2020 IL App (4th) 180217-U

NO. 4-18-0217

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 6, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANDREW PINKSTON,	)	No. 16CF630
Defendant-Appellant.	)	
	)	Honorable
	)	Robert Freitag,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to establish plain error when two instructions resulted in the jury being told it could consider defendant's convictions only as to his believability as a witness but also told it could consider defendant's "conduct" on the question of whether defendant was predisposed to commit the charged offenses in light of his entrapment defense.

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

¶ 2 In December 2017, a jury found defendant, Andrew Pinkston, guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2016)) and unlawful possession of a controlled substance (*id.* § 402(c)). Due to his criminal history, defendant was sentenced as a Class X offender under section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2016)) to concurrent prison terms of 22 years for unlawful delivery and 3 years for unlawful possession. Defendant appeals, arguing (1) he should be granted a new trial as the jury instructions were unduly confusing on the use of his prior

convictions and uncharged conduct and (2) his 22-year sentence for delivery of 0.2 grams of cocaine was excessive. We affirm.

¶ 1 I. BACKGROUND

¶ 2 In June 2016, the State charged defendant with three drug offenses. In count I, the State alleged defendant was guilty of unlawful delivery of a controlled substance within 1000 feet of park property (720 ILCS 570/407(b)(2) (West 2016)). Specifically, the State alleged defendant delivered a controlled substance to a Bloomington Police Department confidential informant, Boris Brown, while within 1000 feet of a public park. In counts II and III, the State alleged the delivery and possession offenses listed above based on the same transaction. The trial court appointed a public defender to represent defendant. Defendant elected to proceed *pro se*.

¶ 3 Five days before trial, defendant filed notice of his entrapment defense. The State dismissed count I. After the dismissal, the trial court granted the State's motion *in limine* to bar defendant from addressing his possible sentence and to bar comments about the 1000-foot enhancement as the count had been dismissed. The State also moved to introduce defendant's prior convictions to impeach defendant if he testified. The court allowed two of defendant's convictions from 2006 and one from 2015. Later, the trial court barred older convictions for drug-related offenses on impeachment and as evidence of predisposition.

¶ 4 At trial, the State presented the testimony of the confidential informant, police officers, and a forensic pathologist. We need not summarize all the testimony here.

¶ 5 Brown, the confidential informant, testified regarding his relationship with defendant and the transaction for which defendant was arrested. Brown testified to having an addiction to crack cocaine, an addiction he had been battling for approximately four years. To get cocaine, Brown would steal or rob. On June 8, 2016, Brown was arrested for delivering

drugs, an offense he denied. Upon his arrest, Brown spoke to Detective Jared Bierbaum at the police station. Brown told Detective Bierbaum he could get drugs from "Drew," whom he identified as defendant. Brown had purchased crack cocaine from defendant for "maybe a little over six months." Brown provided the detective with defendant's phone number, which was programmed into Brown's phone. Because the officer said they would drop the case pending against him, Brown agreed to assist in purchasing cocaine from defendant. At the detective's direction, Brown contacted defendant. In the initial conversation, Brown told defendant he would pay him the $50 he owed for "crack that he had fronted me" and said he wanted to buy "another half," or $50 worth of crack. Brown and defendant agreed to meet at Brown's apartment.

¶ 6 According to Brown, Detective Bierbaum searched him, provided him $100, and told him how to use the camera. Detective Bierbaum drove Brown to his apartment. There, Brown waited for defendant on the back steps. Defendant arrived. Brown showed him the money. Defendant wanted to go inside to do the transaction. Brown attempted to persuade defendant to do the transaction outside as he was directed by Detective Bierbaum. Defendant refused. The two then entered the bathroom of Brown's apartment. Defendant took out the package and put the amount he was giving him for the $50 into a piece of paper. Defendant had more cocaine than he delivered to Brown. Defendant put the remaining amount into his pocket. The two exited the apartment. Defendant sat on the steps, and the two talked. Brown told defendant he had a client and needed to go catch the bus. Defendant said he would walk with him. Brown knew he was to meet the detective, so he made an excuse to return to the apartment. Defendant then left. Brown testified the case against him was dismissed because he worked as an informant in defendant's case.

