NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2024 IL App (4th) 210075-U

NO. 4-21-0075

FILED
September 30, 2024
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
STEPHEN ANDREW ARANDA,	)	No. 17CF566
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Harris and Doherty concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions of controlled substance trafficking and possession of a controlled substance with the intent to deliver, holding:
(1) defendant was not deprived of his statutory right to a speedy trial under section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2016));
(2) the indictments sufficiently stated the offenses even though they did not include the full chemical name of the controlled substance;
(3) the indictments were not improperly constructively amended when the State was allowed to show defendant "caused" methylenedioxymethamphetamine (MDMA) to be brought into Illinois, as opposed to showing defendant "brought" the drugs into the state;
(4) there was no error in the jury instructions when defendant specifically agreed to the instructions and invited any alleged error;
(5) the evidence was sufficient to prove defendant guilty beyond a reasonable doubt;
(6) the convictions did not violate the one-act, one-crime doctrine when they were based on separate acts and possession of a controlled substance with the intent to deliver is not a lesser-included offense of controlled substance trafficking;
(7) the trial court applied the correct standard when finding, following a *Krankel* hearing (see *People v. Krankel*, 102 Ill. 2d 181 (1984)), that trial counsel did not render ineffective assistance;

(8) the court did not err in declining to appoint counsel to investigate the ineffective assistance of *Krankel* counsel;
(9) the sentence for controlled substance trafficking did not violate proportionality principles under the eighth amendment (U.S. Const., amend. VIII); and
(10) sentencing counsel did not render ineffective assistance.

¶ 2 In April 2018, a jury convicted defendant, Stephen Andrew Aranda, of controlled substance trafficking (720 ILCS 570/401.1(a) (West 2016)) and unlawful possession of a controlled substance with intent to deliver (*id.* § 401(a)(7.5)(A)(i)). The trial court sentenced him to concurrent prison terms of 24 years and 12 years.

¶ 3 On appeal, defendant contends (1) he was deprived of his statutory right to a speedy trial under section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2016)), (2) the indictments failed to state the offenses, (3) the indictments were improperly constructively amended, (4) the trial court provided improper jury instructions, leading to legally inconsistent verdicts, (5) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (6) the convictions violated the one-act, one-crime doctrine, (7) the court applied the wrong standard when finding, following a *Krankel* hearing (see *People v. Krankel*, 102 Ill. 2d 181 (1984)), that trial counsel did not render ineffective assistance, (8) the court erred in declining to appoint counsel to investigate the ineffective assistance of *Krankel* counsel, (9) the sentence for controlled substance trafficking violated the eighth amendment (U.S. Const., amend. VIII), and (10) he received ineffective assistance of counsel at sentencing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2017, the State indicted defendant on six counts, two of which (*i.e.*, counts III and V) the State voluntarily dismissed before trial. Count I alleged that, on or about May 18, 2017, defendant committed the offense of controlled substance trafficking (720 ILCS 570/401.1(a) (West 2016)) in that he "knowingly and unlawfully with the intent to deliver brought more than

one hundred (100) grams of methyelenedioxymethamphetamine [*sic*] (MDMA), a controlled substance, into the State of Illinois." Count II also alleged controlled substance trafficking, but it alleged defendant trafficked between 15 and 100 grams of MDMA (*id.*). Count IV alleged that, on or about May 18, 2017, defendant committed the offense of unlawful possession of a controlled substance with the intent to deliver (*id.* § 401(a)(7.5)(A)(i)), in that defendant "knowingly and unlawfully possessed with the intent to deliver more than fifteen (15) grams but less than one hundred (100) grams of a substance containing [MDMA], a controlled substance." Count VI alleged unlawful possession of more than 15 grams but less than 100 grams of MDMA (*id.* § 402(a)(7.5)(A)(i)).

¶ 6 Section 204(d)(2) of the Illinois Controlled Substances Act classifies "3,4-methylenedioxymethamphetamine (MDMA)" as a Schedule I drug. 720 ILCS 570/204(d)(2) (West 2016)). Before trial, defendant never raised an issue about the indictment's omission of "3,4-" from the name of the controlled substance.

¶ 7 A. Pretrial Proceedings

¶ 8 Defendant was arrested on May 18, 2017, and remained in custody until trial. On July 3, 2017, the parties appeared for the "initial status call" in the case, and defense counsel stated, "we are still discussing the evidence that's been tendered and some possible outcomes. We're moving to continue the status hearing. I've explained to the defendant that by doing that we would be tolling the speedy trial calculation until the case could be next set for trial." The trial court suggested July 31, 2017, and counsel agreed to that date. The court told defendant the speedy-trial term was tolled and said, "We won't start counting again until sometime after July 31 when the case can be scheduled for trial." Defendant stated he understood. On July 24, 2017, defendant sent

the court a letter expressing his displeasure with his counsel in which he acknowledged counsel filed a continuance that postponed his right to a speedy trial.

¶ 9 On July 31, 2017, the parties appeared for the continued status hearing. The trial court addressed concerns defendant raised about his appointed counsel. After the court found no potential neglect of the case, defense counsel told the court defendant had rejected a plea offer and was "interested in proceeding to trial as soon as possible." When asked what the status of the case was, counsel stated, "He's asking for a jury trial." The State noted that, once the matter was set for trial, there would be no further plea negotiations. The court asked defendant if he wanted a continuance to further consider the State's previous offer and stated, "or do you want me to set it for a trial date?" Defendant replied, "Trial date." The court, without seeking input from the parties, then set the matter for trial on September 18, 2017, with a final pretrial conference on September 7, 2017. The record shows this was the earliest available trial date.

¶ 10 Immediately after the trial court set the trial date, defendant requested to proceed *pro se*. After admonishing defendant, the court asked him if he wanted to continue the case to consider the issue further. Defendant declined that offer, and the court discharged defense counsel and allowed defendant to represent himself. The court then noted the September 18 trial date, asked defendant whether he wished to maintain the trial schedule, and inquired "or are you asking me to do something else with the case?" Defendant responded, "I think we can maintain the schedule." The court set August 24, 2017, as the deadline for filing pretrial motions, and the court explained to defendant that any motions he filed requiring an evidentiary hearing might delay his trial date. A docket entry from July 31, 2017, stated, "speedy trial tolled."

¶ 11 On August 22, 2017, defendant filed various motions. On September 7, 2017, the parties appeared for the scheduled final pretrial conference, the State answered ready for trial, and

defendant stated he was not ready for trial and requested a hearing on his motions. The trial court explained to defendant that his motions would delay the trial and toll the speedy-trial term. Defendant confirmed he understood. The court vacated the September 18, 2017, trial date and set the matter for a hearing on defendant's motions on October 23, 2017. A new trial date was not set, and defendant did not ask for a trial date. The docket entry for September 7, 2017, stated, "Speedy trial tolled."

¶ 12 On October 23, 2017, after ruling on some of defendant's pretrial motions and taking others under advisement, both parties stated they would like to set a trial date. The trial court offered December 4, 2017, and December 17, 2017, as available dates. The State asked for December 17, 2017, but defendant asked for a date "as soon as possible." The court set the matter for trial on December 4, 2017, with a final pretrial conference on November 30, 2017. On October 25, 2017, the court issued written rulings resolving the motions it took under advisement.

¶ 13 On November 30, 2017, the State requested to continue the trial due to the unavailability of a witness. Defendant answered ready for trial and objected to the continuance. However, defendant did not specifically demand a "speedy" trial. Over defendant's objection, the trial court continued the matter to the next available trial date, which was January 8, 2018, with a final pretrial conference on December 21, 2017. The docket entry for November 30, 2017, stated, "Speedy trial not tolled."

¶ 14 On December 21, 2017, defendant filed a motion to dismiss, alleging he was not brought to trial within 120 days as required by section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2016)). Defendant alleged various delays were attributable to the State. In particular, defendant alleged that, after his continuance on July 3, 2017, the speedy-trial term began running against the State again on July 31, 2017, when he asked for a trial date, and the date the

trial court set fell within the speedy-trial term. The court stated it would address the motion on January 8, 2018.

¶ 15 On January 8, 2018, defendant filed a new motion to dismiss, again alleging a violation of his statutory right to a speedy trial. That same day, the trial court denied the motion. In doing so, the court stated:

> "[W]hat is a common misconception and some of the older case law supports this misconception, but what is a common misconception is that when one moves to continue a status date and then there is another status date set, that the speedy trial term then begins to run again on that next status date if the defendant shows up and says now I'm ready for trial, and that is not correct. That is simply not correct.
>
> Once a defendant moves to continue or agrees to continue a matter, the speedy trial term is tolled until the next available trial date, and that's the key term, is that next available trial date. That's what governs the statute."

The court stated defendant demanded a trial at the July 31, 2017, status appearance, but it found the status date did not end the tolling of the speedy-trial term and start the clock running against the State. Instead, the court found, when it set the trial date for September 18, 2017, that date marked the end of any tolling period because that was the first available trial date. The court then found defendant delayed the case again without setting a trial date, and thus the speedy-trial term did not begin running again until December 4, 2017, based on the State's action on November 30, 2017, of seeking a continuance of the December 4 trial date.

¶ 16 After the trial court denied defendant's motion to dismiss, defendant requested to continue the trial until the next week. The State objected to a continuance, answering ready for trial and stating it had witnesses ready. The court explained the "reality of the situation" was that

"we don't have jurors here today," and the judge was ill, with a doctor's appointment scheduled that afternoon. The court said its intention had been to begin jury selection on the morning of January 9, 2018. The court asked defendant whether he would like to set the case over until the next morning or whether he still wanted to continue the case for a week. Defendant responded he wanted the trial continued to the next week. The court explained to defendant that the delay would not count against the State, and defendant responded, "Okay." Over the State's objection, the court then granted defendant's motion to continue the trial to January 16, 2018, with a final pretrial conference on January 11, 2018. The docket entry for January 8, 2018, stated, "Speedy trial tolled."

¶ 17 On January 11, 2018, both defendant and the State indicated they would be ready for trial on January 16, 2018. Defendant filed a motion to reconsider the ruling concerning the alleged speedy-trial violation, and the trial court said it would address the issue on January 16, 2018.

¶ 18 On January 16, 2018, the trial court denied defendant's motion to reconsider. The State answered ready for trial, but defendant said he was not ready to proceed because he wished to file a motion to dismiss based on an alleged due process violation. The court confirmed defendant understood that a continuance to the next available trial date of February 5, 2018, would toll the speedy-trial term. The court then stated, "the jury trial will be continued and will be scheduled for Monday, February the 5th." The State interrupted and informed the court that one of its witnesses would not be available until February 12, 2018. The court noted that February 12, 2018, was a holiday, so the matter would be set for trial on February 13, 2018. The court ruled the delay between February 5, 2018, and February 13, 2018, would be attributed to the State. The court set the matter for a hearing on defendant's motion to dismiss on January 18, 2018, and for a final pretrial conference on February 8, 2018.

¶ 19 On January 18, 2018, the trial court denied defendant's motion to dismiss. Defendant orally moved the court to reconsider its rulings regarding the alleged speedy-trial violation. The court told defendant it would read the case law defendant cited but would not hold another hearing on that issue. Based on comments defendant made during the hearing, the court asked defendant to reconsider whether he desired counsel and told defendant to inform the court of his decision no later than the final pretrial conference scheduled for February 8, 2018.

