2018 IL App (4th) 150406-U

NO. 4-15-0406

FILED
May 7, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
DONOVAN WHEELER,	)	No. 14CF350
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in granting the State's two motions to continue for purposes of DNA testing.

(2) The trial court did not abuse its discretion in allowing defendant to use only two of a codefendant's prior convictions for impeachment purposes.

(3) Defendant failed to establish his trial counsel provided ineffective assistance.

(4) The trial court did not abuse its discretion in refusing the jury's request for transcripts of witness testimony.

(5) The trial court did not abuse its discretion in sentencing defendant.

¶ 2 In February 2015, a jury convicted defendant Donovan Wheeler of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and robbery to a victim over 60 years old (720 ILCS 5/18-1(a),(c) (West 2012)). In May 2015, the trial court sentenced defendant to 30 years in prison for armed robbery with three years of mandatory supervised release. Defendant appeals, making the

following arguments: (1) his right to a speedy trial was violated; (2) he received ineffective assistance of trial counsel because (a) his attorney failed to move for defendant's trial to be severed from a codefendant's trial and (b) failed to challenge the admissibility of DNA evidence; (3) he was denied a fair trial when the court would not allow him to impeach a witness with all of the witness's prior convictions; (4) the trial court failed to exercise its discretion to provide the jury with requested transcripts of witness testimony because the court believed it could not do so; and (5) the court abused its discretion in sentencing defendant by considering factors inherent in the offense and imposing an excessive sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 31, 2014, the State charged defendant in this case. On September 16, 2014, defendant filed a motion to sever his jury trial from that of his codefendant, Jabari O'Connor. The motion noted defendant and O'Connor were charged with the same offenses and a joint jury trial was scheduled for October 27, 2014. Defendant stated O'Connor had already implicated defendant as being the perpetrator of the alleged offense, and he could not receive a fair trial if they were tried together.

¶ 5 On October 20, 2014, the attorney for a third codefendant, John Billips, asked the trial court to sever Billips's case from both O'Connor's case and defendant's case because of statements they had made to the police. Defendant's attorney stated he was only concerned with O'Connor's statements. The trial court denied the motion to sever, stating the parties could raise the issue again later if necessary.

¶ 6 At a hearing on October 27, 2014, defendant, who was in custody, demanded a jury trial. The State filed a motion to continue the trial for DNA testing. Because the assistant State's Attorney handling the case was unavailable, the court continued the case until October

31, 2014. On that date, the court heard arguments on the State's motion to continue. The State noted defendant was charged on July 31, 2014, and the evidence was taken to the crime lab for testing on August 22, 2014. The State told the court it had learned from Aaron Small at the lab the week before that the evidence had not been assigned for testing. Because of the number of items sent to the lab for testing, Small told the State testing could be completed in 90 days. The State asked the court to continue the case 90 days so the DNA testing could be completed. Defendant objected to the continuance citing his constitutional and statutory speedy-trial rights. Defendant noted the legislature required the State to exercise due-diligence before a continuance could be given. The court found the State exercised due diligence and granted the State's motion for an additional 90 days.

¶ 7 At a hearing on January 15, 2015, the State noted it had filed a motion to continue the trial set for January 20, 2015. The State noted it and Aaron Small had narrowed the exhibits submitted to the lab. Small asked to be given until February 11 to test the samples. The State asked for another 30-day continuance. According to the State, it was at the mercy of the crime lab with regard to the timing of the testing, and the DNA evidence was crucial to its prosecution in this case. Defendant again argued the State's lack of due diligence. The court found the State was exercising due diligence and granted the State's motion. The court noted the assistant State's Attorney was "not the person personally testing these samples and she has done everything in her power to get the testing done as quickly as possible."

¶ 8 On February 17, 2015, defendant filed a motion *in limine* asking to use evidence of Jabari O'Conner's prior convictions for impeachment purposes at defendant's trial, including the following: (1) retail theft (Vermilion County Case No. 02-CM-957) (sentenced to two years' probation on June 1, 2004, and resentenced to 364 days in jail on June 13, 2007); (2) retail theft

(Vermilion County Case No. 04-CM-1260) (sentenced to two years' probation on January 11, 2005, and resentenced to 364 days in jail on June 25, 2007); (3) escape (Vermilion County Case No. 06-CM-385) (sentenced to two years' probation on July 20, 2006, and resentenced to 364 days in jail on June 25, 2007); (4) retail theft (Vermilion County Case No. 03-CF-21) (sentenced to probation on June 1, 2004, and sentenced to three years in prison on June 25, 2007); (5) theft (Vermilion County Case No. 08-CM-449) (sentenced to probation on August 19, 2008, and discharged from probation on March 14, 2013); and (6) unlawful possession of a converted motor vehicle (Vermilion County Case No. 09-CF-1705) (sentenced to probation on March 14, 2010, and eventually sentenced to 3 years in prison on June 1, 2011).

¶ 9 That same day, the trial court heard arguments on defendant's motion *in limine*. With regard to the 10-year limitation found in Illinois Rule of Evidence 609 (eff. Jan. 1, 2011), defendant argued all of the convictions fell within the applicable time period because O'Conner was resentenced to confinement within the 10-year limitation period even though he was originally sentenced outside the 10-year limit. The State argued the relevant date is the date of the original sentence, not a resentencing date. Without explaining the basis for its decision, the court stated it was not going to allow defendant to use all of O'Conner's convictions.

¶ 10 At the same hearing, Billips's attorney stated his continuing objection to the denial of his motion to sever his trial from defendant's trial. The trial court noted the continuing objection. Defendant's counsel then stated:

> "And, Judge, I would note that should—and there's nothing so far that's been disclosed but should occasion arise during the trial where it becomes—where [Billips's] defense become [*sic*] adverse to mine, we would be making a motion at that appropriate time, cause there's always a continuing duty to protect that."

¶ 11 During the jury trial, Brittani Brandon, 24, testified she was the granddaughter of Bruce and Patty Rothery, who owned Rothery Jewelry, the location of the armed robbery. She was helping her grandparents at the store on July 29, 2014. At approximately 10 a.m., she heard the front door open quickly and then heard glass shatter. She saw two suspects in the store. One of the individuals put her grandfather on the floor and ordered her to get on the ground. The suspect had a gun, which he pointed at her and her grandfather. Although the gunman had on some kind of tight netting over his face, she saw he had braids coming down over his forehead and had a unique-looking mouth. After the suspects left the store, she ran out the back door and went to a gym nearby. The gym owner called the police.