¶ 7 On cross-examination, Brown testified he had known defendant "quite a while."

Brown styled defendant's girlfriend's hair at the salon where Brown worked. Defendant paid Brown for those services in crack. Brown had been in defendant's apartment and ate with him. They had used drugs together before. When the two of them met, Brown "was buying drugs from you and you were smoking your drugs." Brown admitted defendant had given him drugs but "not that often." Brown stated, "you were more about your money, getting your money out of me than you were about giving me drugs." Brown testified he had done another controlled buy for the Bloomington Police Department. Brown was paid $100 after cooperating in defendant's investigation. According to Brown, he called defendant from his phone three times and texted him once to facilitate the transaction. Defendant answered each time.

¶ 8 Detective Jared Bierbaum testified about his interview of defendant. During the interview, the two talked about a ball. According to Detective Bierbaum, a "ball" or an "8-ball" is a drug term for a quantity of powdered or crack cocaine. It refers to approximately 3.2 grams. Defendant told the detective he was referred to as "Drew." Defendant listed three people by nicknames from whom he acquired cocaine, but he could not provide any other information for them, such as their given names, phone numbers, or addresses. Detective Bierbaum attempted to give defendant the same opportunity as he gave Brown. Evidence established the substance delivered to Brown contained 0.2 grams of cocaine.

¶ 9 Defendant testified on his own behalf. According to defendant, on June 8, 2016, he was at work, minding his business, when Brown called and continued to call him. Before that date, defendant and Brown would "get high together." That is how the two met; Brown "wanted to score some dope." After defendant took one of the calls, he received an offer. Brown said, "why don't you just come on, man[;] I'll buy you a bag of dope." Defendant said, because Brown had defendant spend all of defendant's money to get them both high, he wanted to spend

some of Brown's money. Defendant called the "dope man." Defendant "used to be in this trade." He admitted to selling it but denied selling it any longer.

¶ 10 According to defendant, when he went to Brown's house, he was "fixing to get high." He believed he would be there a while because he brought "a bag a dope." Defendant said, in the video, he did not grab just one beer, but "a few beers." Defendant was surprised Brown was going to take the drugs and leave. Defendant testified they were going to get high. They went into the bathroom. Defendant did not know why Brown was leaving. Defendant walked out with a lit cigarette, still intending to get high. Defendant testified it was the only way he did cocaine. They "rolled up with tobacco and marijuana and joints, sprinkle with plenty of coke." Brown continued to say he had to go. Defendant gave up. He had to take the money to the person from whom he obtained the dope. Defendant testified he did not sell crack. The money in his pocket was to repay the debt for the drugs he bought for the two men to share.

¶ 11 On cross-examination, defendant testified he knew from whom to "score some dope." Defendant helped others get dope as well, which is how Brown and defendant met. Defendant testified he did not make money from selling the drugs. Brown would pay defendant back for the drugs the two of them used together. Defendant denied selling crack. Brown was not getting crack from defendant. Defendant did not want the money; he wanted the dope. Defendant made no money from crack cocaine. Brown owed defendant money because they ran out of dope. Brown "conned [defendant] into getting on the phone, going in my pocket, going in my wallet and placing an order for us to smoke more dope."

¶ 12 Defendant testified he had been getting high since the 1970s or 1980s. He could not work further on June 8, 2016, after talking to Brown. His mind was focused on getting high. Defendant testified he got his money from working, not from selling drugs.

