2017 IL App (4th) 150739-U

NO. 4-15-0739

FILED
August 1, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CHRISTOPER O. HUGGER,	)	No. 15CF87
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel's representation of defendant was not ineffective.

(2) The trial court was not required to conduct a *Krankel* inquiry into an alleged ineffective-assistance-of-counsel claim contained within defendant's presentence investigation report.

(3) The trial court did not consider improper factors when sentencing defendant to 10 years in prison.

(4) Certain fines and fees were improperly assessed to defendant and are vacated.

¶ 2 Following a jury trial, defendant, Christopher O. Hugger, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014)) and sentenced to 10 years in prison. He appeals, arguing he received ineffective assistance of counsel as a result of defense counsel's failure to (1) object to the State's *voir dire* questioning, (2) object to certain

testimony from the State's witnesses, (3) object to evidence of other bad acts or seek a limiting instruction as to such evidence, and (4) timely convey two plea offers from the State. Defendant also asserts the trial court failed to conduct any inquiry into a *pro se* ineffective-assistance-of-counsel-claim contained within his presentence investigation report, the court relied on improper factors during his sentencing, and fines and fees were improperly assessed to him. We vacate certain fines and fees assessed to defendant but otherwise affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In January 2015, the State charged defendant with unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014)), alleging he knowingly and unlawfully delivered less than one gram of a substance containing cocaine.

¶ 5 In April 2015, defendant's jury trial was conducted. At the outset of the trial and immediately prior to the selection of jurors, the trial court asked whether the State had conveyed a plea offer to defendant's counsel. The State asserted that it had and defendant's counsel, Stephanie Corum, asserted she had received the State's offers and conveyed them to defendant. Upon questioning by the court, defendant reported his sister had informed him that "they received some" plea offers, but that he had not been contacted personally and "just found out [about the plea offers] the other day." The following colloquy then occurred:

> "MS. CORUM: Okay. Your Honor, that is accurate. I have contacted [defendant] by phone to the phone number that he left, to the phone number that is in the court docket. I—that mailbox was full. I then went and got his bond assignment sheet from the circuit clerk's office, contacted his bond assignee last Tuesday, relayed a message to her, asked her for a current number, so—

THE COURT: Okay. You tracked it down. Ms. Carlson [(assistant State's Attorney)], you made an offer before the trial call; correct?

MS. CARLSON: Yes, Your Honor. I made an initial offer and then made an additional offer reducing charges and I know they were conveyed to counsel and she had expressed to me that she was going to convey them and I have every belief that she did.

THE COURT: Okay. At any rate, you haven't revoked those offers? They remain on the table?

MS. CARLSON: Until the jury walks in the room, my last offer of three years for simple possession stands.

THE COURT: Okay. All right. There it is laid on the table.

Ms. Corum, you got that while all of this has gone on? You've conveyed that to your client; correct?

MS. CORUM: Yes, Your Honor.

THE COURT: Okay."

¶ 6 The record next reflects that prospective jurors were called into the courtroom and the matter proceeded with jury selection. During its *voir dire* questioning, the State asked each potential juror whether he or she believed that drugs were a problem in the community. Each juror responded in the affirmative.

¶ 7 At trial, the State presented evidence that defendant sold a substance containing cocaine to a confidential informant during a controlled drug buy. Jim Kerner, a police officer for the City of Urbana, and Matthew Quinley, a detective with the Urbana police department, testi-

fied for the State. Both Kerner and Quinley were members of the police department's street crimes unit and involved in narcotics investigations. Each officer testified regarding his participation in the controlled drug buy, performed on October 24, 2014, with the aid of James Vitton, a confidential informant. According to the officers' testimony, shortly before the events at issue in this case, Vitton was observed by the police engaging in a drug transaction and found in possession of crack cocaine. Thereafter, Vitton agreed to work with the police as a confidential source to "work off his case."

¶ 8 On October 24, 2014, Kerner and Quinley met with Vitton at the police department. Vitton identified an individual named "Moola" as someone who would sell him crack cocaine. Kerner testified Vitton reported that he had previously "purchased crack cocaine from [Moola] about 25 times within the last few months." While at the police department, Vitton contacted Moola by cell phone and agreed to meet with him to purchase $40 worth of crack cocaine. Kerner testified Quinley searched Vitton to make sure he did not have any contraband or currency on him. Quinley stated he searched Vitton's clothing, socks, shoes, and hat. Vitton was given "prerecorded money to purchase crack cocaine from Moola" and a watch with a video recording device. Vitton then left the police department and rode his bicycle to the controlled buy location, a natural foods store named Strawberry Fields.

¶ 9 Kerner and Quinley testified they followed Vitton to Strawberry Fields. Kerner stated they maintained constant surveillance on Vitton while Quinley testified he observed Vitton the "overwhelming majority" of the time. Upon arriving at Strawberry Fields, the officers set up a surveillance position in an unmarked police vehicle. Between the time Vitton left the police department and arrived at Strawberry Fields, neither officer saw him meet with anyone.

¶ 10 Kerner testified Vitton waited in the Strawberry Fields parking lot for 20 to 30 minutes before a maroon Lincoln arrived. Quinley used binoculars to obtain the Lincoln's license plate number. Using that number, Kerner learned the vehicle was registered to defendant. According to the officers' testimony, Vitton got into the passenger seat of defendant's vehicle and was briefly driven around before being returned to Strawberry Fields. The officers followed defendant's vehicle but lost sight of it for one to two minutes. Quinley testified that when he saw the vehicle again, he could see two people inside—the driver, whom he testified was defendant, and Vitton. Once Vitton exited defendant's vehicle, he returned to his bicycle and rode back to the police department. Defendant's vehicle drove away and was not followed or stopped by the police.

