

No. 1-10-2198

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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 3328
)	
ANTHONY BOGARD,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Evidence that defendant engaged in another hand to hand transaction with an unknown individual after the transaction for which he was charged was admissible to rebut defense attempts to discredit the surveillance and identification of defendant by the police officer; strategic move by counsel did not deprive defendant of effective assistance of counsel; the trial court did not abuse its discretion in imposing 12-year sentence; and defendant was properly ordered to serve three-year term of MSR as a Class X offender.
- ¶ 2 Following a jury trial, defendant Anthony Bogard was found guilty of delivery of a controlled substance and sentenced as a Class X offender to 12 years' imprisonment followed by a three-year term of mandatory supervised release (MSR). On appeal, defendant contends that

the trial court erred in allowing the State to introduce evidence of a separate, uncharged narcotics offense; trial counsel was ineffective for failing to request a limiting instruction about other crimes evidence; the trial court abused its discretion in sentencing him; and the period of MSR should be reduced to the two-year MSR term applicable to his underlying Class 2 conviction.

¶ 3 Prior to trial, defense counsel filed a motion *in limine* to preclude the State from presenting testimony about a drug transaction allegedly committed by defendant the day after the transaction for which he was charged. The trial court sustained defendant's motion to exclude that evidence.

¶ 4 After the jury was selected, the State made an oral request to introduce testimony that defendant engaged in a drug transaction 20 minutes after the undercover drug buy that forms the basis for this prosecution. The State argued that this transaction was part of the course of conduct that was observed during the surveillance of defendant by police. Defendant objected to the relevance of testimony regarding the subsequent transaction, and the trial court sustained the objection, ruling as follows:

"The officer may be allowed to testify that he continued to maintain the defendant under surveillance for a certain period of time. That would go towards his identification of the defendant, the amount of time he had to look at him.

And that's not to say the defendant may not open the door depending on any cross-examination of the officers. So they should tread lightly.

Certainly, I can see some situations where the door may be open, so we'll have to see how the Defense approaches it.

But it is a direct delivery to the officer. It is not an intent to deliver matter.

The objection is sustained."

¶ 5 At trial, the State called as witnesses, four Chicago police officers who were members of the undercover narcotics investigation team in this case. The State also introduced the stipulated testimony of a forensic chemist that the item purchased during the undercover buy was heroin. Officer Jorge Rivera was the surveillance officer, whose cross-examination by defense counsel precipitated the testimony at issue.

¶ 6 Officer Rivera testified that shortly before 10 a.m. on January 14, 2009, he was in a covert vehicle on surveillance for possible drug transactions in the area of Chicago and Cicero Avenues when he noticed defendant pacing back and forth on Chicago, between Cicero and the west alley, with an unknown individual. Defendant was wearing a gray hooded sweatshirt underneath a green and white Michigan State letterman's jacket, blue jeans, and black and white gym shoes.

¶ 7 Rivera saw the unknown individual hand defendant an item, which he placed in his right pocket. Shortly thereafter, Officer Dobek, the undercover buy officer, approached and engaged the unknown individual in a brief conversation, and was directed to defendant, who exchanged an item for cash and then entered a sandwich shop at 4807 West Chicago Avenue. Dobek gave the prearranged signal that a positive drug transaction had taken place and walked away. Rivera continued his surveillance as he awaited radio confirmation from Dobek that he safely reached his vehicle. Meanwhile, defendant emerged from the sandwich shop and stepped inside a dark SUV that pulled up. After several minutes, defendant reentered the sandwich shop, stayed briefly, then left the scene in the SUV, which made an abrupt U-turn and sped away. Rivera

alerted the roving surveillance team, but they were unable to locate the SUV or defendant. At Area 5 police headquarters, Dobek showed Rivera four blue-tinted bags of suspected heroin.

¶ 8 The next day, Rivera returned to the area of Chicago and Cicero Avenues with several teammates and immediately recognized defendant because he was dressed in the same clothes he had worn the day before. Dobek confirmed the identification of defendant as the individual from whom he had purchased drugs that day.

¶ 9 On cross-examination, trial counsel questioned Rivera's identification, suggesting that his testimony was not credible because defendant was not arrested immediately after the completion of the undercover buy. Rivera stated that he could not recall exactly when Dobek radioed that he had reached his vehicle safely, but recalled that it was while defendant moved between the sandwich shop and the SUV. This colloquy followed:

"Q. So now enforcement is here or on the way?

A. Negative. This is an ongoing investigation. We don't want to arrest this individual right away. If the police come immediately after an undercover officer makes a buy, they know they just sold to the police. We let them do other hand to hands with unknown individuals prior to us identifying this individual.

Q. So is enforcement's role then only to arrest?

A. I said identify.

Q. Is enforcement's role only to arrest?

A. Negative. I said identify.

Q. Can enforcement detain?

A. Yes.

Q. Can enforcement detain and conduct a field interview?

A. Yes, of course.

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Q. So you called enforcement?