¶ 13 In rebuttal, the State offered into evidence three of defendant's convictions:

> "[I]n McLean County case number 06 CF 810, the defendant *** was convicted of the offense of the unlawful possession of a controlled substance. That conviction date was [March 1,] 2007. In case number 06 CF 931, that's another McLean County case, and the official record in that case indicates that in the matter, the defendant *** was convicted of the offense of the unlawful delivery of a controlled substance on January [30,] 2007. In case number 15 CF 1476, the McLean County case, the official record in that case indicates that the defendant *** was convicted of the offense of driving while license revoked or suspended, subsequent offense, that was a conviction date of October [6], 2016."

¶ 14 The trial court instructed the jury on the defense of entrapment, informing the jury defendant was not entrapped "if he was predisposed to commit the offense and an agent of a public officer merely afforded to the defendant the opportunity or facility for committing an offense." The jury was also instructed regarding the applicability of his convictions to only his credibility as a witness: "Evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." The next instruction given instructed the jury it could consider defendant's other "conduct" on the issue of predisposition:

> "Evidence has been received that the defendant has been

> involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent, motive, common design, knowledge, and predisposition and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of intent, motive, common design, knowledge, and predisposition."

The jurors were not informed which conduct it could consider.

¶ 15 Defendant was found guilty on both counts.

¶ 16 B. Sentencing

¶ 17 A presentence report was prepared for the trial court and filed in January 2018. At that time, defendant was 47 years old. His education record showed defendant left high school during his senior year. In 1996, defendant obtained his graduate equivalent degree. While in custody, defendant completed a life-skills course and a food-handler course. He also received diplomas for "job partnership" and "celebrate recovery" in February 2017. Starting April 2014, defendant worked two years as a laborer for a landscape and construction company.

¶ 18 Defendant's criminal history is lengthy. The author of the presentence report summarized: "The defendant's prior record dates back to 1989[ ] and includes ten (10) traffic, nine (9) DLWR/S, one (1) DUI, eight (8) misdemeanor [offenses], and fourteen (14) felony offenses." In 1991, defendant was convicted of his first felony, unauthorized possession of a cannabis sativa plant. He was sentenced to 30 months' probation. His probation was revoked after defendant resisted a peace officer, drove under the influence of alcohol, and failed to report to the probation office from September 1993 through March 1994. Defendant was sentenced to

three years' imprisonment. He successfully completed his parole.

¶ 19 In February 1997, defendant was sentenced to manufacturing and distributing a look-alike substance and sentenced to three years' imprisonment. In March 1999, defendant was found guilty of "driving while license revoked/suspended—subsequent offense felony—2nd driving under the influence." For these offenses, as well as an attempt aggravated robbery and "intimidation/physical harm," defendant was twice paroled and twice returned to prison before his January 29, 2007, discharge. During the latter time period he was on parole, defendant committed "Obstruct justice/destroy evidence/provide false information." He also committed two offenses of "driving while license revoked/suspended-subsequent offense felony—2nd driving under the influence," as well as two offenses of "manufacture/delivery/other amount narcotic schedule III." For the latter offenses, defendant was sentenced to 11 years' imprisonment. Defendant was paroled in January 2013 but returned to prison approximately four months later. In May 2013, defendant was found guilty of the misdemeanor "battery makes physical contact." In December 2015, defendant was arrested for driving with a revoked or suspended license. He was found guilty of that offense in October 2016. At the time of his arrest in this case, defendant was on bond on the 2015 driving-with-a-revoked-or-suspended-license offense.

¶ 20 Since defendant's arrest in this case, he remained incarcerated. During his incarceration, defendant completed the courses mentioned above. He also attended Alcoholics Anonymous (AA) and Narcotics Anonymous (NA), church, bible study, and Path to Healing.

¶ 21 According to the presentence report, defendant began using drugs around the age of 15. In May 1995, he was admitted to Chestnut Health Systems for detoxification treatment. Two days after his admission, he was transferred to residential treatment, where he remained for 13 days. He was to be transferred to a day-treatment program but, before his discharge,

defendant was found outside the facility at a female's window and was not allowed to enter that program. Chestnut referred defendant to a treatment program for long-term treatment in Springfield, Illinois. Defendant failed to follow through.