¶ 12 Shortly after the robbery, a police officer drove Brandon in an unmarked car to see if she could identify defendant John Billips, whom the police had detained at a traffic stop. The officer drove Brandon by Billips, who was sitting on the back of a vehicle. Brandon identified Billips as the gunman she saw during the robbery based on his braids and mouth. Her identification of Billips was not part of a lineup.

¶ 13 Patty Rothery testified she was also at the store during the robbery and stated the armed suspect pushed her husband down, touching him with the gun. She could not identify the robbers. She did identify a pair of earrings and some jewelry boxes the police found.

¶ 14 Bruce Rothery, 66, testified he heard a commotion in the front of the store at approximately 10 a.m. A gunman pushed him to the floor and put a knee in his back. He testified he did not see anyone come inside but believed two other suspects were in the store.

¶ 15 Nathan Howie, a canine officer with the Danville police department, was on patrol and responded to the robbery. Bruce Rothery told him the suspects ran through the grass field by Fischer Theater across Vermilion Street from the jewelry store. Howie and his canine

started to track the suspects. Howie found a rubber glove, a black bandana or mask, and some jewelry that had been dropped. The rubber glove and black mask were in the area of the jewelry store. He went north in the alley behind the Fischer Theater, then west on Harrison Street, and then turned north on Walnut Street to the area behind Cris Senior Services. Based on the canine's behavior, Howie believed the suspects were near. However, he was not able to pinpoint their location, and he returned to the jewelry store.

¶ 16 Howie then responded to a call requesting assistance for Detective Hartshorn at 308 Franklin Street. When he arrived, Detective Hartshorn had her firearm out, yelling at an individual to stop. The person was starting to run south on Franklin Street. Howie ordered the individual to stop or he would unleash the canine. The man, later identified as Jabari O'Conner, laid on the ground. O'Conner had a necklace with a gold medallion in his hand.

¶ 17 While O'Conner sat on the curb in the area of 306 and 308 Franklin, other officers checked the apartment complex. Deputy Brad Norton saw a ring fall out of O'Conner's pocket while he was sitting on the curb. The ring was photographed and then retrieved. O'Conner also had on a pair of diamond earrings. The earrings were identified as being from the jewelry store.

¶ 18 Todd Damilano, an investigator with the Vermilion County Sheriff's Department, also responded to the robbery at the jewelry store. He secured a light-colored rubber glove lying directly out the front door of the jewelry store in an empty parking space. The police also found a skull cap on the sidewalk in front of the theater across the street.

¶ 19 Sean Jones, a deputy with the Vermilion County Sheriff's Department, testified he took Brittany to see if she could identify John Billips, which she did.

¶ 20 Timothy Kentner, a police officer for the City of Danville, testified he was alerted to another black skull cap that was found behind Turk Furniture, which he collected. He also

went to 306 Franklin Street and retrieved a bag of jewelry officers had recovered from the basement of that address. The bag of jewelry was then taken back to the jewelry store to see if it could be identified. Kentner described the building at 306 Franklin to be a two-story structure with a basement and two apartments.

¶ 21 Jeremy Meyers testified he lived with his wife, two kids, and his sister, Amanda, in apartment "A" at 306 Franklin, which was a first-floor apartment with access to the basement through a door in his kitchen. A door into the basement from the outside was locked from the outside. Meyer did not have a key for that exterior door into the basement and did not store anything in the basement.

¶ 22 On the morning of the robbery, Meyers, his wife, his sister, and the two children went shopping for school supplies. They returned home around 9:30 or 10 a.m. They all went inside the apartment, but he and his wife then went outside and were talking to a neighbor, leaving his sister and the children in the apartment. Because of the police presence in the area, he knew the police must have been looking for something in the area. He went back into his apartment to get his kids and sister to go to the neighbor's house. When he went into the apartment, he saw two black men he did not know. They did not have permission to be there. He yelled at them to get out. One man ran for the front door, and the other man ran to the back of the apartment.

¶ 23 On cross-examination, Meyer testified his wife's name is Mary. His sister's name is Amanda. Amanda had been living with them for approximately three weeks when this happened. Meyer stated he did not know what kind of company Amanda kept while he was not there. Meyer was positive Billips was not in his apartment that day.

¶ 24 Aaron Small, a forensic scientist in biology and DNA for the Illinois State Police

at the Forensic Science Laboratory in Springfield, offered expert testimony in this case. Small testified he was provided a number of exhibits from the Danville police department and known standards for O'Conner, Billips, and defendant. Jabari O'Conner's DNA was a match for DNA found in a latex glove and a jewelry box. Small stated the major DNA profile taken from the glove and jewelry box would be expected to occur in approximately 1 in 3.1 sextillion African Americans, 1 in 10 sextillion Caucasians, and 1 in 1.4 septillion Southwest Hispanics.

¶ 25 Small also collected DNA from a black nylon skull cap. Defendant could not be excluded as the source of this DNA. Small stated the DNA profile based on the three loci he could analyze would be expected to occur in 1 in 32,000 unrelated African Americans, 1 in 230,000 unrelated Caucasians, and 1 in 18,000 unrelated Southwest Hispanics. Billips and O'Conner were excluded as the source of that DNA.

¶ 26 A portion of a latex glove was also tested for DNA. Small found a mixture of the DNA of two people on the glove. A major DNA profile was indentified, and Jabari O'Conner could not be excluded as its donor. Small said this major DNA profile would occur in 1 in 18 million unrelated African Americans, 1 in 1.2 billion unrelated Caucasians, and 1 in 190 million unrelated Southwest Hispanics. Billips and defendant were both excluded from being the contributor of the major DNA profile. However, Small also identified a minor DNA profile. Defendant could not be excluded from being the contributor of the minor DNA profile. Small stated one in two unrelated African Americans, one in three unrelated Caucasians, or one in six unrelated Southwest Hispanics could have contributed the minor DNA profile. O'Conner and Billips were excluded from being the contributor of the minor DNA profile.

