

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 3--08--0337

Order filed April 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of the 9th Judicial Circuit, |
| |) | Knox County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 07--CF--671 |
| |) | |
| PAUL M. BOOS, |) | Honorable |
| |) | Stephen C. Mathers, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

Held: The defendant challenged his conviction for unlawful possession of methamphetamine. The appellate court held that: (1) the circuit court did not err when it rejected the defendant's challenge to the search warrant's validity; (2) the defendant failed to qualify for second-prong plain-error review of his prosecutorial misconduct argument; (3) the defendant failed to qualify for second-prong plain-error review of his due process arguments regarding an *ex parte* communication and regarding the presumption of innocence; and (4) the State proved the defendant guilty beyond a reasonable doubt. Accordingly, the appellate

court affirmed the defendant's conviction.

The defendant, Paul M. Boos, was convicted of unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2006)), and was sentenced to three years of imprisonment. On appeal, the defendant argues that: (1) the court erred when it denied his motion to suppress; (2) he was denied a fair trial due to prosecutorial misconduct because the "jury was swamped with innuendo and bad act evidence and argument"; (3) the court violated his due process rights when it improperly instructed the jury; and (4) the State failed to prove the defendant guilty beyond a reasonable doubt. We affirm.

FACTS

On December 7, 2007, the State charged the defendant with unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2006)) and unlawful possession of methamphetamine with intent to deliver (720 ILCS 646/55(a)(1)(A) (West 2006)). On January 31, 2008, the defendant filed a motion to suppress evidence, which the court denied.

The charges filed in this case arose after a search warrant was executed on December 5, 2007. The search warrant authorized a search of the defendant and the residence at 1251 Day Street in Galesburg [the residence]. The complaint for the search warrant described two controlled drug purchases that took place at the residence. On both occasions, police officers, through a

confidential source, purchased methamphetamine from the defendant at the residence. The confidential source had told the police prior to making the purchases that the defendant and a woman named Jerri were selling methamphetamine out of the residence. Prior to both purchases, the confidential source and his vehicle were searched and he was given money. During the purchases, the confidential source observed other prepackaged bags of methamphetamine either inside the residence or on the defendant's person. After the purchases, the police met the confidential source at prearranged locations where the confidential source turned over methamphetamine he purchased from the defendant.

The court held a trial in this case on March 17 and 18, 2008. At two points during *voir dire*, the court addressed two groups of prospective jurors and told them that the defendant was presumed to be not guilty, which remained throughout trial "until the State brings forth sufficient evidence" to prove him guilty beyond a reasonable doubt. Individuals from both of these groups were eventually placed on the jury.

During his opening statement and closing argument, the prosecutor made several references to the fact that the search warrant was for the residence and the defendant. During trial, the prosecutor also elicited testimony from two police officers and a lab technician concerning the existence of the warrant. Neither the statements nor the testimony revealed any substantive

matters contained in the complaint for the search warrant.

At trial, several police officers testified regarding the search of the residence. When the officers broke through the door and entered the residence through an apparent game room, the defendant was observed standing in the doorway of a bathroom off of the kitchen. The defendant's right side was behind the bathroom's door jamb. The defendant refused to comply with multiple requests to put his hands up and get on the floor. Several officers forced the defendant to the ground, where he remained for a brief time in the fetal position before he was handcuffed. The defendant was the only person found inside the residence.

An officer who had gone into a bedroom used by the defendant's girlfriend, Jerri Herslow, announced that he found some methamphetamine. The defendant said, "that's bullshit. You planted that there." The methamphetamine was in two small plastic bags and was located on top of a dresser just inside the bedroom. In a second bedroom, officers found a letter addressed to the defendant at a different address. No other personal effects belonging to the defendant were found in the residence, and neither the residence nor the evidence seized was tested for fingerprints. The defendant did not live at the residence; the house was owned by a truck driver who was there at times only on weekends. However, the defendant stayed there with his

girlfriend in her bedroom several nights per week.

The proofs were closed late on the second day of trial. After the court noted its concern with whether the jury would be able to finish its deliberations that night, defense counsel gave the court permission to talk to the jury off the record. When the case was resumed on the record, the court stated:

"With counsel's permission, I did go back and talk to the jury informally in the presence of the bailiff about the idea of staying tonight to deliberate. Both sides out here said that they wanted to try and do that. The vast majority of the jurors said that they would like to go ahead and stay into the evening.

I cautioned them specifically that I didn't want them to give up any strongly-held belief about the evidence in order to get out, and I got nods from all of them--I didn't individually question them--that they would do that. And then I proceeded to talk about--again ad-libbing from instructions and my recollection of them, I didn't have them in front of me--I also told them about listening to one another and feeling free to change their minds if they were convinced by the arguments of their fellow jurors."