¶ 22 At the sentencing hearing, the State sought a significant double-digit sentence based on the need to deter others and to protect the community against ongoing criminal conduct. According to the State, the only gap in defendant's criminal history was during his incarcerations. The State argued defendant's substance-abuse issue was clearly an aggravating factor, as defendant had been ordered to complete a drug-and-alcohol program but failed to do so. The State highlighted facts from a 1999 case, in which defendant threatened to hurt a man who owed him money for drugs, telling him they would take him to a cornfield and shoot him. The man escaped. Defendant was sentenced to seven years. The State asked for a three-year sentence on the possession charge and recommended 26 years on the delivery conviction.

¶ 23 Defendant asked for the minimum. Defendant denied the cornfield incident and emphasized he accepted his punishment in each of the cases. Defendant acknowledged he had not yet overcome his drug problems but emphasized he had been attending AA and NA since his arrest. Defendant further emphasized his attendance at Celebrate Recovery classes and church. Defendant highlighted for the court that he was not in the best health and argued 26 years for $50 worth of dope was outrageous. Defendant stated his arrest had changed him. He was not going to stop attending church or NA meetings.

¶ 24 The trial court stated it was encouraged by defendant's comments. The court was hopeful defendant could change his life. The court stated, "The unfortunate reality of this situation is this: I agree with you. This is a relatively—and I want to use the term strongly—relatively minor drug offense." While noting a multiple-year sentence seemed "out of whack,"

the court said it could not look at the case in a vacuum. The court could not ignore defendant's record. The court acknowledged a number of defendant's 14 felony convictions were nonviolent and non-drug offenses but found the repeated offenses demonstrated defendant's disregard for the law. The court was convinced the history was connected to defendant's substance abuse. Particularly concerning to the court was defendant's inability to comply with terms of parole and the fact defendant was on felony bond when committing the drug offenses in this case. The court imposed a 22-year prison sentence.

¶ 25 After sentencing, defendant requested the appointment of counsel for the motion to reconsider sentence. Defense counsel argued the sentence was excessive and requested a finding the offense was committed due to drug abuse. The court entered the finding but did not reduce the sentence. The court stated it could have given defendant the maximum of 30 years but felt the mitigating evidence merited a lesser term.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. Jury Instructions

¶ 29 On appeal, defendant argues the jury received unduly confusing instructions on the use of his prior convictions and uncharged conduct. Defendant argues the use of Illinois Pattern Jury Instructions, Criminal, Nos. 3.13, 3.14 (approved Oct. 17, 2014) (hereinafter IPI Criminal Nos. 3.13, 3.14), which address the use of prior convictions on the believability of a defendant's testimony and proof of other offenses or conduct, caused confusion. Defendant postulates a risk existed the instructions may have allowed the jury to consider his 2016 conviction for driving while license revoked or suspended not only as to his credibility, for which it was admitted, but also for the purpose of predisposition, for which it was not and

improperly considered. Defendant concludes the trial court should have explained which convictions applied to credibility and which conduct applied to the question of entrapment.

¶ 30 Our analysis begins with the State's assertion defendant has forfeited the issue by not objecting at trial. Defendant disagrees with the State, asserting at the jury instruction conference he argued the use of IPI Criminal No. 3.14, as written, was confusing.

¶ 31 To preserve an allegation of error, defendant must object to the error during trial and raise the error in a posttrial motion before the trial court. *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009). The failure to assert error before the trial court denies that court the opportunity to correct the error and grant a new trial if one is warranted, wasting time and judicial resources. *Id.* at 488.

¶ 32 Our review of the record does not establish defendant objected at trial. At the jury-instruction conference, defendant did not object to giving IPI Criminal No. 3.13 to the jury, which instructed the jury as follows: "Evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." The next instruction given to the jury was a modified version of IPI Criminal No. 3.14. It was given over defendant's objection and reads as follows:

> "Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent, motive, common design, knowledge, and predisposition and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that conduct and,

if so, what weight should be given to this evidence on the issues of intent, motive, common design, knowledge, and predisposition."