¶ 27 On cross-examination, defendant's attorney questioned Small about the random match probability statistics he provided the jury during his direct examination. Counsel

questioned Small about the DNA found in the black nylon skull cap, which defendant could not be excluded from contributing and the statistical odds regarding him being the contributor (1 in 32,000). Small testified it was possible each individual in a random group of 10 people could not be excluded as the contributor of the DNA found in the black nylon skull cap. With regard to the DNA found on the latex glove which defendant could not be excluded from contributing (1 in 2), Small testified it was possible no one in a random group of 12 African Americans could be excluded as contributing the DNA.

¶ 28 Small testified Billips could be excluded as the contributor of all the DNA evidence he tested.

¶ 29 Brad Norton, a deputy with the Vermilion County Sheriff's Department, testified he responded to the robbery and then to the 300 block of North Franklin Street. He saw a few officers speaking to a white woman on the porch at 306 Franklin. The officers on the porch asked for additional officers to assist in going inside the structure because someone was reportedly inside. Norton found an African American man lying in a bed in one of the bedrooms. He handcuffed the man and patted him down but did not find any weapons or feel any bulges.

¶ 30 Phillip Wilson, a Danville police officer, testified he searched the basement of the building at 306 Franklin. He found a pair of blue jeans with a red belt along with a black nylon cinch bag, which contained numerous dark-colored jewelry boxes. He was then directed upstairs to a bedroom where he and two other officers found defendant lying on a mattress.

¶ 31 Jabari O'Conner testified he had been charged in this case and was currently in custody at the public safety building. He pleaded guilty to a reduced charge of aggravated robbery and an eight-year-prison sentence the week before defendant's trial in exchange for testifying against defendant and Billips. O'Conner testified he took part in the robbery with

Billips and defendant. They met the morning of the robbery and decided to steal something. They went to the jewelry store and committed the robbery.

¶ 32 O'Conner was the third person to go into the store. Billips went toward the back of the store, defendant was in the middle of the store, and he secured the door. O'Conner said he was still "high" from the night before. After a few seconds inside the store, they took off running from the store and went to an apartment where Billips's girlfriend lived.

¶ 33 Billips left the apartment. His girlfriend told O'Conner and defendant they had to leave. O'Conner and defendant went downstairs and were on the side of the building when he saw a canine officer. O'Conner and defendant then ran around the back of the building. O'Conner cut his hand opening the door into the basement. In the basement, they tried to decide what to do. O'Conner and defendant changed their clothes. O'Conner had another pair of pants with him, which he changed into. Defendant had two pairs of pants on and was trying to change the pair of pants he had on. O'Conner left the jewelry from the robbery in the basement. O'Conner and defendant then went up the stairs to the first floor apartment. He tried to bribe a woman to be quiet with a chain. He then went out the front door and was apprehended.

¶ 34 Both defendant and Billips then moved for directed verdicts, which the trial court denied.

¶ 35 Kevlena Williams testified on defendant's behalf. She stated defendant watched her child on the morning of the robbery. She picked up her child from defendant about 9:15 a.m. in the area of Franklin and Seminary Streets. She and defendant talked until about 9:30 a.m. Defendant then walked back toward his friend's house. Williams did not know the friend's name but said her nickname was "Snow."

¶ 36 Defendant testified on his own behalf. He was living at 315 Bradley Lane on July

29, 2014. Kevlena Williams dropped her child off for him to watch at 7:30 in the morning. After the child arrived, they watched television for a while. He and the child then went to County Market so he could buy some cigarettes. They then went to his friend Snow's house at about 8:15 or 8:20. He and the child then met Kevlena again at 9:10 or 9:15. He talked to Kevlena for a few minutes and then went back to Snow's house. "Snow" was a nickname for a white female. He was at Snow's house until about 10 a.m. He then started walking back toward Beeler Terrace. He took a shortcut and ended up by 308 North Franklin. He saw three black men running the opposite way. One of the men was Jabari O'Conner, whom defendant had been around two or three times. O'Conner told him the police were "hot," which defendant took to mean the police were out in numbers. He knew of a house close by with a basement door that was always open. Defendant said he had been in a sexual relationship with a female living on the first floor of the house named "Amanda."

¶ 37 Defendant testified he had drugs in his possession so he and O'Conner went into the basement of the house. O'Connor had a black knapsack. After a while in the basement, defendant went to the back door and saw a police officer and canine unit outside. He then closed the door but heard the officer yell at him to "come here." Defendant threw his cocaine down the drain and told O'Conner the police were coming. He and O'Conner went up the stairs to the first floor apartment. O'Conner was talking to the female with whom defendant had the sexual relationship. Her brother, Jeremy, then came into the apartment and told defendant and O'Conner to get out of his apartment. O'Conner went out the front door. The female told defendant to go to the back of the apartment. That is where he later was found by the police. Defendant denied participating in the robbery.

¶ 38 The State called Detective Dawn Hartshorn as a rebuttal witness. She testified

Amanda Meyers denied having any kind of sexual relationship with defendant.

¶ 39 During his closing argument, defendant's attorney argued defendant was nowhere near the robbery in this case. He argued O'Conner's story could not be believed because of the deal he made with the State. Defense counsel stated:

> "About two weeks before this fateful day, couple two, three times apparently Jabari O'Conner and his tear drop tattoo walked into Rothery Jewelers. Walked in—and you heard that from Patty, walked in and was kind of browsing but not browsing, and in hindsight we now know what happened. Because on July 29th, 2014, 10:07 a.m., boom, into the door. Into the door. A man with *** crazy braids, teeth, carrying a gun, another man in a black hoodie comes in, and Jabari O'Conner, the third. Jabari O'Conner and his band of merry men are about to commit a horrible, tragic offense. That's what happened that morning. Donovan Wheeler was nowhere near that."

Defense counsel argued defendant was in the wrong place at the wrong time when he helped O'Conner hide in the basement at 306 Franklin.

¶ 40 During Billips's closing argument, his attorney pointed out the State had no DNA evidence linking Billips to this crime. She also discredited O'Conner's testimony. Billips's attorney argued:

> "Now, Jabari O'Conner came and testified, [defendant's attorney] already told you that there's a huge problem with his testimony, and that is the fact that he is getting a huge reduction. He terrorized these people at the jewelry store, but it doesn't matter, we're not gonna give him any time in prison because we wanna make sure that we're gonna point the finger at someone else that we have no

evidence against other than the fact that we had a show up with one person. Why is DNA evidence so important? It is 2015. There is a reason. You hear it every day. People getting exonerated day after day sitting in prison for 20 years because there was a faulty witness or a misidentification and the DNA evidence excludes them and they come out 20 years later. Do not let that happen to John Billips. The DNA evidence already excludes him. Do not let that happen to him.