After the parties made their closing arguments and the court instructed the jury, the jury was sent to deliberate. After approximately three hours of deliberation, the jury found the

defendant guilty of unlawful possession of methamphetamine, but not guilty of unlawful possession of methamphetamine with intent to deliver. The court denied the defendant's motion for a new trial, which did not raise any issue regarding the off-the-record discussion the court had with the jury, or the manner in which the court described the presumption of innocence to prospective jurors. The defendant was sentenced to three years of imprisonment, and the defendant appealed the conviction for unlawful possession.

ANALYSIS

I. WHETHER THE COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS

First, the defendant alleges that the circuit court erred when it denied his motion to suppress the proceeds of a search warrant executed at the residence. The defendant claims that the affidavit supporting the warrant was deficient in that no probable cause existed to justify the issuance of the warrant because the affiant lacked personal knowledge and the hearsay was unreliable.

In *People v. McCarty*, 223 Ill. 2d 109 (2006), our supreme court analyzed whether "insufficient probable cause supported [a] warrant's authorization to search certain places and individuals." *McCarty*, 223 Ill. 2d at 152. The *McCarty* court began its analysis by reviewing principles associated with the general theory of probable cause. "Whether probable cause exists

in a particular case depends on the totality of facts and circumstances known to an affiant applying for a warrant at the time the warrant is sought." *McCarty*, 223 Ill. 2d at 153 (citing *People v. Free*, 94 Ill. 2d 378 (1983)). "A showing of probable cause means that the facts and circumstances within the knowledge of the affiant are sufficient to warrant a person of reasonable caution to believe that an offense has occurred and that evidence of it is at the place to be searched." *People v. Moser*, 356 Ill. App. 3d 900, 908 (2005).

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

"In light of these considerations, a reviewing court must not substitute its judgment for that of the magistrate in construing an affidavit. [Citation.] Rather, the court must merely decide whether the magistrate had a ' "substantial basis" ' for concluding that probable cause existed." *McCarty*, 223 Ill. 2d at 153 (quoting *People v. Stewart*, 105 Ill. 2d 22, 49 (1984)).

The circuit court in this case had a substantial basis to

conclude that probable cause existed and that a fair probability existed that contraband or evidence of a crime would be found at the residence. The complaint for the search warrant described two controlled drug purchases in which a confidential source bought methamphetamine from the defendant. Both purchases took place at the residence. During each purchase, the confidential source observed several other prepackaged bags containing suspected methamphetamine either on the defendant's person or on the kitchen table of the residence. The complaint further noted that prior to the first controlled purchase, the confidential source provided information to the police indicating that the defendant and Jerri Herslow were selling methamphetamine from the premises and identified pictures of each.

The defendant attacks the veracity of the information in the complaint for the search warrant claiming it cannot be credible because the officer "had no personal knowledge of the central events" and there "was no eavesdrop to confirm anything the unnamed source chose to say." The defendant's argument is without merit.

It has long been held that, "[h]earsay evidence alone can be a sufficient basis to establish probable cause, so long as there is a substantial basis for crediting the hearsay." *People v. Francisco*, 44 Ill. 2d 373 (1970). In this case, facts sufficiently corroborating the confidential source's information

exist within the complaint. Most notably, the affiant officer indicated that he searched both the source's person and vehicle prior to the purchases of methamphetamine from the defendant. No currency or contraband was in the vehicle or on the source's person prior to the purchases. After the transaction, the affiant officer then followed the source from the residence to a prearranged location where the source turned over methamphetamine and indicated that he purchased it from the defendant. It is true that the complaint contains hearsay and that the affiant officer did not witness the actual drug purchases described therein. Nevertheless, the complaint contained sufficient corroborating information upon which the issuing judge could have reasonably concluded that the hearsay was in fact credible. Accordingly, we hold that the circuit court did not err in denying the defendant's motion to suppress the proceeds of the search executed at the residence.

II. WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT

Second, the defendant argues that he was denied a fair trial due to prosecutorial misconduct because "the jury was swamped with innuendo and bad act evidence and argument" by the prosecutor. The majority of the prosecutor's remarks to which the defendant now objects concern statements made before the jury acknowledging the existence of the search warrant. The defendant

acknowledges that he has forfeited the issue (see *People v. Enoch*, 122 Ill. 2d 176 (1988)), but requests this court to review the matter for plain error.

The plain-error doctrine allows a reviewing court to address a forfeited error when:

"(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The first step is to determine whether clear error occurred. *Piatkowski*, 225 Ill. 2d 551.

