2024 IL App (4th) 231162-U

NO. 4-23-1162

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 27, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PHILLIP R. ANGLIN, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Livingston County No. 22CF277 Honorable Jennifer Hartmann Bauknecht, Judge Presiding.

PRESIDING JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: (1) When a purchasing agent hands over the cocaine to the principal, a delivery occurs, despite a contention that the agent and principal, by virtue of the agency relationship, were already in joint possession of the cocaine.

(2) Putting the cocaine, at the buyer's direction, in a storage space of the buyer's personal property over which the buyer has physical control could reasonably be regarded as a delivery of the cocaine.

(3) Errors in trial strategy, such as missing an opportunity for additional impeachment and failing to object to an argument by the prosecutor, are not ineffective assistance unless defense counsel entirely fails to conduct any meaningful adversarial testing.

(4) The prosecutor erred by arguing to the jury that, to acquit the defendant, the jury would have had to believe that the State's witnesses were lying, but because defendant has not carried his burden of showing that the evidence at trial was closely balanced, the procedural forfeiture of this error will be honored.

(5) Prosecutors are allowed wide latitude in their arguments to the jury, and such latitude includes bringing out arguable implications of defendant's testimony.

(6) A Class X felony could be reasonably regarded as "serious" in that it was a repetition of the same Class X felony of which defendant was convicted only a few months earlier.

(7) Arguably, someone who is in the business of distributing cocaine cannot reasonably claim, in mitigation, that he was "induced" by the buyer.

(8) Even though defendant was apparently a petty distributor of cocaine instead of a large-scale distributor, his prior criminal record arguably justified the imposition of an extended-term prison sentence.

¶ 2 A jury in Livingston County found defendant, Phillip R. Anglin, guilty of count I of the amended information, unlawful delivery of cocaine (see 720 ILCS 570/401(a)(2)(A) (West 2022)), and count II, unlawful possession of cocaine with the intent to deliver it (see *id.*), both Class X felonies (see *id.* § 401(a)). After concluding that count II merged into count I, the circuit court sentenced defendant to an extended term of imprisonment of 30 years. See 730 ILCS 5/5-5-3.2(b)(1), 5-4.5-25(a), 5-8-2(a) (West 2022).

¶ 3 Defendant appeals for two reasons. First, he maintains that the State failed to prove he delivered cocaine. Second, he claims that, at trial and the sentencing hearing, defense counsel rendered ineffective assistance and plain errors were committed.

¶ 4 When we view the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find, beyond a reasonable doubt, that defendant delivered cocaine to a confidential source, Seth Rich. Also, we conclude that defendant has failed to carry his burden of showing ineffective assistance and plain error. Therefore, we affirm the circuit court's judgment.

¶ 5 I. BACKGROUND

¶ 6 At trial, Seth Rich testified he was a confidential source for the Livingston County Sheriff's Office. He had an agreement with the sheriff's office to buy drugs from suspects. If a suspect expressed to Rich a willingness to sell him drugs, Rich was to contact Inspector Zachary

Benning so that a controlled buy from the suspect could be arranged.

¶ 7 In a phone conversation on November 27, 2022, defendant told Rich he was "ready to go up," meaning that defendant was ready "[t]o go pick up drugs." Defendant asked Rich if he, too, was ready. Rich told defendant he was ready and that he wanted an ounce of cocaine. They agreed on a price of $1200 and that the cocaine would be purchased the next day. Rich informed Benning.

¶ 8 The next day, before the controlled buy, Rich met with police officers, who searched his truck and his person, finding no drugs. The police issued Rich a recording device disguised as a key fob, put a GPS tracker on his truck, and supplied him with $1200. Rich then parked in front of his house but did not go inside—the police had told him that, having been searched, he was not to reenter his house. So, Rich just waited in his truck for defendant to show up.

¶ 9 Defendant arrived at Rich's house with another man, whom Rich did not know. As those two were getting into Rich's truck, Rich went back inside his house to use the bathroom. Benning texted Rich, " ['W]hat are you doing[?] You can't go inside your house. You need to come back here right now.['] " Consequently, in a ruse, Rich told defendant and the other man that he "had to go to Casey's[,] up the street," and meet someone who was "real[ly] sketchy"—so sketchy that he preferred "to go down the street to meet" the person instead of having the person come to the house. Defendant and his companion waited in defendant's car while Rich drove up the street, to Casey's.

¶ 10 At Casey's, Benning asked Rich why he had gone back inside his house. Rich answered that he had needed to use the bathroom. After Benning searched Rich and his truck again, Rich drove back to his house.

¶ 11 Defendant and the man who had come with him were still there. They got into Rich's truck, and the three of them set out for the place where the cocaine was to be bought. Rich thought they would go to the Aurora area, but instead, defendant gave him directions to Yorkville, Illinois.

¶ 12 As they drew near to Yorkville, defendant's companion made a phone call, obtained an address, and "put it in the GPS." They drove to that Yorkville address.

¶ 13 Upon arriving at that address, they parked. Rich testified:

"We called and said, ['H]ey, we're here.['] I don't know the guy's name. He came out. He handed drugs to [defendant]. [Defendant] gave him the cash. We talked a little bit. He left, and then we left.

Q. Where were the drugs when you left?

A. They wanted me to try some. I didn't really want to do that so I offered to set it in the seat. I had a cubbyhole in the back passenger seat. I kind of pulled forward, and there was like a cubby hole there. I said, ['P]ut it there just in case we get pulled over. They won't find it.[']

Q. So a cubbyhole. And where did you say the cubbyhole was?

A. In the back seat of the truck.

Q. Okay. So whatever you had purchased at that point was then put into the back seat?

A. Right."

¶ 14 On the return journey, the police pulled Rich over. "They took everybody out of the vehicle." Rich further testified:

"I was asked where was it at. I said, ['I]t's in the cubbyhole in the back seat.[']

They grabbed it. They arrested everybody, put everybody in cars; and they took them away to jail; and they let me out; and I drove away, drove home."

¶ 15 Rich identified People's exhibit No. 1 as the cocaine. The parties stipulated that this exhibit contained more than 24.1 grams of cocaine.

¶ 16 On cross-examination, defense counsel asked Rich:

"Is it true that you have had a delivery of meth case pending against you since September of 2020?

A. Yes.

Q. And you are set for a sentencing next month?

A. Yes.

Q. And what, if anything, has the State promised you in order to get you to testify today?

A. Nothing."

¶ 17 Also, on cross-examination, defense counsel asked Rich:

"Q. So moving back to November 28th, isn't it true that you were the one that set up this drug buy?

A. No. I don't believe so. I asked [defendant] the next time he was going up let me know. He said he was going up. I said, ['O]kay, I'm ready.['] "

Rich further denied, on cross-examination, that he was "the one that [had] used the other passenger's phone." Also, Rich denied it was he who had made "contact with the seller to get the correct address."

¶ 18 Defense counsel also asked Rich:

"Q. When the seller arrived to the vehicle, he was on the passenger side of

the vehicle?

A. Yes.

Q. And isn't it true that he threw the drugs into the car, and it landed on your lap?

A. No.

Q. And isn't it true you handed the money directly to the seller?

A. No."

¶ 19 Benning and Inspector Samer Assaf were on the surveillance team for the controlled buy. Benning testified that, before the controlled buy, he searched Rich "around his residence in Flanagan," searched his truck, provided him $1200 in cash for the drugs, and "provided him with the overhear device"—which, they discovered after the controlled buy, "ultimately did not work." In his preliminary search, Benning found no contraband, either on Rich or in his vehicle (according to Benning's testimony). After Rich went into his house with defendant and the other man, Benning had Rich meet him at Casey's, where Benning again searched Rich and his truck and again found no contraband.

