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FIRST DIVISION
FILED: FEBRUARY 22, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY
)	
v.)	No. 08 CR 4330
)	
REGINALD BARRETT,)	HONORABLE
)	DENNIS J. PORTER,
Defendant-Appellant.)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

- HELD: 1. The trial court's failure to strictly comply with the requirements of Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R431(b), eff. May 1, 2007) did not deprive the defendant of a fair trial and was forfeited for lack of an objection.
2. The trial court did not abuse its discretion by permitting the State to elicit testimony explaining the course of a police investigation.
3. The trial court improperly assessed a \$25 court service fee and a \$5 court system fee against the defendant.
4. The defendant is entitled to an \$805 credit against the fines assessed against him for pre-sentence time

No. 1-09-0754

which he spent in custody.

Following a jury trial, the defendant, Reginald Barrett, was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver. He was sentenced to two concurrent 10-year terms of incarceration and assessed \$1710 in fines and fees. On appeal, the defendant contends that: (1) he was denied his right to a fair trial when the circuit judge failed to ask potential jurors whether they understood and accepted certain principles of law set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); (2) the circuit court erred in permitting the State to elicit prejudicial hearsay testimony under the guise of explaining the course of a police investigation; (3) the circuit court erred in failing to give the jury a limiting instruction explaining the purpose for which it was to consider the police investigation testimony; (4) the circuit court improperly assessed a \$25 court service fee and a \$5 court system fee against him; and (5) he is entitled to an \$805 credit against the fines assessed against him for pre-sentence time which he spent in custody. For the reasons which follow, we: vacate the \$25 court service fee and the \$5 court system fee assessed against the defendant; order the circuit court to grant the defendant a \$805 credit for pre-sentence time in custody against the remaining fines assessed against him; and affirm the circuit court's judgment in all other respects.

No. 1-09-0754

The following summary taken from the evidence elicited at the defendant's trial is confined to the facts necessary to resolve the issues raised by this appeal.

On February 6, 2008, Chicago police officers Green, Hatch, Lyke, and Burns executed an unrelated search warrant in the area of 57th Street and South Justine Street in Chicago. Following the execution of the warrant, Officer Green was standing on the porch of the house which had been searched when he was approached by an unknown man who told him of a "dope line" (a phone number which a person can call and order narcotics to be delivered at a location of the caller's choosing). The telephone number was 312-525-0206. Officer Green talked to the unknown individual for approximately 5 minutes before the man left. None of the other officers were present during the conversation.

Following Officer Green's conversation with the unknown individual, the officers decided to make a narcotics purchase and arrest with the information supplied to Officer Green. They agreed that Officer Green, who was dressed in civilian clothes, would make the narcotics purchase; Officer Hatch would act as the surveillance officer, watching the transaction from a concealed location; and Officers Lyke and Burns would act as the enforcement officers. Officer Green called the "dope line" phone number which had been supplied to him. When an unknown male answered the phone, Officer

No. 1-09-0754

Green identified himself as "Dre" and ordered six packets of heroin. He told the man who answered the phone that he wanted to meet him at the north end of 57th and Justine.

After making the phone call, Officer Green took up a position on Justine Street, about 3 houses from the corner of 57th Street. About 10 minutes later, Officer Green saw a silver Mercury Sable, the car which he testified had been described to him when he arranged the purchase, stop on 57th Street, just outside of the cul-de-sac on Justine. Officer Green approached the vehicle, and the driver, whom Officer Green identified as the defendant, stepped out of the vehicle and walked toward him. The defendant asked Officer Green if he was "Dre." Officer Green said that he was and asked the defendant if he had six "hits" of heroin. When the defendant said that he did, Officer Green gave a prearranged signal to Officer Hatch, who in turn radioed Officers Lyke and Burns. The defendant reached into his pocket and pulled out six tinfoil packets taped together and handed them to Officer Green. According to Officer Green, he stood on the street looking at the items in an effort to stall for time until the two enforcement officers could arrive. He never gave the defendant any money because he did not want to risk losing \$150 of his own money. Although Officer Hatch saw Officer Green give the prearranged signal, he did not observe the narcotics transaction itself.