¶ 11 Kerner and Quinley followed Vitton to the police department. They testified he did not make any stops or meet with anyone during that time. Upon his arrival, Vitton was searched, and he turned over the substance he had purchased. Quinley testified the substance field-tested positive for the presence of cocaine, and he secured it into evidence.

¶ 12 Both Kerner and Quinley testified that, ultimately, they were able to identify Moola as defendant. Kerner stated he showed Vitton a Secretary of State photograph of defendant, noting that, at that time, the police "still didn't have a positive identification for the male that went as Moola." From that photograph, Vitton identified defendant "as being the male that he knew as Moola."

¶ 13 Quinley testified he viewed the video recording taken from the watch that Vitton wore during the buy and also reviewed still images from the recording. He identified defendant as the being the person in the images and stated defendant could be seen "holding a clear bag that

contains what I believe to be crack cocaine. You see him exchange, and then you see, well, ultimately [Vitton] get out of the car." The State also showed Quinley images that were taken from the recording and asked if he recognized the images. Quinley identified one image as depicting defendant's arm and testified as follows: "[I]f you look underneath his forearm there you will see the clear plastic bag that contains more of the controlled substance that we were purchasing." Quinley also identified two images from the recording as showing defendant, and he testified defendant was the person who sold Vitton cocaine on October 24, 2014.

¶ 14 Quinley testified he spoke with Vitton following the controlled buy and asked him to explain what happened. When asked by the State what he learned from speaking with Vitton, Quinley testified as follows:

> "[Vitton] stated that he rode his bicycle directly to Strawberry Fields. That he waited in the parking lot for what he thought was 15 to 20 minutes. He then received a call from [defendant] stating ['] I'm across the street in a maroon car.['] [Vitton] then walked across the street, at which point the maroon car pulls around the corner, pulls a few steps up—or a few car lengths in front of me. [Vitton] then gets into the car. [Defendant] starts driving. While driving, they—[defendant] retrieves a bag of what he believes to be crack cocaine, approximately a quarter ounce from his pocket. He then rips off a piece of paper, places the crack cocaine from the bag onto this, which would be equivalent to the $40 that we were trying to buy, folded it up, gave it to [Vitton]. [Vitton] then gave him the $40 buy money. [Vitton]—or [defendant] then pulled over back near Strawberry Fields and exited the vehicle."

¶ 15 On cross-examination, Kerner testified Quinley searched Vitton's clothing prior to the controlled buy. He stated, during such a search, a police officer would "go through all of the pockets, *** check around belts and shoes and socks and just essentially make sure that the informant doesn't have any illegal items or money on them." Kerner agreed that the officers did not perform a "strip search" of Vitton. He also agreed that after Vitton got into the maroon Lincoln at Strawberry Fields, they lost surveillance on him for "close to two to three minutes." Further, Kerner acknowledged that he did not see defendant in the vehicle, and he only identified defendant as being in the vehicle when he watched the surveillance video. When questioned as to how he identified the person in the video as defendant he testified, "[i]t look[ed] exactly like his [S]ecretary of [S]tate photograph."

¶ 16 On cross-examination, Quinley testified he was able to identify Moola as defendant by showing Vitton defendant's Secretary of State photograph. He also testified that when he compared images from the video recording to defendant's Secretary of State photograph, he "believed that it was [defendant]." Quinley acknowledged that he did not ever identify or observe defendant in the car during the controlled buy. Further, he described the search he conducted on Vitton prior to the buy, stating as follows:

> "What we do is we start with their outer clothing. We go through any pockets, seams. Like if they have their pants rolled up at any point, we would unroll that. We would have them remove their shoes. We search their shoes, make sure that the sole inside the shoe is not loose. We then would check their socks, make sure that they don't have anything in their socks. If they were wearing a hat, we would check inside their hat. If they are a person of a lot of hair, then we'll have them

like rub their fingers through their hair just to make sure there is nothing inside their hair. We try to do as thorough as we can without going too far."

Quinley acknowledged that individuals had the ability to hide drugs on their person in places other than clothing, like in "crevices on [the] body." He then agreed that the search he conducted "may not be able to locate things that were hidden."

¶ 17 Vitton testified he was an inmate in the Illinois Department of Corrections (DOC) and was serving a sentence for a 2013 theft conviction. He acknowledged his criminal history also included convictions for "driving under revocation," obstructing justice, burglary, possession, as well as a 1996 theft conviction. Vitton stated he had a drug problem and his drug of choice was cocaine. In fall 2014, Kerner and Quinley caught him purchasing cocaine. Vitton testified, thereafter, he agreed to work with the police to get the drug possession charges dropped.

¶ 18 Vitton recalled participating in the controlled buy on October 24, 2014. He stated he told the police officers that he could buy drugs from an individual named Moola and stated he bought cocaine from Moola once or twice a week. Vitton identified defendant as Moola. He testified he contacted Moola on the phone and they agreed to meet at Strawberry Fields, located approximately five blocks from the police department. Vitton stated he was then searched and given a watch with a camera in it and money. He denied that he had any drugs, money, or anything illegal on his person.

¶ 19 Vitton testified he rode his bicycle to Strawberry Fields and waited for Moola to show up. He denied meeting or talking with anyone else. When Moola arrived, Vitton got in his car. He testified defendant was driving and they "went around the block" and to "[t]he back of Strawberry Fields." Vitton testified Moola then "bagged it up" and handed him the cocaine.