¶ 20 Although Benning, Assaf, and their team maintained surveillance on Rich's truck at all times, neither Benning nor Assaf could see the drug transaction. Benning saw the seller of the drugs come to the passenger side of Rich's truck, but he could not see who passed the money or the drugs.

¶ 21 After the controlled buy, the police followed Rich's truck, which stopped at a gas station. Benning testified:

"Basically the vehicle stopped. [The confidential source] stayed in the vehicle the whole time. He never went inside. I believe [defendant] went inside to use the

restroom. Nothing out of the ordinary. Nothing that appeared to be anything out of the ordinary stopping at a gas station."

This stop at the gas station was the only voluntary stop on the way back.

¶ 22 When Rich took an exit for Pontiac, Illinois, the police pulled him over (Benning continued in his testimony). The police had all the occupants of the truck, including Rich, get out. Rich told Benning where the cocaine was. Benning asked him "if there was any more cocaine other than what he had bought." Rich answered no. He was searched, and no drugs were found on his person. Benning found the cocaine where Rich had told him it was: in a cubbyhole in the back seat, behind the driver's seat.

¶ 23 Assaf likewise testified that "the narcotics were in the vehicle at the time" its occupants were arrested. Assaf further testified that he was the one who took Rich into custody after the controlled buy and that when he patted Rich down, he found no drugs on Rich's person.

¶ 24 Defendant took the stand in his own behalf and testified substantially as follows. In October 2022, he met Rich through Mallory Conroy. When they first became acquainted, Rich told defendant that he, Rich, was a police officer and that he wanted defendant to become an informant for him.

¶ 25 On cross-examination, the prosecutor asked defendant:

"Q. Your testimony is you believed you were working as an informant for Seth Rich?

A. That's what he told me originally when he put the gun on us and took, robbed Mallory Conroy in the front seat of her car.

Q. Okay. So you believed you were working for Seth Rich who's committing crimes on you and he's a police officer?

A. You have never met a dirty cop in your life?

Q. Oh. So the cops are dirty, and Seth is one of them? I'm just trying to make sense of that.

A. Do you want me to answer?

Q. Yeah. So Seth is dirty, and he's one of the cops?

A. That's what I said. Yeah.

Q. Okay. Did you talk to any police officers about Seth Rich?

A. No.

Q. You had a month to talk to police officers about Seth Rich.

A. I was in the hospital during that month for about three weeks.

Q. Okay. But you can call a police department. Correct?

* * *

A. I'm not going to call the police when he's threatening me with going to jail.

Q. Right.

A. He said he was the police, and he said that if the cops come to his house that night that he would have to put me in jail for what he took from Mallory Conroy."

¶ 26 Despite this threat, defendant socialized with Rich. Defendant testified that, on November 28, 2023, around 8 or 9 p.m., he and a man named Mauricio (last name unspecified) traveled in defendant's car from the city of Gilman, Illinois, to Rich's residence in Flanagan, Illinois. When asked why he made this trip, defendant answered, "I hung out with Seth all the time."

¶ 27 Defendant and Mauricio arrived at Rich's house. When defendant came out of Rich's bathroom, Rich said he needed to go to Casey's because "he was having an argument with his lady."

¶ 28 After Rich returned from Casey's, defendant and Mauricio "got in the car with him." Rich was in the driver's seat, defendant was in the front passenger seat, and Mauricio was in the back passenger seat.

¶ 29 Defense counsel asked defendant:

> "Q. And what did you believe was going to take place when you went to Yorkville?
>
> A. I thought he said something about trading the guy some guns on his phone for a jeep."

¶ 30 Defendant denied using Mauricio's phone to contact anyone in Yorkville. Instead, according to defendant's testimony, it was Rich who used "used Mauricio's phone to contact the person in Yorkville." Defendant explained that Rich "had his phone plugged into the radio and the GPS so he said he couldn't use it." Consequently, Rich "asked him to use his phone in the back."

¶ 31 In Yorkville, according to defendant's testimony:

> "A. Seth pulled into a parking spot; and then he called the guy back; and the guy—
>
> Q. What guy are you referring to?
>
> A. They call him Rat.
>
> * * *
>
> Q. Rat. Okay.

A. And when Rat come out, where he parked at in his subdivision, on the driver's side of the truck there was a State Police SUV. So instead of him going around and talking to Seth on that side, he come up to the passenger side window; and Seth went in his pocket and reched [*sic*] the $1200 and took a bag of coke and tossed it to Seth in his lap. Seth then took the bag of coke—

Q. Hold on. So at any point, did you touch the money that was given to this Rat guy?

A. No. It wasn't my money.

Q. And at any point did you touch the drugs? You said they were thrown into the vehicle?

A. Yeah. He tossed them in Seth's lap. I was laid back in the seat. My leg was up because I had a [*sic*] external fixated bolts to my leg.

Q. And so then what happened?

A. Seth opened up the bag of coke and put some on top of his cellphone and put lines out for everybody in the car.

Q. Okay. And then what happened?

A. Everybody was snorting lines."

¶ 32 They then set out on their return journey. At the second exit to Pontiac, the police stopped Rich's truck. Defendant testified:

"A. They pulled Mauricio out of the back seat; and then the detective, the second detective, he pulled Seth out; and Seth reched [*sic*] him something in his hand.

Q. Hold on. Seth did what?

A. Reched [*sic*] him a bag of drugs in his hand.

Q. What is that word you are using?

A. Reched [*sic*]. Like reached.

* * *

Q. Reached toward the officer?

A. Yes.

Q. Okay.

A. The second officer was on the stand. Assar [*sic*] or whatever, he reched [*sic*] him a white bag of substance in his hand to the detective.

Q. Okay. You saw that actually take place?

A. Yeah."

Then, according to defendant's testimony, the police opened the door to the front passenger seat, whereupon defendant protested, " ['Y]ou can't pull me out like that. I've got metal going through my legs[.'] "

¶ 33 Defense counsel preemptively brought out two of defendant's prior convictions. She asked defendant:

"Q. You have previously been convicted of a felony offense?

A. Yeah.

Q. A 2012 delivery of a controlled substance?

A. Yes.

Q. And a 2019 possession of a stolen vehicle?

A. I rented a U-Haul.

Q. I'm sorry. What?

A. I had rented a U-Haul, and I didn't get it back on time.

Q. Okay. All right. So did you make, were you part of any arrangements between Seth meeting this guy, Rat?

A. No."

¶ 34 On cross-examination, the prosecutor asked defendant if he had seen any guns in Rich's vehicle. Defendant answered that he had not searched Rich's vehicle but that he had seen no guns. Nevertheless, defendant explained that Rich "said he was going up there to show him some guns on his phone, and then he ends up texting me for a drug deal." (It does not appear that this text message was presented at trial.)

¶ 35 The prosecutor asked defendant:

"Q. Okay. Now what jeep were you guys going to be getting? Do you know?

A. It was a gray I think 2000, either '18 or '17.

Q. There was no gray jeep though. Correct?

A. Yeah. There was a jeep out there. In the guy's driveway."

¶ 36 According to defendant's testimony, "Seth was doing a lot of drugs all the way up [to Yorkville,] with the radio up." The prosecutor asked defendant:

"Q. What were you guys talking about on the way to Yorkville? It's like an hour and a half drive. Right?