No. 1-09-0754

Officers Lyke and Burns arrived seconds later in an unmarked police car bearing municipal license plates. They had been parked in an alley near 57th Street. As they drove toward the defendant, Officer Green attempted to grab him, but the defendant was able to get back to his car and drive away. Officers Lyke and Burns gave chase, following the defendant as he drove on 57th Street to Throop Street. The defendant abandoned his vehicle on Throop and fled on foot. Officer Lyke apprehended the defendant in front of 5740 S. Throop Street and placed him under arrest. When searched by Officer Lyke, the defendant had in his possession \$182, a wallet, and one packet containing heroin. Officer Lyke gave those items to Officer Burns. Officer Burns searched the car that the defendant was driving and found a cell phone. However, the phone's number was not the number which Officer Green had called to arrange the narcotics purchase, nor did it appear that a call to the "dope line" number or from that number been made from or received by the phone. When the officers arrived at the police station, Officer Green delivered the suspected narcotics to Officer Bozek to be inventoried. Officer Burns also delivered the items taken from the defendant and his vehicle to Officer Bozek

The defendant was indicted for one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver. Prior to trial, the State moved

No. 1-09-0754

in limine requesting that Officer Green be permitted to testify to the phone call that he made to the "dope line" number and the content of the conversation he had leading to the defendant's arrest. The State argued that the content of the conversation was necessary to explain the course of the police investigation and to rebut any suggestion that the defendant was either targeted by the police or that he was randomly at the scene to make a drug purchase himself. Defense counsel argued that the content of the conversation was inadmissible hearsay and irrelevant. Defense counsel also argued that the prejudicial effect of the testimony far outweighed its probative value. The trial court granted the State's motion, explaining that the entire conversation was relevant to show the officers' actions, including why they went to a particular location to purchase narcotics.

The defendant elected to be tried by a jury. The trial judge advised the potential jurors that the defendant was presumed innocent of the charges against him, that the State had the burden of proving his guilt beyond a reasonable doubt, that the defendant was not required to prove his innocence, and that the defendant was not required to present any evidence on his own behalf. Thereafter, a panel of 28 potential jurors was sworn, and the trial judge again admonished the panel that the defendant was presumed innocent of the charges against him, that the State had the burden

No. 1-09-0754

of proving his guilt beyond a reasonable doubt, that the defendant was not required to prove his innocence, and that the defendant had an absolute right to remain silent and elect not to testify on his own behalf. Following each of these admonishments, the trial judge inquired as to whether any of the panel members had "any quarrel" with the propositions of law which he had stated and, if any panel members did, he instructed them to raise their hands. The record reflects that none of the potential jurors raised their hands to any of the inquiries. In addition, the trial judge inquired as to whether any of the panel members could not apply the propositions of law which he had articulated. Again none of the potential jurors raised their hands. However, the trial judge never specifically asked the panel members if they "understood" and "accepted" the mentioned propositions of law. The entire jury before whom the defendant was tried was chosen from this panel of 28 potential jurors.

Defense counsel moved the court to reconsider its ruling on the State's *in limine* motion, arguing that the substance of Officer Green's conversation was learned for the first time during the hearing on the motion and had not been memorialized in any police report. Counsel requested that Officer Green's testimony be limited to the fact that he made a phone call to the "dope line" number and, based upon the conversation, he went to a particular

No. 1-09-0754

location to purchase narcotics. The trial court ruled that Officer Green would be permitted to testify that he made the call, what he said during the conversation, to where he went after the call, and that he was looking for a particular car.

The State called five Chicago police officers to testify. Officers Green, Hatch, Lyke, and Burns testified about the events of February 6, 2008, leading to the arrest of the defendant as noted earlier. Officer Bozek testified as to the chain of custody of the inventoried articles.

On cross examination, Officer Green admitted that he did not attempt to get the records for the "dope line" phone number which he called. In addition, he did not recall giving the individual to whom he spoke a description of himself. Officer Green testified that he was not given a description of the person who would be delivering the heroin, but was told the type of car he would be driving. He also admitted that he never memorialized any of the details of his phone conversation in the police reports relating to the incident, and he never attempted to procure marked money with which to purchase the drugs.

Following the cross examination of Officer Green, the prosecutor asked for a sidebar conference and argued that defense counsel had opened the door to the admission of the entire conversation which Officer Green had with the unknown individual

No. 1-09-0754

that answered the "dope line" phone call. The trial court agreed and ruled that, on redirect examination, Officer Green could testify to the price that was discussed for the heroin, and that he was told the type of car that the person delivering the drugs would be driving. Thereafter, Officer Green testified that during the conversation he told the individual to whom he spoke that his name was "Dre"; that, when he approached, the defendant asked him if his name was "Dre"; and that he was told that the person delivering the drugs would be driving a silver Mercury.

