

No. 1-10-1123

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).

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. 09 CR 14675
)	
RICHARD FAIRLEY,)	The Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

ORDER

1. *Held:* Defendant failed to establish plain error and thus forfeited his claim that he was denied his right to present his defense. Defendant also failed to show that he was provided ineffective assistance of counsel where he was not prejudiced by counsel's alleged errors.
2. Following a bench trial, defendant Richard Fairley was convicted of delivery of a controlled substance and sentenced as a Class X offender to eight years' imprisonment. On appeal, defendant asserts that he was denied his right to present his defense where the trial court precluded him from

cross-examining police about the street value of the recovered narcotics. Defendant also contends that he was denied effective assistance of counsel where counsel failed to present evidence of the street value of the recovered narcotics and that the money recovered from defendant was in the form of two \$20 bills. We affirm.

3. At trial, Officer Knight testified that at about 11:30 a.m. on July 15, 2009, she was working with a team of officers in the vicinity of 24 South Kostner Avenue. While performing her duties as a surveillance officer, she saw defendant, from a distance of about 25 feet, walking back and forth across the street. Knight saw other people, who were at times standing next to defendant on the street, flagging down vehicles and yelling "rocks" and "blows." Defendant was approached by an individual, and the two engaged in a short conversation. The person tendered an unknown amount of money to defendant, at which time defendant produced a small item from his waistband. After receiving the item from defendant, the person left the scene. Officer Knight observed defendant engage in similar transactions with two or three other people. During the final transaction, Knight saw an African-American woman approach defendant, engage in a conversation, and tender an unknown amount of money to him. Defendant reached into his waistband, pulled out a golf-ball size item, and handed it to her. Knight then called the enforcement officers and gave them descriptions of the people at the scene. Four people were arrested, including defendant and the woman who engaged in defendant's final transaction.

4. Officer Fraction testified that while she was working as an enforcement officer near the scene in question, she received a radio transmission from Officer Knight describing individuals who were involved in possible narcotics transactions. Fraction relocated to 24 South Kostner Avenue where she detained defendant and Trina Murphy. After recovering 10 baggies that contained heroin from

Murphy, defendant and Murphy, along with two other people, were placed into custody. Knight confirmed that defendant and Murphy were the individuals she was observing. On cross-examination, defense counsel attempted to elicit from Knight the monetary value of the heroin recovered from Murphy, but the trial court sustained the State's objection to that line of questioning.

5. Officer Neberieza testified that he performed a custodial search of defendant and recovered \$40 from him. Neberieza's police inventory report indicated that the money recovered from defendant was in the form of two \$20 bills, but this evidence was not presented at trial.

6. The parties stipulated that the total estimated weight of the 10 items was 2.2 grams, and 1.1 grams of the substance were tested. Forensic scientist Daniel York determined that the contents of the tested items were positive for the presence of heroin.

7. During closing arguments, defense counsel maintained that it was unlikely that defendant would sell \$100 to \$200 worth of heroin for only \$40. Counsel also asserted that the surveillance officer testified that she saw two or three other transactions involving defendant where money was given to him, and the \$40 he was arrested with was inconsistent with the number of transactions that allegedly occurred. Moreover, defendant was not arrested with any narcotics and there was no testimony that he was yelling "rocks" or "blows." Counsel thus contended that Officer Knight was mistaken as to who she saw selling drugs, particularly considering there were numerous people on the street and four individuals were arrested.

8. In response, the State argued that there was no testimony regarding how much defendant was charging for narcotics, and counsel was speculating as to their value. The State also argued that it was irrelevant that defendant was arrested without any drugs in his possession. In contrast, the State maintained that it was relevant that defendant was observed conducting a hand to hand drug

transaction with Murphy, who was arrested with heroin in her possession.

9. Following arguments, the trial court found defendant guilty of delivery of a controlled substance. In so finding, the trial court stated that the State proved beyond a reasonable doubt that defendant was identified by police as the person who tendered "something" to several individuals, and, in the case of Murphy, that "something" was heroin. Furthermore, the trial court stated that the amount of money found on defendant was irrelevant, and that defendant set the price for the product he was selling.

10. On appeal, defendant contends that he was denied his right to fully present his defense. He specifically maintains that the court erroneously precluded him from cross-examining Officer Fraction about the street value of the recovered narcotics because the evidence would show that the value of the heroin was incompatible with the amount of money recovered from defendant.

11. The State contends that defendant waived this argument because he failed to make an offer of proof when the trial court sustained the State's objection to defense counsel's questioning of Officer Fraction regarding the value of the drugs recovered from Murphy. We agree. "It is well recognized that the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court." *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992). The purpose of an offer of proof is to disclose to the trial court the nature of the offered evidence, and to enable a reviewing court to determine if the exclusion of the evidence was proper. *Andrews*, 146 Ill. 2d at 421. Here, defendant failed to make such an offer of proof and thus forfeited this issue on appeal.

12. In so deciding, we reject defendant's contention that he did not forfeit review of this issue because defense counsel's questions indicated the purpose and substance of the evidence he was trying to elicit. In making this argument defendant relies on *People v. Lynch*, 104 Ill. 2d 194 (1984),

which is distinguishable from the case at bar. In *Lynch*, 104 Ill. 2d at 202-04, the supreme court held that it was not necessary for the defendant to make an offer of proof because the excluded evidence was clearly admissible. Here, by contrast, the value of the heroin retrieved from Murphy was not even relevant to whether defendant delivered a controlled substance.