Vitton gave Moola the money. He denied that anyone besides himself and defendant were in the vehicle. Vitton stated, after the transaction, he rode his bicycle back to the police station. At the police station, he gave the drugs to the police and described what happened. He was also searched.

¶ 20 Vitton testified he watched the video recording taken from the watch he was wearing during the controlled buy. He asserted it accurately depicted what happened on October 24, 2014. Specifically, Vitton testified the video showed him "having a drug transaction with *** defendant." He testified defendant was "somebody that [he] bought cocaine from on a weekly basis prior to working for the police."

¶ 21 The record reflects the video recording from the controlled buy was admitted into evidence. Vitton described what was occurring in the video as it was played for the jury. He identified defendant as the person in the video who handed him cocaine.

¶ 22 On cross-examination, Vitton testified he participated in a total of two controlled drug buys while working with the Urbana police department. He stated he agreed to work with the police because he "didn't want to have to do anymore time." Further, Vitton testified that, when he was searched by police officers prior to the controlled buy in this case, his pockets were pulled out, he was patted down, the officers checked around his waist and ankles, and he was required to take his shoes and socks off. Vitton also testified he had made other purchases from Moola before and had been in Moola's car three or four times.

¶ 23 Finally, the State presented two additional witnesses, John Lockard, an evidence technician for the Urbana police department, and Aaron Roemer, a forensic scientist for the Illinois State Police. Their testimony showed the suspected controlled substance retrieved from

Vitton by Quinley was taken into evidence and submitted to the Springfield crime laboratory for forensic testing. Testing determined the substance to be 0.1 grams of cocaine.

¶ 24 Following the close of the State's evidence, defendant rested without presenting any evidence. The jury deliberated and found defendant guilty of the charged offense. In May 2015, defendant filed a posttrial motion for acquittal or, in the alternative, a new trial. He argued the State failed to prove his guilt beyond a reasonable doubt.

¶ 25 In June 2015, the trial court conducted defendant's sentencing hearing. It first addressed and denied defendant's posttrial motion. The court then proceeded with sentencing. It noted it received and reviewed defendant's presentence investigation report, along with letters written by various individuals on defendant's behalf. The report showed defendant was 24 years old and had a criminal history that included a 2007 juvenile adjudication for resisting a peace officer and a 2009 adult conviction for unlawful possession with intent to deliver a controlled substance. With respect to his juvenile offense, defendant was initially sentenced to 12 months' probation. However, his probation was later revoked and, in October 2008, defendant was resentenced to 364 days in the juvenile division of DOC. In December 2008, his DOC commitment was vacated and defendant was sentenced to 18 months' probation. In July 2009, defendant's probation was terminated unsuccessfully pursuant to a plea agreement in his 2009 drug-related case. In connection with the latter case, defendant was originally sentenced to 36 months' probation. Again, however, his probation was revoked. In August 2011, defendant was resentenced to 80 months in DOC. In January 2010, defendant was released from prison on mandatory supervised release. His projected discharge from parole date was in January 2016.

¶ 26 The presentence investigation report further described defendant as "the father of

three children with two more on the way." Each of his five children had a different mother. Defendant was also named as a potential father of a sixth child in a pending paternity case with the mother of one of his five children. No child support orders were in effect for any of defendant's children.

¶ 27 Additionally, according to the presentence investigation report, defendant stated he did not finish high school but, in 2014, he obtained his general equivalency degree while in DOC. The report described defendant as unemployed, with his only prior reported employment being in 2010, cleaning apartments for cash. With respect to emotional health, defendant reported that he had been diagnosed with bipolar disorder. He was prescribed medication but "stopped taking it a long time ago." Defendant also reported having problems with drugs and alcohol, stating his last use of cocaine was "two months ago." Finally, the report stated that, when asked how he felt about his current offense and possible sentence, defendant responded as follows: " 'I was not helped in the right way by my counsel because I would of took [*sic*] the three years. I feel that my offenses was [*sic*] only to take care of my kids and my habit ***.' "

¶ 28 Next, in aggravation, the State presented the testimony of John Nickell, a police officer for the City of Champaign. Nickell testified he was a patrol officer, and on the evening of March 18, 2015, he attempted to execute a traffic stop on a vehicle that made a wide right turn and failed to signal. However, the vehicle sped up and failed to stop even after Nickell activated his emergency lights and siren. It also disregarded traffic control devices and drove in excess of the posted speed limit. Nickell testified he momentarily lost sight of the vehicle but, ultimately, he found it parked in the driveway of a residence. The vehicle was unoccupied and on fire. The fire damaged some of the siding on the residence. After the fire department successfully extin-

guished the fire, Nickell searched the vehicle and found two cell phones and a walkie-talkie. He testified that, in his experience, such items were indicative of someone engaged in illegal narcotic sales.

¶ 29 Nickell testified he spoke with a woman who lived at the residence. She reported seeing a white sport utility vehicle drive through her yard, pick someone up, and speed off. The woman also identified defendant as the owner of the vehicle parked in her driveway and reported that he frequently parked there at random times of the night. Nickell testified he was able to determine that defendant was the registered owner of the vehicle. Further, he stated he was aware that, several days after the incident, defendant spoke with another officer about getting his vehicle returned. At that time, defendant admitted he was the person who drove the vehicle that evaded Nickell and caused the fire.

