

No. 1-09-3509

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 18933
	)	
ANTHONY HALL,	)	The Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.  
Justices McBride and Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Judgment entered on conviction for delivery of a controlled substance within 1000 feet of a school affirmed where defendant forfeited chain of custody claim through stipulation; defendant was not denied a fair trial by State's closing argument; Class X offender sentence and three-year term of MSR proper.
- ¶ 2 Following a jury trial, defendant Anthony Hall was convicted of delivery of a controlled substance within 1000 feet of a school, and sentenced to 15 years' imprisonment as a Class X offender (730 ILCS 5/5-5-3(c)(8) (West 2008)). On appeal, he contends that the State failed to establish a sufficient chain of custody for the controlled substance, and that he was denied a fair trial by the alleged prosecutorial misconduct in closing argument. He also raises two sentencing issues.

¶ 3 Defendant was charged with several narcotics offenses based on the observations of three Chicago police officers on August 22, 2008. At trial, Officer Balesteri testified that at 9:30 p.m. that evening, he and his partners, Officers Rodekohl and Conlan, were patrolling in the area of 545 West 100th Street in Chicago when he saw defendant and two other individuals on the sidewalk. Officers Balesteri and Rodekohl testified that they observed defendant accept money from one of the individuals, later identified as Michael Robertson, place the money in his pocket, remove an item from a plastic bag, and give the item to Robertson. These observations led them to believe that they had observed a narcotics transaction.

¶ 4 Officer Balesteri further testified that when defendant looked in his direction, he shoved the plastic bag down his pants, and walked away quickly. He then approached defendant, while Officer Rodekohl approached Robertson, who dropped an item, and Officer Conlan approached the third person, who was let go based on his noninvolvement in the narcotics transaction.

¶ 5 The item that Robertson dropped was recovered and found to be a knotted plastic bag of suspect cocaine. The officers arrested defendant and Robertson, and in the search that followed, Officer Balesteri removed \$310 from defendant, as well as the clear plastic bag that defendant had shoved down his pants which held a knotted plastic bag containing a white rocky substance believed to be crack cocaine. Officer Conlan testified that the item removed from defendant was given inventory number 11406718.

¶ 6 Officer Balestri further testified that after he created a case report, he noticed some typographical errors, and filed a corrected supplementary report. He did not note the third individual in his report because he was not involved in the transaction. He did note in his report that the narcotics weighed zero, but at the time of reporting he did not know the weight, and had the narcotics sent to the Illinois State Police crime lab to be weighed and tested. Officer

Rodekahr wrote the arrest report in which he estimated the weight of the cocaine found on defendant to be .1 gram.

¶ 7 Officer Rodekahr testified that he retrieved the item defendant gave to Robertson, and described it as a tiny knotted bag containing a hard rock-like substance, which he believed was cocaine. He gave the item to Officer Colan, who assigned it inventory number 11406717. When shown this item in court, Officer Rodekahr testified that it was in substantially the same condition as when he retrieved it, except that the bag had been untied and the cocaine had been broken up.

¶ 8 The parties entered a written stipulation that the suspect narcotics recovered and inventoried under numbers 11406718 and 11406717 tested positive for cocaine, weighed .2 and .1 gram, respectively, and that "a proper chain of custody was maintained at all times." No objection was raised to the admission of this evidence, and the State completed its case with the testimony of investigator Frank Amato who measured the distance from the narcotics transaction to the nearby elementary school and determined that it was 731 feet.

¶ 9 Fernando Brim testified that he resides in Glen Ellyn, and is a very good friend of defendant, whom he has known for eight years, and would always be there for him. On the night in question, Brim was heading to the home of his fiancée at 9959 South Wallace Street in Chicago, when he saw defendant, and Donald and Michael, whom he has known for more than a year but did not know their last names, across the street from the home of his fiancée at 545 West 100th Street. Brim joined in their conversation about a football game, and while he was talking with defendant, police pulled up and told them to put their hands on the car. One of the officers found \$87 in Brim's pocket, but returned it to him, and another officer took an adult movie DVD from defendant, handed it to one of the other civilians, and told him he could watch it. He then

let Donald and Brim leave. Brim went to the home of his fiancée, where he watched Michael and defendant placed under arrest.

¶ 10 Brim testified that he did not notice any narcotics transactions or see police recover any narcotics from defendant and Michael that evening, that he learned three days before trial that defendant had been wrongfully charged, and was concerned about it. When Brim was asked whether he was contacted by an investigator and shared his recollection of the incident, defense counsel objected, and, after a sidebar, the court informed the parties that it would instruct the jury that the law does not require a witness to talk to an investigator. The court then allowed the questioning to continue and Brim responded that when the investigator asked if she could talk to him, he told her, "no, there is no need to come out and talk to me," that he would share any knowledge he had in court.