13. We also find *People v. Kellas*, 72 Ill. App. 3d 445 (1979), relied on by defendant, unpersuasive. Defendant maintains that in *Kellas*, 72 Ill. App. 3d at 454, as in the case at bar, defense counsel was seeking to elicit information from an adverse witness and thus the substance of the excluded evidence cannot be anticipated. In making this argument, defendant appears to be contradicting his initial argument that counsel's questions did in fact indicate the purpose and substance of the evidence he was attempting to elicit. Nevertheless, defendant's argument fails because unlike in *Kellas*, 72 Ill. App. 3d at 454, where we held that an offer of proof is not required when the cross-examination of a witness is erroneously prohibited, the contested evidence here was properly excluded.

14. Because we find that defendant has forfeited this issue by failing to make an offer of proof, defendant requests that we review the issue as plain error. He specifically contends that the evidence in this case was close, and the error of restricting his cross-examination was so fundamental that he was denied a fair trial.

15. The plain error doctrine is a limited and narrow exception to the forfeiture rule that applies only where the error is so substantial that it deprived the defendant of a fair trial, or where the evidence is so closely balanced that the finding of guilt may have resulted from the error. *People v. Caffey*, 205 Ill. 2d 52, 103 (2001). To obtain relief under the doctrine, defendant must first establish that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The

burden of persuasion is on defendant, and if he fails to meet his burden, the forfeiture will be honored. *Hillier*, 237 Ill. 2d at 545.

16. Defendant has a constitutional right to confront the witnesses against him and conduct a reasonable cross-examination. *People v. Davis*, 185 Ill. 2d 317, 337 (1998). However, the trial court may limit the scope of that cross-examination, and the appellate court will not disturb the trial court's ruling unless there has been a clear abuse of discretion that prejudiced defendant. *People v. Green*, 339 Ill. App. 3d 443, 455 (2003).

17. Here, we find no error occurred where defendant had the opportunity to present his case and the limitations imposed by the trial court were not an abuse of discretion. On cross-examination, the following colloquy occurred between defense counsel and Officer Fraction:

"Q. Based on your experience, when you looked at those smaller packets, *** you believed them to be a controlled substance, correct?

A. Yes.

Q. Do you have any opinion on whether they were nickel bags or dime bags or dubs?

MS. GROEBNER [State's attorney]: Objection, your Honor.

THE COURT: Sustained.

Q. [DEFENSE ATTORNEY:] How large were these bags?

A. They were smaller than the plastic bag they were in.

Q. Are you familiar, Officer, based on your experience in narcotics, how much this sort of material sells for on the street?

MS. GROEBNER: Objection, your Honor.

THE COURT: Sustained."

18. Defendant maintains that the trial court erred in refusing to allow counsel to cross-examine Officer Fraction about the street value of heroin because it was relevant to whether defendant sold drugs to Murphy. Defendant asserts that the money he possessed when he was arrested was inconsistent with the amount of drugs recovered from Murphy. However, whether or not money was even passed in a drug transaction is not a legally material fact. The important factor, however, is whether the transfer of possession of narcotics occurred. See *People v. Jordan*, 5 Ill. App. 3d 7, 13 (1972) (holding that in an unlawful sale of narcotics case, the important fact was the transfer of possession of a packet of heroin, and whether or not money was actually passed during the transaction was not a legally important fact).

19. Moreover, the elements of delivery of a controlled substance include that defendant had: 1) knowledge of the presence of a controlled substance; 2) the controlled substance was within his immediate control, and 3) the intent to deliver it. *People v. Rivas*, 302 Ill. App. 3d 421, 429-30 (1998); 720 ILCS 570/401(c)(1) (West 2008). None of the elements include that an exchange of money must occur. Here, the record clearly shows that defendant transferred possession of heroin with the requisite intent. The fact that he was arrested with an amount of money that defendant argued was inconsistent with the street value of heroin was irrelevant, particularly where the transfer of money was unnecessary to convict him of delivery of a controlled substance.

20. Defendant next contends that his trial counsel was ineffective for failing to present evidence of the street value of the recovered heroin, and that the money recovered from defendant was in the form of two \$20 bills.

21. A defendant arguing ineffective assistance of counsel, must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000)), citing *Strickland*, 466 U.S. at 697.

22. In this case, we find that defendant failed to prove sufficient prejudice in either of his claims. Even if the value of the heroin and the police inventory sheet were presented at trial, the outcome would not have been different because of the substantial amount of evidence that showed defendant was guilty of delivery of a controlled substance. At trial, Officer Knight testified that she saw defendant engage in drug transactions with three or four people. During the last transaction, Knight saw Murphy approach defendant, engage in a conversation, and tender an unknown amount of money to him. Defendant reached into his waistband and pulled out a golf-ball size item and handed it to her. Knight then called the enforcement officers and described defendant and Murphy. Shortly thereafter, Officer Fraction detained defendant and Murphy, and recovered 10 baggies of heroin from Murphy. Officer Neberieza subsequently recovered \$40 from defendant after performing a custodial search. This evidence from the trial shows that the irrelevant facts regarding the street value of the heroin and the denomination of bills found on defendant would not have caused a different result at trial.

23. For the foregoing reasons, we affirm the judgment of the circuit court.

24. Affirmed.