¶ 30 Neither party presented any further evidence. The State recommended the trial court impose a sentence of 10 years in prison, noting defendant was "non-probationable" and subject to a sentencing range of 3 to 14 years in prison. Defense counsel asked the court to impose a sentence of six years in prison, "with a recommendation for boot camp." In making that recommendation, defense counsel argued that defendant had dependents, which was a statutory factor in mitigation. Specifically, she asserted, "[i]t would be a hardship on his dependents for [defendant] to be incarcerated." Defense counsel also argued that defendant lacked a lengthy criminal history, was young, could be rehabilitated, had mental-health and substance-abuse issues, and had a "vast support system."

¶ 31 Ultimately, the trial court sentenced defendant to 10 years in prison. In reaching its decision, the court noted defendant's criminal history, which it found showed that, since the

age of 16, defendant had "constantly either been on probation, in jail or [DOC,] or on parole." It also rejected defense counsel's argument that defendant's children were a mitigating factor, stating as follows: "You could say there's mitigation that he has children, but the children don't really rely on him and he just keeps having them by different women and he doesn't work to support them so the children are just an excuse." The court further noted defendant had been given opportunities for probation, as well as mental-health and substance-abuse treatment, but he failed to follow through and "continuously did not do the things he was supposed to do." The court concluded as follows:

> "At this point the Court finds that of course he has to be sentenced to the penitentiary and of course anything less would deprecate the seriousness of the offense. [Defendant] is continuously having children and raising them in a community where he continuously sells drugs. He is a peddler of misery. He is a peddler of death. He destroys people's lives. At this point there's no showing that [defendant has] learned a darned thing."

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. Ineffective Assistance of Counsel

¶ 35 On appeal, defendant argues Corum committed a number of errors that denied him a fair trial. Specifically, he contends Corum was ineffective based on her failure to (1) object to the State's *voir dire* questioning, (2) object to certain testimony from the State's witnesses, (3) object to evidence of other bad acts or seek a limiting instruction as to such evidence, and (4) timely convey two plea offers from the State. Defendant maintains Corum's errors—both indi-

vidually and cumulatively—caused him prejudice and warrant a new trial. We disagree.

¶ 36 When addressing ineffective-assistance-of-counsel claims on review, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *People v. Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871. "More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id*. (quoting *Strickland*, 466 U.S. at 694). A defendant's failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *Id*.

¶ 37 Initially, we note the State argues defendant forfeited all of his ineffective-assistance claims by failing to object at trial or raise them in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (holding that to preserve an issue for appellate review, the issue must be raised by both an objection at trial and in a posttrial motion). However, this court has held that a *per se* conflict of interest exists in requiring trial counsel to assert his or her own ineffectiveness and, as a result, the failure to do so will not result in forfeiture of the issue on appeal. *People v. Parker*, 288 Ill. App. 3d 417, 421, 680 N.E.2d 505, 507 (1997); see also *People v. Keener*, 275 Ill. App. 3d 1, 5, 655 N.E.2d 294, 297 (1995) (holding that the defendant did not waive an ineffective-assistance claim by not raising it in his posttrial motion where the motion was prepared and presented by the same attorney who represented the defendant during his trial). Here, defendant was represented by Corum at all times throughout the underlying proceedings. Under such circumstances, Corum was not required to argue her own

ineffectiveness, and the ineffective-assistance claims defendant now raises for the first time on direct appeal are not forfeited.

¶ 38 1. *The State's* Voir Dire *Questioning*

¶ 39 Defendant's first ineffective-assistance claim centers on a question posed by the State to prospective jurors during *voir dire*. He points out that the State asked all prospective jurors whether they believed drugs were a problem in their community and each juror responded "yes." Defendant maintains the question was improper because it served to indoctrinate the jury with the State's theory of the case and predisposed them to finding him guilty. Defendant argues Corum was ineffective for failing to object to the State's question.

¶ 40 "The constitutional right to a jury trial encompasses the right to an impartial jury" (*People v. Rinehart*, 2012 IL 111719, ¶ 16, 962 N.E.2d 444), and "[t]he purpose of *voir dire* is to assure the selection of an impartial jury" (*People v. Dow*, 240 Ill. App. 3d 392, 396, 608 N.E.2d 259, 263 (1992)). The manner and scope of *voir dire* examination is within the discretion of the trial court, and its decisions are reviewed for an abuse of discretion. *Rinehart*, 2012 IL 111719, ¶ 16, 962 N.E.2d 444. "An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination—namely, the selection of a jury free from bias or prejudice." *Id*. "Stated differently, a trial court does not abuse its discretion during *voir dire* if the questions create 'a reasonable assurance that any prejudice or bias would be discovered.' " *Id*. (quoting *Dow*, 240 Ill. App. 3d at 397, 608 N.E.2d at 263).

¶ 41 "*Voir dire* questioning may not be used as a means for preeducating and indoctrinating prospective jurors as to a particular theory or defense or impanelling a jury with particular predispositions, nor may the questions concern matters of law or instruction." *Dow*, 240 Ill. App.

3d at 397, 608 N.E.2d at 263. "Broad questions are generally permissible," while "[s]pecific questions tailored to the facts of the case and intended to serve as 'preliminary final argument' [citation] are generally impermissible." *Rinehart*, 2012 IL 111719, ¶ 17, 962 N.E.2d 444.

¶ 42 To support his argument on appeal, defendant relies on *People v. Bell*, 152 Ill. App. 3d 1007, 1010, 505 N.E.2d 365, 367 (1987), wherein the defendant was found guilty of murdering his parents. The State's theory of the case was that the defendant killed his parents "because of some long-standing family disputes they had been unable to resolve," and it presented evidence that the defendant confessed the crimes to police. *Id*. at 1009, 505 N.E.2d at 367.