The State also called Cotelia Fulcher, a forensic chemist employed by the Illinois State Police Forensic Science Center, to testify as an expert. She stated that she received six tinfoil packets of suspected heroin to test as well as an individual tinfoil packet, each in a sealed condition. According to Fulcher, she weighed and tested one of the packets in the six packet group recovered by Officer Green and the individual packet recovered by Officer Lyke, and each tested positive for less than one gram of heroin.

After the State rested, the defendant moved for a directed verdict. The motion was denied, and the defendant elected to testify on his own behalf.

The defendant acknowledge that he had been convicted of arson in 1995 and had been sentenced to 5 years' incarceration. He also

No. 1-09-0754

admitted that he was addicted to heroin and had last used heroin on the day of his arrest. As to the events of February 6, 2008, the day of his arrest, the defendant stated that he had been working as an electrical assistant on a job site at 57th and Peoria, located about 5 minutes by car from the place where he was arrested. He began working that day at 9 a.m. and took a lunch break at 12:30 p.m. He testified that he made a call on a friend's cell phone to purchase heroin. The phone number that he called was 312-525-0206, a number that he often called to purchase heroin. According to the defendant, he and the person who answered the phone agreed to meet in the middle of 57th and Justine streets. He testified that he drove his vehicle to 57th and Justine; parked on 57th Street, facing east; and started to walk toward a man who he thought was the individual he was supposed to meet. The defendant stated that, as he was walking, he began to feel uneasy, so he returned to his car and drove away. After driving several blocks, he noticed that he was being followed by a police car. The defendant was driving without a driver's license. Apprehensive that he might be stopped by the police, he drove several more blocks, pulled over, and started to walk away. The defendant testified that the police car pulled up beside him as he was walking on Throop Street. One of the officers told him to walk over to the car and stated "you're the guy who wanted to buy some drugs." The defendant stated that

No. 1-09-0754

he was not, but the officers, nevertheless, handcuffed him and took his car keys. One of the officers used his keys to enter the car. Thereafter, the police took him and his car to the police station. According to the defendant, he had \$182 on his person from a previously cashed pay check and a cell phone which he said belonged to his girlfriend. He denied being in possession of any heroin. The defendant stated that the police officers asked him whether he knew of a "safe house" or where people had guns; and, when he said he knew of neither, they arrested him.

After his testimony, the defendant rested his case. Thereafter, the jury was instructed. Following its deliberations, the jury found the defendant guilty of both delivery of a controlled substance and possession of a controlled substance with intent to deliver.

The defendant filed a motion for a new trial, again arguing that the trial court erred in permitting Officer Green to testify to the details of the phone conversation he had when he called the "dope line" phone number. The trial court denied the motion.

The defendant was sentenced as a class X offender to two concurrent 10-year terms of incarceration and assessed \$1710 in fines and fees. The defendant's motion for a reduction of sentence was denied, and this appeal followed.

For his first issue on appeal, the defendant asserts that the

No. 1-09-0754

trial court failed to comply with Supreme Court Rule 431(b) because it failed to ask the prospective jurors whether they understood and accepted the principal that a defendant is not required to present any evidence, and because it did not ask the prospective jurors whether they understood and accepted the remaining principals set forth in Rule 431(b). As a consequence, the defendant asserts that he is entitled to have his convictions reversed and the matter remanded for a new trial.

The State acknowledges that the trial court's admonishments failed to strictly comply with Supreme Court Rule 431(b). It argues, however, both that the error was harmless and that the defendant has forfeited the claimed error by failing to object at trial or raise the issue in his post-trial motion. The State also argues that the failure of the defendant to properly preserve the error should not be overlooked and the error reviewed under a plain error analysis because the evidence of his guilt was overwhelming, and he testified on his own behalf.

Supreme Court Rule 431(b) provides that:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be

No. 1-09-0754

convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. R431(b) (eff. May 1, 2007).