The defendant has not identified the prong of the plain-error doctrine under which he claims he is entitled to relief. While the defendant submits that the prosecutor "had a bad case," he does not argue in this section of his brief that the evidence was closely balanced. He does claim, however, that his right to a fair trial was denied. Thus, we confine our review to the second prong of the plain-error doctrine. See *People v. Roberson*, 401 Ill. App. 3d 758 (2010); *People v. Alexander*, 396

Ill. App. 3d 563 (2009).

The defendant notes that the prosecution mentioned the search warrant in its opening and closing statements and also elicited testimony from two officers and a lab technician concerning the existence of the warrant. None of these statements describe any substantive matters contained within the complaint for the search warrant. Each statement objected to by the defendant simply indicates that his name was on the search warrant or that the warrant authorized search of his person. The defendant acknowledges that the prosecutor told the jury "that this whole thing started *** when a search warrant was issued for [the residence] *** as well as the Defendant, Paul Boos."

It is well settled that "references throughout [a] trial about the issuance of a search warrant [that are] so crucially intertwined with the defendant's arrest as to form part of one chain of relevant circumstances" are permissible. *People v. Canet*, 218 Ill. App. 3d 855, 861 (1991); *People v. Olivas*, 41 Ill. App. 3d 146 (1976). While it is improper for the prosecutor to use testimony regarding the investigatory techniques behind, and issuance of, a search warrant to infer guilt (see, e.g., *People v. Okundaye*, 189 Ill. App. 3d 601 (1989)), those circumstances do not exist in this case. Again, the defendant makes no allegation that the statements regarding the search warrant relayed any of the substantive information contained

within the complaint for search warrant. The defendant fails to direct our attention to any mention by the prosecutor or the police witnesses of the confidential source's hearsay statements that served as the basis for the warrant. The statements as outlined by the defendant did not impermissibly relay the confidential source's hearsay allegations. As such, the defendant has not met his burden of persuasion that the search warrant statements constituted any error at all, let alone plain error.¹

III. WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE EX PARTE COMMUNICATION OR THE STATEMENT OF THE PRESUMPTION OF INNOCENCE TO PROSPECTIVE JURORS

Third, the defendant argues that the circuit court violated his due process rights when it improperly instructed the jury. In part, the defendant argues that the court violated his due process rights when it improperly instructed the jury during an *ex parte* communication.

Initially, we note that the defendant has forfeited this issue for review. See *Enoch*, 122 Ill. 2d 176. However, the

¹ Because the defendant has failed to establish that any error occurred in this regard, we also reject his alternative argument that defense counsel was ineffective for failing to object to the prosecutor's comments under *Strickland v. Washington*, 466 U.S. 668 (1984).

defendant requests that we address the issue under the plain-error doctrine. As previously noted, the first step in the plain-error doctrine is to determine whether clear error occurred. *Piatkowski*, 225 Ill. 2d 551.

"A criminal defendant has a constitutional right to a public trial, and to appear and participate in person and by counsel at all proceedings which involve his substantial rights [citations], so that he may know what is being done, make objections, and take such action as he deems best to secure his rights and for his protection and defense [citation]." *People v. Childs*, 159 Ill. 2d 217, 227 (1994). In this case, after the proofs were closed, the court communicated with the jury *ex parte*. While the interaction took place with the permission of defense counsel, its agreed purpose was to address the late hour and determine whether the trial could be completed that night. The court's description of its discussion with the jurors clearly establishes that the interaction exceeded the scope of the defendant's acquiescence in and waiver regarding the *ex parte* discussion. During the interaction, the court gave the jury some informal oral instructions. While the court's intentions were pure, not only did the court's actions breach the boundaries of the defendant's waiver, we believe the court's actions also elevated this interaction to a critical stage of trial. The court's actions denied the defendant the right to be present at this

critical stage. Accordingly, we hold that clear error occurred in this case.

We do not find the evidence closely balanced and therefore consider the defendant's challenge under the second prong of the plain-error doctrine. That prong allows a clear error to be addressed if it "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565.

In *People v. Johnson*, 238 Ill. 2d 478 (2010), our supreme court addressed *ex parte* communications between the trial judge and the jury. During jury deliberations in that case, the jury sent a note to the judge stating that their decision was 11 to 1 and they needed advice or help. Without notifying the attorneys, the judge told the jury to continue deliberating. On appeal to the supreme court, the defendant argued, in relevant part, that he was prejudiced by the trial judge's action simply because it deprived him of his right to be present with counsel at all critical proceedings. He acknowledged he forfeited the issue, but requested the court to address the issue under the plain-error doctrine. *Johnson*, 238 Ill. 2d 478.