¶ 43 On appeal, the defendant argued that his defense counsel "was ineffective for failing to object to improper questioning by the prosecutor during *voir dire*." *Id*. at 1017, 505 N.E.2d at 372. Specifically, he objected to questions by the State to potential jurors regarding "(1) whether they believed that people have a natural impulse to confess their wrongdoings; and (2) whether they believed a person could plan and carry out a murder of another person, even if that person was a family member, as a solution to problems within the relationship." *Id*. On review, the Third District agreed with the defendant, finding "the disputed questions were improper because they served primarily to indoctrinate the jurors as to the State's theory at trial and asked them to prejudge the facts of the case." *Id.* The court held "[d]efense counsel clearly had grounds to object to these questions and should have done so to ensure the impartiality of the chosen jurors." *Id*.

¶ 44 This case is distinguishable from *Bell*, and we find no error occurred in the State's questioning of potential jurors. Unlike in *Bell*, defendant, here, challenges a single question posed by the State to prospective jurors. The question was broad and not tailored to any specific

facts of defendant's case. It did not serve to preeducate jurors as to the State's theory of the case, nor did it concern matters of law or instruction. Instead, as the State argues, the challenged question "focused on the potential juror's preconceptions about drug use in general, in an effort to uncover any bias regarding a potential juror's willingness to follow the law."

¶ 45 The State's questioning of potential jurors was not improper and the trial court committed no abuse of discretion in the manner in which it conducted *voir dire*. As a result, defendant's claim of ineffective assistance is without merit. See *Rinehart*, 2012 IL 111719, ¶ 22, 962 N.E.2d 444 ("Defense counsel's failure to object to *voir dire* questions which the trial court did not abuse its discretion in allowing was not objectively unreasonable.").

¶ 46 2. *Witness Testimony*

¶ 47 Defendant next argues Corum was ineffective for failing to object to certain testimony from Kerner and Quinley. He first contends Corum should have objected to both of the witnesses' identifications of defendant as the person who sold Vitton drugs. Defendant maintains such testimony was inadmissible under Illinois Rule of Evidence 701 (Ill. R. Evid. 701 (eff. Jan. 1, 2011)), which sets forth the requirements for admissible opinion testimony by lay witnesses.

¶ 48 Rule of Evidence 701 provides as follows:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Id.*

In *People v. Thompson*, 2016 IL 118667, ¶ 50, 49 N.E.3d 393, our supreme court considered the admissibility of lay opinion identification testimony under Rule of Evidence 701, holding as follows:

> "[O]pinion identification testimony is admissible under Rule of Evidence 701 if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Lay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the jury. A showing of sustained contact, intimate familiarity, or special knowledge of the defendant is not required. Rather, the witness must only have had contact with the defendant, that the jury would not possess, to achieve a level of familiarity that renders the opinion helpful."

¶ 49 Further, the supreme court adopted a "totality of the circumstances" approach to determining whether lay opinion identification testimony his helpful. *Id*. ¶ 51. It identified several factors to be considered when determining whether some basis exists for concluding a lay witness is more likely to correctly identify the defendant than the jury, including (1) the witness' familiarity with the defendant, (2) the witness' familiarity with the defendant at the time the recording was made or "where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording," (3) the defendant's use of a disguise in the recording or whether the defendant changed his or her appearance between the time of the recording and trial, and (4) the clarity of the recording and the extent to which the individual is depicted. *Id*.

¶ 50 The supreme court next applied the aforementioned principles to determine whether certain lay opinion identification testimony was properly admitted at the defendant's trial. *Id*. ¶¶ 60-65. Ultimately, it concluded that identification testimony from three law enforcement officers was not admissible. *Id*. ¶ 66. Relevant to this appeal, the court described inadmissible witness identification testimony as follows:

> "Officer Jackson testified next. Jackson viewed the blurry black and white still image and believed it 'resembled' defendant. He further testified when he viewed the video, he was positively able to identify defendant and he identified defendant in court. Jackson's testimony insinuates he had prior contact. However, there is no testimony as to how long he had known defendant, how many times he had seen defendant, and under what conditions or circumstances he had seen defendant. There is nothing in the record to demonstrate any basis which might lead one to conclude Jackson was more likely to correctly identify defendant than the jury. Thus, his testimony was not admissible." *Id*. ¶ 63.

¶ 51 Here, Kerner and Quinley both identified defendant as "Moola," the subject of the controlled buy and the individual depicted in the video recording. However, the record reflects both witnesses' ability to personally identify defendant was based solely on viewing his Secretary of State photograph and the video recording of the controlled buy. No evidence in the record indicates that either Kerner or Quinley otherwise had any contact with defendant, either before or after the video recording was made, or that they were in any way familiar with defendant or his appearance. Similar to *Thompson*, there is nothing in the record to demonstrate any basis to conclude that either Kerner or Quinley was more likely to correctly identify defendant than the jury.

¶ 52 On appeal, the State recited the relevant principles set forth in *Thompson* and concluded that "[w]ith these principles in mind, the identification testimony of the officers who conducted the surveillance of defendant's sale of drugs was appropriate." However, the State failed to elaborate on its conclusion that the identification testimony was admissible. Further, to the extent that it suggests the officers' surveillance activities provided a basis for concluding they had some familiarity with defendant, we reject its argument. Specifically, the evidence presented fails to reflect that either officer was able to view the subject of the controlled buy while it was occurring. Given the circumstances presented, we agree that Kerner's and Quinley's identifications of defendant were not admissible under Rule of Evidence 701.