In *People v. Thompson*, 238 Ill. 2d 598 (2010), the trial judge failed to ask prospective jurors, in accordance with Rule 431(b), whether they accepted and understood that a defendant need not produce any evidence on his own behalf and whether they accepted the principle that a defendant is presumed innocent. In *Thompson*, as in this case, the defendant failed to object to the court's failure to fully admonish the prospective jurors. *Thompson*, 238 Ill. 2d at 611. The defendant in this case argues, as did the defendant in *Thompson*, that the trial court's failure to ask the prospective jurors if they understood and accepted each of the four principles set fourth in Rule 431(b) denied him the right to a fair trial and an impartial jury, entitling him to a new trial; and

No. 1-09-0754

that, even in the absence of an objection on his part, the issue may be reviewed under the plain error doctrine. See *Thompson*, 238 Ill. 2d at 605-607.

The supreme court in *Thompson* held that a trial court's failure to comply with the requirements of Rule 431(b) is not a structural error. *Thompson*, 238 Ill. 2d at 609-610. The court stated the "[w]hile trial before a biased jury is structural error subject to automatic reversal, failure to comply with Rule 431(b) does not necessarily result in a biased jury." *Thompson*, 238 Ill. 2d at 610. Consequently, the supreme court concluded that the trial court's violation of Rule 431(b) did not fall within the limited category of structural errors and did not require automatic reversal of the defendant's conviction. " *Thompson*, 238 Ill. 2d at 611. For the same reasons, we conclude that the trial judge's failure to fully comply with the requirements of Rule 431(b) in this case was not a structural error and does not require an automatic reversal of the defendant's conviction.

To preserve a claimed error for review, a defendant must both object at trial and include the alleged error in a written post-trial motion. *People v. Enoch*, 122 Ill 2d 176, 186 (1988). In this case, the defendant did neither. Nevertheless, he argues that we should review the unpreserved claim under the plain error doctrine. However, the burden of persuasion on such an assertion

No. 1-09-0754

rests with the defendant. People v. Walker, 232 Ill. 2d 113, 124 (2009). Although trial before a biased jury would certainly satisfy the plain-error doctrine because it would affect the defendant's right to fair trial and challenge the integrity of the judicial process (*Thompson*, 238 Ill. 2d at 614), the defendant in this case failed to meet his burden of producing evidence of jury bias. While it is true that the prospective jurors received some, but not all, of the required Rule 431(b) admonitions and questioning, the defendant has failed to show that the error affected the fairness of his trial or challenged the integrity of the judicial process. For this reason, the plain error doctrine provides no basis for this court to excuse the defendant's failure to object at trial or include the claimed error in his post-trial motion. The issue is forfeited. See *Thompson*, 238 Ill. 2d at 614-15.

Next, the defendant argues that the trial court erred in permitting Officer Green to testify to inadmissible hearsay under the guise of explaining the course of the police investigation. Specifically, he contends that Officer Green should not have been allowed to testify to the substance of the phone call he had with the unidentified individual that answered the call Officer Green made to the "dope line." According to the defendant, the State's actual purpose for eliciting the testimony was to imply that the

No. 1-09-0754

defendant was the person to whom Officer Green spoke when he called the "dope line," not to explain the course of the investigation.

The admissibility of evidence is a matter committed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there has been an abuse of that discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984). Hearsay is an out-of-court statement offered to establish the truth of the matter asserted, and is generally not admissible as evidence. *People v. Williams*, 181 Ill. 2d 297, 312-13 (1998). Testimony of an out-of-court statement introduced for purposes other than to prove the truth of the matter asserted in the statement is not hearsay. *People v. Simms*, 143 Ill. 2d 154, 173 (1991). Specifically, statements offered, not for the truth of the matter asserted, but to explain the actions or steps that a police officer subsequently took during the course of the investigation leading to the defendant's arrest are not hearsay. *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997); *People v. Hammonds*, 399 Ill. App. 3d 927, 943-44 (2010).

On direct examination, Officer Green testified that he had a conversation with an unknown male when he called the "dope Line." He stated that he told this individual that his name was "Dre;" that he ordered six "hits" of heroin; and that he wanted to meet in the north end of 57th and Justine. He testified that he was looking

No. 1-09-0754

for a silver-toned Mercury Sable which drove up to the appointed location about 10 minutes after the conversation. According to Officer Green, the driver stepped out of the vehicle and asked if he was "Dre;" to which officer Green answered that he was and asked if the individual had his "six hits." The individual, whom Officer Green identified as the defendant, said "yeah." On cross-examination, it was the defendant's attorney that elicited testimony from Officer Green that the individual to whom he spoke on the phone gave him a description of the vehicle he would be driving. On redirect examination, Officer Green was permitted to testify that it was the individual to whom he spoke that stated he would arrive in a silver-toned Mercury Sable.