What makes sense here. That there's two skull caps found, two male blacks, two male blacks inside of an apartment, DNA evidence tied to two male blacks, it's two male blacks. That's what it is. It's two male blacks. It is Jabari O'Conner and Donovan Wheeler. It is two male blacks."

¶ 41 During deliberations, the jury sent a note to the trial court asking for a copy of the testimony of Donovan Wheeler, Jabari O'Conner, and Kevlena Williams. After reading the request, the court stated, "In my opinion the answer is no. You have to rely on your own memory of the evidence." Defendant's attorney stated he did not see the harm in giving them the transcripts. Billips's attorney said, "Your Honor, I would think just saying that you have the—the evidence and something—I can't remember what the exact thing—[.]" The court stated she was going to tell the jury, "no, you have to rely on your own memory of the evidence." Billips's attorney then gave the court a suggestion how to respond to the jury's request. The court then stated, "I personally have never heard of ordering the transcript for a jury. And any time there's been a question in the past about any issues regarding evidence it's always been you need to rely on" your recollection of the evidence.

¶ 42 The jury found defendant guilty of armed robbery and robbery of a victim who is 60 years of age or over and Billips not guilty of the same offenses.

¶ 43 On May 5, 2015, the trial court held a hearing on defendant's motion for a new trial and sentencing hearing. The court denied defendant's motion for a new trial. The State recommended defendant receive a 30-year sentence. Defendant's attorney asked the court to impose the minimum sentence of 21 years. The parties were in agreement the two offenses would merge, and defendant would only be sentenced on the Class X offense.

¶ 44 In sentencing defendant, the trial court stated:

> "I find your conduct every bit as culpable as the person that was holding the gun because you are a room away from that person and even though you weren't the one pointing the gun, you knew exactly what that person was in there doing and you continued to take part in the situation and you continued to do what your job description was or what you were ordered to do or decided on to do while you knew that that person was standing there holding the gun to these three people and scaring the crap out of them, and so you are just as culpable, in my opinion, as the person who was holding the gun.
>
> Your actions are despicable. Absolutely despicable, inexcusable, and, you know, you have to live with them the rest of your life. But just absolutely despicable and inexcusable and every bit as culpable as the person holding the gun.
>
> When I look at the factors in mitigation, I find that your conduct caused or threatened serious harm, you received compensation for committing the offense, you have a history of prior delinquency or criminal activity, and the sentence is necessary to deter others from committing the same crime. I didn't find any factors in mitigation that applied to you."

The court sentenced defendant to 30 years in prison with 3 years of mandatory supervised release.

¶ 45 On May 20, 2015, the trial court denied defendant's motion to reconsider sentence.

¶ 46 This appeal followed.

¶ 47 II. ANALYSIS

¶ 48 Defendant raises a series of arguments on appeal. We do not address the arguments in the order defendant raised them.

¶ 49 A. Speedy Trial

¶ 50 Defendant argues his right to a speedy trial was violated when the trial court granted the State's two motions to continue this case so the State's crime lab could complete DNA testing on the evidence in the case. The question here is whether the trial court erred in continuing this case past the statutory 120-day-speedy-trial limit. Under section 103-5(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/103-5(a) (West 2012)), absent certain exceptions, a defendant in custody must be tried within 120 days of being taken into custody. However, section 103-5(c) of the Procedure Code (725 ILCS 5/103-5(c) (West 2012)) provides:

> "If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days. If the court determines that the State has exercised without success *due diligence to obtain results of DNA testing that is material to the case* and that

there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." (Emphasis added.)

This court has stated "[t]he speedy-trial statute must be liberally construed in a defendant's favor because it enforces a constitutional right." *People v. Colson*, 339 Ill. App. 3d 1039, 1047, 791 N.E.2d 650, 656 (2003). The State must establish it exercised due diligence to obtain DNA test results within the 120-day speedy-trial limit. *Colson*, 339 Ill. App. 3d at 1047, 791 N.E.2d at 656. A court must determine whether the State exercised due diligence on a case-by-case basis. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656.

¶ 51 The statute does not define what constitutes due diligence or what the State must prove to establish due diligence. This court has declined to require the State to follow a specific series of steps before getting a continuance for DNA testing as the Fifth District did in *People v. Battles*, 311 Ill. App. 3d 991, 1002, 724 N.E.2d 997, 1005 (2000), instead following the established rule due diligence is to be determined on a case-by-case basis. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656. However, this court did make clear "[t]he provision for DNA testing was not meant to provide an automatic continuance in every trial that involved DNA testing because the statute requires that the State must exercise 'without success due diligence to obtain results of DNA testing.' [Citation.]" *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656.

¶ 52 The facts in *Colson* are analogous to the facts in the case *sub judice*. The offense in question in *Colson*, aggravated criminal sexual assault, occurred on the day of the defendant's arrest, November 27, 2000. *Colson*, 339 Ill. App. 3d at 1041, 791 N.E.2d at 651. The crime lab did not receive the sexual assault evidence kit and defendant's blood sample until nearly two months later on January 19, 2001. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657. The

crime lab received the victim's boyfriend's blood for DNA analysis on February 15, 2001. The DNA testing was completed on March 21, 2001. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657. This court stated:

> "The State did not delay excessively in getting the DNA materials to the lab. The lab did not take an excessively long time in getting the results processed. Defendant suggests that the State's request for a continuance was a ruse because Ms. Dobson said that she wanted a continuance in addition to a DNA continuance so she could try the case. However, the trial court did not grant Ms. Dobson's personal continuance, and when the State asked for the continuance on February 22, it was because the results were not back yet and the State actually needed the continuance. In short, while the State could have perhaps done better, it pursued a course of action meant to get the DNA testing done as soon as possible, and the record gives no indication that the request was a ruse. The trial court therefore could properly find that the State had acted with due diligence. The grant of the continuance was not an abuse of discretion[.]" *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657.