A. He was on his phone. He had the music on.

Q. No conversation?

A. Not really. No.

Q. And then you said at Yorkville you were all sniffing drugs, cocaine?

A. No. He had a methamphetamine pipe.

Q. So now he's smoking meth?

A. Correct."

¶ 37 The State called Rich in rebuttal. He denied that, on November 28, 2022, he had any guns in his car or any "pictures of guns on a phone that [he] wanted to show someone." A rule of the controlled buy was that he had to refrain from consuming drugs. He believed that if he had violated that rule, he would have been arrested and jailed.

¶ 38 The State then offered certified copies of defendant's previous felony convictions, People's exhibit Nos. 3 and 4, as impeachment evidence.

¶ 39 Both parties gave closing arguments. The prosecutor maintained that Rich was more believable than defendant. The prosecutor urged the jury to

> "think of where Seth Rich's mind was at and the perspective he had because again in order to believe this Defendant, to find him not guilty, you would have to believe that Seth Rich framed this Defendant and somehow pulled one over on all the police in their efforts as well. I think that's belied by the evidence."

¶ 40 The prosecutor argued that Rich could not have framed defendant, because Rich "had an absence of knowledge about how he was going to do that," especially considering that there was a recording device that, for all Rich knew, was picking up everything that was said in his truck. "Obviously he anticipated that he would have had the audio recording," the prosecutor noted, "but Seth Rich had no idea that it had malfunctioned. Detective Benning had no idea it malfunctioned"—until after the controlled buy.

¶ 41 The prosecutor acknowledged that, at first, it might seem "weird" to talk about an "audio recording that malfunctioned." Yet, the prosecutor explained, "it's not [weird] when you

think about this boiling down to credibility, when it's boiling down to whether or not you believe Seth Rich and what he sat there and testified to or if you believe this man" (that is, defendant).

¶ 42 According to the prosecutor, defendant was "the only one with interest and bias in this situation," and "[t]here's been no demonstrated interest or bias put forth on behalf of Seth Rich framing this Defendant." Anticipating that a jury instruction on credibility would be given, the prosecutor told the jury, "So you are going to be asked to consider the believability of the witnesses by me and the State, when you are making your determinations because I think it's a very important part of your decision today in who you believe." Because the parties had stipulated that the substance the police recovered was more than 15 grams of cocaine, the prosecutor reasoned, "All you are left to determine really is whether or not you believe this Defendant and everything that he has to lose in this case or if you believe what the officers and Seth Rich were able to put forward to you."

¶ 43 Defense counsel responded that, contrary to the prosecutor's assertion, "Seth Rich has a vested interest in becoming a [confidential source] in the hopes of something favorable would happen to him regarding [his own drug] case." Defense counsel disputed that the State had carried its burden of proof. It was the position of the defense that defendant never touched the drugs and never had possession of the money.

¶ 44 In his rebuttal argument, the prosecutor reiterated that the State had made no promises to Rich for his testimony and that "[t]here's nothing from that mere fact that he's now doing good deeds for the police working as a confidential source that would bring into suspicion his motivations." The prosecutor characterized defendant's testimony as "ridiculous" and argued:

> "[H]is explanation for why he never saw any police officers with this Seth Rich person who was an informant with the police was because they are all dirty and

very confrontational about that fact and the fact that all officers are dirty and [‘]have I ever met a dirty cop.[’] ”

¶ 45 Defense counsel objected:

“That’s a misstatement of the facts of what my client actually testified to. He did testify that Mr. Rich he believed was dirty. I do not recall him making a statement that he thought all cops were dirty.

THE COURT: Overruled. He did make a more general statement, but also it’s argument so he’s entitled to make an argument. There are facts in the record that support that argument.”

¶ 46 The prosecutor then summed up:

“And that just I think sets out the tenor of what this Defendant is asking you to believe today, asking you to decide whether you are believing his testimony or not.

Again, it comes down to a reasonable doubt. This is not an insurmountable standard. It’s not beyond a shadow of a doubt. It’s not beyond all doubt. It’s beyond a reasonable doubt.

What about what this Defendant testified to today was reasonable from your ability to sit and review his manner while testifying? I would argue nothing. Nothing is reasonable.

Seth Rich was working for the police. He as we learned from Detective Benning and from Seth Rich, learned he was able to sell drugs. He then cooperates with the police. Gives them that tip. Controlled buys. Everything that happens after that largely out of his control. So to believe this Defendant, believe

that Seth Rich framed him for this event occurring on November 28, 2022, and this Defendant's role in that event I would argue is not reasonable; and I would ask that you reject that argument and find him guilty."

¶ 47 On June 20, 2023, the jury found defendant guilty on both counts of the amended information: count I, unlawful delivery of a controlled substance, and count II, unlawful possession of a controlled substance with the intent to deliver it.

¶ 48 On July 31, 2023, while still represented by counsel, defendant filed a *pro se* motion for a new trial. One of the grounds he raised in this motion was that defense counsel had rendered ineffective assistance by failing to impeach Rich with a new methamphetamine charge, a charge brought against Rich in 2023.

¶ 49 On August 7, 2023, the circuit court held a sentencing hearing, at which the prosecutor recommended imprisonment for 35 years—a sentence "toward the middle of" "the extended-term range." See 730 ILCS 5/5-5-3.2(b)(1) (West 2022). The prosecutor argued, "[W]hen you're looking at a defendant with [defendant's] history, he does pose a threat to others when he's released from confinement."

¶ 50 Defense counsel, on the other hand, recommended no more than 15 years' imprisonment. While granting that "the minimum would probably deprecate the serious nature of this offense" and acknowledging that "we don't have any mitigation," defense counsel reiterated defendant's position that he was not guilty, that he had been entrapped, and that Rich, a person with "unclean hands," had "tricked him into this and made threats against him if he didn't."

¶ 51 The circuit court, however, honored the jury's finding of guilt. Because of defendant's prior criminal record and because of the need to deter other drug dealers from "harming the whole community [by] doing things to bring drugs back into this community," the

court sentenced defendant to imprisonment for 30 years on count I (finding that count II merged into count I).

¶ 52 On September 1, 2023, defense counsel filed a motion for a new trial. The motion raised six grounds for this requested relief: (1) the insufficiency of the evidence; (2) defendant's innocence; (3) the admission of unspecified inadmissible evidence; (4) the denial of the defense's motion *in limine* to exclude, as impeachment, defendant's 2019 conviction of delivery of a controlled substance; (5) a conflict of interest that defendant alleged on the ground that defense counsel had represented a witness he failed to call, Jasmine Casas, in an unrelated case; and (6) ineffective assistance of counsel alleged by defendant.

¶ 53 Also on September 1, 2023, defense counsel filed a motion for reconsideration of the sentence. This motion claimed that the sentence of 30 years' imprisonment "was unduly harsh and punitive in consideration of all of the matters placed in evidence at the sentencing hearing, and in respect of the factors in mitigation which apply in this cause."

¶ 54 On October 11, 2023, after receiving the trial transcript on September 24, 2023, defense counsel filed a supplemental motion for a new trial. This supplemental motion complained that, in his closing argument, the prosecutor "argued facts not in evidence" and that the circuit court erroneously overruled defense counsel's objection to the misstatement of facts. Specifically, the supplemental motion claimed the court had erred by refusing to instruct the jury to disregard the prosecutor's false assertion that defendant had characterized *all* "cops" as "dirty."