¶ 20 On February 8, 2018, the trial court informed defendant it reviewed the case law he submitted, and it again determined there had been no speedy-trial violation. The State answered ready for trial, but defendant requested the court to appoint him counsel. The court appointed counsel and set the matter for trial on March 5, 2018. The docket entry from February 8, 2018, stated, "Speedy trial tolled."

¶ 21 On February 23, 2018, defense counsel requested a continuance. Without objection from the State, the trial court set the matter for trial on April 16, 2018. The docket entry stated, "Speedy trial tolled." Trial commenced on April 16, 2018.

¶ 22 B. Trial

¶ 23 Evidence at trial showed that, on May 12, 2017, a federal agent with a canine unit, working in the mail facility at JFK Airport in New York, discovered a package with a substance that field-tested positive for "MDMA." The package was addressed to Joshua Wahls at 1510 Hancock Drive, No. 5, in Normal, Illinois (Hancock Drive). Law enforcement personnel arranged for the package to be transported to Illinois. On May 17, 2017, a forensic scientist with the Illinois State Police determined the substance weighed 112.1 grams and tested positive for "MDMA." At trial, witnesses repeatedly referred to the substance as "MDMA" rather than its scientific name. A

laboratory report admitted into evidence stated the substance was "3,4-Methylenedioxymethamphetamine (MDMA)."

¶ 24 Despite the package being addressed to Wahls, law enforcement narrowed their focus to defendant, who was known to reside at Hancock Drive. On May 18, 2017, law enforcement coordinated a controlled delivery of the package to the designated address. Officers obtained an anticipatory search warrant, which authorized them to search the premises at Hancock Drive if somebody accepted the package and entered the residence. Before delivering the package, a sergeant with the Illinois State Police removed approximately 80 grams of the substance to avoid the possibility of somebody accepting the delivery and then destroying all of the evidence before officers could make an arrest.

¶ 25 As an undercover postal inspector attempted to deliver the package to Hancock Drive, defendant arrived on a motorcycle. The postal inspector testified that, when defendant accepted the package, defendant said he lived at the address but was not the addressee. Defendant took the package inside Hancock Drive and exited shortly after without it.

¶ 26 When defendant exited, police officers approached him. Using keys from a lanyard found on defendant, officers were able to open both the front door to Hancock Drive and a locked basement door. Officers found no one inside. At the base of the basement stairs, officers found the package that had just been delivered. The package had been at the top of the stairs, but it was kicked to the bottom when officers opened the door and walked down the stairs. In the pockets of two different coats at the base of the stairs, officers found additional "MDMA" that weighed 27.9 grams and 21.9 grams respectively. A laboratory report in evidence showed the substances were "3,4-Methylenedioxymethamphetamine (MDMA)." Officers also found items indicative of drug distribution, such as a digital scale, calibrating weights for the scale, baggies, and $900 in cash. In

addition, officers found paperwork and packages with defendant's name on it, listing his address as Hancock Drive. A utility bill addressed to defendant was dated May 11, 2017. Defendant's voter registration card was also in the basement. Officers did not find documentation in the basement linked to anybody other than defendant. In an upstairs bedroom belonging to a tenant named Ezequiel Dominguez, officers found cannabis and "minor paraphernalia."

¶ 27 Thomas Vagasky, a sergeant with the Illinois State Police, testified as an expert for the State on the topic of drug deliveries. He explained that most MDMA users buy only one or two grams at a time, and the street value is about $100 per gram. Based on the amount of MDMA and the various items found in the basement of Hancock Drive, Vagasky opined defendant possessed the MDMA with the intent to deliver it.

¶ 28 Wahls testified he had lived at Hancock Drive for three or four months in 2015. Wahls was not specifically asked to identify defendant at trial. However, he testified that, when he resided at the location, he paid rent to "Stephen," who lived in the basement. Right after referring to "Stephen," Wahls answered questions that referred to "Mr. Aranda." Wahls did not have a key to the basement or access to it, as the door was always locked. As of May 18, 2018, Wahls was living elsewhere, and he had not been back to Hancock Drive since he moved out. Although his name was on the package that was delivered on May 18, 2017, Wahls did not order it or recognize it. Wahls did not have an ongoing relationship with "Mr. Aranda."

¶ 29 Dominguez testified he lived at Hancock Drive from summer 2015 to the end of June 2017 in an upstairs bedroom. Dominguez did not specifically identify defendant at trial, but "Mr. Aranda" and "the defendant" were referred to by counsel when asking questions during Dominguez's testimony. Dominguez testified he never went into the basement of the residence, as it was locked and he did not have a key. He said he did laundry at a laundromat, but he then

clarified he had used the washer and dryer in the basement once. According to Dominguez, defendant spent the majority of his time in the basement. Other people also "came and went" into the basement. Dominguez's contact with defendant was only about "day-to-day stuff," such as the payment of rent or discussions about utilities. Other than defendant, there was a brief time when Dominguez had another roommate, who stayed in the other upstairs bedroom. Dominguez had met Wahls only briefly and never saw him at Hancock Drive.

¶ 30 Dominguez testified that, on May 18, 2017, as he left for work, he saw defendant sleeping on the couch. Defendant said he was waiting for a package, which Dominguez understood contained a motorcycle battery. Although Dominguez was not home when the police searched the residence, he acknowledged that officers found a small amount of cannabis in his room for personal use, along with a pipe.

¶ 31 Defendant testified that, as of May 18, 2017, he had resided with his brother and his brother's girlfriend for approximately six months. Before that, defendant lived at Hancock Drive, a unit in which his mother had "some ownership." As of May 18, 2017, defendant managed the property at Hancock Drive and had keys to both the front door and the basement. Defendant maintained that Dominguez, who had a month-to-month verbal lease, was the only resident of Hancock Drive on May 18, 2017.

¶ 32 Defendant testified that, on the afternoon of May 18, 2017, he rode his motorcycle to Hancock Drive because he was expecting a new motorcycle battery that he purchased on eBay to be delivered. When asked why he did not have the battery delivered to his current residence, defendant responded he had been unable to update his address on eBay because he had lost the password for an associated e-mail account. Defendant saw a postal worker in front of Hancock Drive and, believing the delivery was the motorcycle battery he was waiting for, defendant

approached the postal worker. The postal worker asked defendant if he was Wahls. Defendant said he was not, but he accepted the package with the intent to eventually get it to Wahls. Defendant acknowledged taking the package inside the unit, unlocking the basement door, setting the package at the top of the stairs, and locking the basement door again. Defendant testified officers then detained him as he attempted to leave out the front door. As he was being transported to jail, he saw a delivery truck two blocks away from this unit, which led him to believe the motorcycle battery was indeed delivered later in the day.

¶ 33 Defendant denied knowing what was inside the package he took to the basement, and he said he did not "solicit" the package in the mail. Defendant also denied the other drugs found in the basement were his. He testified he neither used nor sold drugs. Defendant believed there were times when Dominguez had access to the basement. Defendant also believed the door was "unlocked at certain points."

¶ 34 On cross-examination, defendant acknowledged his name was on certain items found in the basement at Hancock Drive. However, he repeated that he managed the property but did not live there.

¶ 35 C. Jury Instructions, Closing Arguments, and Verdict

¶ 36 Although count I of the indictment alleged trafficking more than 100 grams of MDMA, whereas count II alleged between 15 and 100 grams of MDMA, at the jury instructions conference, the State explained its theory was defendant committed only one act of trafficking. The reason for alleging two different quantities for the trafficking charge was because police officers removed approximately 80 grams of MDMA from the original package before delivering it to defendant, so the package defendant accepted contained only 31 grams. Although the State's theory was that defendant trafficked the entire 112.1 grams, the other count was so pleaded in case

the jury concluded defendant trafficked only the amount of MDMA that was in the package he accepted.

¶ 37 When reviewing the State's tendered jury instructions, the trial court expressed concern about the possibility of the jury being confused by the different amounts specified in the trafficking counts and returning inconsistent verdicts. The court's specific concern was the tendered instructions allowed the jury to find defendant guilty of trafficking more than 100 grams of MDMA but not guilty of trafficking between 15 and 100 grams of MDMA, which would be inconsistent. The court gave the attorneys two options to deal with that problem. The first option was to instruct the jury that count II was a lesser-included offense of count I. The second option was to remove the upper parameters in the ranges specified such that, instead of stating "15-100 grams" and "100-400 grams," the instructions would state "more than 15 grams" and "more than 100 grams." The court noted the comments to the pattern instructions all stated the upper limit did not need to be included if it was not an issue. Thus, the court indicated it preferred the second option of removing the upper ranges, and it took the liberty of preparing new instructions implementing that suggestion. Defense counsel stated the court's position was "logical" and addressed the concern "in an appropriate way." Counsel further stated he preferred the court's proposed instructions rather than instructing the jury about lesser-included offenses. The State agreed with defense counsel. As the court and the attorneys went through the instructions to implement the changes, defense counsel indicated each time that he had no objection.

¶ 38 In accordance with the discussion concerning the instructions, the jury was ultimately instructed based on Illinois Pattern Jury Instructions, Criminal, No. 2.01(approved Dec. 8, 2011) (hereinafter IPI Criminal No. 2.01), which provided:

> "The defendant is charged with the offenses of Controlled Substance Trafficking More Than 100 Grams, Controlled Substance Trafficking More Than 15 Grams, Unlawful Possession of a Controlled Substance with the Intent to Deliver More Than 15 Grams, and Unlawful Possession of a Controlled Substance More Than 15 Grams. The defendant has pleaded not guilty."

The jury was also instructed based on Illinois Pattern Jury Instructions, Criminal, No. 26.01 (approved Dec. 8, 2011) (hereinafter IPI Criminal No. 26.01), which provided, in part:

> "The defendant is charged with the offenses of Controlled Substance Trafficking More Than 100 Grams, Controlled Substance Trafficking More Than 15 Grams, Unlawful Possession of a Controlled Substance with the Intent to Deliver More Than 15 Grams, and Unlawful Possession of a Controlled Substance More Than 15 Grams. You will receive eight forms of verdict. As to each charge, you will be provided with both a 'not guilty' and 'guilty' form of verdict. From these two verdict forms with regard to a particular charge, you should select the one verdict form that reflects your verdict on that charge and sign it as I have stated."

¶ 39 During closing arguments, the State argued defendant constructively possessed the MDMA found in the coats in the basement and in the package that was placed at the top of the stairs. Defense counsel argued that, although defendant briefly possessed the MDMA that was in the package, he did not know it was MDMA. Defense counsel asked the jury to consider that either Wahls or Dominguez may have been responsible for the drugs. The jury found defendant guilty of all charges.

¶ 40 D. Posttrial Motions and *Krankel* Proceedings

¶ 41 In May 2018, counsel filed a motion for a new trial, alleging the State failed to prove defendant guilty beyond a reasonable doubt. Defendant also filed multiple *pro se* posttrial motions, including motions alleging ineffective assistance of counsel. The trial court conducted a *Krankel* inquiry and appointed new counsel to investigate some of defendant's claims. Defendant's *Krankel* counsel ultimately filed a 60-page amended brief raising 14 primary issues in support of defendant's ineffective assistance claims. The original judge presiding over the case retired, and a new judge inherited it.