¶ 33 When presented with this instruction at the conference, the State raised the issue of possibly listing the offenses: "[U]nder all the circumstances, I can understand the court's position that 3.14 may be the better avenue, and I do understand there may be some modifications and I don't know if that goes towards listing the offenses or having it in general." In response defendant, argued the language would "throw off" the jurors. Defendant argued the following:

> "I didn't intend to be caught up in this delivery, okay? I didn't intend to bring Boris drugs. He put that in my head, okay? I didn't intend to do this. Motive. There is no motive behind all this except, if anything, we—we have gotten—we've shared drugs, the same drugs together, okay? Common design[.] [C]ommon design is like—is like what's being done in this courtroom, you know. This is what we do here every day. We handle cases. This is not that. You know what I'm saying? This ain't no—okay. I'm going to keep moving. Knowledge, now, that's—we'll leave that one in, you know what I'm saying, because I already said I know—I got—I got a person when I want to get high and spend some money, I got a person I had—I already testified to that bull crap. I wish I could take it back. Okay. And the other one, now, predisposition, okay, but I don't want to—I don't want to—don't get me wrong. I want to—you want to give me a fair trial. I want to be given a fair

> trial. I don't want to take away from their advantages or give myself an advantage, so I would say on this first pas is—is like—is like, okay. It's confusing me. It's like these jury instructions is like one part it says you must find him guilty and the second part says you must not find him guilty, so which, right, am I correct, in this one?"

The trial court interpreted defendant's argument as suggesting "intent, motive, and common design" should be stricken from the instruction. The court overruled defendant's objection.

¶ 34 On appeal, defendant asserts he satisfied the procedural requirement to raise the issue before the trial court when he objected to the use of the language "intent, motive, and common design." We disagree. Defendant objected to the use of these words for reasons that they were "confusing." Defendant did not argue, as the State suggested, there would be confusion if offenses were not listed. He has forfeited review.

¶ 35 Defendant argues, however, this court should review his contention as plain error. Under the plain-error doctrine, a court of review may remedy an otherwise forfeited "clear or obvious error" in two circumstances: "(1) where the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that he defendant was denied a substantial right, and thus a fair trial." *McLaurin*, 235 Ill. 2d at 489. Defendant carries the burden of persuasion under both prongs of plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009).

¶ 36 Our first step in the plain-error analysis is thus to determine whether an error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25, 902 N.E.2d 691, 697 (2009). "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the

evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). "Jury instructions should not be misleading or confusing." *People v. Herron*, 215 Ill. 2d 167, 187-88, 830 N.E.2d 467, 480 (2005). In general, the trial court's decision to determine the jury instructions to be given is afforded deference and will not be reversed absent an abuse of discretion. See *People v. Lovejoy*, 235 Ill. 2d 97, 150, 919 N.E.2d 843, 847-48 (2009). An abuse of discretion occurs if the jury instructions are unclear, mislead the jury, or are not justified by the law and evidence. *Id.*

¶ 37 While the State notes "clear or obvious" error and not "mere error" is necessary for a plain-error determination, the State does not develop the argument that clear error did not occur. In fact, the State concedes the instructions may have permitted the jury to consider defendant's driving-while-license-revoked conviction when considering the entrapment defense, whether defendant was predisposed to commit the charged offenses. See generally *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 28, 976 N.E.2d 513 (observing an entrapment defense requires defendant to present some evidence showing he lacked predisposition to commit the offense). It seems an argument could be made the instruction telling jurors "convictions" can only be used to consider defendant's credibility as a witness distinguishes the 2016 driving conviction from "conduct." The State, however, did not develop this argument and has thus forfeited any argument error did not occur.