¶ 55 On October 30, 2023, the circuit court held a hearing on counsel's postjudgment motions and a preliminary inquiry into defendant's claim of ineffective assistance. The court asked defendant to "identify for me or tell me I guess why you believe that [counsel] was

ineffective." Defendant responded that defense counsel failed to properly examine him at trial, failed to raise an entrapment defense, and failed to call Casas as a witness. After discussing these ineffectiveness claims with defense counsel, the court denied defendant's request to appoint new counsel to evaluate these claims. Also, the court denied defense counsel's motion for a new trial and her motion to reconsider (or, more precisely, reduce) the sentence.

¶ 56 This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 A. Proof of Delivery

¶ 59 Section 401 of the Controlled Substances Act (Act) provides that "it is unlawful for any person knowingly to *** deliver *** a controlled substance." 720 ILCS 570/401 (West 2022). Defendant was charged with violating subsection (a)(2)(A) of section 401 (*id.* § 401(a)(2)(A)). That subsection provides as follows:

> "(a) Any person who violates this Section with respect to the following amounts of controlled *** substances *** is guilty of a Class X felony and shall be sentenced to a term of imprisonment as provided in this subsection (a) ***:
>
> * * *
>
> (2)(A) not less than 6 years and not more than 30 years with respect to 15 grams or more but less than 100 grams of a substance containing cocaine." *Id.*

According to count I of the amended information, defendant "violate[d] this Section," section 401, by knowingly "deliver[ing]" to Rich "more than 15 grams of a substance containing cocaine," a Schedule II controlled substance (see *id.* § 206(b)(4)).

¶ 60 The term "deliver" is specially defined in the Act. Under section 102(h),

" '[d]eliver' or 'delivery' means the actual, constructive[,] or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." *Id.* § 102(h). "An agent is one who, acting under authority from another, transacts business for him." *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 232 (1991). Someone can buy narcotics for another, at that other person's request. If *A* buys cocaine with funds provided by *B* and receives the cocaine for the purpose of handing it over to *B*, *A*'s act of handing the cocaine over to *B* will qualify as a " 'delivery,' " even though *A* acts on *B*'s behalf, as *B*'s purchasing agent. See 720 ILCS 570/102(h) (West 2022).

¶ 61 Defendant argues, "Since the cocaine was purchased from the car, with both [defendant] and Rich inside, both parties jointly acquired the cocaine. Accordingly, the State failed to prove the element of delivery in this case as [defendant] could not have been found guilty of delivering the controlled substance to Rich." By defendant's logic, "when the dealer 'handed' the cocaine to [defendant] [citation], Rich also took possession of it. Accordingly, [defendant] could not have delivered it to him—*i.e.*, transferred his possession—where Rich already had joint possession with [defendant]."

¶ 62 Thus, defendant would have us hold as follows: If, from inside a car that *A* is driving and with *A*'s money, *B* buys narcotics exclusively for *A*'s use and, at *A*'s direction, stashes the narcotics in a compartment of *A*'s car, *A* and *B* are joint possessors of the narcotics, and no delivery from *B* to *A* occurred. We are aware of no case so holding. It is true that if *B* is *A*'s purchasing agent, *B*'s possession could be said to be *A*'s possession. Even so, the concluding phrase in section 102(h)—"whether or not there is an agency relationship"—prevents the joint possession implied in an agency relationship from defeating a delivery. *Id.*

¶ 63 Granted, if two or more people acquire cocaine *for their joint use*, they might be

said to jointly possess the cocaine, and they cannot deliver to one another what they already collectively possess. We acknowledge defendant's testimony that, after the controlled buy, Rich "opened up the bag of coke and put some on top of his cellphone and put lines out for everybody in the car." The jury, however, did not have to believe this testimony by defendant. Alternatively, the jury could have believed Rich's testimony that after the seller handed the cocaine to defendant, Rich declined an invitation to sample it and that the cocaine was promptly stashed, at his suggestion, in the cubbyhole in the back seat. Defendant and Maurice put the cocaine where Rich told them to put it. It was Rich's cocaine (supposedly), bought with his money (supposedly), and secreted, at his direction, in a compartment of his truck, which he was driving. Nothing in Rich's testimony suggests an intention on his part to gift any of the cocaine to defendant or Maurice. Nor does Rich's testimony imply that defendant and Maurice were just as entitled as he was to possess and use the cocaine or that Rich had done anything to lead them to believe that the cocaine was for them, too.

¶ 64 In support of his theory of joint possession, defendant cites *People v. Kidd*, 2013 IL App (2d) 120088, and *People v. Coots*, 2012 IL App (2d) 100592. The present case is significantly different, however, from *Kidd* and *Coots* in that the record appears to lack evidence that Rich, defendant, and Maurice set out for Yorkville with the express intention that they all would partake of the cocaine. In *Kidd*, by contrast, the defendant " 'got *us* a bag [of cocaine]' "—meaning a bag of cocaine for himself and his girlfriend—and they consumed the cocaine together, resulting in his girlfriend's fatal overdose. (Emphasis added.) *Kidd*, 2013 IL App (2d) 120088, ¶ 9. Similarly, in *Coots*, the defendant bought heroin, with her friend's money, at her friend's suggestion that "they 'party' with [the] heroin." *Coots*, 2012 IL App (2d) 100592, ¶ 7. In a hotel room, they both injected the heroin (*id.* ¶ 10), and the friend fatally overdosed (*id.*

¶ 5).

¶ 65 In *Kidd* and *Coots*, therefore, an argument could be made that, at the time of the purchase, the defendants and their friends "share[d] the intention and power to exercise control" over the drugs, making the defendants joint possessors with their friends. (Emphasis omitted.) *Id.* ¶ 43. The purchases in *Kidd* and *Coots* were made with the plan that the defendants would consume the drugs with their companions—and arguably, joint consumption meant joint possession. See *id.* Joint possessors of drugs cannot deliver the drugs to one another; each of them already possesses the drugs. See *id.* In other words, according to some case law, "[u]nlawful delivery [does] not include the exchange of physical possession between two persons who jointly acquired and [held] the drug for *their* own use." (Emphasis added and internal quotation marks omitted.) *Id.* ¶ 23. Viewed in a light most favorable to the prosecution (see *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999)), the evidence shows that the cocaine was bought in contemplation of Rich's sole use (ostensibly) instead of in contemplation of joint use by Rich, defendant, and Maurice. For all that appears in Rich's testimony, there was no cocaine party and no plans for one. Rather, the cocaine was bought, and on Rich's direction, it was soon put away, unconsumed. Therefore, *Kidd* and *Coots* are distinguishable.

¶ 66 Instead of being an intended couser of the cocaine (like the victims in *Kidd* and *Coots*), defendant was merely a purchasing agent for Rich. Defendant bought the cocaine for Rich through the passenger-side window of Rich's truck. Such an agency relationship does not negate delivery. See 720 ILCS 570/102(h) (West 2022).