¶ 42 Following a hearing, the trial court found in a written order that defendant had not shown ineffective assistance of trial counsel. Citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the court wrote, "A claim of ineffective assistance of counsel will only be sustained if counsel has failed to perform in a reasonably effective manner and there is a reasonable probability that, but for this substandard performance, the outcome of the proceedings would have been different." In some instances, the court found defendant failed to show prejudice, stating at times the alleged deficient representation of counsel "probably" would not have changed the outcome of the trial. Defendant filed a *pro se* motion to reconsider, which the court denied. The court also denied defendant's motion for rehearing of the motion to reconsider.

¶ 43 E. Sentencing

¶ 44 Before sentencing, defendant filed *pro se* motions alleging the sentencing ranges for the trafficking offenses violated the eighth amendment and due process. In particular, he argued the sentencing range was disproportionate to other jurisdictions. The trial court denied the motions.

¶ 45 The presentence investigation report (PSI) showed defendant was born in 1982. Defendant's criminal record included multiple traffic offenses, a conviction of criminal trespass to land, and a 2002 charge for possessing less than 15 grams of a controlled substance. He initially

received first-time-offender probation for that charge, but his probation was revoked multiple times. He was sentenced to jail, but he ultimately received a conditional discharge in 2006. While the current case was pending, defendant was charged, in October 2018, with aggravated battery of a peace officer, and in April 2019, with criminal damage to government property. Both were based on incidents occurring while he was incarcerated at the McLean County jail. The PSI listed multiple disciplinary actions taken against defendant at the jail and stated he had not been productive while in jail and had violated many of the facility's rules.

¶ 46 Torry Carnes, a Knox County sheriff's deputy, testified about an incident in July 2015, during which he was contacted by a Nebraska State Trooper concerning potential drug activity involving defendant on an Amtrak train. Defendant had refused to consent to a search, and the train was headed to Illinois. Carnes performed a dog sniff, and the dog alerted to defendant's bag, which was later found to contain over 100 grams of psilocybin mushrooms, drug paraphernalia, and scales. Bags of "little pills" and bags of a "crystal substance" were found in his pocket. A lab report showed those substances to be MDMA and "MDA" (3,4-Methylenedioxyamphetamine). The criminal case resulting from the incident was later dismissed based on the grant of defendant's motion to suppress, which alleged an illegal search and seizure.

¶ 47 Ovid Winans, the assistant superintendent at the McLean County jail, testified about disciplinary actions against defendant at the jail. Defendant had been "written up" 17 times for rule violations. Winans described defendant's general attitude as "[m]ostly contrary." Defendant often filed appeals of the rule violations, even in cases where he had previously admitted to the violation. Winans also indicated defendant filed frivolous grievances.

¶ 48 Defendant did not present any evidence in mitigation and declined to give a statement in allocution. The parties agreed the controlled substance trafficking counts would

merge, and the possession count would merge with the possession with the intent to deliver count, such that defendant would be sentenced for trafficking more than 100 grams of MDMA and possessing more than 15 grams of MDMA with the intent to deliver. The sentencing range for defendant's controlled substance trafficking was 18 to 80 years in prison, and the range for defendant's possession of a controlled substance with the intent to deliver was 6 to 30 years. The State asked for a 40-year sentence on the controlled substance trafficking conviction and 15 years for possession of a controlled substance with the intent to deliver. Defense counsel asked for the minimum sentences.

¶ 49 The trial court sentenced defendant to concurrent prison terms of 24 years for controlled substance trafficking and 12 years for possession of a controlled substance with the intent to deliver. In doing so, the court stated it would not hold against defendant his choice to file appeals or exercise his rights regarding issues before the jail or the court. The court also rejected the State's request for a 40-year sentence, finding there were not significant factors in aggravation to the extent the State argued were present. In aggravation, the court noted defendant's criminal history, the seriousness of the crime, which involved a large amount of MDMA, and the need for deterrence.

¶ 50 F. Postsentencing Motions

¶ 51 Counsel filed a motion to reconsider the sentence, arguing the sentence was excessive. Defendant filed numerous *pro se* motions after sentencing, some of which his counsel adopted. In particular, in a motion in arrest of judgment, defendant argued the indictments were defective because the Illinois Controlled Substances Act lists "3,4-methylenedioxymethamphetamine (MDMA)" as a Schedule I drug (720 ILCS 570/204(d)(2) (West 2016)), whereas the indictments omitted the "3,4-" portion of the substance name. At the

hearing on defendant's motion in arrest of judgment, defense counsel told the trial court there was a laboratory analysis of the substance, and he had received an affidavit during discovery "determining that the substance was 3,4-methylenedioxymethamphetamine, MDMA."

¶ 52 In other motions, defendant also argued his 24-year sentence for trafficking violated the eighth amendment to the United States Constitution (U.S. Const., amend. VIII). He included an extensive list of penalties provided in other jurisdictions and information concerning studies showing beneficial uses of MDMA or suggesting MDMA was not a dangerous substance.

¶ 53 Defendant further raised additional issues of ineffective assistance of counsel, and he contended his *Krankel* counsel was ineffective for failing to present evidence related to the case at the *Krankel* hearing, such as coat sizes or bills from his address. He did not elaborate on how the evidence would establish ineffective assistance or change the outcome of the trial. Instead, he wrote the failure to present the evidence left the record incomplete and, therefore, the trial court could not have made a proper decision at the *Krankel* hearing.

¶ 54 The trial court conducted another initial *Krankel* inquiry with respect to defendant's additional allegations of ineffective assistance against both his trial counsel and *Krankel* counsel. During the hearing, defendant told the court the following:

> "I believe that [*Krankel* counsel] was required to provide for the Court different evidence during that hearing and he failed to do so.
>
> Some of those things are my brother's testimony. He should have collected affidavits to present to the Court or subpoenaed him to testify there at the hearing.
>
> I believe that there should have been investigation and evidence presented as far as the coat sizes and the fit of the coats. And I realize the argument has already been made and it was presented in the motion, but he failed to conduct any

investigation into that, any physical investigation into that and present it to the Court.

He did not collect the bills in my name for my address, and I believe that was necessary to present that to the Court. I've got bills—multiple bills in my name from the address that I was living at and none of those were collected even though they were available.

He did attempt to subpoena the records from Comcast but was unable to obtain them that way. He could have had me file—sign a release to get the records from them or collected the bills from my brother as he was in possession of those.

I believe there was additional evidence he should have presented, and I believe I've listed that here in the motion and would like the Court to review that."

The court told defendant its role at the first *Krankel* hearing was to determine whether a *Strickland* violation had taken place. The court said, "It wasn't time to gather and present evidence to the Court in terms of trial type evidence." The court determined defendant's claims did not require the appointment of new counsel.

¶ 55 The trial court denied defendant's posttrial motions, and this appeal followed.

¶ 56 II. ANALYSIS

¶ 57 On appeal, defendant contends (1) he was deprived of his statutory right to a speedy trial under section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2016)), (2) the indictments failed to state the offenses, (3) the indictments were improperly constructively amended, (4) the trial court provided improper jury instructions, leading to legally inconsistent verdicts, (5) the evidence was insufficient to prove him guilty beyond a reasonable doubt, (6) the convictions violated the one-act, one-crime doctrine, (7) the court applied the wrong standard

when finding, following the *Krankel* hearing, that trial counsel did not render ineffective assistance, (8) the court erred in declining to appoint counsel to investigate the ineffective assistance of *Krankel* counsel, (9) the sentence for controlled substance trafficking violated the eighth amendment, and (10) he received ineffective assistance of counsel at sentencing.

¶ 58 A. Ineffective Assistance of Counsel and Plain Error

¶ 59 At the outset, we note defendant raises issues of plain error and ineffective assistance of counsel in connection with multiple issues. Accordingly, we set forth the applicable law here, which applies to all issues in which defendant alleges plain error or ineffective assistance.

¶ 60 Both an objection at trial and raising the issue in a posttrial motion are necessary to preserve an issue for appellate review. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). However, this court will review forfeited challenges under the plain-error doctrine when:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30.

The defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 61 "Claims of ineffective assistance of counsel are governed by the standard set forth in [*Strickland*]." *People v. Cathey*, 2012 IL 111746, ¶ 23. "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy

either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). To establish prejudice, the defendant must show, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *People v. Houston*, 229 Ill. 2d 1, 4 (2008). "Counsel's performance is measured by an objective standard of competence under prevailing professional norms." *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 62 A reviewing court gives a great amount of deference to counsel's judgment and indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. "A defendant is entitled to competent, not perfect, representation, and mistakes in trial strategy or judgment will not, of themselves, render the representation ineffective." *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 26. "The only exception to this rule is when counsel's chosen trial strategy is so unsound that 'counsel entirely fails to conduct any meaningful adversarial testing.' " *People v. West*, 187 Ill. 2d 418, 432-33, (1999) (quoting *People v. Guest*, 166 Ill. 2d 381, 394 (1995)).

¶ 63 When addressing a claim of plain error and an alternative claim of ineffective assistance of counsel, appellate courts first consider whether the defendant has established a clear or obvious error. Absent a clear or obvious error, neither the doctrine of plain error nor a theory of ineffective assistance affords the defendant any relief. *People v. Gilker*, 2023 IL App (4th) 220914, ¶ 78.

¶ 64 B. Speedy Trial

¶ 65 Defendant first argues he was deprived of his statutory right to a speedy trial under section 103-5(a) of the speedy-trial statute. In particular, he argues the trial court abused its discretion when it attributed time to the defense for purposes of the speedy-trial statute. The following date ranges are primarily at issue: (1) July 31, 2017, to September 18, 2017, (2) October

23, 2017, to December 4, 2017, (3) December 4, 2017, to January 8, 2018, (4) January 8, 2018, to January 9, 2018, and (5) February 5, 2018, to February 13, 2018. Defendant further contends his counsel rendered ineffective assistance by failing to object to the February delay and failing to include the speedy-trial issue in a posttrial motion. He also argues the court should have appointed new counsel to investigate the claims of ineffective assistance in connection with the speedy-trial issue.

¶ 66 Under section 103-5(a) of the speedy-trial statute, a defendant who is in custody must be tried within 120 days after arrest, excluding certain enumerated delays. Specifically, the speedy-trial statute provides:

> "(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, aftercare release, or mandatory supervised release for another offense." 725 ILCS 5/103-5(a) (West 2016).

The speedy-trial statute further provides:

> "(f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended." *Id.* § 103-5(f).

¶ 67 To calculate the days of the speedy-trial term, courts exclude the first day but include the last day unless it is a Sunday or a holiday. See 5 ILCS 70/1.11 (West 2016); *People v. Shaw*, 24 Ill. 2d 219, 222 (1962). The speedy-trial term begins to run automatically for an in-custody defendant, without any need for a formal demand. *People v. McBride*, 2022 IL App (4th) 220301, ¶ 38. However, courts exclude from the calculation any of the delays described in section 103-5(a), including delays " 'occasioned by the defendant' " and delays to which the defendant agreed. *People v. Cross*, 2021 IL App (4th) 190114, ¶ 74, *aff'd*, 2022 IL 127907.