¶ 38 We thus turn to the next step of plain-error analysis and consider whether either prong of the plain-error doctrine applies.

¶ 39 1. *Closely Balanced Prong*

¶ 40 Defendant contends the evidence was not closely balanced on the issue of whether defendant was predisposed to *possess* drugs but was closely balanced on the issue of whether he

was predisposed to *sell* drugs. Defendant begins his argument by establishing, should defendant present some evidence showing he was not predisposed to deliver drugs, the State carried the burden of proving beyond a reasonable doubt the contrary. Defendant argues, while the evidence shows he was predisposed to *use* drugs, the evidence is closely balanced on the issue of whether he was predisposed to *sell* drugs.

¶ 41 Defendant's argument appears to be based on the misconception proof of the unlawful delivery offense, in light of defendant's entrapment defense, required the State prove defendant was predisposed to *sell* drugs. Defendant was charged with violating section 401(d) of the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/401(d)(1) (West 2016)), which makes it unlawful to "deliver" cocaine: "[I]t is unlawful for any person knowingly to manufacture or deliver" a narcotic drug. The Controlled Substances Act defines "deliver" or "delivery" as "the actual, constructive or attempted transfer of possession of a controlled substance, *with or without consideration* ***." 720 ILCS 570/102(h) (West 2016) (Emphasis added). Thus, evidence on the issue of whether defendant was predisposed to *sell* drugs is not relevant to the determination of whether he was predisposed to commit the offense of "unlawful delivery." We note, in his reply brief, defendant recognizes this mistake and argues the evidence was closely balanced on the issue of whether he was predisposed to deliver drugs.

¶ 42 The evidence was not closely balanced on the issue of whether defendant was predisposed to deliver drugs to Brown. Brown testified he had been buying cocaine from defendant for approximately six months and he owed defendant $50 for drugs defendant fronted him. Defendant admitted he and Brown had been getting high together for some time before defendant's arrest. Defendant testified he had spent his own money getting them both high together. Defendant admitted selling drugs in the past and admitted knowing from whom to

acquire them in the present. Defendant admitted to helping others find drugs. This prong does not permit plain-error review.

¶ 43 2. *Serious Error Prong*

¶ 44 Defendant next argues the second prong of the plain-error doctrine applies as the confusing jury instructions denied the defendant a fair trial and undermined the integrity of the judicial process. Defendant's argument on this issue is limited. Defendant cites two cases, *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 76, 991 N.E.2d 396, and *Herron*, 215 Ill. 2d at 193, and argues the instructions were confusing, denying him a fair trial.

¶ 45 Defendant has not met his burden of persuading the second prong prompts plain-error review. See *Lewis*, 234 Ill. 2d at 43 (noting defendants carry the burden of proof in plain-error analysis). The purpose of this prong is to protect against errors that erode the integrity of the judicial process and undermine the fairness of defendant's trial. *People v. Sargent*, 239 Ill. 2d 166, 190-91, 940 N.E.2d 1045, 1059 (2010). While considering the second prong of the plain-error doctrine, our supreme court has applied the same standard enunciated in *Hopp*: jury instruction error "rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Id.* at 191 (citing *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190, 1194 (2004)). It is a difficult standard to meet. *Id.* "Even an incorrect instruction on an element of the offense is not necessarily reversible error." *Id.* (citing *Hopp*, 209 Ill. 2d at 10).

¶ 46 Defendant has not met his burden of showing the error created a serious risk the jurors incorrectly convicted the defendant and so severely threatened the trial's fairness. When read together, the jury was told it could consider defendant's "conduct" toward the issue of

predisposition but also told it could consider "convictions" only on the issue of believability. There is little risk the jury read these instructions to mean the 2016 conviction for driving while license revoked could or should be considered for predisposition. Defendant has not identified any language by the trial court or the State during trial that exacerbated the possible confusion. At no point did the State encourage the jury to consider that conviction toward the issue of predisposition. During closing argument, the State told the jury defendant's prior convictions "that you heard about. They go towards his credibility, and it's not as evidence of guilt but it goes to credibility." The State then told the jury evidence about predisposition, "the key to entrapment," was presented. For this, the State emphasized defendant's drug use, emphasizing defendant's testimony had "been doing this for 30 years, basically running drugs, using drugs." The State told the jury defendant "uses drugs extensively" and defendant talked "about how he procures drugs, and he talked extensively about how he shares drugs with others." The State did not identify the convictions and, more specifically, made no reference to the 2016 driving offense or the other drug-related convictions, as relevant to predisposition.