¶ 53 Defendant also argues Corum was ineffective for failing to object to testimony from Quinley that defendant argues positively identified a substance Quinley viewed on the video recording as cocaine. Specifically, defendant challenges Quinley's testimony that defendant could be seen "holding a clear bag that contained what [Quinley] believed to be crack cocaine" and that images from the video depicted a "clear plastic bag that contains more of the controlled substance that we were purchasing." Defendant maintains such testimony was inadmissible under Rule of Evidence 701 because Quinley relied on "his specialized training to identify the substance in the bag."

¶ 54 As stated, Rule of Evidence 701 provides that lay witness opinion or inference testimony is limited to those opinions and inferences which are "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011). Rule of Evidence 702 concerns expert testimony and provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to deter-

mine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

¶ 55 We reject defendant's assertion that Quinley's challenged testimony was inadmissible. Nothing in the record indicates he relied on specialized knowledge to identify the substance he observed in the video recording as cocaine. Rather, the record reflects he logically inferred that the substance was cocaine given the factual circumstances before him, *i.e.*, a controlled drug buy. Specifically, Quinley was aware that Vitton reported he could purchase cocaine from "Moola" and, following the controlled buy, Vitton turned over a substance that field tested positive for cocaine. Also, as noted by the State, Quinley's testimony fell far short of definitively or "positively" identifying the substance at issue. Instead, the record shows Quinley's testimony was based on what he "believed" the substance to be. We find no error occurred in the admission of this testimony.

¶ 56 On appeal, defendant further argues Corum should have objected to testimony from Kerner and Quinley regarding out-of-court statements made by Vitton. Specifically, he challenges Kerner's testimony that Vitton "stated he had purchased crack cocaine from [Moola] *** about 25 times" and Quinley's recitation of Vitton's statements during their post-buy interview. Defendant maintains the testimony improperly bolstered Vitton's credibility and notes that, "[g]enerally, 'a witness may not testify regarding an out-of-court statement made by the witness or a third person which corroborates the witness' or third person's testimony at trial.' " *People v. Graham*, 206 Ill. 2d 465, 478, 795 N.E.2d 231, 239 (2003) (quoting *People v. Beals*, 162 Ill. 2d 497, 507, 643 N.E.2d 789, 795 (1994)). Here, Kerner and Quinley testified regarding statements

Vitton made during the course of their investigation that corroborated Vitton's trial testimony. According to *Graham*, such testimony was inadmissible.

¶ 57 We note that, on appeal, the State asserts that a witness's prior consistent statements are admissible to rebut an express or implied suggestion that the witness is motivated to testify falsely or his testimony is a recent fabrication. *People v. Ruback*, 2013 IL App (3d) 110256, ¶ 26, 988 N.E.2d 745. While, here, the record indicates there was a suggestion that Vitton was motivated to testify falsely, for the exception to apply, the consistent statement must be "made before the motive to falsify arose." *Id.* ¶ 37. In this instance, Vitton's alleged motive to testify falsely arose prior to the time he made any of the statements attributed to him by Kerner or Quinley, *i.e.*, when he was caught purchasing drugs and agreed to work with law enforcement to "work off his case." Thus, the exception referenced by the State does not apply in this case.

¶ 58 Here, we agree that error occurred in the admission of specific testimony from Kerner and Quinley. However, a "[d]efense counsel's failure to object to trial testimony may be a matter of strategy and does not necessarily establish substandard performance." *Graham*, 206 Ill. 2d at 478-79, 795 N.E.2d at 240. In this case, the record is silent regarding Corum's reason for failing to object to inadmissible testimony from Kerner and Quinley. Thus, we are unable to determine whether her omissions were a matter of strategy. Nevertheless, even if we are to assume the failure to object was the result of her deficient performance, defendant's ineffective-assistance claim must still fail. As stated, ineffective-assistance claims require both a finding of deficient performance by counsel and prejudice to defendant. In this case, we find no " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871 (quoting *Strickland*, 466

U.S. at 694).

¶ 59 The evidence presented against defendant was considerable. Vitton testified and identified defendant as the person who sold him cocaine. Even excluding the challenged testimony from Kerner and Quinley, Vitton's testimony was substantially corroborated by the officers' testimony and the video recording. We note the evidence showed that the vehicle in which the controlled buy took place was registered to defendant. Moreover, the jury had the opportunity to view the video recording, which contained clear and unobstructed views of the target for the controlled drug buy. Moreover, the challenged testimony was brief and not a significant part of the State's case against defendant. Any error which occurred in the admission of Kerner's and Quinley's identification testimony or testimony regarding Vitton's out-of-court statements was not sufficient to undermine confidence in the jury's verdict. Even excluding the challenged testimony, the result of defendant's trial probably would have been the same. Thus, defendant has failed to establish ineffective assistance of his defense counsel based on Corum's failure to object to witness testimony.

¶ 60 3. *Other-Crimes Evidence*

¶ 61 On appeal, defendant further argues Corum was ineffective for failing to object to evidence of prior bad acts, *i.e.*, other-crimes evidence. He notes that both Vitton and Kerner testified that Vitton had purchased drugs from defendant in the past and that Quinley "told the jury that *** [defendant] had additional cocaine in his car." Defendant maintains the evidence was too prejudicial to properly be admitted. Alternatively, he contends the jury should have been given a limiting instruction regarding such evidence and Corum was ineffective for failing to request one.

¶ 62 "Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. Specifically, it is admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged. *Id*. Also, "evidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime." *Id*. ¶ 20. "However, even where relevant, the evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect." *Id*. ¶ 11.