¶ 68 In considering claims a defendant was denied a speedy trial, this court has adopted definitions used by the Illinois Supreme Court. *Id.* ¶¶ 79-83. Specifically, (1) the "speedy-trial term" refers to the 120 days referenced in the statute, (2) "discharge date" refers to the final day of the speedy-trial term, and (3) "delay attributable to the defendant" means "a delay of the speedy-trial term, with the effect of moving back that defendant's discharge date." *Id.* ¶¶ 80-82. We have further clarified the meaning of the term "delay," as follows:

> " '[D]elay' is clearly the appropriate term for any action that slows down the criminal justice process and often—directly or indirectly—delays trial or the mere possibility of a trial. As we later explain, 'delay' is used very broadly by Illinois courts, and any action that 'eliminates the possibility that [a] case could be immediately set for trial' counts as delay. [Citation]. In the context of analyzing a

> particular defendant's speedy-trial term and determining his discharge date, a 'delay'—or, more precisely, a 'delay attributable to the defendant'—means a delay of the speedy-trial term, with the effect of moving back that defendant's discharge date. 'Delay' does not mean a delay of defendant's trial or trial date." (Emphasis omitted.) *Id.* ¶ 82.

We have defined "tolling" as:

> "a well-recognized term that is employed in various contexts throughout the law, and it accurately captures what happens when a defendant causes a delay, thereby moving back the discharge date. [Citations.] Tolling refers to (1) suspending or stopping the running of the statutory speedy-trial term and then (2) having that term begin to run again (with a later discharge date) once whatever the action was that caused the tolling has been concluded. [Citation.]" *Id.* ¶ 83.

¶ 69 The law is well-settled that delays caused by defense motions toll the speedy-trial term. *People v. Hall*, 194 Ill. 2d 305, 328 (2000). Specifically, both the time required for the State to respond to a defense motion and the time required for the trial court to hear and decide such a motion are attributable to the defense. *People v. Kliner*, 185 Ill. 2d 81, 117 (1998). Likewise, a defense counsel's express agreement to a continuance may be considered an affirmative act contributing to a delay attributable to the defendant. *Id.* 114. Essentially, any type of motion filed by a defendant which eliminates the possibility that the case could immediately be set for a trial constitutes an affirmative act of delay attributable to the defendant. *Cross*, 2021 IL App (4th) 190114, ¶ 87 (citing *People v. Lilly*, 2016 IL App (3d) 140286, ¶ 40).

¶ 70 In particular, agreed delays are attributable to the defendant, and section 103-5(a) expressly provides that a defendant is considered to have agreed to a delay unless he or she "objects

to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2016). The speedy-trial statute is meant to be used as a "shield" to avoid an untimely trial, not as a "sword after the fact to defeat a conviction." *People v. Hartfield*, 2022 IL 126729, ¶ 35. Thus, a defendant may not camouflage his or her intent or hide the demand from the State's notice. *Id.*

¶ 71 To avoid time from being attributed to the defense, a defendant must unambiguously convey his or her intent to invoke the right to a speedy trial. See *id.* ¶ 36 ("[A] defendant's statement of custodial status and readiness for trial does not, by itself, equate to a demand that the government set in motion the necessary machinery to try him within 120 days."). Thus, stating a readiness for trial and adamantly objecting to a delay are not sufficient to affirmatively invoke a defendant's speedy-trial right. *People v. Murray*, 379 Ill. App. 3d 153, 161 (2008). "In the absence of language clearly showing an intent to invoke the speedy-trial statute and without a specific finding by the trial court, there is not an affirmative and unambiguous request for a speedy trial on the record." *Id.* Likewise, merely telling the court that a person wants a trial "as soon as possible" is not sufficiently specific to invoke the statutory right to a speedy trial. *People v. Peco*, 345 Ill. App. 3d 724, 734 (2004).

¶ 72 "[T]he defendant bears the burden of affirmatively establishing a speedy-trial violation by showing that the delay was not attributable to his own conduct [citation]." *Id.* at 731. The trial court's decision regarding which party is responsible for a particular delay is entitled to deference and will not be overturned on appeal absent an abuse of discretion. *People v. Mayo*, 198 Ill. 2d 530, 535 (2002). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the court's view. *People v. Rivera*, 2013 IL 112467, ¶ 37; *Cross*, 2022 IL 127907, ¶ 24.

¶ 73 Here, defendant was arrested on May 18, 2017, and remained in custody until his trial. At that time, the speedy-trial term automatically began to run, with, absent any delays occasioned by defendant, a discharge date 120 days later, on September 15, 2017. The parties agree that 46 days elapsed between May 18, 2017, and July 3, 2017. They also agree that defendant caused the speedy-trial term to be tolled for 28 days between July 3, 2017, and July 31, 2017, by seeking to continue the case. At that time, defendant's discharge date, absent additional delays, would have been October 13, 2017. However, defendant takes issue with the trial court's attribution of delay to him for multiple time periods after July 31, 2007.

¶ 74 1. *July 31, 2017, to September 18, 2017*

¶ 75 Defendant first contends the delay caused by his continuance of proceedings on July 3, 2017, ended on July 31, 2017, when the parties appeared for the continued status hearing and defendant asked for a trial date. He then argues, because he specifically requested a trial date, it was the first setting of a trial date, and that date fell within the speedy-trial term, there was no "delay" attributable to him, because there was no "delay" of the speedy-trial term at all. See *People v. Zeleny*, 396 Ill. App. 3d 917, 921-22 (2009) (holding that in the context of section 103-5(b) of the speedy-trial statute, which applies to out-of-custody defendants, a trial date set at a defendant's request within the speedy-trial term was not a "delay"); but see *Lilly*, 2016 IL App (3d) 140286, ¶ 37 (distinguishing *Zeleny* in a case involving an in-custody defendant). Here, however, defendant was in custody, and the trial court found the delay caused by defendant's request for a continuance on July 3, 2017, ended instead on September 18, 2017, which was the date set for trial. While the court did not name a specific case for that rule, it is clear from the court's comments that it was applying this court's rule derived from *People v. Majors*, 308 Ill. App. 3d 1021, 1028 (1999).

¶ 76 In *Majors*, this court held that, when a defendant causes a trial date to be continued without requesting a new trial date, all of the time between the continuance and the next trial setting is attributable to the defendant. *Id.* "Trial setting" in this context means the trial date, not the status hearing date during which the trial date was determined or changed. See *People v. Thompson*, 2021 IL App (4th) 180830-U, ¶¶ 36-38. A defendant cannot obtain an open-ended motion for a continuance, requesting only that the matter be scheduled for a status hearing, and then unilaterally halt the tolling of the speedy-trial term. *Majors*, 308 Ill. App. 3d at 1028. If a defendant had such a right, it would unduly instill in the defendant the ability to undermine and disrupt the presentation of the State's case. *Id.* For example, a defendant could continually seek open-ended continuances, requesting a new trial date at each status hearing, and repeat the process until the speedy-trial term had run, effectively using the speedy-trial act as a sword instead of a shield. Thus, a defendant cannot seek an open-ended continuance, thereby tolling the speedy-trial term, and then withdraw his acquiescence to that tolling and demand a trial within the remaining time. See *Id.* at 1029.

¶ 77 The trial court correctly applied *Majors*. On July 3, 2017, defendant moved to continue without setting a trial date. As such, while there was a status date set, the trial date was left open-ended. When defendant sought that open-ended continuance without seeking a trial date, he took an action that slowed down the criminal justice process and delayed the possibility of a trial. That action also eliminated the possibility the case could be immediately set for trial and effectively moved back the discharge date to an unknown date in the future. Thus, the term was tolled until the trial date that was eventually set, which would have been the conclusion of defendant's previous open-ended continuance. Defendant's act of asking for a trial date on July 31, 2017, and the fact that a trial date ultimately was set within the speedy-trial term, did not change the tolling period, as defendant could not unilaterally halt the tolling that he occasioned.

Indeed, defendant even stated his understanding and agreement to the tolling at the July 3, 2017, hearing. As such, the court did not abuse its discretion in determining that the speedy-trial term was tolled until the next trial setting, which here was September 18, 2017. Thus, at that time, only 46 days had run against the speedy-trial term.

¶ 78 Defendant does not discuss this court's rule derived from *Majors*, and he instead cites *People v. Howard*, 205 Ill. App. 3d 702, 709-10 (1990), for the proposition that, where a continuance is for a set period, the time following that period cannot be attributed to the defendant simply because a specified trial date had not been set. However, *Howard* is a Fifth District case predating *Majors*, and it involved a defendant released on bail with facts indicating the State was the party not ready to proceed at the end of the continuance. In any event, to the extent *Howard* is inconsistent with this court's decision in *Majors*, we decline to follow *Howard*.

¶ 79 Because we apply the rule from *Majors*, we need not address defendant's argument there was no actual delay between July 31, 2017, and September 18, 2017. Nor do we address whether defendant agreed to a continuance or made a speedy-trial demand on July 31, 2017. Those matters are irrelevant because it was defendant's open-ended continuance of July 1, 2017, that acted to delay the matter until the next set trial date, making that entire period attributable to defendant.

¶ 80 We also note defendant argues the period between September 7, 2017, and September 18, 2017, should be attributed to the State. But the rule from *Majors* applies to that time as well. Further, on September 7, 2017, the parties appeared for the scheduled final pretrial conference, the State answered ready for trial, and defendant stated he was not ready for trial and requested a hearing on his motions. The trial court explained to defendant that his motions would delay the trial and toll the speedy-trial term. Defendant confirmed he understood. The court vacated

the September 18, 2017, trial date and set the matter for a hearing on defendant's motions on October 23, 2017. Thus, that delay was clearly attributable to defendant.

¶ 81 2. *October 23, 2017, to December 4, 2017*

¶ 82 Defendant acknowledges that the time between September 18, 2017, and October 23, 2017, was attributable to him, as the delay was occasioned by his motions. At that time, the speedy-trial term remained tolled, with 46 days having run and with a discharge date of January 5, 2018. However, defendant contends the trial court abused its discretion in tolling the speedy-trial term between October 23, 2017, and December 4, 2017, when both parties asked for a trial date. Defendant argues he was not required to object to the new trial date, as no "delay" occurred because the trial date was within the speedy-trial term. However, as with the period between July 31, 2017, and September 18, 2017, defendant previously sought an open-ended continuance. No trial date had been set and, applying *Majors*, the court properly found the term tolled until the next set trial date, which was December 4, 2018.