¶ 53 In this case, at the October 31, 2014, hearing, the State noted defendant was charged on July 31, 2014, and 28 pieces of evidence were taken to the crime lab for analysis on August 22, 2014. The assistant State's Attorney told the court:

> "I spoke with Mr. Small[] last week from the crime lab. He stated [the evidence] had not been assigned; but due to the number of pieces of evidence, it would take a little while. He stated that it could be completed in 90 days, and we're asking for that additional 90 days and asking that the trial be set January 20

along with Mr. Billips and Mr. O'Conner."

¶ 54 Defendant responded it opposed the State's motion, informing the trial court the State bore the burden of showing it was entitled to an extension of the 120-day speedy-trial deadline. According to defendant, the State knew as early as July 29, 2014, DNA evidence could be important in this case. However, the State did not check on the status of the DNA testing at the State Crime lab until the week before the trial was scheduled.

¶ 55 Relying on *Colson*, the trial court granted the State's motion, finding the State took the evidence to the crime lab in a timely manner, and gave the State an additional 90 days from October 27, 2014. This 90-day extension would have run on Sunday, January 25, 2015. The trial was scheduled for January 20, 2015.

¶ 56 In this case, defendant argues the State did not exercise due diligence because the State collected forensic evidence on the day of the robbery but did not submit the evidence until nearly a month later. However, the State submitted the evidence in this case much quicker than it did in *Colson*.

¶ 57 Defendant also points to the fact the State did not check with the crime lab about its progress in testing the evidence until a week before the originally scheduled trial date, which was October 27, 2014. This ignores the fact the statutory speedy-trial deadline would not have run until late November 2014. The State had over a month to try defendant within the 120-day statutory limit when it asked the crime lab about its progress. In this context, the State's failure to contact the lab sooner clearly does not mean the State did not exercise due diligence. The trial court could have continued the trial until November 25, 2014, irrespective of section 103-5(c) (725 ILCS 5/103-5(c) (West 2012)) if the lab could have completed its analysis prior to that date. Because the lab could not complete the DNA testing before defendant's 120-day speedy-trial

term would run, the State asked for a continuance based on subsection (c), which the trial court granted.

¶ 58 This court has stated it will not overturn a trial court's decision to grant a continuance based on subsection (c) unless the trial court clearly abused its discretion. *People v. Colson*, 339 Ill. App. 3d at 1047, 791 N.E.2d at 656. Based on the facts in this case, the trial court did not abuse its discretion in granting this first continuance.

¶ 59 We next turn to the trial court's decision to grant the second continuance. On January 12, 2015, the State filed a second motion to continue asking for another 30 days for the crime lab to finish DNA testing. According to the motion, on December 19, 2014, an assistant State's Attorney spoke with Aaron Small at the crime lab about the large number of exhibits that had been sent to the lab for analysis. Small requested the State narrow the number of exhibits to be tested to an amount he could realistically complete. The assistant State's Attorney and Smith significantly narrowed the evidence to be analyzed. Small requested until February 11, 2015, to complete analysis of this evidence. The State asked the court to continue the case to either February 9, 2015, or February 17, 2015.

¶ 60 On January 15, 2015, the trial court held a hearing on the State's second motion to extend the case for speedy-trial purposes. The State noted Small was asking to have until February 11 to complete his testing. However, the State was asking for the trial to be set for February 9. The State noted, "I can simply tell him that, you know, look, he has to have those results, you know, a week prior to that setting." The State argued:

> "But in terms of due diligence, Judge, I mean, I would simply argue that we established our due diligence between our office and the Danville Police Department. At this point[,] we're simply at the mercy of the crime lab which in

addition to this case—which Mr. Small[] indicated he would just have to work on this and only this case in order to even get that done for February 11th to the exclusion of all other cases that are assigned to him."

Defense counsel objected to the continuance, arguing the State had not shown due diligence.

¶ 61 The trial court allowed the State's motion, stating the State continued to show due diligence. The court noted the assistant State's Attorney was not personally testing the evidence and had done everything in her power to get the testing completed as quickly as possible. The court granted the State an additional 30-day continuance.

¶ 62 Based on the record in this case, including the fact the State agreed to narrow the amount of items it wanted the crime lab to test, the trial court did not clearly abuse its discretion in granting defendant another 30-day extension to try defendant.

¶ 63 B. Impeachment with Prior Convictions

¶ 64 We next address defendant's argument he was denied a fair trial when the trial court refused to allow him to impeach Jabari O'Conner with all six of O'Conner's prior convictions. The decision to allow the use of a prior conviction for impeachment is a matter within the trial court's discretion and will not be disturbed unless the trial court abused its discretion. *People v. Montgomery*, 47 Ill. 2d 510, 515, 268 N.E.2d 695, 698 (1971).

¶ 65 Before defendant's trial, the State argued four of O'Conner's six convictions fell outside the 10-year time frame established in *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971), and Illinois Rule of Evidence 609(a) (eff. Jan. 1, 2011). The trial court only allowed defendant to use O'Conner's two most recent convictions.

¶ 66 Defendant argues the trial court bypassed the *Montgomery* analysis. Further, according to defendant, the record does not show the court was aware it had discretion to allow

the use of all six of O'Conner's convictions. Defendant argues the record shows the court gave up its role of balancing the probative value of the convictions against their prejudicial effect and simply followed the State's mistaken belief four of the convictions were inadmissible as a matter of law.

¶ 67 The State does not argue O'Conner's convictions were inadmissible on appeal as it did in the trial court. Instead, the State argues the record does not show the trial court barred defendant from using four of the six convictions based on the prosecutor's erroneous argument. The State points out defense counsel provided the trial court with the proper rule.

¶ 68 We note a trial judge is presumed to know and correctly apply the law. To overcome this presumption, a strong affirmative showing in the record establishing the trial court did not know and apply the law correctly is required. *People v. Howery*, 178 Ill. 2d 1, 32-33, 687 N.E.2d 836, 851 (1997). The record here does not make a strong affirmative showing the court did not know and apply the law correctly. Nothing in the record establishes the court based its decision on a misunderstanding of the law.

