into the claim to determine whether new counsel should be appointed to assist the defendant. See *Krankel*, 102 Ill. 2d at 189, 464 N.E.2d at 1049; *People v. Johnson*, 159 Ill. 2d 97, 126, 636 N.E.2d 485, 498 (1994); *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). Where the court's inquiry discloses "possible neglect of the case," it should appoint new counsel to independently investigate and represent the defendant at a separate hearing. *Id*. at 78, 797 N.E.2d at 637-38. If, on the other hand, the court determines the claim "lacks merit or pertains only to matters of trial strategy," the court may deny the claim without appointing new counsel. *Id.* at 78, 797 N.E.2d at 637. In making such a determination, the court may rely on the allegations and responses of defense counsel and the defendant, its knowledge of defense counsel's performance at trial, and on its own legal knowledge of what does and does not constitute ineffective assistance. *People v. Mays*, 2012 IL App (4th) 090840, ¶ 57, 980 N.E.2d 166.

¶ 84 At defendant's January 2014 hearing on his motion to suppress evidence, Owens testified he was dispatched to 1065 North College Street with information indicating two individuals were arguing outside of a residence, a possible domestic-violence situation, and one of the individuals may have been armed. Upon his arrival, Owens observed a vehicle in a vacant lot next to the residence and one subject, later identified as defendant, standing and arguing with a female, who was sitting on the ground and leaning against the vehicle. Owens noted he was unsure whether the argument would qualify as a domestic-violence type situation. While approaching defendant and the female, Owens observed defendant place his hand in his pocket, remove it, and then make a tossing motion toward the rear of the vehicle. Owens directed defendant to keep his hands out of his pocket. Defendant again placed his hand in his pocket, causing Owens to draw his firearm and direct defendant to get on the ground. Suspected narcotics were later discovered on the ground in the location where defendant's tossing motion was directed. Defendant was unarmed.

¶ 85 At his June 2014 preliminary *Krankel* hearing, defendant alleged defense counsel failed to have the State bring dispatch records to his hearing on his motion to suppress evidence. In response to defendant's allegations, defense counsel asserted defendant directed him to file a motion to suppress against his advice that any such motion would be frivolous. The trial court found no basis to support defendant's claim of ineffective assistance and declined to appoint new counsel.

¶ 86 Defendant claims the dispatch records would have established whether the police had reasonable suspicion to conduct an investigatory stop. Defendant highlights, while dispatch provided the responding officers with information an individual may have been armed, no

evidence was introduced to indicate the basis for the complaint. Defendant asserts the dispatch records may have supported his motion to suppress if they indicated the information in the underlying complaint was unreliable.

¶ 87 We initially note, regardless of the source of the information contained in the underlying complaint, Owens' observations corroborated the information individuals were arguing outside a residence. Defendant fails to address how an officer responding at 12:30 a.m. to a reported altercation discovering two individuals, one standing and one seated, arguing in a vacant lot would be insufficient to serve as a basis to approach and conduct an investigatory stop.

¶ 88 Regardless, as the State maintains, the record establishes defense counsel did not neglect the case as the dispatch records were irrelevant—defendant did not have standing to assert a privacy interest in the abandoned narcotics. The fourth amendment protects individuals from "unreasonable searches and seizures." U.S. Const., amend. IV. The fourth amendment is not implicated where a defendant abandons property before a seizure occurs. *California v. Hodari D.*, 499 U.S. 621, 629 (1991); *People v. Hoskins*, 101 Ill. 2d 209, 220, 461 N.E.2d 941, 946 (1984). Defendant abandoned the narcotics prior to submitting to official authority. See, *e.g.*, *United States v. Lewis*, 40 F.3d 1325, 1334 (1st Cir. 1994). Regardless of the contents of the dispatch records, defendant could not have achieved suppression of the abandoned narcotics. Defense counsel's failure to subpoena the dispatch records, even if available, does not demonstrate possible neglect. The trial court properly denied defendant's claim without appointing new counsel.

¶ 89 III. CONCLUSION

¶ 90 We affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 91 Affirmed.