¶ 83 3. *December 4, 2017, to January 8, 2018*

¶ 84 In its brief, the State initially conceded the court properly determined the 35 days between December 4, 2017, and January 8, 2018, counted against the speedy-trial term. This brought the total time attributable to the State to 81 days. However, later in its brief, the State argues the 39 days from November 30, 2017, to January 8, 2018, are attributable to defendant because he did not specifically invoke his right to a speedy trial when objecting to the continuance requested by the State on November 30, 2017. Given that the docket entry on November 30, 2017, stated the speedy-trial term was *not* tolled, the court apparently understood defendant's objection to the continuance to be an assertion of his right to a speedy trial. We note the State did not object to that determination. Given the lack of an objection, we hold the court did not abuse its discretion

in attributing time to the State based on the continuance of the trial from December 4, 2017, to January 8, 2018. See *People v. Moore*, 99 Ill. App. 3d 664, 667 (1981) (finding no abuse of discretion in the determination a trial demand had been made when the State did not object).

¶ 85 4. *January 8, 2018, to January 16, 2018*

¶ 86 Defendant next argues one day from January 8, 2018, to January 9, 2018, should be attributed to the State based on the judge's statement he was ill and had a doctor's appointment. However, on January 8, 2018, defendant asked for a continuance to the next week. The trial court explained to defendant the delay would not count against the State, and defendant responded, "Okay." Over the State's objection, the court then granted defendant's motion to continue the trial to January 16, 2018, with a final pretrial conference on January 11, 2018. The docket entry for January 8, 2018, stated, "Speedy trial tolled." When there are multiple reasons for a delay, "the fact that the delay was partially attributable to the defendant will be sufficient to toll the statutory term." *People v. Myers*, 352 Ill. App. 3d 684, 688 (2004). Thus, despite the illness of the judge, the delay was occasioned by defendant and tolled the speedy-trial term.

¶ 87 5. *February 5, 2018, to February 13, 2018*

¶ 88 Finally, defendant notes the period between February 5, 2018, and February 13, 2018, was attributed to the State. Defendant does not dispute the tolling of the term between January 16, 2018, and February 5, 2018, when the trial court continued the matter for defendant to file motions. However, after the court set the next trial date for February 5, 2018, the State informed the court one of its witnesses would not be available until February 12, 2018. The court noted that February 12, 2018, was a holiday, so the matter would be set for trial on February 13, 2018. Thus, the court ruled the delay of trial between February 5, 2018, and February 13, 2018, would be attributed to the State. The State does not address the fact the court attributed time to the

State between February 5, 2018, and February 13, 2018. Accordingly, we agree with defendant that the court properly attributed eight days to the State between February 5, 2018, and February 12, 2019. At that time, the total time attributable to the State was 89 days.

¶ 89 6. *February 13, 2018, to April 16, 2018*

¶ 90 Defendant does not dispute that the speedy-trial term was tolled for the remaining time until trial began on April 16, 2018. We observe that defendant occasioned the remaining delays by seeking continuances. Accordingly, the trial court did not abuse its discretion in attributing the delays to defendant. See *Cross*, 2022 IL 127907, ¶ 24. Thus, when trial began on April 16, 2018, 89 days of the speedy-trial term had passed. Accordingly, defendant has not demonstrated the State failed to bring him to trial within 120 days, and there was no violation of his statutory speedy-trial right. Further, because there was no speedy-trial violation, defendant has no basis to claim ineffective assistance of counsel in connection with that issue. See *Id.* ¶ 19 ("Where there is no lawful basis for raising a speedy-trial violation, counsel's failure to assert such a violation cannot establish a violation of either prong of an ineffective assistance of counsel claim under *Strickland*.").

¶ 91 C. Sufficiency of the Indictments

¶ 92 Defendant next argues the indictments failed to state an offense, which he raised for the first time in a *pro se* postsentencing motion in arrest of judgment. He notes the Illinois Controlled Substances Act lists "3,4-methylenedioxymethamphetamine (MDMA)" as a Schedule I drug (720 ILCS 570/204(d)(2) (West 2016)), whereas count I of the indictment alleged he trafficked "methyelenedioxymethamphetamine [*sic*] (MDMA)," and count IV alleged he possessed "methylenedioxymethamphetamine (MDMA)" with the intent to deliver. Defendant

also contends his trial counsel was ineffective for failing to file a motion to dismiss the indictments before trial.

¶ 93 Section 111-3(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3 (West 2016)) specifies a charge must allege the commission of an offense by (1) stating the name of the offense, (2) citing the statutory provision alleged to have been violated, (3) setting forth the nature and elements of the offense charged, (4) stating the date and county of the offense as definitely as can be done, and (5) stating the name of the accused. Here, defendant focuses on the third requirement.

¶ 94 The timing of a defendant's challenge to the charging instrument dictates the analysis. If a defendant challenges the charging instrument before trial, "the charging instrument must strictly comply with the requirements in section 111-3(a)" of the Code. *People v. Carey*, 2018 IL 121371, ¶ 21. If the charging instrument does not comply with section 111-3(a), the trial court must dismiss the charges. *People v. Kidd*, 2022 IL 127904, ¶ 17. The State may then recharge the defendant to correct the defect. 725 ILCS 5/114-1(e) (West 2016).

¶ 95 In contrast, when a charging instrument is attacked for the first time posttrial, a defendant must show he or she was prejudiced in the preparation of his or her defense. *People v. Espinoza*, 2015 IL 118218, ¶ 23. In that context, "the charging instrument is sufficient if it notified the defendant of the precise offense charged with enough specificity to allow the defendant to (1) prepare his or her defense and (2) plead a resulting conviction as a bar to future prosecution arising out of the same conduct." *Carey*, 2018 IL 121371, ¶ 22 (addressing a claim raised for the first time on appeal); see 725 ILCS 5/116-2(c) (West 2020) (adopting the same standard where a defendant challenges the charging instrument for the first time in a motion in arrest of judgment). When evaluating whether a defendant was prejudiced by a defect in a charging instrument, the

reviewing court is not confined to reviewing the charging instrument and may resort to the record to reach a determination. *Carey*, 2018 IL 121371, ¶ 22. Reviewing the sufficiency of a charging instrument presents a question of law that we review *de novo*. *Id.* ¶ 19.

¶ 96 Here, defendant has not demonstrated he was prejudiced by the indictment identifying the substance as either "methyelenedioxymethamphetamine [*sic*] (MDMA)" or "methylenedioxymethamphetamine (MDMA)" rather than "3,4-methylenedioxymethamphetamine (MDMA)." Importantly, the indictment specified the charges pertained to "MDMA," which is the same acronym used in the Illinois Controlled Substances Act. Additionally, at the hearing on defendant's motion in arrest of judgment, defense counsel conceded there had been a lab analysis of the substance, and he received in discovery an affidavit determining that it was "3,4-methylenedioxymethamphetamine, MDMA." Accordingly, before trial, the defense had actual knowledge of both the scientific name and the colloquial name of the illegal substance defendant allegedly trafficked and possessed with the intent to deliver. Under these circumstances, defendant suffered no prejudice from any typo, omission, or deficiency in the indictment.

¶ 97 In arguing to the contrary, defendant relies on cases from foreign jurisdictions. See *State v. Admadi-Turshizi*, 625 S.E.2d 604 (N.C. Ct. App. 2006); *State v. Ledwell*, 614 S.E.2d 412 (N.C. Ct. App. 2005); *Copeland v. State*, 423 So. 2d 1333 (Miss. 1982); *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975). These cases do not change our conclusion, as none of them engaged in the same type of "prejudice" analysis Illinois requires when a defendant challenges an indictment for the first time after trial. Additionally, we note that only one of the cases, *Admadi-Turshizi*, addressed the substance known as 3,4-methylenedioxymethamphetamine. Importantly, in that case, the North Carolina Court of Appeals held that a trial court has jurisdiction over a defendant

only if the indictment alleges all essential elements of the charged crime. *Admadi-Turshizi*, 625 S.E.2d at 605. North Carolina law differs from Illinois law on that point. See *People v. Benitez*, 169 Ill. 2d 245, 256 (1996) (explaining that "a charging instrument which fails to charge an offense does not deprive the circuit court of jurisdiction").

¶ 98 Defendant further alleges ineffective assistance of counsel for failing to challenge the indictment in a pretrial motion, which would have subjected the indictment to more exacting scrutiny. However, defendant has not shown prejudice. Had defense counsel filed a motion to dismiss the indictment before trial based on the indictment's failure to identify the substance by the name listed in the statute, the State would have had the ability to amend the indictment to correct the mistake. See *People v. Frazier*, 2017 IL App (5th) 140493, ¶ 22. Thus, the alleged defect would have been addressed, and the matter still would have proceeded to trial. Accordingly, defendant cannot demonstrate there is a reasonable probability the result of the proceedings would have been different had counsel addressed the issue before trial.

¶ 99 Nevertheless, defendant cites *People v. Spann*, 332 Ill. App. 3d 425, 442 (2002), in support of his ineffective assistance claim. There, the First District found counsel's representation deficient when counsel failed in part to file a motion to dismiss two counts of the defendant's indictment based on the State's failure to satisfy strict statutory pleading requirements. However, *Spann* is distinguishable, as the appellate court in that case determined trial counsel committed numerous serious trial errors, which cumulatively resulted in prejudice. *Id.* at 444. We are not faced here with cumulative errors, as was the case in *Spann*.

¶ 100 D. Constructive Amendment of the Indictments

¶ 101 Defendant next contends the trial court improperly constructively amended the indictments to (1) change an element of controlled substance trafficking from having "brought"

the MDMA to Illinois to "caused to be brought," (2) change the names of the drugs in the indictments, and (3) remove the language "but less than 100 grams." He also contends, with little to no analysis, that the matter is one of plain error or ineffective assistance of counsel.

¶ 102 Defendant bases his argument on a violation of his constitutional rights under the grand jury clause of the fifth amendment (U.S. Const., amend. V). However, the provision of the fifth amendment requiring indictment by a grand jury is not applicable to State criminal proceedings. *People v. Okoro*, 2022 IL App (1st) 201254, ¶ 29 (citing *People v. Redmond*, 67 Ill. 2d 242, 246 (1977), citing *Hurtado v. California*, 110 U.S. 516 (1884)). Instead, we are left with a variance claim—"that is, whether there was a variance between the indictment, trial evidence, and jury instructions and, if so, whether the variance was 'fatal.' " *Id.* As with defendant's argument concerning the sufficiency of the indictment, the timing of the attack on the indictment matters.

> "[W]hen, as here, the indictment or information is challenged for the first time on appeal, our review is limited to determining whether the indictment apprised defendant of the precise offense charged with sufficient specificity to prepare his defense and would allow defendant to plead a resulting conviction as a bar to future prosecution arising out of the same conduct." *Id.* ¶ 33.

¶ 103 "The State must prove the essential elements of the charging instrument." *Id.* ¶ 34. "A variance between allegations in an indictment and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense [citation] or expose him to double jeopardy [citation]." *Id.*

¶ 104 "We consider the plain and ordinary meaning of the language in the indictment as read and interpreted by a reasonable person." *Id.* ¶ 35. "A charging instrument is to be read as a

whole, and where a statute is cited in a count, the statute and count are to be read together." *Id.* "If the essential elements of an offense are properly charged but the manner in which the offense is committed is incorrectly alleged, the error is one of form." *Id.* (citing *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 67).