The State argues, and we agree, Officer Green's testimony on direct examination was confined to facts necessary for the jury to understand that he used the alias of "Dre," the quantity of narcotics that he ordered, and the reason why he was standing near 57th and Justine looking for a silver-toned Mercury Sable. His direct testimony was confined to an explanation of the actions he took during the course of the investigation leading to the defendant's arrest. In fact, it was not until he was questioned by defense counsel that Officer Green ever testified to what he was told by the individual to whom he spoke. Contrary to the defendant's assertions, Officer Green's testimony did not go to the

No. 1-09-0754

truth of any matter asserted. Simply put, his testimony was not hearsay, and the trial court did not abused its discretion in permitting its admission.

The defendant also argues that the trial court erred in not giving the jury a limiting instruction to the effect that it could not consider Officer Green's testimony for any purpose other than establishing the reason why he approached the defendant. However, as the State points out, the defendant never requested any limiting instruction and, as a consequence, the issue has been forfeited. *Enoch*, 122 Ill. 2d at 186; *People v. Rush*, 401 Ill. App. 3d 1, 16 (2010).

In a related argument, the defendant also contends that defense counsel's representation was deficient because she failed to request a limiting instruction addressing Officer Green's testimony concerning his call to the "dope line," and there is a reasonable probability that had she requested such an instruction one would have been given, and the result of his trial would have been different. See *People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (1993). We disagree.

A defendant is entitled to competent legal representation, not perfect representation. *People v. Markiewicz*, 246 Ill. App. 3d 31, 48 (1993). A defendant raising a claim of ineffective assistance of trial counsel must establish both that his attorney's

No. 1-09-0754

performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced him that he was denied his constitutional right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). However, a reviewing court need not determine whether defense counsel's performance fell below an objective standard of reasonableness before determining whether the defendant suffered any prejudice. *Strickland*, 466 U.S. 697. Although failure to request a limiting instruction may well demonstrate that an attorney's performance was deficient, it does not necessarily establish prejudice to such an extent that it could be said that the defendant was deprived of his right to a fair trial. *Hooker*, 253 Ill. App. 3d at 1085.

As noted earlier, Officer Green's direct testimony concerning the conversation he had with the unknown individual that answered the phone when he called the "dope line" revealed only that he used the alias of "Dre," that he ordered six "hits" of heroin, that he would receive delivery of the narcotics that he ordered near 57th and Justine, and that he would be looking for looking for a silver-toned Mercury Sable. None of the information established an element of the crimes with which the defendant was charged, but merely informed the jury why the officer was at 57th and Justine and the significance of the defendant referring to him as "Dre."

No. 1-09-0754

Consequently the failure of defense counsel to request a limiting instruction, and the trial court's failure to give one, did not prejudice the defendant as there is no reasonable possibility that, had such an instruction been given, the verdict would have been different. Having failed to establish the second prong of the Strickland test, the defendant is not entitled to any relief based upon a theory of ineffective assistance of counsel.

The defendant's final issues on appeal relate to the fees assessed against him and the credit he is due for pre-sentence time spent in custody. The defendant argues, and the State agrees, that the trial court improperly imposed a \$25 court service fee pursuant to 55 ILCS 5/5-1103 (West 2008) and a \$5 court systems fee pursuant to 55 ILCS 5/5-1101(a) (West 2008). The defendant also argues, and the State again agrees, that he is entitled to a credit against the fines imposed against him of \$805 for the time which he spent in presentence custody. See 725 ILCS 5/110-14 (West 2008). We agree with the defendant on each of these issues.

For the foregoing reasons, we vacate the \$25 court service fee and the \$5 court system fee assessed against the defendant; remand this matter to the circuit court with directions to grant the defendant a \$805 credit for pre-sentence time in custody against the remaining fines assessed against him; and affirm the circuit court's judgment in all other respects.

No. 1-09-0754

Affirmed in part, vacated in part, and remanded with directions.