¶ 11 Following closing arguments, the court instructed the jury, *inter alia*, that it should disregard questions and exhibits to which objections were sustained, that closing arguments are not evidence, and any argument that is not based on the evidence, should be disregarded. The court also instructed that it is proper for an attorney's investigator to attempt to interview a witness for the purpose of learning the testimony of the witness, but the law does not require a witness to talk to an attorney's investigator before testifying.

¶ 12 The jury found defendant guilty of delivery of a controlled substance within 1000 feet of a school, and defendant filed a motion for a new trial. The court denied the motion, and sentenced defendant to a Class X term of 15 years' imprisonment followed by a three-year term of MSR.

¶ 13 On appeal, defendant raises no issue regarding the narcotics recovered from him which weighed .2 gram and was inventoried under number 11406718. Instead, he contends that there

was a complete breakdown in the chain of custody for the narcotics police saw him deliver to Robertson and which was inventoried under number 11406717. He claims that the description of the item inventoried under that number was different from the description of it at trial in that at recovery it was described as a rock-like substance and at trial it was described as broken up.

Although defendant claims that this is a sufficiency of the evidence issue, the State responds that it is one of admissibility.

¶ 14 In *People v. Woods*, 214 Ill. 2d 455, 471 (2005), the supreme court rejected the notion that a challenge to the chain of custody is a question of the sufficiency of the evidence.

Defendant, nonetheless, maintains that *Woods* is distinguishable because it involved the admissibility of evidence and not the sufficiency of the evidence as in this case.

¶ 15 Defendant's argument overlooks the clear ruling in *Woods* that a challenge to the chain of custody is a claim that the State has failed to lay an adequate foundation for the evidence. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). As such, he was required to preserve his error for review by objecting at trial and raising it in a post-trial motion. *Woods*, 214 Ill. 2d at 471-72. Further, the record shows that defendant acquiesced in the admission of the evidence when he stipulated to the chain of custody, did not object to the admission of the evidence, and did not raise the issue in his post-trial motion. Under these circumstances, we find that defendant has waived the issue for review. *Woods*, 214 Ill. 2d at 471, 475.

¶ 16 The supreme court has recognized limited situations in which defendant may attack the chain of custody, although waived, if the alleged error was plain error, *i.e.*, there is a complete breakdown in the chain of custody such that there was no link between the substance recovered and the substance tested. *Woods*, 214 Ill. 2d at 471-72. We find none here where the inventory numbers of the item Robertson had dropped after being handed it by defendant and the item

introduced in court matched, the cocaine contained therein was described as broken up, which was consistent with having been tested, and there was no testimony suggesting tampering, mistake or compromise of the suspect drugs. *People v. Blankenship*, 406 Ill. App. 3d 578, 588-90 (2010). Thus, where defendant entered a written stipulation to the chain of custody which required no additional foundation (*People v. Peppers*, 352 Ill. App. 3d 1002, 1010 (2004); *People v. Hill*, 345 Ill. App. 3d 620, 633 (2003)), thereby signifying his intent to remove this issue from consideration (*Alsup*, 241 Ill. 2d at 279), we honor the forfeiture that resulted from defendant's failure to raise his challenge in the trial court (*Alsup*, 241 Ill. 2d at 280).

¶ 17 Defendant next contends that he was denied a fair trial based on allegedly improper comments made by the State during closing argument. He maintains that the State:

- 1) improperly argued that the officers' credibility was enhanced based on their profession;
- 2) distorted and minimized the burden of proof; 3) improperly commented on Brim's refusal to speak to the State's investigator and suggested that it was due to his need for time to fabricate a story; and 4) made inflammatory comments regarding defendant to impassion the jury to convict him.

We initially observe that those comments complained of here, but not objected to at trial or raised in the written post-trial motion, are waived for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant maintains, however, that those alleged errors can be reviewed as plain error because the evidence in his case was closely balanced and the State's comments were so pervasive and deliberate that he was denied a fair trial.

¶ 18 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). Defendant has the burden of persuasion, and the first step is to determine whether error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the

reasons that follow, we find that it did not.