¶ 105 Here, the State was allowed at trial to argue not only that defendant "brought [MDMA]" into Illinois, he also "caused [MDMA] to be brought" into the state. While the indictment alleged only that defendant "brought" the MDMA into Illinois, the indictment cited the trafficking statute, which provides:

> "[A]ny person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver a controlled substance other than methamphetamine or counterfeit substance in this or any other state or country is guilty of controlled substance trafficking." 720 ILCS 570/401.1(a) (West 2016).

Thus, the statute included the omitted language. Accordingly, any error was a matter of form, and the variance between the indictment's language and the State's proof that defendant caused the drugs to be brought to Illinois was not fatal.

¶ 106 As previously discussed, defendant has also not demonstrated he was prejudiced by the indictment identifying the subject substance as either "methyelenedioxymethamphetamine [*sic*] (MDMA)" or "methylenedioxymethamphetamine (MDMA)" rather than "3,4-methylenedioxymethamphetamine (MDMA)," especially when the indictment specified the charges pertained to "MDMA," which is the same acronym used in the Controlled Substances Act. We further find no showing of prejudice based on later jury instructions removing the language

"but less than 100 grams" from the trafficking charge. As we discuss further when we next address the jury instructions, defendant specifically agreed to and requested that variance.

¶ 107 In sum, we find nothing material about the variances here that could have misled defendant in making his defense or exposed him to double jeopardy. Thus, there was no error. Because there was no error, there likewise was no plain error or ineffective assistance of counsel.

¶ 108 E. Jury Instructions

¶ 109 Defendant next argues the jury instructions were deficient in multiple respects. Defendant recognizes his counsel did not object to the instructions at issue, but he argues plain error applies. Defendant also suggests, with little to no meaningful analysis, that counsel was ineffective for failing to object to or offer certain instructions.

¶ 110 1. *IPI Criminal No. 3.17*

¶ 111 Defendant first contends the trial court plainly erred when it failed to give Illinois Pattern Jury Instructions, Criminal, No. 3.17 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.17), referred to as the accomplice witness instruction. Defendant argues Dominguez's admission he resided at the residence entitled defendant to the instruction.

¶ 112 IPI Criminal No. 3.17 provides, "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." *Id.* The underlying rationale reflected in the pattern instruction "is that it is fair to question the testimony of a witness who has admittedly participated in the crime at issue in the proceedings." *People v. Fane*, 2021 IL 126715, ¶ 35.

¶ 113 Here, Dominguez did not admit to any involvement in the crime. Therefore, IPI Criminal No. 3.17 was irrelevant. As such, there was no error in the trial court not giving the instruction, and hence no plain error or ineffective assistance of counsel.

¶ 114 2. *IPI 2.01 and 26.01 and Removal of the Phrase "But Less Than 100 Grams"*

¶ 115 Defendant next contends the trial court erred when it provided multiple verdict forms and instructed the jury using IPI Criminal Nos. 2.01 and 26.01 to instruct the jury about the charges instead of Illinois Pattern Jury Instructions, Criminal, Nos. 2.01Q and 26.01Q (approved Dec. 8, 2011) (hereinafter IPI Criminal No. 2.01Q and IPI Criminal No. 26.01Q), which pertain to lesser-included offenses. Defendant argues the State admitted lesser-included offenses applied, points to committee notes stating IPI Criminal Nos. 2.01 and 26.01 should not be used when that is the case, and argues the multiple verdict forms misled the jury. Defendant also takes issue with the court's removal of the phrase "but less than 100 grams" from the instructions defining the crimes. However, based on the unique facts of the case, defense counsel expressly agreed with the court's suggestion to remove the phrase "but less than 100 grams" and instruct the jury without reference to the lesser-included offenses. Thus, not only was there no objection to the instructions, but counsel also affirmatively invited the court to use the instructions that were given.

¶ 116 When defense counsel affirmatively invites the trial court not to instruct the jury on a lesser-included offense, the defendant may not raise a challenge to the instructions under the plain-error doctrine. See *People v. Villarreal*, 198 Ill. 2d 209, 227-28 (2001). Further, when defense counsel agrees to the forms which were used, the defendant cannot directly attack the verdict forms. See *id.* " '[W]here, as here, a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby.' " *Id.* at 227. "Active participation in the direction of proceedings, as in this case, goes beyond mere waiver," and to allow the defendant to

object on appeal to the verdict forms he agreed to at trial would offend notions of fair play. See *id*. Normally, neither Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), allowing parties to raise plain error, nor Illinois Supreme Court Rule 451(c) (eff. April 8, 2013), which overrides waiver when "the interests of justice require," are applicable "where the instruction of which defendant complains on review is one which he himself tendered in the trial court." *People v. Smith*, 71 Ill. 2d 95, 104 (1978). It is well-established that a defendant may not ask the court to proceed in a certain manner and then contend on appeal that the order which he obtained was in error. *Villarreal*, 198 Ill. 2d at 228.

¶ 117 Here, the trial court raised a concern about the instructions based on the unique circumstances of the case, where investigators had removed a portion of the MDMA forming the basis of the controlled substance trafficking charges. To avoid confusion and inconsistent verdicts, the court suggested either instructing the jury on lesser-included offenses or removing the upper parameter of the offenses and avoiding lesser-included offense instructions. The court said it preferred the latter. Defense counsel stated the court's position was "logical" and addressed the concern "in an appropriate way." Counsel further stated he preferred the court's proposed instructions rather than instructing the jury about lesser-included offenses. As the court and the attorneys went through the instructions to implement the changes, defense counsel indicated each time he had no objection. Under these circumstances, we determine defense counsel affirmatively invited the court not to instruct the jury using lesser-included offense instructions. Thus, defendant may not raise a challenge pursuant to the plain-error doctrine. See *id.* at 227-28.

¶ 118 Defendant also suggests, without analysis, that counsel was ineffective for agreeing to the instructions. However, while defendant cited the *Strickland* standard in a different portion of his brief, defendant fails to argue specifically how it applies to this issue. In particular, defendant

does not address how defense counsel's agreement to the instructions was not a matter of reasonable trial strategy, especially in light of the trial court's comments illustrating the potential for confusion and its suggestion of a reasonable solution that defense counsel agreed with.

¶ 119 Defense counsel's decision as to what jury instructions to tender is one of several determinations widely recognized as matters of trial strategy. *People v. Lowry*, 354 Ill. App. 3d 760, 766 (2004). Because defendant has failed to present any argument on this critical element of the *Strickland* test, he has forfeited his claim of ineffective assistance of counsel. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (requiring a brief to contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on," and providing that "[p]oints not argued are forfeited"); see also *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88 (finding a defendant forfeited his ineffective assistance of counsel claim because he made a cursory argument and did "not cite any authority").

¶ 120 Defendant also argues the effect of the instructions and jury forms resulted in legally inconsistent verdicts. The trial court proposed the instructions and verdict forms precisely to avoid inconsistent verdicts. Defense counsel specifically agreed with and requested that approach. Thus, for the reasons previously discussed, defendant cannot contend on appeal that the order which he obtained was in error. Further, we note defendant was ultimately sentenced on charges that he trafficked more than 100 grams and possessed with the intent to deliver more than 15 grams and less than 100 grams. Those verdicts are not inconsistent.

¶ 121 F. Sufficiency of the Evidence

¶ 122 Defendant next argues the evidence was insufficient to prove him guilty beyond a reasonable doubt. Defendant first argues, based on the indictment, the State was required to prove he "brought" the MDMA into the state, and it failed to do so when the package arrived via a

delivery service. He next argues, even if it was permissible for the State to prove he "caused" the MDMA to be brought into the State, evidence of receipt and possession of an unopened package is insufficient to prove guilt.

¶ 123 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The determination of the credibility of each witness, the weight to be given to his or her testimony, and the resolution of any conflicts in the evidence is within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). "Moreover, the testimony of a single witness, if positive and credible, is sufficient to prove a defendant guilty beyond a reasonable doubt." *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 62. Further, minor inconsistencies in the testimony do not, of themselves, create a reasonable doubt as to a defendant's conviction. *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993).

¶ 124 1. *The Trafficking Conviction*

¶ 125 Defendant first contends the indictment alleged he "brought" MDMA into Illinois, whereas the evidence showed law enforcement intercepted the package in New York and sent it to Illinois. Thus, he contends the State failed to prove he "brought" the MDMA to Illinois.

¶ 126 Section 401.1(a) of the Controlled Substances Act provides:

> "Except for purposes as authorized by this Act, any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver a controlled substance other than methamphetamine or counterfeit substance in this or any other state or country is guilty of controlled substance trafficking." 720 ILCS 570/401.1(a) (West 2016).

Because section 401.1(a) criminalizes either (1) the action of knowingly bringing a controlled substance into Illinois or (2) causing it to be to be brought into the state, defendant argues the State was obligated to choose which one to prove, and based on the indictment, the State chose to show he "brought" the MDMA to Illinois. We disagree.

¶ 127 This court has previously held there are two primary elements of the offense of controlled substance trafficking: (1) that controlled substances were brought or caused to be brought into Illinois and (2) venue, meaning where the act of causing drugs to be brought into the State was committed. *People v. Izquierdo*, 262 Ill. App. 3d 558, 561 (1994). By using the word "or," the statute plainly allowed the State to prove either that defendant personally brought MDMA into Illinois or that he caused MDMA to be brought into Illinois. See *People v. Frieberg*, 147 Ill. 2d 326, 349 (1992) (explaining that "the word 'or' marks an alternative indicating the various members of the sentence which it connects are to be taken separately"). We disagree that the State was required to choose to prove only one of the two options.

¶ 128 Further, as previously discussed, there was no fatal variance between the indictment and the proof at trial, and the jury was properly instructed about defendant causing MDMA to be brought into Illinois. Thus, the State was not limited to proving solely that defendant "brought" the MDMA to Illinois, as opposed to "causing" it to be brought to the state.

¶ 129 Defendant next contends the State failed to prove he caused the MDMA to be brought into Illinois, as there was no evidence he ordered the package containing MDMA that was delivered to Hancock Drive. However, the State presented adequate circumstantial evidence to prove otherwise. Evidence supporting the conclusion defendant ordered the MDMA included that (1) the package was addressed to a residence where defendant purportedly lived and admittedly managed; (2) defendant claimed to have ordered another package to be delivered to that address; (3) defendant accepted the package containing the MDMA despite it being addressed to someone who did not reside there; (4) defendant put the package in a locked basement, where officers found additional MDMA, a scale, calibrating weights for that scale, baggies, $900 in cash, and documents bearing defendant's name; and (5) there was no indication anyone else had a key or access to the basement. Although defendant testified that he did not order the MDMA, the jury was free to discredit his testimony.

¶ 130 Defendant also argues the State failed to prove he trafficked more than 100 grams of MDMA, as the package he accepted on May 18, 2017, contained approximately only 31 grams. However, the evidence showed a sergeant with the Illinois State Police removed approximately 80 of the 112.1 grams of MDMA that were contained in the original packaging in order to protect the evidence. At that time, defendant had already caused the MDMA to be brought to Illinois. Thus, the jury rationally found that defendant caused the entire 112.1 grams of MDMA to be delivered to Illinois, even though he ultimately took possession of approximately 31 grams. Accordingly, the State proved defendant guilty beyond a reasonable doubt of controlled substance trafficking.