¶ 69 Defendant also argues—in the alternative—the trial court abused its discretion in refusing defendant's request to impeach O'Conner with all six of his prior convictions. Based on the record in this case, the trial court did not abuse its discretion in excluding evidence of O'Conner's three convictions for retail theft and one conviction for escape. The court allowed defendant's use of O'Connor's misdemeanor theft conviction in 2008 and his felony conviction for unlawful possession of a converted motor vehicle, for which he was eventually sentenced to three years in prison on June 1, 2011.

¶ 70 In addition to impeaching defendant with two prior convictions, defendant was able to challenge O'Conner's credibility in this case by way of his guilty plea for his

involvement in the charged offense and his agreement to testify against defendant and Billips in exchange for a shorter prison sentence. In other words, defendant was allowed to establish O'Conner was a criminal in the past and admitted robbing the jewelry store in this case.

¶ 71 Based on the jury's verdict acquitting Billips, we can say with reasonable certainty that the jury did not find O'Conner to be a credible witness on all matters to which he testified. O'Conner testified he, Billips, and defendant all robbed the store together. Yet, despite O'Conner's testimony and the identification of an eyewitness working at the store, the jury acquitted Billips. Had the jury found O'Conner credible, it seems clear it would have convicted Billips and defendant, even absent additional corroborating evidence, like DNA, against Billips.

¶ 72 C. Ineffective Assistance of Trial Counsel

¶ 73 We next address defendant's arguments his trial counsel was ineffective. Defendant contends his trial counsel was ineffective for failing (1) to challenge the admissibility of the DNA evidence and (2) to move to sever defendant's trial from Billips's trial. To establish ineffective assistance of counsel, a defendant must establish his counsel's performance was constitutionally deficient and he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, a defendant must show a reasonable probability exists the result of the proceeding would have been different but for counsel's deficient performance. *Strickland*, 466 U.S. at 694. Our supreme court has stated a "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

¶ 74 "Under the first *Strickland* prong, defendant must demonstrate his attorney's performance fell below an objective standard of reasonableness." *People v. Evans*, 209 Ill. 2d 194, 220, 808 N.E.2d 939, 953 (2004). A mistake with regard to trial strategy does not

necessarily render an attorney's assistance ineffective. *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 10, 93 N.E.3d 664. "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found." *People v. Perry*, 224 Ill. 2d 312, 355-56, 864 N.E.2d 196, 222 (2007). The presumption of ineffective assistance may also be overcome if the attorney's strategic decisions appear so irrational that no reasonably effective defense attorney in a similar situation would have pursued the same strategy. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85, 28 N.E.3d 923.

¶ 75 1. *Failure to Challenge Admissibility of DNA Evidence*

¶ 76 According to defendant, the DNA evidence presented by the State "was irrelevant because it barely narrowed the potential donors" and did not connect him to this crime. Instead, the evidence only showed he could not be excluded as the possible donor. Defendant argues his attorney both failed (1) to adequately challenge the admission of this irrelevant evidence and (2) challenge the State's expert's conclusions on cross-examination and in his closing argument.

¶ 77 Aaron Small testified defendant could not be excluded as the source of DNA on a latex glove found by the front door of the jewelry store and a skull cap found near the theater across the street from the jewelry store. Small testified one in two African American men could have contributed the partial profile found on the latex glove and 1 in 32,000 unrelated African Americans could have contributed the partial profile found on the skull cap.

¶ 78 Evidence is relevant if it has any tendency to establish a fact as more or less probable than without the evidence. *People v. Harvey*, 211 Ill. 2d 368, 392, 813 N.E.2d 181, 196 (2004). In this case, the fact defendant could not be excluded as the source of the DNA found on a latex glove and skull cap found near the jewelry store is relevant. That being said, relevant

evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. *People v. Walker*, 211 Ill. 2d 317, 337, 812 N.E.2d 339, 350 (2004).

¶ 79 Citing *People v. Pike*, 2016 IL App (1st) 122626, 53 N.E.3d 147, and *People v. Schulz*, 154 Ill. App. 3d 358, 506 N.E.2d 1343 (1987), defendant argues DNA evidence should not be admitted when the probability statistics are so low the evidence does not make defendant's identification more or less probable. In *Pike*, the First District held "the admission of DNA expert testimony of a 50% probability of inclusion for a random person in the population as a possible contributor to a mixed DNA profile was error because it was irrelevant, as it did not tend to make the issue of defendant's identification more likely than not." *Pike*, 2016 IL App (1st) 122626, ¶ 1, 53 N.E.2d at 151-52. The only DNA evidence in *Pike* showed the defendant could not be excluded but neither could approximately 1 in 2 unrelated African American males, 1 in 2 unrelated Caucasian males, and 1 in 2 unrelated Hispanic males. *Pike*, 2016 IL App (1st) 122626, ¶ 26, 53 N.E.3d 147. However, while the court found the admission of this evidence was error, the error was not so serious as to constitute plain error because the evidence was not closely balanced and defendant was not deprived of a fair trial. *Pike*, 2016 IL App (1st) 122626, ¶¶ 102-03, 53 N.E.3d 147. The court noted the expert presented the evidence "accurately and there could be no mistake that defendant in fact was only included as a potential contributor, along with 50% of the population, and in fact was *not* identified as 'matching' the DNA." (Emphasis in original.) *Pike*, 2016 IL App (1st) 122626, ¶ 102, 53 N.E.3d 147. The court stated it believed "jurors are capable of fairly evaluating all the evidence presented, including the irrelevant *** DNA evidence in this case." *Pike*, 2016 IL App (1st) 122626, ¶ 104, 53 N.E.3d 147.

¶ 80 In *Schulz*, the First District noted neither of the State's experts "could identify

characteristics in the blood or semen samples which would tend to make the likelihood that defendant committed the crime more or less probable. One of the experts could only testify the semen could have been produced by 20% of the general population, and the other expert could only testify defendant could not be excluded as the semen donor. *Schulz,* 154 Ill. App. 3d at 366, 506 N.E.2d at 1348. The First District reversed the conviction in that case because the trial court admitted this evidence which "served no relevant purpose, was totally lacking in probative value, and thereby prejudiced defendant's cause." *Schulz,* 154 Ill. App. 3d at 366, 506 N.E.2d at 1348.