¶ 19 The law gives the prosecutor wide latitude in closing argument, and she may comment on facts and legitimate inferences that may be drawn therefrom. *People v. Campbell*, 332 Ill. App. 3d 721, 727 (2002). She may also respond to comments made by defense counsel. *Campbell*, 332 Ill. App. 3d at 727. In reviewing allegations of prosecutorial misconduct, the arguments of the prosecutor and defense counsel must be examined in their entirety and allegedly improper comments placed in their proper context. *Campbell*, 332 Ill. App. 3d at 727.

¶ 20 Defendant contends that the State essentially told the jury that it should believe the officers because of their status and their combined years of experience when it argued that the officers were honest, hardworking police with 31 years of combined experience, did good police work, and testified credibly. The record shows that these comments were made in response to defendant's argument that had there been a camera on the police car, they would not be here today, because all they had was the officers' word, and that they should believe Brim who is a hard-working man and has no reason to lie, that police pinned the crime on him, and were on a mission to get someone, and the question as to what police were hiding by failing to note in their police report that two other individuals were allegedly present at the scene. When the complained-of comments are placed in context, they show that the State was properly responding to the attack made by defendant on the credibility of the officers, and not, as asserted by defendant, claiming that the officers' status as policemen entitled them to greater credibility. *People v. Woods*, 2011 IL App (1st) 091959, ¶¶42, 43; *Campbell*, 332 Ill. App. 3d at 727.

¶ 21 We also find that the State's comments regarding the burden of proof did not minimize or shift that burden to defendant. Defendant specifically refers to the State's comments that the defense wanted the jury to believe that the officers concocted a story, and were lying, and claims

that the State suggested to the jury that to believe defendant's story it must believe the officers were lying. Not every prosecutorial statement questioning relevance or credibility rises to an impermissible shift of the burden of proof (*People v. Phillips*, 127 Ill. 2d 499, 527 (1989)), however; and here, we find that the State could comment on the honesty of its witnesses to rebut defendant's argument that they were incredible (*People v. Howard*, 232 Ill. App. 3d 386, 389 (1992)).

¶ 22 We also find, contrary to defendant's contention, that there was no impropriety in the following comments by the State on its burden of proof:

"[t]he defense wants [the jury] to believe that we have not met our burden in this case. It is proof beyond a reasonable doubt, and that is not an insurmountable burden. It is not proof beyond any doubt. \*\*\* It is the same burden that is used in criminal courtrooms across the country every day. It is the burden that we embrace and it is the burden that we have met in this case."

In reviewing such comments, courts have found that they do not minimize the State's burden (*Phillips*, 127 Ill. 2d at 527-28; *People v. Averett*, 381 Ill. App. 3d 1001, 1007-08 (2008)), and we find no reason to differentiate the comments made here from that determination.

¶ 23 We also find no error in the State's comment on Brim's refusal to speak with the State's investigator, and that his refusal may have been due to his need for time to fabricate a story. Defendant has not cited, nor have we found, case law holding that the State cannot comment on a witness' refusal to talk to an attorney's investigator prior to trial, particularly where, as here, the comment was based on Brim's testimony that he did not talk to an investigator. Closing arguments can be based on the evidence presented at trial and any reasonable inferences that may

be inferred therefrom, even if they are unfavorable to defendant. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). The State was thus permitted to comment on Brim's testimony in the matter, and the court instructed the jury that an attorney's investigator may attempt to interview a witness to learn that witness' testimony, but that the witness is not required by law to talk to the attorney's investigator before testifying.

¶ 24 Defendant also complains of the prosecutor's comment that it was the first time she heard Brim's story, and she wanted to hear it before. The trial court, however, sustained defendant's objection to this remark, instructed the jury that closing arguments are not evidence and should be confined to the evidence and reasonable inferences drawn therefrom, and that argument which is not based on the evidence should be disregarded. The trial court thus cured any prejudice that might have resulted by the brief, isolated comment. *People v. Johnson*, 208 Ill. 2d 53, 116-17 (2003).

¶ 25 As to those comments which defendant objected to and were not waived, we note that due to a conflict between two supreme court cases, it is unclear whether our review is under *de novo* or an abuse of discretion standard. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *People v. Blue*, 189 Ill. 2d 99, 128 (2000). We, however, need not determine the proper standard of review because the result here is the same under either one. *Woods*, order at ¶38.