¶ 131 2. *The Possession Convictions*

¶ 132 Defendant next contends the State failed to prove him guilty beyond a reasonable doubt of possession of a controlled substance with the intent to deliver. He first argues the State

did not prove the controlled substance he possessed when the indictment did not allege he possessed "3,4-methylenedioxymethamphetamine (MDMA)." For the reasons previously discussed when addressing the indictments, we hold that argument lacks merit.

¶ 133 Defendant also contends the State failed to prove he knowingly constructively possessed the MDMA found in the coats in the basement. In presenting this argument, defendant reasons (1) it was not clear whether Wahls and Dominguez were referencing defendant when they testified about "Stephen" living in the basement at Hancock Drive, (2) Dominguez's testimony about not doing laundry in the basement and having a conversation with defendant on May 18, 2017, was not credible, and (3) the various items bearing defendant's name found in the basement were consistent with him being a property manager rather than a resident of the location.

¶ 134 Under Section 401 of the Controlled Substances Act, "Except as authorized by this Act, it is unlawful for any person knowingly to *** possess with intent to *** deliver[ ] a controlled substance." 720 ILCS 570/401 (West 2016). To prove possession of a controlled substance with the intent to deliver, the State must prove (1) the defendant had knowledge of the presence of the controlled substance, (2) the controlled substance was in defendant's immediate possession or control, and (3) defendant intended to deliver the controlled substance. See *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008).

¶ 135 "Possession of contraband may be actual or constructive." *People v. Anderson*, 2018 IL App (4th) 160037, ¶ 31. Actual possession is proved by testimony which shows that the defendant has exercised some dominion over the contraband. *Id.* The act of dominion may be that the defendant had the contraband on his body, that he tried to conceal it, or that he was seen throwing it away. *Id.* "However, mere proximity is not sufficient evidence to prove actual possession." *Id.*

¶ 136 " 'Actual possession need not be demonstrated when constructive possession can be inferred.' " *Id.* ¶ 32. Constructive possession exists where there is no personal dominion over the contraband, but the defendant has control over the area where the contraband was found. *People v. Hunter*, 2013 IL 114100, ¶ 19. In such an instance, the State must prove beyond a reasonable doubt the defendant had knowledge of the presence of the contraband and exercised "immediate and exclusive" control over the area where the contraband was discovered. *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19. Significantly, evidence establishing constructive possession is " 'often entirely circumstantial.' " *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003) (quoting *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002)). Knowledge and possession are questions of fact to be resolved by the trier of fact, and those findings should not be disturbed on review unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of guilt. *Anderson*, 2018 IL App (4th) 160037, ¶ 32.

¶ 137 "Generally, habitation of the location where contraband is found is sufficient evidence of control constituting constructive possession." *People v. Terrell*, 2017 IL App (1st) 142726, ¶ 19; see *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 14 ("Constructive possession of contraband is often found where it is located on premises over which the defendant has control, such as the defendant's home."). "Evidence of residency or habitation often takes the form of rent receipts, utility bills, or mail." *Terrell*, 2017 IL App (1st) 142726, ¶ 19.

¶ 138 Here, viewing the evidence in the light most favorable to the State, the jury rationally found defendant constructively possessed the MDMA. The evidence showed defendant entered the locked basement to store a package containing MDMA moments before his arrest. There was no indication that anyone else had a key to the basement. In the basement, along with the package of MDMA, officers found MDMA in two coat pockets. Also located were various

items associated with defendant, including his voter registration card, mail, packages, and a utility bill dated May 11, 2017. Moreover, Dominguez expressly testified defendant resided in the basement on May 18, 2017. Another former tenant, Wahls, likewise testified defendant had resided in the basement when he lived there in summer 2015. Although the package was addressed to Wahls, Wahls did not order it.

¶ 139 In challenging the State's evidence of constructive possession, defendant isolates individual pieces of evidence rather than focusing on the collective facts. For example, citing *People v. Ackerman*, 2 Ill. App. 3d 903, 905-06 (1971), defendant asserts the mere possession of an unopened package is insufficient to establish proof of possession beyond a reasonable doubt. Likewise, defendant asserts possession of keys alone cannot establish constructive possession.

¶ 140 In *Ackerman*, the evidence was insufficient to support an inference of knowledge that packages contained narcotics when the evidence proved only that the defendant received a package in the course of a normal mail delivery and placed it under his arm "for about five seconds." *Id. Ackerman* has been distinguished when, as is the case here, there was a sequence of events in which the defendant picked up a package containing a controlled substance and the package was then found in plain view in the defendant's residence with other paraphernalia. *Bui*, 381 Ill. App. 3d at 421.

¶ 141 Here defendant did more than merely handle the package of MDMA or possess keys to the basement. Instead, he placed the MDMA in a locked area containing additional amounts of MDMA and paraphernalia when there was both direct testimony and strong circumstantial evidence that he resided there and had exclusive access to the area.

¶ 142 Defendant also cites various cases to suggest the mail found in the basement was insufficient to prove constructive possession and argues it was reasonable he would receive mail

at a location where he was the property manager. However, those cases are distinguishable, as they lacked a strong connection between the defendant and the premises where the contraband was found. See *People v. Alicea*, 2013 IL App (1st) 112602, ¶¶ 31-32 (noting a lack of strong evidence of constructive possession and a reasonable explanation for papers to be at the address at issue); *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 24 (stating the mere evidence of two mailings was insufficient given the lack of any direct evidence establishing the defendant's control over the premises); *People v. Ray*, 232 Ill. App. 3d 459, 462-63 (1992) (noting "scant evidence," other than a lone six-month-old cable television bill, to show habitation in the apartment where contraband was found). Here, as previously noted, aside from circumstantial evidence, there was direct testimony defendant resided in the basement of Hancock Drive and had exclusive control over the area.

¶ 143 Defendant further contends Dominguez and Wahls could have been referencing a different "Stephen" in their testimony. He also suggests Dominguez's testimony lacked credibility. We find those arguments frivolous. The full context of the testimony made it clear the witnesses were referencing defendant. Furthermore, the jury was entitled to credit Dominguez's testimony over defendant's conflicting testimony.

¶ 144 Finally, citing cases pertaining to plain error, defendant suggests the evidence was insufficient because it was closely balanced. Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). Thus, whether the evidence here was closely balanced is irrelevant to the determination of whether the evidence was sufficient to sustain defendant's convictions.

¶ 145 G. One-Act, One-Crime Challenge

¶ 146 Defendant next contends his convictions of controlled substance trafficking and possession of a controlled substance with the intent to deliver violated the one-act, one-crime rule. Defendant argues the crimes of controlled substance trafficking and possession of a controlled substance with the intent to deliver involved the same act. He further argues, if multiple acts were involved, possession with intent to deliver is a lesser-included offense of controlled substance trafficking.

¶ 147 The one-act, one-crime doctrine prohibits multiple convictions which arise from the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). When evaluating whether a conviction violates the one-act, one-crime rule, we must determine (1) whether the defendant committed multiple acts and (2) if so, whether any of the charges are lesser-included offenses. *King*, 66 Ill. 2d at 566, *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). We review *de novo* whether a defendant's convictions violate the one-act, one-crime rule. *People v. Csaszar*, 375 Ill. App. 3d 929, 943 (2007).

¶ 148 Defendant first argues his convictions of controlled substance trafficking and possession of a controlled substance with the intent to deliver were based on the same physical act. Our supreme court has "defined 'act' as 'any overt or outward manifestation which will support a different offense.' " *People v. Price*, 2011 IL App (4th) 100311, ¶ 26 (quoting *King*, 66 Ill. 2d at 566). A defendant may be convicted of two offenses when a common act is part of both offenses. *Id.* As long as there are multiple acts as defined in *King*, the interrelationship of the offenses does not preclude multiple convictions. *Id.* For example, we recently held, where home invasion and residential burglary convictions shared the act of entry, but home invasion required the additional act of causing injury to a resident, the offenses were not carved out of the same physical act. *Id.* ¶ 30.

¶ 149 Here, defendant was convicted of controlled substance trafficking, which required proof defendant brought or caused to be brought MDMA into Illinois with the intent to deliver. He was also convicted of possession of MDMA with the intent to deliver based on the presence of MDMA in his residence, coupled with items presenting an indicia of drug dealing. While both the trafficking and possession offense shared the requirement of an intent to deliver MDMA, the trafficking charge required the additional act of bringing the drugs or causing the drugs to be brought into the state. Thus, the offenses were not carved out of precisely the same physical act.

¶ 150 Relying on *People v. Crespo*, 203 Ill. 2d 335 (2001), defendant argues that to truly have separate acts, the State was required to apportion the charges between the drugs that were mailed and those found in the coat pockets. But apportionment is not at issue here, since both offenses, regardless of the drugs at issue, involved separate acts. See *People v. Melvin*, 2023 IL App (4th) 220405, ¶ 26 (determining that apportionment was not at issue where one charged offense alleged an element that was not an element of the other offense). Further, we note defendant was sentenced for possession of a controlled substance with the intent to deliver more than 15 but less than 100 grams of MDMA, while he was sentenced for controlled substance trafficking of more than 100 grams. While the State did not clearly apportion the acts of possessing the MDMA found in the coats from the MDMA in the package that was mailed, the record supports the conclusion the possession charges were based on the drugs found in the coat pockets, which was separate from the MDMA that was the subject of the trafficking charge.

¶ 151 Having found multiple acts, the next question is whether possession of a controlled substance with the intent to deliver is a lesser-included offense of controlled substance trafficking. In 1993, the First District, in *People v. Lynch*, 241 Ill. App. 3d 986, 992-93 (1993), with little analysis other than to compare the statutes at issue, held the possession of cannabis with the intent

to deliver was a lesser-included offense of cannabis trafficking. There, the court noted the trafficking offense included all of the elements of possession with the intent to deliver, with the additional element of bringing cannabis into the state. *Id.* Further, in *People v. Barraza*, 253 Ill. App. 3d 850, 856-57 (1993), we accepted the State's concession that possession of cannabis with the intent to deliver was a lesser-included offense of cannabis trafficking. However, both of those cases were decided before our supreme court clarified the proper method of analyzing the issue.

¶ 152 Previously, Illinois courts "[had] identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166. However, in *Miller*, our supreme court made it clear that, where a defendant is charged with multiple offenses and the question is whether one of those charged offenses is a lesser-included offense of another charged offense, courts must apply the "abstract elements" approach. *Id.* at 174-75. Under that approach:

> "[A] comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, *it must be impossible to commit the greater offense without necessarily committing the lesser offense*. [Citations.]" (Emphasis added.) *Id.* at 166.

See *People v. Novak*, 163 Ill. 2d 93, 106 (1994), *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353 (2006).

¶ 153 Here, controlled substance trafficking requires the defendant to have brought drugs or caused to have brought drugs into the state. It is possible an accused could commit the greater offense of controlled substance trafficking without the possession element of the lesser offense of possession of a controlled substance with the intent to deliver by causing drugs to be mailed to the state with the requisite intent but not actually taking possession of them. For example, a defendant could have the drugs mailed to another person in the state with the intent to later deliver them, or a defendant could have the drugs brought to an Illinois location but not succeed in taking possession of them. Thus, applying the abstract elements approach from *Miller*, we find it is not impossible to commit the greater offense without necessarily committing the lesser offense. Accordingly, possession of a controlled substance with the intent to deliver is not a lesser-included offense of controlled substance trafficking. To the extent *Lynch* and *Barraza* hold otherwise, we decline to follow them. Because there were separate acts, and possession of a controlled substance with the intent to deliver is not a lesser-included offense of controlled substance trafficking, there was no violation of the one-act, one-crime rule.