¶ 67 In sum, then, when we view all the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could make the following finding beyond a

reasonable doubt: By acceding to Rich's suggestion that the cocaine be stashed in the cubbyhole in Rich's truck, defendant put Rich, the intended recipient, in constructive possession, if not actual possession, of the cocaine (see *People v. Horn*, 2021 IL App (2d) 190190, ¶ 39) and thereby delivered the cocaine to him (see 720 ILCS 570/102(h) (West 2022)). At the very least, defendant attempted to deliver the cocaine to Rich. See *id.*

¶ 68 Such a finding of delivery is not to be confused with accountability. We take defendant's point that the State did not argue accountability to the jury and that the jury was not instructed on accountability. See *People v. Johnson*, 2013 IL App (4th) 120162, ¶ 34. Also, we acknowledge that, after defendant's statement in allocution, the circuit court spoke of defendant's accountability for the conduct of the seller. We are not limited, however, by the court's remarks. See *People v. Porcayo-Bahena*, 2024 IL App (2d) 210393-UB, ¶ 12 ("We may affirm on any basis appearing in the record, regardless of the rationale used by the trial court."). The court was not the jury, and accountability has nothing to do with our discussion. It is not that defendant delivered the cocaine vicariously by being "legally accountable for the conduct of" the seller (720 ILCS 5/5-2 (West 2022)). Rather, after the seller handed the cocaine to defendant through the passenger-side window of Rich's truck, defendant himself delivered the cocaine to Rich by relinquishing physical possession of the cocaine for the purpose of enabling the cocaine to be stashed, at Rich's direction, in the cubbyhole in the back seat of Rich's truck. Thus, defendant—himself—accomplished "the actual, constructive[,] or attempted transfer of possession of" the cocaine to Rich. 720 ILCS 570/102(h) (West 2022). Putting the cocaine, at the buyer's direction, in a storage space of the buyer's personal property over which the buyer has physical control is a delivery.

¶ 69 B. Failure to Cross-Examine Rich About the New Methamphetamine Charge

¶ 70 Defendant points out that, on March 27, 2023, about three months before defendant's trial, Rich was charged in Livingston County case No. 23-CF-116 with possession of methamphetamine, a Class 3 felony. See https://www.judici.com/courts/cases/case_history.jsp?court=IL053015J&ocl=IL053015J,2023CF116,IL053015JL2023CF116D1 (last visited Dec. 18, 2024). This charge was new, over and above the methamphetamine conviction for which, at the time of defendant's trial, Rich awaited sentencing. Defendant contends that because Rich's credibility was critical to the prosecution, defense counsel rendered ineffective assistance by failing to cross-examine Rich about the new methamphetamine charge. Although defense counsel cross-examined Rich about the upcoming sentencing hearing in the other, older methamphetamine case, defendant maintains it was substandard performance by defense counsel to let the new methamphetamine charge go unmentioned. In defendant's view, reasonable professional assistance required the exposure of Rich's *double* incentive to testify falsely: not only the upcoming sentencing hearing but also the new methamphetamine charge.

¶ 71 Impeachment, though, is a matter of trial strategy (*People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997); *People v. Phillips*, 2017 IL App (4th) 160557, ¶ 58), and the supreme court has held that "matters of trial strategy *** are generally immune from claims of ineffective assistance of counsel." *People v. West*, 187 Ill. 2d 418, 432 (1999). The only exception to this immunity, according to the supreme court, is "when counsel's chosen trial strategy is so unsound that counsel *entirely* fails to conduct *any* meaningful adversarial testing." (Emphases added and internal quotation marks omitted.) *Id.* at 433. The supreme court has reiterated this rule from *West*, holding again that "[e]rrors in trial strategy do not constitute ineffective assistance unless

counsel entirely fails to conduct any meaningful adversarial testing." (Internal quotation marks omitted.) *People v. Custer*, 2019 IL 123339, ¶ 39; see *Phillips*, 2017 IL App (4th) 160557, ¶ 58; *People v. Aranda*, 2024 IL App (4th) 210075-U, ¶ 62.

¶ 72 To assert that defense counsel entirely failed to subject the State's case to any meaningful adversarial testing would be an exaggeration. Defense counsel called defendant and elicited from him that he had nothing to do with the purchase of the cocaine, but that he merely rode along to Yorkville, where Rich handed the seller the $1200 and the seller tossed the cocaine into Rich's lap. Defense counsel cross-examined Rich, eliciting from him the admission that "a delivery of meth case" had been "pending against [him] since September of 2020" and that the case was "set for a sentencing next month." Defense counsel argued to the jury that defendant never touched the cocaine or the money. She further argued that "Rich ha[d] a vested interest in becoming a [confidential source] in the hopes of something favorable would happen to him regarding [his own drug] case." This was a good, hard-hitting argument. Thus, defense counsel subjected the State's case to some meaningful adversarial testing. It follows that she is immune to a claim that she rendered ineffective assistance by failing to additionally raise the 2023 methamphetamine charge. See *Custer*, 2019 IL 123339, ¶ 39; *Phillips*, 2017 IL App (4th) 160557, ¶ 58.

¶ 73 Because of this immunity, which was ascertainable from case law and from the face of the record, the circuit court rightly determined that (1) the claim of ineffective assistance premised on defense counsel's failure to cross-examine Rich regarding the 2023 charge lacked merit and (2) an appointment of new counsel to evaluate this claim of strategic error was unnecessary. See *People v. Jolly*, 2014 IL 117142, ¶ 29.

¶ 74 Equally apparent from the face of the record was the lack of prejudice. A

defendant alleging ineffective assistance has the burden of showing that two propositions hold true: (1) defense counsel rendered deficient performance, and (2) prejudice resulted to the defendant. See *People v. Davis*, 304 Ill. App. 3d 427, 441 (1999). Prejudice is "a reasonable probability *** that, but for counsel's errors, the result of the proceeding would have been different." *People v. Webb*, 2023 IL 128957, ¶ 21. Because a failure to establish either of those propositions "precludes a finding of ineffective assistance of counsel" (*id.*), we may proceed directly to the question of prejudice, without evaluating counsel's performance (*People v. Gray*, 2012 IL App (4th) 110455, ¶ 48). We find, *de novo*, no reasonable probability of an acquittal if defense counsel had elicited from Rich that he had been charged with a new methamphetamine offense. See *Webb*, 2023 IL 128957, ¶ 23 ("This court's standard of review for determining whether a defendant was denied the effective assistance of counsel is *de novo*."). The jury already knew that Rich faced legal peril from the methamphetamine conviction. An additional, lesser form of legal peril, a charge, would not have significantly changed Rich's perceived incentive to incriminate defendant.

¶ 75 C. Remarks in the Prosecutor's Closing Argument

¶ 76 1. *A Misstatement of Law*

¶ 77 a. Plain Error

¶ 78 Defendant accuses the prosecutor of making improper remarks in his closing argument to the jury.

¶ 79 First, according to defendant, the prosecutor "misstated the law and improperly shifted or diminished the burden of proof by arguing the jury could only acquit [defendant] if they believed him and found Rich and the officers were lying." Defendant quotes the prosecutor's argument that, "in order to believe this Defendant, *to find him not guilty*, you would

have to believe that Seth Rich framed this Defendant and somehow pulled one over on all the police in their efforts as well." (Emphasis added.) The supreme court has drawn

> "a distinction between situations where a prosecutor permissibly argues that a jury would have to believe the State's witnesses were lying in order *to believe* the defendant's version of events and where a prosecutor improperly argues that a jury would have to believe the State's witnesses were lying in order *to acquit* defendant." (Emphases in original.) *People v. Banks*, 237 Ill. 2d 154, 185 (2010).