¶ 81 This case is distinguishable from both *Pike* and *Schulz* because the State in this case had stronger DNA evidence. This is not a case where the State could only say defendant, and half of the rest of African American men, could not be excluded as the source of the DNA on one item of evidence. In this case, the State's DNA expert also testified defendant could not be excluded as the source of DNA found on a skull cap found near the jewelry store where the robbery suspects were seen running after the robbery. According to the State's expert, only 1 in 32,000 unrelated African American men could have been the source of this DNA. As a result, the probability defendant's DNA was on the skull cap was much higher than the probability his DNA was on the latex glove. Evidence regarding the DNA found on the skull cap was clearly relevant and statistically significant to bolster O'Conner's identification of defendant as one of his accomplices. Even if, assuming *arguendo,* defendant's attorney's failure to object to the State's introduction of DNA evidence from the latex glove fell below an objective standard of reasonableness, defendant was not prejudiced by this failure as the State also had much stronger DNA evidence against him from the skull cap.

¶ 82 Assuming this court might find his trial counsel was not ineffective for not keeping the DNA evidence out of the case, citing *People v. Watson,* 2012 IL App (2d) 091328,

965 N.E.2d 474, defendant argues his trial counsel was ineffective because he did not adequately challenge the probative value of the DNA evidence and the probability statistics regarding the DNA evidence. Without commenting on the merits of the Second District's opinion in *Watson*, defendant's reliance on this case is misplaced. In *Watson*, the only evidence against the defendant was a partial DNA match. The First District noted:

> "Here, there was only one piece of evidence linking defendant to the crime, and the circumstances required subjecting that evidence to adversarial testing beyond that displayed. As such, we conclude that counsel's performance fell below an objective standard of reasonableness." *Watson*, 2012 IL App (2d) 091328, ¶ 32, 965 N.E.2d 474.

With regard to *Strickland's* prejudice prong, the First District stated:

> "Here, there was a basis to challenge the infallibility of the DNA evidence against defendant, which was portrayed as a 'match,' but that argument and evidence was not developed. Given that the DNA evidence here was the only evidence against defendant, there is a reasonable probability that, if counsel had effectively explained and argued to the jury the potential weaknesses of the evidence, reasonable doubt as to defendant's guilt might have been raised." *Watson*, 2012 IL App (2d) 091328, ¶33, 965 N.E.2d 474.

¶ 83 Based on the record in this case, defendant has not established his trial attorney was constitutionally ineffective in the way he cross-examined the State's expert witness. Defendant's attorney did more than the attorney in *Watson*. He compared the probabilities related to O'Conner and defendant and effectively questioned the State's expert witness with regard to his probability testimony.

¶ 84 In addition, unlike in *Watson*, the State was not relying solely on the DNA evidence in this case. The police tracked the robbers to an apartment building where defendant was eventually found. Defendant admitted being with O'Conner hiding in the basement of the building where defendant was eventually apprehended. And, O'Conner admitted his involvement in the robbery and testified defendant was also involved.

¶ 85 2. *Failure to Sever Defendant's Trial from Codefendant Billips*

¶ 86 Defendant next argues his trial counsel was ineffective for not moving to sever his trial from Billips's trial. Defendant acknowledges charges against multiple defendants arising out of the same occurrence may be tried jointly unless a defendant will be unfairly prejudiced by a joint trial. *People v. Bean*, 109 Ill. 2d 80, 92, 485 N.E.2d 349, 355 (1985). "Illinois recognizes that when codefendants' defenses are so antagonistic to each other that one of the codefendants cannot receive a fair trial jointly with the others, severance is required." *Bean*, 109 Ill. 2d at 93, 485 N.E.2d at 355. However, "[a]ctual hostility between the two defenses is required." *Bean*, 109 Ill. 2d at 93, 485 N.E.2d at 355.

¶ 87 Defendant argues antagonism manifested itself in this case when Billips's attorney cross-examined the State's witnesses and argued during his closing argument that Billips was innocent and defendant and O'Conner were the only two robbers. Defendant contends the situation in this case—where Billips was proclaiming his own innocence while accusing defendant—is a textbook situation where defense counsel should have requested a severance. As a result, according to defendant, defendant faced two opponents, the State and Billips.

¶ 88 We do not agree with the premise defendant and Billips had antagonistic defenses prior to the closing arguments in this case. Although he did not name Billips, we note

defendant's attorney during closing arguments drew the jury's attention to the fact one of the robbers had distinctive hair and a distinctive mouth. One of the State's witnesses identified Billips based on his hair and mouth. During Billips's closing argument, his attorney named defendant as the other robber with O'Conner.

¶ 89 After Billips's attorney accused defendant of robbing the store with O'Conner, defendant's attorney had to make a strategic decision based on his observations of the jury during the trial and what might occur if he moved to sever defendant's trial at that point and the motion was granted. A reasonable attorney would have assumed the jury would convict Billips based on the eyewitness testimony identifying him as one of the robbers. If defendant was retried, a reasonable attorney could believe the State would have both O'Conner and Billips testifying against him. Trial counsel's decision not to request defendant's trial be severed from Billips or for a mistrial does not constitute ineffective assistance of counsel as it was a reasonable strategic decision. Billips's attorney made the same decision during closing arguments, and the decision worked out well for his client. As the Supreme Court stated in *Strickland*, representation "is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. This case is a perfect example of this. Both defendant's attorney and Billips's attorney made the same decision not to move to sever their respective cases during closing arguments; the strategy worked for Billips but failed for defendant.

¶ 90 D. Jury's Request for Transcripts

¶ 91 Defendant next argues the trial court erred by refusing the jury's request to see transcripts of the testimony of defendant, O'Conner, and Kevlena Williams. According to defendant, the court refused to provide these transcripts to the jury because it did not know it

could accommodate the jury's request. Defendant argues, "Because the court failed to exercise discretion in responding to the jury's request, Wheeler did not receive a fair trial, and his conviction should be reversed and the case remanded for a new trial."

¶ 92 The State recognizes a trial court may show the jury transcripts of testimony if the jury requests transcripts and the trial court, exercising its discretion, determines the transcripts will be helpful. *People v. Flores*, 128 Ill. 2d 66, 93, 538 N.E.2d 481, 491 (1989). However, the State argues the trial court did not affirmatively state it lacked authority or discretion to allow the jury's request for transcripts.