¶ 154 H. *Krankel* Proceedings

¶ 155 Defendant next takes issue with the trial court's denial of his ineffective assistance of counsel claims after the first *Krankel* proceeding and its denial of the appointment of counsel when he raised claims of ineffective assistance of his *Krankel* counsel.

¶ 156 1. *Denial of Claims Following the First* Krankel *Proceeding*

¶ 157 Defendant first contends the trial court applied the wrong standard when it denied his posttrial ineffective assistance claims. Specifically, defendant argues that, in finding after the

Krankel inquiry that trial counsel did not render ineffective assistance, the court failed to follow the proper standard from *Strickland* that considers whether, but for counsel's deficient performance, the outcome of the proceedings would have been different. Defendant notes the court at times wrote that counsel's allegedly deficient performance "probably" would not have changed the trial outcome. Based on this, defendant suggests the court confused the proper *Strickland* standard with the standard for newly discovered evidence, which requires the court to consider whether the evidence would " 'probably change the result on retrial.' " *People v. Whalen*, 2020 IL App (4th) 190171, ¶ 100.

¶ 158 A common-law procedure has developed from our supreme court's decision in *Krankel* that governs a *pro se* posttrial claim alleging ineffective assistance of counsel. *People v. Jackson*, 2020 IL 124112, ¶ 95. The procedure " 'serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims.' " *Id.* (quoting *People v. Patrick*, 2011 IL 111666, ¶ 39).

¶ 159 "New counsel is not automatically appointed in every case when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel." *Id.* ¶ 97. Instead, when a defendant makes such a claim, the trial court first examines its factual basis. If the court determines the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. *Id.* "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* The new counsel would then represent the defendant at the hearing on the *pro se* claim of ineffective assistance of counsel. *Id.* Here, the court appointed counsel to investigate some of defendant's claims.

¶ 160 During *Krankel* proceedings, the trial court analyzes whether the defendant's claims lack merit by applying the *Strickland* standard. See *People v. Cherry*, 2016 IL 118728,

¶¶ 32-33. "The applicable standard of review depends on whether the trial court did or did not determine the merits of the defendant's *pro se* posttrial claims of ineffective assistance of counsel." *Jackson*, 2020 IL 124112, ¶ 98. "Whether the trial court properly conducted a *Krankel* preliminary inquiry presents a legal question that we review *de novo*." *Id.* "However, if the trial court has properly conducted a *Krankel* inquiry and has reached a determination on the merits of the defendant's *Krankel* motion, we will reverse only if the trial court's action was manifestly erroneous." *Id.*

¶ 161 Here, in its written order, the trial court properly articulated the *Strickland* standard, citing *Strickland* directly, and writing, "A claim of ineffective assistance of counsel will only be sustained if counsel has failed to perform in a reasonably effective manner and there is a reasonable probability that, but for this substandard performance, the outcome of the proceedings would have been different." (citing *Strickland*, 466 U.S. at 694). While the court at times in its analysis used the word "probably" instead of "reasonable probability," it is clear from the context of the court's order that it understood and was applying the *Strickland* standard, and it was merely restating that standard at times using analogous language. Accordingly, defendant's claim on this issue lacks merit.

¶ 162 2. *Second* Krankel *Proceeding*

¶ 163 Defendant also argues the trial court erred by not appointing counsel to investigate his claims of ineffective assistance of *Krankel* counsel in connection with the first *Krankel* hearing. Defendant takes issue with the court's statement that the first *Krankel* hearing "wasn't [a] time to gather and present evidence to the Court in terms of trial type evidence." He suggests, because courts have referred to evidentiary hearings in connection with *Krankel* hearings (see *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991)), *Krankel* counsel was required to introduce evidence. Thus,

defendant contends the court's decision to not appoint counsel to investigate the ineffective assistance of *Krankel* counsel was based on a misapprehension of the law.

¶ 164 When the trial court conducts a *Krankel* inquiry, "[t]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 78 (2003). During that evaluation, some interchange between the court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary to assess what further action, if any, is warranted on a defendant's claim. *Id.* "Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations." *Id.* "A brief discussion between the trial court and the defendant may be sufficient." *Id.* "Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.*

¶ 165 Here, the trial court correctly informed defendant that counsel was not required to submit evidence in support of defendant's claims of ineffective assistance. Further, a review of defendant's allegations shows defendant failed to show the court erred in declining to appoint counsel to investigate his claims of ineffective assistance of *Krankel* counsel. While defendant listed a variety of types of evidence he thought should have been presented, his allegations generally lacked specificity, and he did not elaborate on how the evidence would have changed the outcome of the trial. Doing so would require speculation on our part. Thus, even if there was evidence *Krankel* counsel could have presented, defendant failed to show prejudice under *Strickland*. Accordingly, defendant's argument on this issue lacks merit.

¶ 166 I. Sentencing Issues

¶ 167 Finally, defendant raises several sentencing issues.

¶ 168 1. *Eighth Amendment*

¶ 169 Defendant contends his 24-year sentence for controlled substance trafficking violates the eighth amendment as cruel and unusual punishment. See U.S. Const., amend. VIII. He contends his sentence is disproportionate to cases in other jurisdictions, arguing he found only 16 cases involving MDMA with a penalty imposed of over 20 years. In the trial court, defendant further presented a list of statutory sentencing ranges in each state for crimes involving MDMA or similar controlled substances to show that Illinois has an unusually high sentencing range. He also points to various studies showing the beneficial uses of MDMA and suggesting it is not a dangerous drug and will be or should be legalized in the near future.

¶ 170 The penalty in Illinois for the offense of controlled substance trafficking is a term of imprisonment not less than twice the minimum term of imprisonment authorized by section 401 of the Act. 720 ILCS 570/401.1(b) (West 2016). Section 401(a)(7.5)(b)(i) provides a sentence of 9 to 40 years for possession with intent to deliver 100 grams or more of MDMA. 720 ILCS 570/401(a)(7.5)(b)(i) (West 2016). Thus, defendant faced a prison term of 18 to 80 years. The trial court sentenced him to 24 years.

¶ 171 The eighth amendment states that "cruel and unusual punishments" shall not be inflicted and has been interpreted to include "a narrow proportionality principle." U.S. Const., amend. VIII; *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part, joined by O'Connor and Souter, JJ.). Defendant relies solely on the U.S. Constitution and does not invoke the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 172 "[O]utside the context of capital punishment, successful challenges to the proportionality of a particular sentence are exceedingly rare." *People v. Adams*, 198 Ill. App. 3d

74, 82 (1990), *aff'd*, 144 Ill. 2d 381 (1991) (citing *Solem v. Helm*, 463 U.S. 277, 289-90 (1983)). "Moreover, reviewing courts should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crime." *Id.*

¶ 173 The United States Supreme Court has held a sentence of life in prison without the possibility of parole for possession of cocaine did not violate the eighth amendment. *Harmelin*, 501 U.S. at 994-96; see *United States v. Jones*, 674 F.3d 88, 96-97 (1st Cir. 2012) (upholding a life sentence for a 30-year-old defendant for a drug distribution conviction). Further, in addressing proportionate penalties under the Illinois Constitution, the appellate court has noted the controlled substance trafficking statute was reasonably designed to remedy the danger posed by interstate drug traffickers. *People v. Sesmas*, 227 Ill. App. 3d 1040, 1051 (1992). Thus, the court concluded it was reasonable for the legislature to determine that interstate drug traffickers should be penalized more severely than intrastate traffickers. *Id.* On this point, we note the federal court of appeals' reasoning that, while some regard American drug policy as in disarray, and various sentences often cause disquiet among judges, lawyers, and others, the legislative branch of government, unlike the judiciary, sets both sentencing policy and the prescribed range of sentences for drug crimes. *Jones*, 674 F.3d at 96-97. Thus, while defendant points out potentially changing views concerning MDMA and suggests the legislature has set an inappropriate sentencing range,

> "[a]bsent a clear violation of a constitutional limitation, as where the penalty under the statute is so disproportionate to the offense that it is cruel or degrading or shocks the moral sense of the community, we will not interfere with the legislature's determination of the character and extent of the penalty for the crime." *Sesmas*, 227 Ill. App. 3d at 1051.

¶ 174 Here, given our legislature's view of the gravity of the offense and the Supreme Court's decision in *Harmelin*, we decline to find Illinois's sentencing range for controlled substance trafficking violates the eighth amendment. As such, defendant's 24-year sentence does not violate the eighth amendment.

¶ 175 2. *Ineffective Assistance of Counsel at Sentencing*

¶ 176 Defendant next argues his counsel rendered ineffective assistance at sentencing for a litany of reasons. However, defendant mostly provides nothing more than a bare assertion of ineffective assistance, without any meaningful explanation of the facts or legal analysis. As previously noted, a defendant must provide more than bare conclusory statements of ineffective assistance of counsel. Accordingly, other than defendant's argument concerning counsel's failure to present studies concerning the effects of MDMA and the sentences imposed in similar cases in Illinois, we find his arguments of ineffective assistance have been forfeited.

¶ 177 Citing unpublished federal district court cases, defendant argues counsel rendered ineffective assistance by failing to present studies to the trial court at sentencing to show that MDMA presents less harm than other drugs. Defendant then concludes, had that information been provided to the court, there was a reasonable probability his sentence would have been different. We disagree.

¶ 178 First, we note defendant's 24-year sentence was at the low end of the sentencing range. At the hearing on the motion for resentencing, counsel specifically argued to the trial court defendant's allegation from his *pro se* motion to reconsider his sentence that MDMA was a less harmful drug that was perhaps misclassified by the legislature as a more serious substance. The court also noted defendant's eighth amendment and proportionality arguments. The State emphasized defendant's previous convictions and the amount of MDMA at issue. The court noted

it previously rejected the State's argument for a longer sentence. The court then noted the legislature's determination that controlled substance trafficking was a more serious offense. Thus, given the court was presented with the information after sentencing and declined to reconsider the sentence in light of it, even if we were to find counsel should have presented the material earlier, defendant has not shown his sentence would have been different.

¶ 179 Defendant also argues counsel failed to show that other trial courts were not sentencing offenders in Illinois to terms of over 20 years for offenses related to MDMA. However, his allegation was conclusory, as he failed to provide specific facts from relevant other cases, such as the exact charges and the aggravating and mitigating facts in those cases. Further, a trial court is not required to justify its sentence in relation to the sentences imposed in other cases, and a defendant cannot attack a sentence on the basis a defendant in a separate, unrelated case received a lighter sentence. *People v. Fern*, 189 Ill. 2d 48, 62 (1999). Accordingly, counsel did not render ineffective assistance by failing to present such information to the court.

¶ 180 III. CONCLUSION

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

¶ 182 Affirmed.