¶ 63 Here, defendant does not argue that a valid basis for admitting the other-crimes evidence was lacking. Rather, he maintains its prejudicial effect outweighed its probative value. We disagree. As argued by the State, evidence of defendant's previous sale of drugs to Vitton was relevant to put the State's evidence into context and establish how the controlled buy at issue arose. Quinley's testimony concerned logical inferences he made from the ongoing events of the controlled buy at issue. Additionally, the evidence was minimal, amounting to only a small portion of the evidence presented. Moreover, even without the challenged evidence, we cannot say a different verdict would have resulted. The evidence against defendant was not close and was more than sufficient to sustain his conviction. Thus, assuming defense counsel erred in failing to object to the evidence or request a limiting instruction, we find no prejudice to defendant, even when coupled with the inadmissible witness testimony previously addressed.

¶ 64 4. *Plea Offers*

¶ 65 Finally, in challenging his counsel's effectiveness, defendant argues Corum erred by failing to timely convey the State's plea offers. He contends the State made at least two plea offers to Corum prior to trial, and the record indicates Corum never told defendant the details of

the first offer and he "only learned about the State's final plea offer in the moment immediately before the venire walked into the courtroom."

¶ 66 "[A] defendant has a constitutional right to be advised by his counsel of [a plea] offer ***." *People v. Williams*, 47 Ill. 2d 239, 240, 265 N.E.2d 107, 108 (1970); see also *Missouri v. Frye*, 566 U.S. 133, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). "[T]o prove a violation of this right, a defendant must prove that there was an offer to accept a plea, which was not transmitted to him." *Williams*, 47 Ill. 2d at 240-41, 265 N.E.2d at 108.

¶ 67 Here, the record refutes defendant's contention that the State's plea offers were either not conveyed to him or not conveyed to him in a timely manner. It shows that, at the outset of the trial, the trial court questioned the parties regarding plea offers made by the State. The State reported that it had made two plea offers to defendant—"an initial offer" and "an additional offer reducing charges." Corum asserted the offers had been conveyed to defendant. The record indicates defendant was out on bond and Corum detailed her efforts to contact defendant by telephone and through his "bond assignee." Upon inquiry by the court, defendant asserted that his sister had informed him that "they received some" plea offers and that he had "just found out [about the plea offers] the other day." Corum expressly stated she conveyed the State's second offer of three years for a reduced charge to defendant. Further, at the time of the court's inquiry, that second offer remained available to defendant.

¶ 68 Given these circumstances, we cannot find that Corum failed to convey the State's plea offers to defendant or that they were conveyed in an untimely matter. In particular,

the record simply does not establish that the State's second plea offer was not conveyed to defendant "until the moment before the venire walked into the courtroom," as argued by defendant. Thus, the record fails to support a finding that that Corum's performance was deficient on this asserted basis.

¶ 69 B. *Krankel* Inquiry

¶ 70 On appeal, defendant also maintains the trial court erred by failing to consider a *pro se* ineffective-assistance-of-counsel claim he raised during the preparation of his presentence investigation report. He points out that his presentence investigation report contained a notation by his probation officer that he asserted he " 'was not helped in the right way by [his] counsel because [he] would of took [*sic*] the three years.' " Defendant maintains the trial court should have conducted an inquiry into his claim pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984).

¶ 71 A *Krankel* inquiry "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. When a defendant presents such a claim, the following procedure is required:

> "[T]he trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003).

"[A] *pro se* defendant is not required to do any more than bring his or her claim to the trial

court's attention ***." *Id*. at 79, 797 N.E.2d at 638.

¶ 72 Defendant contends his statement set forth in the presentence investigation report was sufficient to bring his alleged claim of ineffective assistance to the trial court's attention. We disagree. A "statement, contained only in [a] defendant's presentence investigation report, does not by itself bring to the court's attention a claim of ineffective assistance so as to require further inquiry by the court." *People v. Harris*, 352 Ill. App. 3d 63, 71, 815 N.E.2d 863, 871 (2004). Here, defendant's statement was made to a probation officer during the preparation of his presentence investigation report with no guarantee that it would be included within the report. Defendant never directed his statement to the trial court through either an oral or written posttrial motion. See *People v. Ayres*, 2017 IL 120071, ¶ 22 (rejecting an argument that "a claim of ineffective assistance in *any* communication to the court would necessitate an inquiry" (emphasis in original) and holding "*Krankel* is limited to posttrial motions").We agree that such circumstances fail to meet the requirement that a defendant bring his claim to the trial court's attention. Thus, no *Krankel* inquiry was required under the facts presented.

¶ 73 C. Sentencing

¶ 74 On appeal, defendant also argues the trial court considered improper factors when sentencing him to 10 years in prison. Specifically, he contends the court improperly relied on a factor inherent in his offense and "the fact that he had a number of children with different women." Defendant acknowledges that these issues have been forfeited by his failure to raise them in a postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010) ("[T]o preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). However, he maintains this court may

reach the merits of his claimed sentencing errors because Corum was ineffective for failing to object to the court's consideration of the factors and raise the issues in a postsentencing motion. We elect to address the merits of defendant's sentencing challenge in the context of an ineffective-assistance claim.

¶ 75 "The Illinois Constitution provides penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26, 21 N.E.3d 810 (citing Ill. Const. 1970, art. I, § 11). "This constitutional mandate calls for balancing the retributive and rehabilitative purposes of punishment, and the process requires careful consideration of all factors in aggravation and mitigation." *Id.*

¶ 76 "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). The trial court "is generally in a better position than a reviewing court to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits." *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27.