¶ 93 We note a trial judge is presumed to know and correctly apply the law. To overcome this presumption, a strong affirmative showing in the record establishing the trial court did not know and apply the law correctly is required. *Howery*, 178 Ill. 2d at 32-33, 687 N.E.2d at 851. The court stated, "I personally have never heard of ordering the transcript for a jury." This statement does not affirmatively establish the court believed it could not provide transcripts to the jury. Instead, the court's statement simply indicates she had never heard of it actually being done. We do not find the court abused its discretion here.

¶ 94 E. Sentencing

¶ 95 Defendant next argues the trial court abused its discretion in sentencing him to 30 years in prison and by improperly considering the threat of serious harm, receipt of compensation, and the use of a firearm as aggravating factors. Defendant argues these factors are inherent in the offense of armed robbery.

¶ 96 A trial court has significant discretion in imposing a sentence, and its sentencing decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). We will not substitute our judgment for the trial court's judgment simply

because we might have sentenced a defendant differently. *Alexander*, 239 Ill. 2d at 213, 940 N.E.2d at 1066. However, a court abuses its discretion by considering factors implicit in the offense as aggravating factors. *People v. Conover*, 84 Ill. 2d 400, 404-05, 419 N.E.2d 906, 908-09 (1981).

¶ 97 The State argues defendant forfeited his arguments regarding the trial court's consideration of these factors. Pursuant to section 5-4.5-50(d) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-50(d) (West 2014)), we agree and find defendant forfeited any issue regarding the court's use of these factors as well as its discussion regarding the firearm in sentencing defendant. *People v. Reed*, 177 Ill. 2d 389, 393-94, 686 N.E.2d 584, 586 (1997).

¶ 98 Regardless of forfeiture, the trial court did not err in discussing the use of a gun in this case or the fact his conduct caused or threatened serious harm. Our supreme court has stated:

> "[T]his court did not intend a rigid application of the rule [that an implicit factor in an offense should not be used as an aggravating factor at sentencing], thereby restricting the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence. The Illinois Constitution provides that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' (Ill. Const. 1970, art. I, sec. 11.) A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the particular circumstances of each individual case. [Citations.] Such a judgment depends upon many *relevant* [(emphasis in original)] factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment (citations), as well as ' "the nature and circumstances of the offense, including the nature and

> extent of each element of the offense as committed by the defendant" ' [(citations)].
>
> Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphasis added unless otherwise noted.) *People v. Salvidar*, 113 Ill. 2d 256, 268-69, 497 N.E.2d 1138, 1142-43 (1986).

As the State argues, the threat of serious harm is not always involved in an armed robbery. *People v. Carmack*, 103 Ill. App. 3d 1027, 1037, 432 N.E.2d 282, 289 (1982). In this case, one of the robbers did threaten the victims in this case with serious harm by actually pointing his firearm at the store employees and pushing one of the employees to the floor at gunpoint.

¶ 99 As for the trial court's comments with regard to the firearm in this case, the court was responding to an argument made by defendant's attorney that defendant did not have a gun and should get the minimum 21-year sentence. Defense counsel argued:

> "And for someone to be involved with other players and the other players are the ones holding the weapons, Judge, I think that is significant in [defendant's] role and whether or not he was the ring leader and whether or not he was the one who was calling the shots, Judge. So with that being said, smashing cases, albeit not appropriate, illegal, damaging other's property, is significantly different from holding a gun, from taking a gun and holding a gun to someone."

The court disagreed with defense counsel's argument and found defendant was just as culpable as the individual holding the gun. Further, the court did not say anything about the gun being a factor it was considering in aggravation for sentencing purposes.

¶ 100 The State does concede the trial court erred in considering the fact defendant received compensation for committing the armed robbery as an aggravating factor. Defendant argues we should consider this error regardless of forfeiture pursuant to the plain error doctrine. This court has stated:

> " 'The plain error rule may be invoked if the evidence at a sentencing hearing was closely balanced[] or if the error was so egregious as to deprive the defendant of a fair sentencing hearing.' *People v. Hall,* 195 Ill. 2d 1, 18, 743 N.E.2d 126, 136 (2000). The second prong of the plain error rule should be invoked only when the possible error is so serious that its consideration is ' "necessary to preserve the integrity and reputation of the judicial process." [Citation.]' *People v. Hampton*, 149 Ill. 2d 71, 102, 594 N.E.2d 291, 305 (1992). The rule is not a general savings clause for alleged errors but is designed to redress serious injustices." *People v. Baker*, 341 Ill. App. 3d 1083, 1090, 794 N.E.2d 353, 359 (2003).

Defendant argued the evidence was closely balanced because little evidence in aggravation was

presented without the improperly considered evidence. However, as we just noted, the behavior of defendant and his accomplices during the robbery was properly considered by the trial court. Further, considering the weight the trial court placed on the behavior of defendant and his accomplices during the robbery, the court's statement it considered defendant's receipt of compensation for the offense did not cause any serious injustice. We note the sentencing range in this case was 21 years to 45 years. Defendant's sentence was 9 years above the minimum and 15 years below the maximum. As a result, we will not review this issue pursuant to the plain error doctrine.

¶ 101 Defendant also argues his trial counsel was ineffective for not raising these issues with the trial court. According to defendant, "[t]he failure to properly raise and preserve the judge's consideration of improper sentencing evidence prejudiced [defendant]. Had counsel done so, the sentence *might* have been shorter." (Emphasis added.) However, "[t]o succeed on a claim of ineffective assistance of counsel during sentencing, a defendant must show that counsel's performance fell below minimal professional standards and that *a reasonable probability exists* that the defendant's sentence was affected." (Emphasis added.) *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 122, 26 N.E.3d 460. The fact a sentence *might* have been shorter is not sufficient to show a *reasonable probability exists* his sentence was affected for purposes of establishing ineffective assistance of counsel.

¶ 102 Finally, defendant argues the trial court abused its discretion in sentencing him to 30 years in prison. According to the State, citing *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 210 (1999), the sentence imposed by the court was not greatly at variance with the purpose and spirit of the law nor clearly disproportionate to the nature of the offense committed. Based on the record in this case, the trial court did not abuse its discretion in sentencing defendant to 30

years in prison.

¶ 103 III. CONCLUSION

¶ 104 For the reasons stated, we affirm defendant's conviction and sentence in this case. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 105 Affirmed.