The prosecutor in this case argued to the jury that, to find defendant not guilty, or to acquit him, the jury had to believe that the State's witness, Rich, had framed defendant and had deceived the police—in other words, that Rich had lied. According to the quoted language from *Banks*, that argument crossed the line. This misstatement of law "distort[ed] the burden of proof by suggesting incorrectly what the jury [had to] find in order to reach a certain verdict." (Internal quotation marks omitted.) *People v. Crossno*, 93 Ill. App. 3d 808, 821 (1981). So, judging by the language from *Banks*, defendant is right about this clear or obvious error in the prosecutor's closing argument. The test is "not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt." (Internal quotation marks omitted.) *Id.*

¶ 80 The trouble is, defense counsel never made a contemporaneous objection to the misstatement of law, let alone reiterated the objection in a posttrial motion. Normally, those omissions would result in a procedural forfeiture of the objection. See *People v. Sebby*, 2017 IL 119445, ¶ 48. "To preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion. [Citation.] Failure to do either results in forfeiture." *Id.*

¶ 81 In two sets of circumstances, though, the doctrine of plain error can avert a procedural forfeiture:

> "(1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *Id.*

Defendant contends that the first set of circumstances exists in his case: at a trial in which the evidence was closely balanced (according to defendant's assessment), the prosecutor clearly erred by telling the jury that to acquit defendant, the jury would have to believe that Rich lied.

¶ 82 Simply because defendant's testimony was pitted against Rich's testimony, it does not necessarily follow that the evidence was closely balanced. Rather,

> "[i]n determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case. [Citations.] That standard seems quite simple, but the opposite is true. A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, *along with any evidence regarding the witnesses' credibility*." (Emphasis added.) *Id.* ¶ 53.

¶ 83 It is true that both Rich and defendant were vulnerable to attacks on their credibility. They both were convicted felons, and neither of them was disinterested. Rich had an incentive to give testimony that would result in a conviction of defendant so that, in Rich's

upcoming sentencing hearing, he would be able to tout his contribution to getting a drug dealer off the street. Defendant was self-interested, too. Having chosen to testify, he had an incentive to give an account that would oppose the incriminating tendencies of Rich's testimony.

¶ 84 Even so, in the inherent believability of their competing accounts, Rich and defendant were not on the same level of credibility. Although both witnesses were problematic with respect to their background and circumstances, Rich's testimony was not unbelievable on its face, whereas defendant's testimony abounded in evasions and improbabilities. (In fact, during the prosecutor's cross-examination, the circuit court warned defendant, "Sir, you need to answer the question. You're not helping yourself by being evasive and not answering the question.")

¶ 85 It is unclear, for instance, why defendant would travel 56 miles, from Gilman to Flanagan, bringing along Maurice, whom Rich did not know, for the purpose of "hanging out" with Rich—especially considering that (according to defendant's testimony) Rich had pointed a gun at defendant and Mallory and had robbed Mallory in defendant's presence and afterward, to add insult to injury, had threatened to frame defendant if defendant told on him. The natural expectation would be that, after those unpleasant experiences, defendant would have tried to avoid Rich instead of driving 56 miles to visit him.

¶ 86 Speaking of a long road trip, it is unclear why defendant and Maurice would have wanted to ride 70 more miles, from Flanagan to Yorkville, so that they could be present when Rich showed pictures of guns to someone whose jeep Rich proposed acquiring in exchange for the guns. In his testimony, defendant did not explain what business this was of his and Maurice's or why Rich needed or wanted them to come along. Defendant's story makes even less sense in view of his testimony that he had only a vague idea of the purpose of the journey to Yorkville ("I thought he said something about trading the guy some guns on his phone for a jeep."). In other

words, with "external fixated bolts" running through his leg, defendant rode along on a two-and-a-half hour round trip without a definite understanding of the reason for this journey—or so he claimed.

¶ 87 Granted, defendant also testified that that Rich "said he was going up there to show him some guns on his phone, *and then he ends up texting me for a drug deal*." (Emphasis added.) This text message potentially went to the heart of an important factual dispute in this case: whether it was Rich who made arrangements with the seller (and framed defendant) or whether it was defendant who made the arrangements. The text message was on defendant's phone, and yet the defense never presented the text message at trial, nor did the defense offer any explanation for the omission. Nor does defendant offer any explanation now.

¶ 88 To be clear, at trial, defendant had no burden of proof and no obligation to explain anything. Having chosen to testify, however, he opened himself up to criticism for any deficiencies in his testimony. See *People v. Irby*, 237 Ill. App. 3d 38, 66 (1992). Tantalizing the jury and then leaving the jury unsatisfied was no way to inspire confidence. When, in his testimony, defendant claimed to have a potentially significant item of documentary evidence and then let the jury down by inexplicably failing to offer this item, he made himself look unreliable—as if the text message were withheld because, in truth, it showed that he, defendant, was expected to make the arrangements with the seller.

¶ 89 If defendant and Maurice were not the ones arranging the drug deal, their presence seems superfluous. The reason why Rich had them come along to Yorkville is unexplained. Granted, defendant was an addict—but cocaine is expensive. Gratuitously sharing it with defendant and a man whom Rich did not even know would have made no sense.

¶ 90 It is unclear how, on the way to Yorkville, Rich could have smoked a methamphetamine pipe ("doing a lot of drugs all the way up [to Yorkville]," as defendant put it), considering that, immediately before Rich, defendant, and Maurice set out for Yorkville, Benning searched Rich and his truck and found no contraband. Defendant could not even seem to get his story straight on which drug Rich consumed: methamphetamine or cocaine.

¶ 91 It seems improbable that, on the way to Yorkville, Rich himself telephoned the drug dealer and arranged for a buy, thereby framing defendant, when the key fob hanging from the ignition supposedly was recording everything that Rich said—or so Rich would have had to assume. It seems improbable that Rich would have turned up the volume of the radio in his truck to sabotage the audio recording and alienate the police he was trying to mollify. It seems improbable that, during the one-and-a-half-hour drive to Yorkville, the occupants of the truck did not speak to one another.

¶ 92 It seems incredible that if "a State Police SUV" were "on the driver's side of [Rich's] truck," the drug dealer, Rat, would have approached the truck at all, on either the driver's side or the passenger side. If a police cruiser were close to the driver's side of Rich's truck (which is what being "on the driver's side" of the truck means), it seems unlikely that Rat would have thought the deal could be safely done, even on the passenger side. The more reasonable explanation for why he came to the passenger side of Rich's truck was that defendant was sitting in the front passenger seat and he knew defendant and had been in contact with him.

¶ 93 To believe defendant's testimony that when the police took Rich out of his truck, Rich reached out and handed the cocaine to Assaf, one would have to conclude that both Benning and Assaf were incorrect when they testified that the cocaine was found in the

cubbyhole of the back seat. It seems unlikely that both Benning and Assaf would have been mistaken, and it is unclear what motive they would have had to lie in that respect.

¶ 94 For all those reasons, we conclude that the evidence at trial was not closely balanced. In the accounts they gave at trial, Rich and defendant were not equally believable. Much of defendant's testimony, it seems to us, made no sense and was inherently improbable. Absent a showing that the evidence at trial was closely balanced, the "procedural default must be honored." (Internal quotation marks omitted.) *People v. Walker*, 232 Ill. 2d 113, 124 (2009). We hold, therefore, that defendant has forfeited his objection that the prosecutor distorted the burden of proof by arguing that, to acquit defendant, the jury had to believe that Rich was lying.

¶ 95 b. Ineffective Assistance

¶ 96 Alternatively, defendant contends that defense counsel rendered ineffective assistance by causing the procedural forfeiture of this objection. This contention likewise collides with *West* and *Custer*. "A decision whether to object to an argument is a matter of trial strategy and does not establish ineffective assistance of counsel" (*People v. Beard*, 356 Ill. App. 3d 236, 244 (2005))—unless, as *Custer* puts it, "counsel entirely fails to conduct any meaningful adversarial testing." (Internal quotation marks omitted.) *Custer*, 2019 IL 123339, ¶ 39. As we have discussed, there was meaningful adversarial testing at defendant's trial.