The supreme court rejected the defendant's argument, holding that the defendant must show actual prejudice to be entitled to a new trial due to improper *ex parte* communication. *Johnson*, 238

Ill. 2d 478. The court further held that, "when a defendant forfeits his challenge to a trial court's *ex parte* communication with the jury, it is necessary to consider the substance of that communication to determine whether it constitutes plain error." *Johnson*, 238 Ill. 2d at 482. In so holding, the supreme court emphasized that the trial court's action of telling the jury to continue deliberating was an action otherwise squarely within its discretion. *Johnson*, 238 Ill. 2d 480.

While *Johnson* is factually distinguishable from this case in that the judge in this case overstepped his authority in front of the jury, the law is clear that a defendant must prove he was actually prejudiced by an *ex parte* communication to warrant a new trial. *Johnson*, 238 Ill. 2d 478. Examining the substance of the *ex parte* communication in this case, it appears that the judge paraphrased from several jury instructions, although the only specific instruction recognizable from his statement on the record was a paraphrased *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62 (1972)). The decision to give a *Prim* instruction is a matter within the trial court's discretion (*People v. Chapman*, 194 Ill. 2d 186 (2000)), and the test for determining whether the decision to give the instruction was erroneous "is whether, upon examination of all the facts, the language used in the instruction coerced or interfered with the deliberation of the jurors to the prejudice of the defendant or hastened the verdict"

(*People v. Plantinga*, 132 Ill. App. 3d 512 (1985)). The defendant cannot point to any way in which the *ex parte* communication in this case coerced or interfered with the jury's approximately three-hour deliberation. In fact, much like *Johnson*, the defendant's argument is essentially that he was prejudiced *per se* by the court's action, which is insufficient to establish that he was denied his right to a fair trial. *Johnson*, 238 Ill. 2d 478. Accordingly, the defendant has not satisfied his burden on this issue under the plain-error doctrine.

Within his due process argument, the defendant also argues that the court erroneously described the presumption of innocence to prospective jurors. The defendant has forfeited this issue for review. See *Enoch*, 122 Ill. 2d 176. However, the defendant requests that we review this issue under the plain-error doctrine.

The defendant essentially argues that the circuit court erred when it failed to secure the potential jurors's understanding of the nature of the presumption of a defendant's innocence before trial. See Ill. S. Ct. R. 431(b) (eff. May 1, 2007). While the failure to give proper Rule 431(b) admonishments is in fact error, the defendant must still show that the violation resulted in a biased jury. *People v. Thompson*, 238 Ill. 2d 598 (2010). Similar to his *ex parte* communication argument, the defendant essentially argues that he

was prejudiced *per se* by the error, which is insufficient to establish that the error negatively impacted the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d 598. Accordingly, the defendant has not satisfied his burden on this issue under the plain-error doctrine.

For the foregoing reasons, we hold that the defendant is not entitled to a new trial on the grounds that the circuit court improperly instructed the jury.

IV. WHETHER THE DEFENDANT WAS PROVED GUILTY BEYOND A REASONABLE
DOUBT

Fourth, the defendant argues that the State failed to prove him guilty beyond a reasonable doubt.

When faced with a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). It is not the function of the reviewing court to retry the defendant. *Collins*, 106 Ill. 2d 237.

Section 60(b)(1) of the Methamphetamine Control and Community Protection Act provides that one who knowingly possesses less than five grams of methamphetamine commits a Class 3 felony. 720 ILCS 646/60(b)(1) (West 2006). Possession may be

actual or constructive. *Moser*, 356 Ill. App. 3d 900.

"Constructive possession exists where there is an intent and a capability to maintain control and dominion over the narcotics and may be proved by showing that the defendant controlled the premises where the narcotics were found." *Moser*, 356 Ill. App. 3d at 910-11.

The evidence presented in this case, viewed in light of the standard of review, was sufficient to establish that the defendant constructively possessed the methamphetamine. While the defendant did not live in the searched residence, he did stay there with his girlfriend at times during the week. At the time the officers executed the search warrant, the defendant was the only person in the residence. The methamphetamine was found in a conspicuous location in the bedroom in which the defendant slept when he stayed at the residence. Viewing the evidence in the light most favorable to the State, we hold that a rational fact finder could have found the defendant guilty of unlawful possession of methamphetamine.

CONCLUSION

The judgment of the circuit court of Knox County is affirmed.

Affirmed.

No. 3--08--0337, *People v. Paul M. Boos*

Justice Schmidt, specially concurring:

I concur in the judgment.