¶ 26 Defendant claims that the State made inflammatory comments to impassion the jury to convict him. He specifically refers to the State's comments that the narcotics business is profitable, drug dealers make a lot of money, drug dealers have lots of "addictive" customers, and the jury should take away defendant's profit and customers. Although defendant's objections to these comments were sustained, he claims that the damage was done when the jury heard them. The record shows, however, that the comments were isolated and brief within the context of a

lengthy, 15-page closing argument, and thus, had little impact, if any, on the jury. *Woods*, order at ¶42, 45. Furthermore, the jury was instructed that arguments are not evidence, that they should be confined to the evidence and reasonable inferences drawn therefrom, and that any argument not based on the evidence should be disregarded. We are satisfied that the prompt, sustained objections to the comments, combined with the proper jury instructions, were sufficient to cure any prejudice arising from them. *Johnson*, 208 Ill. 2d at 116-17. We, therefore, find that under either the *de novo* or abuse of discretion standard, defendant was not denied a fair trial by the State's closing argument. *Woods*, order at ¶38.

¶ 27 Notwithstanding, defendant claims that even if each error alone did not warrant reversal, the cumulative effect of the improper comments prejudiced the jury and constituted a material factor in his conviction. We reject defendant's argument since we find that there was no error where the prosecutor's comments were either proper or promptly objected to and sustained, and where the court provided proper limiting instructions to the jury. *People v. Foster*, 322 Ill. App. 3d 780, 791 (2000).

¶ 28 Defendant next contends that his sentencing as a Class X offender under section 5-5-3(c)(8) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3(c)(8) (West 2008)) was unconstitutional. He claims, relying primarily on *Shepard v. United States*, 544 U.S. 13 (2005) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the State was required to prove the elements of that statute beyond a reasonable doubt, and that the trial court improperly relied on his presentence investigation report (PSI) to determine if he should be sentenced as a Class X offender.

¶ 29 Defendant may challenge the constitutionality of a statute at any time. *People v. White*, 407 Ill. App. 3d 224, 237 (2011). However, this court has held, subsequent to *Shepard* and

*Apprendi*, that section 5-5-3(c)(8) is not unconstitutional, that the factors in that section need not be proven beyond a reasonable doubt, and that a trial court may rely on a PSI to impose a Class X sentence because the PSI is a reliable source for the purpose of inquiring into a defendant's criminal history. *White*, 407 Ill. App. 3d at 236-37, and cases cited therein. We find no reason to depart from our prior holding and likewise reject defendant's claim here.

¶ 30 Notwithstanding, defendant maintains that since the PSI does not disclose the dates of the commission of the prior offenses, he cannot be sentenced as a Class X offender under section 5-5-3(c)(8) of the Code which requires that defendant have two previous felony convictions of a Class 2 or greater felony, with the first felony being committed after the effective date of the amendatory Act of 1977, the second felony being committed after conviction of the first, and the third felony being committed after conviction of the second. Defendant has waived this issue for review where he did not object at the sentencing hearing or raise the issue in a post-sentencing motion. *People v. Reed*, 177 Ill. 2d 389, 394-95 (1997). Moreover, it was defendant's responsibility to bring to the trial court's attention any errors or discrepancies in the PSI (*People v. Matthews*, 362 Ill. App. 3d 953, 967 (2005)); and here, defendant raised none to the entries in his PSI which reflect numerous felony convictions after 1977, and a separation of years between the arrest dates and dispositions from which the court could reasonably assume that the statutory criteria were met.

¶ 31 Finally, defendant claims that his three-year term of MSR should be reduced to two years because he was convicted of a Class 1 felony. Defendant concedes that he is raising this issue for the first time on appeal, but claims that he did not forfeit it because his sentence is void. Although a void sentence can be challenged at any time, the question is whether the sentence is actually void (*People v. Balle*, 379 Ill. App. 3d 146, 151 (2008)), and for the reasons that follow,

we find that it is not.

¶ 32 Section 5-8-1(d) of the Code (730 ILCS 5/5-8-1(d) (West 2008)) provides that the MSR term for a Class X felony is three years and two years for a Class 1 felony. Since he was convicted of a Class 1 felony offense, defendant maintains that he is only subject to a two-year term of MSR, relying on *People v. Pullen*, 192 Ill. 2d 36 (2000). *Pullen* has been fully addressed and found not to change the conclusion that defendants sentenced as Class X offenders shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies. *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); accord *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011). We agree with these decisions, and thus conclude that the three-year MSR term was correctly entered. We also observe, contrary to defendant's contention, that the rule of lenity does not apply here where there is no ambiguity and sections 5-8-1 and 5-5-3(c)(8) of the Code (730 ILCS 5/5-8-1, 5-5-3(c)(8) (West 2008)) can be read together in a consistent and harmonious manner. *Lee*, 397 Ill. App. 3d at 1069-70.

¶ 33 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.