¶ 97 2. *An Alleged Misstatement of Fact*

¶ 98 The second alleged error in the prosecutor's closing argument was factual. Defendant accuses the prosecutor of "misstat[ing] [defendant's] testimony when he claimed [that defendant] said all police officers are dirty."

¶ 99 It is true that, in his testimony, defendant did not explicitly say that all police officers were dirty. Prosecutors, however, are given "wide latitude in the content of their closing

arguments" (*People v. Jackson*, 2020 IL 124112, ¶ 78), and prosecutors may bring out, and criticize, the arguable implications of a defendant's testimony. When defendant asked the prosecutor, "You have never met a dirty cop in your life?" he did not ask a neutral question. He asked an opinionated question. Arguably, he meant to imply that a negative answer would be incredible because police officers (in his view) were commonly dirty.

¶ 100 The prosecutor gave defendant a chance to disavow that implication. The prosecutor followed up by asking him, "Oh. So the cops are dirty, and Seth is one of them? I'm just trying to make sense of that." Instead of disavowing that interpretation of his testimony, defendant could have been understood as embracing that interpretation when he responded, "Do you want me to answer?"—as if to ask, "Do you really want me to say out loud the terrible truth?" We conclude, then, that the prosecutor was within his "wide latitude" when he criticized defendant for suggesting that all police officers were dirty. *Id.*

¶ 101 D. The Severity of the Sentence

¶ 102 1. *Seriousness*

¶ 103 Rich bought approximately an ounce of cocaine from someone other than defendant, and defendant served merely as a facilitator of the transaction, a link in the delivery from the seller to Rich. Defendant regards 30 years' imprisonment as too harsh a punishment for his services as a "petty distributor" in the purchase of a small amount of cocaine, an amount that typically would be bought only for personal use. Yet, according to defendant, "[t]he circuit court found this sentence appropriate based on 'the very serious nature of these charges.' " Relatively speaking, though, the charges were not serious, in defendant's view. He argues, "When evaluating the conduct that would qualify as a Class X offense for delivery of a controlled

substance, there are not many ways to commit the offense less harmfully than [defendant's] conduct in this case."

¶ 104 By "serious," the circuit court seemed to mean "legislatively classified as serious" and "serious in view of defendant's prior criminal record." For example, after the attorneys made their sentencing arguments, the court remarked, "This is obviously a very serious matter. It's a class x felony, unlawful delivery of a controlled substance; and the Legislature has deemed this to be of such a serious matter that the mandatory minimum sentence is 6 years, the maximum sentence is 60 based upon your prior record." In other words, it was apparent, merely from the Class X classification, that the legislature regarded the bare offense as serious. The punishment for a Class X felony was normally imprisonment for not less than 6 years and not more than 30 years. See 730 ILCS 5/5-4.5-25(a) (West 2022). However, defendant's prior conviction of a Class X felony (manufacture or delivery of cocaine, in Iroquois County case No. 22-CF-115) made the present Class X offense even more serious in the legislature's view, for the new offense made defendant statutorily eligible for an extended term: imprisonment for not less than 30 years and not more than 60 years. See *id.* §§ 5-4.5-25(a), 5-5-3.2(b)(1), 5-8-2. In short, a Class X felony was serious enough, judging by the statutory ranges of punishment, but a prior conviction of a Class X felony added another dimension of seriousness to the new Class X felony.

¶ 105 So, we agree with defendant that, insomuch as the circuit court characterized the circumstances of this offense as "serious" in the sense of serious *compared to cocaine deliveries in general*, the characterization is unconvincing. As drive-up drug purchases go, not much stands out about this offense. The court made a defensible use of the term "serious," however, when commenting that defendant's previous Class X conviction made his present Class X offense especially serious. Thus, the sentence is not "manifestly disproportionate to the nature of the

offense" (*People v. Stacey*, 193 Ill. 2d 203, 210 (2000)) if the "nature of the offense" is understood not merely as an ordinary purchase of an ounce of cocaine, but also as a Class X felony committed soon after a conviction of the identical Class X felony.

¶ 106 2. *Inducement as a Mitigating Factor*

¶ 107 That "[t]he defendant's criminal conduct was induced or facilitated by someone other than the defendant" "shall be accorded weight in favor of *** minimizing a sentence of imprisonment." 730 ILCS 5/5-5-3.1(a)(5) (West 2022). Defendant argues that the circuit court abused its discretion by failing to consider this mitigating factor.

¶ 108 Defendant complains that, instead of pointing out this mitigating factor at the sentencing hearing and raising it specifically in the postsentencing motion, defense counsel forfeited the issue by telling the circuit court, at the sentencing hearing, "[W]e don't have any mitigation." "It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant contends, however, that the evidence at the sentencing hearing was closely balanced and that the doctrine of plain error therefore should undo the forfeiture. See *id.* at 545.

¶ 109 "To obtain relief under [the plain-error] rule, a defendant must first show that a clear or obvious error occurred." *Id.* It is less than clear or obvious that the circuit court excluded inducement as a mitigating factor. Granted, defense counsel told the court, "[W]e don't have any mitigation." She was, however, equivocal: she went ahead and argued entrapment and Rich's "unclean hands." To quote defense counsel's sentencing argument:

> "[Defendant] believes that the [confidential source] kind of tricked him into this and made threats against him if he didn't. My client feels that he was entrapped.

> I've explained to him I did not think this rose to the level of entrapment; but I believe the [confidential source] did not have clean hands in this case at a minimum, and I think that should be a factor in deciding what would be an appropriate sentence in this case."

Thus, according to defendant (as his position was relayed to the court by defense counsel), Rich tricked and bullied defendant into participating in the drug transaction—which is to say, induced and influenced defendant to do so (see 730 ILCS 5/5-5-3.1(a)(5) (West 2022)). Defense counsel "did not think this rose to the level of entrapment"—and defense counsel probably was right in that assessment, considering defendant's arguable predisposition to commit the offense. See *People v. Placek*, 184 Ill. 2d 370, 381 (1998). Nevertheless, defense counsel went ahead and criticized Rich for having "unclean hands." She implied that the uncleanliness lay not only in Rich's incentive to implicate defendant but also in Rich's use of trickery and threats to induce defendant's conduct (see 730 ILCS 5/5-5-3.1(a)(5) (West 2022)). So, even though defense counsel said, "[W]e don't have any mitigation," she turned around and essentially raised the mitigating factor in section 5-5-3.1(a)(5). "Absent some affirmative indication to the contrary, other than the sentence itself, we presume the trial court considered all mitigating evidence before it"—including Rich's purportedly "unclean hands." *People v. Kindle*, 2021 IL App (1st) 190484, ¶ 67.

¶ 110 We acknowledge that the circuit court remarked, "In terms of other mitigating factors, I just don't see that there are many present, with the exception that, as I indicated, you have an addiction. That's not an actual mitigating factor." In defendant's interpretation, this remark shows that, on the mitigation side of the ledger, the court considered only defendant's addiction—if the court considered even that. The court's remark, however, was ambiguous, for,

while referring to addiction as a seemingly lone "exception," the court also said, "I just don't see that there are many [mitigating factors] present"—as if to imply that there was more than one mitigating factor but that there were not many mitigating factors. The court also stated, "Now, I'm cognizant of the mitigating factors in this case." That statement, with its use of the plural "mitigating factors," would make no sense if the court thought there was only one mitigating factor. To us, then, it appears less than clear or obvious (see *Hillier*, 237 Ill. 2d at 544) that the court refused or failed to consider the mitigating factor of inducement. At most, the record is ambiguous in that regard—meaning that there is no *plain* error (see *id.*) and there is no *affirmative* rebuttal of the presumption of regularity (see *Kindle*, 2021 IL App (1st) 190484, ¶ 67).