¶ 47 Defendant's cases are distinguishable and, thus, fail to show plain error occurred. In *People v. Placek*, 184 Ill. 2d 370, 388-89, 704 N.E.2d 393, 401 (1998), a decision that does not contain plain-error analysis of a confusing jury instruction, the State improperly made "numerous references" to crimes regarding stolen auto parts in seeking a conviction on drug charges. In *Johnson*, unlike here, an improper joinder was involved. See *Johnson*, 2013 IL App (2d) 110535, ¶ 58. A domestic battery charge was improperly tried with weapons charges, leading the joinder error to manifest itself at the time of jury instructions when "it was too late to untangle the evidence to make it understandable for the jury." *Id.* ¶ 80 (finding the only option at that point was to declare a mistrial and start over as "the cumulative error in this case was so

egregious"). In *Herron*, plain error was found under the closely-balanced prong. See *Herron*, 215 Ill. 2d at 193-94.

¶ 48 B. Sentencing

¶ 49 Defendant next argues his 22-year sentence for delivery of 0.2 grams of cocaine to an undercover informant is excessive. Defendant emphasizes the offense occurred entirely at the behest of the Bloomington police and his previous convictions were largely nonviolent and drug- or traffic-related. Defendant maintains his sentence is unconstitutional as it is disproportionate to the nature of the offense and serves little rehabilitative purpose. It also, according to defendant, largely punishes him for his addiction. Defendant further emphasizes his "advanced age," as well as the fact the State offered him a 16-year deal when defendant was facing count I, a Class 1 felony, but received 22 years for a Class 2 felony. Defendant concludes a sentence closer to the six-year minimum would offer the greater balance of punishing defendant and allowing for the potential of restoring him to a productive place in society.

¶ 50 In sentencing, the trial court has discretion; we will not reverse or modify a sentence absent a finding the court abused that discretion. See *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656; see also *People v. Lawson*, 2018 IL App (4th) 170105, ¶ 28, 102 N.E.3d 761. We will find an abuse of discretion if the court's sentence is fanciful, arbitrary, or unreasonable. *Id.* We will reverse a sentence that is "greatly at variance with the spirit and purpose of the law" (*People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)) or, if within the statutory range, a sentence that is "manifestly disproportionate to the nature of the offense" (*People v. Franks*, 292 Ill. App. 3d 776, 779, 686 N.E.2d 361, 363 (1997)).

¶ 51 In this case, the challenged sentence was the one imposed on defendant's conviction for unlawful delivery, a Class 2 felony (720 ILCS 570/401(d) (West 2016)).

Ordinarily, convictions for Class 2 felonies carry terms of three to seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2016). Because defendant had previously been convicted of two offenses containing the same elements, he was to be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2016). The sentencing range for Class X offenders is 6 to 30 years. 730 ILCS 5/5-4.5-25 (West 2016).

¶ 52 In imposing a sentence, the trial court must determine a penalty "according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The court should consider the seriousness of the offense, the need to protect society, the need for deterrence and punishment, in addition to the history, character, and rehabilitative potential. See *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005).