¶ 77 Initially, defendant argues the trial court erred by considering the fact that he sold drugs when determining an appropriate sentence because it is a factor inherent in his offense. We agree "it is error for the trial court to consider as an aggravating factor an inherent element of the offense." *People v. Mays*, 2012 IL App (4th) 090840, ¶ 67, 980 N.E.2d 166. In other words, "a single factor cannot be used both as an element of the offense and as a basis for imposing a harsher sentence than would have been imposed without it." *Id.* However, a trial court may

properly consider the nature and circumstances of the offense when imposing a defendant's sentence. *People v. Scott*, 363 Ill. App. 3d 884, 892, 844 N.E.2d 429, 436 (2006).

¶ 78 Here, when viewing the trial court's comments as a whole, we find the record does not support defendant's contention that it used the fact that defendant sold drugs as an aggravating factor. Rather, the court's comments indicate it considered the nature and circumstances surrounding the offense for which defendant was convicted—unlawful delivery of a controlled substance. The record further reflects that the court relied heavily on defendant's criminal history, which included a prior conviction for a similar drug-related offense. Thus, the record reflects no error on this asserted basis.

¶ 79 Defendant also argues the trial court erred by considering "the fact that he had a number of children with different women" when sentencing him to 10 years in prison. However, we note that whether a defendant's imprisonment "would entail excessive hardship to his dependents" is a statutory mitigating factor for the court to consider. 730 ILCS 5/5-5-3.1(a)(11) (West 2014). In this case, defense counsel argued that this statutory mitigating factor applied to defendant. In responding to this argument, the court recited the evidence presented, which indicated defendant was not a significant source of support for his children. The court's comments establish its rejection of defense counsel's argument. Further, when looking at the court's comments in total, we disagree that the court overemphasized this evidence. Additionally, we find it relevant to factors including defendant's "general moral character, mentality, social environment, and habits." *Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27.

¶ 80 Here, the record fails to reflect that the trial court applied any improper sentencing factors. Thus, defense counsel did not provide ineffective assistance by failing to either object to

the evidence considered by the court or to raise these issues in a postsentencing motion.

¶ 81 D. Assessments

¶ 82 Finally, on appeal, defendant challenges fines and fees assessed to him in the underlying proceedings. He first argues the circuit clerk improperly assessed several fines, which he argues must be vacated on review.

¶ 83 " 'This court has consistently held the circuit clerk does not have the power to impose fines.' " *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912 (quoting *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37, 5 N.E.3d 246). "Although circuit clerks can have statutory authority to impose a *fee*, they lack authority to impose a *fine*, because the imposition of a fine is exclusively a judicial act." (Emphases in original.) *Id*. "[F]ines imposed by the circuit clerk are void from their inception." *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959.

¶ 84 Defendant argues the circuit clerk improperly imposed the following fines: (1) $10 arrestee's medical fine; (2) $15 State Police operations fine; and (3) $10 State Police services fine. The State concedes that these fines were improperly imposed by the circuit clerk rather than the trial court and must be vacated. We agree. The State's concession is accepted and these fines are vacated.

¶ 85 Defendant also argues the circuit clerk improperly imposed additional assessments, including (1) $2 for State's Attorney automation; (2) $15 for automation; and (3) $15 for document storage. The State disagrees, asserting the assessments are fees, which the circuit clerk may properly assess.

¶ 86 In *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117, this

court found that State's Attorney automation assessments are fees because they are not punitive in nature and are "intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems." We agree with the State as to the State's Attorney automation assessment and decline defendant's request that we depart from *Warren*.

¶ 87 Additionally, *Warren* is equally applicable to the automation assessment, which is intended to defray the expense of establishing and maintaining an automated record keeping system in clerks' offices (705 ILCS 105/27.3a(1) (West 2014)), and the document storage assessment, which is intended to defray the expense of establishing and maintaining a document storage system in clerks' offices (705 ILCS 105/27.3c(a) (West 2014)). See *People v. Tolliver*, 363 Ill. App. 3d 94, 97, 842 N.E.2d 1173, 1176 (2006) (holding the automation and document storage assessments were fees because they were compensatory in nature); *People v. Carter*, 2016 IL App (3d) 140196, ¶ 60, 62 N.E.3d 267 (holding the automation and document storage assessments were properly made by the circuit clerk). These charges are not punitive in nature but, instead, are intended to reimburse clerks' offices for certain expenses.

¶ 88 Consistent with *Warren*, we find assessments for States' Attorney automation, court automation, and court document storage constitute fees rather than fines. Thus, they were properly assessed by the circuit clerk.

¶ 89 Defendant next challenges the assessment of a $100 violent crime victim's assistance fine. He contends that, although the trial court ordered the imposition of this fine, it neglected to impose a specific amount. The State concedes that this fine should be vacated, noting that "[a]bsent a court order imposing a specific fine, it is well established the clerk of a court, as a nonjudicial member of the court, has no power to levy fines." *Smith*, 2014 IL App (4th)

121118, ¶ 63, 18 N.E.3d 912. We accept the State's concession and order this fine vacated.

¶ 90 Last, defendant challenges a $250 deoxyribonucleic acid (DNA) analysis assessment on the basis that he submitted to DNA analysis following an earlier conviction. Further, he notes that the trial court's order in this case made the imposition of such a charge contingent on whether he had previously submitted a DNA sample. Again, the State concedes this issue. We accept the State's concession and also vacate the DNA analysis fee.

¶ 91 III. CONCLUSION

¶ 92 For the reasons stated, we vacate the imposition of the following assessments: (1) $10 arrestee's medical fine; (2) $15 State Police operations fine; (3) $10 State Police services fine; (4) $100 violent crime victim's assistance fine; and (5) $250 DNA analysis fee. We otherwise 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.

¶ 93 Affirmed in part and vacated in part.