¶ 111 Another reason why the asserted error is less than clear or obvious is that it is debatable whether defendant can reasonably claim inducement as a mitigating factor. To explain why we are dubious about the applicability of this mitigating factor, we invite a consideration of the following hypothetical. A cocaine dealer is sitting at an intersection, and he has a runner, who goes back and forth between the dealer and drive-up customers—the runner is a go-between, somewhat like defendant. The runner finds out how much cocaine the customer wants, takes the customer's cash, and trots over to the dealer, who gives the runner the cocaine to take back to the waiting customer. One day, after delivering an ounce of cocaine through a car window, the runner is arrested, and the dealer flees. Could the runner reasonably claim, in mitigation, that the customer induced the runner's conduct by driving up, requesting an ounce of cocaine, and handing the runner the purchase money? Our sense is that most people would answer "no." What makes inducement unconvincing as a mitigating factor in this hypothetical is that the runner induced the customer at least as much as the customer induced the runner. The

runner was part of an enterprise that created demand. Defendant is analogous to the runner. He served as an intermediary in a business that promoted addiction.

¶ 112 For all those reasons, we find no clear or obvious error, no plain error, in the mitigation assessment. See *Hillier*, 237 Ill. 2d at 544. Absent a clear or obvious error, there was no ineffective assistance, either. See *People v. Carr-McKnight*, 2020 IL App (1st) 163245, ¶ 93.

¶ 113 3. *Bringing Drugs Back Into Livingston County*

¶ 114 In the sentencing hearing, the circuit court stated:

> "Now, when you look at the range of penalties here, certainly, based upon the amount of drugs that we're talking about, as well as certainly the State's argument that you're leaving Livingston County to bring these drugs back into Livingston County; and from that perspective, deterrence is a very, very strong factor. The amount of drugs that are available within this community get here by people going and bringing them in from somewhere else. If we don't send a strong message that you cannot go somewhere else, bring this amount of drugs here, if we don't send a strong message on that, then we're going to continue battling this problem."

¶ 115 One reason for "impos[ing] a "more severe sentence" is that "the sentence is necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(A)(7) (West 2022). Defendant complains that, in its deterrence discussion, the circuit court unjustifiably "impl[ied]" a "belie[f] [that defendant] had an intent to distribute these drugs to other people in Livingston County." Defendant argues, "Without evidence that [defendant] intended to distribute this cocaine to anyone other than his friend Rich, nor that anyone other than the individuals in

the car were planning on using this cocaine, it was improper to find [defendant] was 'harming the whole community' and enhance his sentence accordingly."

¶ 116 Acknowledging that this sentencing issue is forfeited for lack of an objection below (see *Hillier*, 237 Ill. 2d at 544), defendant criticizes defense counsel for causing the forfeiture. In defendant's view, it was ineffective assistance to remain silent when the circuit court "enhanced [defendant's] sentence based on a suspected intent to distribute these drugs to people other than those present in the car that day."

¶ 117 It is unclear, though, that the circuit court suspected such an intent or that such a suspicion was necessary to the court's deterrence rational or implied therein. The court's logic could be understood this way. Rich was a Livingston County resident, and because the ounce of cocaine was expensive ($1200), it would have been a reasonable assumption that, instead of using the cocaine up all at once in Yorkville (in Kendall County), Rich would bring at least some of the cocaine home with him, to Flanagan (in Livingston County). Other out-of-county distributors of cocaine (or intermediaries in the distribution of cocaine) may well have been watching what happened to defendant in this case. If defendant received an insufficiently severe sentence, such distributors might have decided, "Doing business with visiting residents of Livingston County—sending drugs into their county and creating demand there—is worth the risk. What defendant did once without getting hit very hard we will do repeatedly, customer by customer, an ounce here and an ounce there, nurturing a market in Livingston County." The message the court intended to send was, "Don't even start." It would be "within the wide range of reasonable professional assistance" to so interpret the court's deterrence rationale and to perceive the logic of the rationale. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶ 118 4. *Defendant's Prior Record*

¶ 119 Not only defendant's previous Class X conviction, but his prior criminal record as a whole, was, arguably, a substantial factor in aggravation. Section 5-5-3.2(a)(3) of the Unified Code of Corrections provides:

> "(a) The following factors *** may be considered by the court as reasons to impose a more severe sentence under *** Article 4.5 of Chapter V [(730 ILCS 5/ch. V, art. 4.5 (West 2022))]:
>
> * * *
>
> (3) the defendant has a history of prior delinquency or criminal activity." 730 ILCS 5/5-5-3.2(a)(3) (West 2022).

Section 5-4.5-25(a) of article 4.5 sets forth the nonextended and extended ranges of punishment for a Class X felony. See *id.* § 5-4.5-25(a). Thus, a history of prior delinquency or criminal activity can be a reason to impose a more severe extended-term sentence—and, by logical corollary, can justify the discretionary decision to impose an extended-term sentence in the first place, rather than a nonextended-term sentence. See *id.* § 5-8-2 ("[T]he judge *may* sentence an offender to an extended term as provided in Article 4.5 of Chapter V [citation]." (Emphasis added.)).

¶ 120 In our review of the presentence investigation report pertaining to defendant, we count 31 prior convictions: Class A, B, and C misdemeanors and Class 1, 2, 3, 4, and X felonies. Among these prior convictions, we see five drug convictions, including the prior Class X conviction on May 29, 2022, of manufacturing or delivering cocaine. We see five convictions of battery, one of them an aggravated battery with a weapon and another a battery inflicting physical harm. We see two convictions of mob action. We see four convictions of theft. Defendant has been repeatedly punished with imprisonment: four years for property damage,

four years for forgery, three years for aggravated battery with a weapon, eight years for the Class 1 felony of manufacturing or delivering cocaine, and four years for possessing a stolen vehicle. Given these numerous prior convictions—most notably, defendant's conviction, in September 2022, of precisely the same Class X felony that he committed in the present case, in November 2022—we are unable to say the circuit court abused its discretion by deciding that a nonextended-term prison sentence would be inadequate and that defendant should receive, instead, an extended-term prison sentence. See *Stacey*, 193 Ill. 2d at 209-10.

¶ 121 The sentence the circuit court imposed, imprisonment for 30 years, was the minimum extended-term sentence. See 730 ILCS 5/5-5-3.2(b)(1) (West 2022). This sentence is "within the appropriate sentencing range" and therefore deserves "great deference." *People v. Colon*, 2018 IL App (1st) 160120, ¶ 66. Given defendant's prior record and the need for deterrence, we are unconvinced that the sentence is "greatly at variance with the spirit or purpose of the law or manifestly disproportionate to the nature of the offense." *Id.*

¶ 122 We acknowledge that defendant, an "occasional petty distributor of controlled substances," is hardly comparable to "the large-scale, unlawful purveyors and traffickers of controlled substances" and that, generally, these two categories of offenders should not be punished with the "same severity." 720 ILCS 570/100 (West 2022). Arguably, though, defendant's prior criminal record is large-scale. Those who persist in reoffending should reasonably expect a ratcheting up of punishment. We decline to substitute our sentencing judgment for that of the circuit court. See *Colon*, 2018 IL App (1st) 160120, ¶ 66.

¶ 123 III. CONCLUSION

¶ 124 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 125 Affirmed.