¶ 53 Defendant argues the most important sentencing factor is the seriousness of the defendant's crime. In support, he relies upon *People v. Calhoun*, 404 Ill. App. 3d 362, 388-89, 935 N.E.2d 663, 686 (2010). In *Calhoun*, the First District acknowledged the seriousness of the crime had been held to be the most important factor. See *id.* at 388-89 (quoting *People v. Weatherspoon*, 394 Ill. App. 3d 839, 862, 915 N.E.2d 761, 781 (2009)). However, the *Calhoun* acknowledgement can be traced through *Weatherspoon* and other First District and Second District decisions to *People v. Morgan*, 29 Ill. App. 3d 1043, 1045, 332 N.E.2d 191, 193 (1975). *Morgan* does not support the proposition. In fact, at no point in the *Morgan* decision does the First District hold or state the seriousness of the offense is the most important factor in sentencing. *Id.* at 1043-46. In his reply brief, defendant adds a citation to *People v. Saldivar*, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986), for the same. However, *Saldivar* does not support the proposition. The *Saldivar* decision does not elevate the seriousness of the offense

over other sentencing factors. See *id.* at 259-72.

¶ 54 In contrast, Fourth District precedent states the seriousness of the offense is a factor to be *equally weighed* with defendant's history, character, and rehabilitative potential; the need to protect society; and the need for deterrence and punishment. *People v. Lawson*, 2018 IL App (4th) 170105, ¶ 33, 102 N.E.3d 761. We are not persuaded by the citations to *Calhoun* and *Saldivar* to abandon this approach.

¶ 55 In rendering the sentence, the trial court summarized its rationale. The trial court recognized defendant's delivery offense involved a "pretty small amount of cocaine" but emphasized defendant's offense could not be considered in a vacuum. The court noted defendant's 14 felony convictions and his "pattern of complete disregard for the law." The court found troubling defendant's failures to successfully complete probation and parole, as well as the fact defendant committed the offenses while on bond for the driving-while-license-revoked/suspended offense. Given defendant's lengthy history, the court found a "very significant sentence" was necessary to protect society and deter others.

¶ 56 Defendant argues insufficient consideration in mitigation was given to his drug addiction. While the Unified Code of Corrections lists aggravating and mitigating factors that must be considered in fashioning an appropriate sentence (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2016)), drug addiction is not one of these factors. A sentencing court may view a history of addiction as either a mitigating or an aggravating factor. *People v. Mertz*, 218 Ill. 2d 1, 83, 842 N.E.2d 618, 662 (2005). In this case, the trial court was aware of defendant's addiction and gave some consideration to defendant in response. After the motion to reconsider, the trial court noted it did consider defendant's drug addiction but continued to believe the 22-year sentence was appropriate as mitigating factors rendered the maximum term inappropriate. The court, which

had the presentence report and heard the State's argument at trial, considered the addiction in addition to defendant's repeated failures at addressing that addiction. The court's analysis is not unreasonable.

¶ 57 Citing *People v. Busse*, 2016 IL App (1st) 142941, 69 N.E.3d 425, defendant also argues the sentence was manifestly disproportionate to the nature of his offense. *Busse* involved a defendant who stole $44 worth of quarters from a vending machine. *Id.* ¶ 1. Due to his lengthy criminal history, albeit with nonviolent offenses, the defendant was a Class X offender, and the trial court sentenced him to 12 years' imprisonment. *Id.* ¶¶ 1-2. His sentence was reduced on appeal after the majority found the 12-year sentence did not reflect the seriousness of the offense. *Id.* ¶¶ 34, 38.

¶ 58 *Busse* is distinguishable. *Busse* involved petty thefts, whereas here, defendant's Class X status was due to his repeated participation in the delivery of drugs. Defendant's 22-year sentence followed a criminal history which included multiple failures to comply with parole and probation terms including acts of intimidation, obstructing justice, and resisting arrest. Defendant had served prison sentences of 7 and 11 years but had failed to rehabilitate. In addition, the trial court was aware defendant was out on bond when he committed the charged offenses.

¶ 59 Defendant's 22-year sentence was not an abuse of discretion.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm the trial court's judgment.

¶ 62 Affirmed.