A. Not for that purpose, ma'am.

Q. But you have called enforcement?

A. No, I informed them that the transaction had happened and our target is back and forth between the vehicle.

Q. Okay. Now, when I asked you if they were on hold waiting for a confirmation that Officer Dobek had returned to his vehicle, you said yes, right? And understanding by my questioning on hold was and waiting to receive the signal to come to that location, [you said yes,] ma'am?

A. To identify, yes ma'am.

Q. Okay. Are they there to identify now that this person has made two trips in the sub shop?

A. Like I said, we –

Q. Is enforcement at the location at Cicero and Chicago at this point to make an identification?

A. We told them not to.

Q. You called them off?

A. We never called them to go.

Q. So when I asked you if you called enforcement, did you or did you not?

A. I said I informed them that the transaction with our target had occurred, and our target was still present.

Q. They were never on hold to come to that location, is that correct?

A. You're asking me if they are waiting to identify or to arrest? I don't know what you are asking.

Q. Well, you said that their role was going to be to identify?

A. That is correct.

Q. Were they waiting to come to the area to identify?

A. Yes.

Q. Did you call enforcement to come to the area and identify?

A. We were waiting for the subject to conduct narcotics transactions with other individuals, not to impede our investigation."

¶ 10 On redirect examination, the State elicited the disputed testimony from Rivera that defendant "engaged in another hand to hand transaction with a male Hispanic." When asked if that was when he notified the enforcement officers, Rivera stated, "Immediately after that hand to hand transaction he jumped into the SUV, was in there, at which point we were waiting for him to exit the vehicle like he had done a couple times afterwards, but he never did. And that's when he got, or the vehicle did the U-turn and sped off westbound giving us no opportunity for the enforcement team members to arrive and detain this individual." However, on recross-examination, trial counsel elicited testimony from Rivera that the unknown Hispanic male was not detained and searched, and thus Rivera could not be certain that a drug transaction had occurred.

¶ 11 During the ensuing sidebar outside the presence of the jury, the trial court overruled defendant's objection to Rivera's testimony about the subsequent transaction. The trial court reasoned that defendant "opened the door" during cross-examination.

¶ 12 The State's further evidence established that the day after defendant sold drugs to Officer Dobek, he was interviewed by Officer Smitka, who noticed defendant, in a green and white Michigan State jacket, walk into a liquor store in the area of Chicago and Cicero avenues. At Area 5, Smitka obtained a photograph of defendant which was used to compile a photo array.

After Dobek positively identified defendant from the photo array, Smitka obtained an arrest warrant for defendant. Officer Amador arrested defendant at his home on February 4, 2009.

¶ 13 Defendant presented no evidence after the State rested its case. During the State's rebuttal closing argument, the trial court sustained trial counsel's objection to the State's reference to another "sale of heroin," and instructed the jury to disregard any comments not supported by the evidence. After deliberating, the jury found defendant guilty of delivery of a controlled substance. The trial court subsequently denied defendant's motions for a new trial and to reconsider sentence.

¶ 14 In this appeal, defendant first contends that the trial court abused its discretion in allowing the State to introduce other crimes evidence that he sold drugs to the "unknown male Hispanic" because that evidence was not admissible for any permissible purpose and prejudiced him. He also argues that, contrary to the trial court's ruling, he did not open the door to that evidence, or, alternatively, that trial counsel was ineffective for doing so.

¶ 15 Other crimes evidence is admissible when it is relevant to establish any material question, other than defendant's propensity to commit a crime (*People v. Gilliam*, 172 Ill. 2d 484, 514 (1996)), including motive, intent, identity, absence of mistake, *modus operandi*, or the existence of a common plan or design (*People v. Spyres*, 359 Ill. App. 3d 1108, 1112 (2005)). Other crimes evidence encompasses misconduct or criminal acts that occurred both before and after the alleged crime for which defendant is standing trial. *Spyres*, 359 Ill. App. 3d at 1112. However, under the continuing narrative exception, other crimes evidence is not admissible merely to explain how the investigation unfolded unless relevant to specifically connect defendant with the crime for which he is being prosecuted. *People v. Jackson*, 232 Ill. 2d 246, 268-69 (2009). Although the State argues, alternatively, that the disputed testimony was admissible under this exception, we agree with defendant that the continuing narrative exception

does not aid our analysis when the trial court's rationale for allowing the disputed testimony was that trial counsel opened the door to it by asking Officer Rivera whether the enforcement team was immediately called to make an arrest.

¶ 16 As relevant here, other crimes evidence may be admissible if it is procured, invited, or acquiesced to by defendant. *People v. McGee*, 268 Ill. App. 3d 582, 586 (1994). Under these circumstances, the trial court must weigh the probative value of the other crimes evidence against its prejudicial effect and may exclude the evidence where its prejudicial effect substantially outweighs the probative value. *People v. Haley*, 2011 IL App (1st) 093585, ¶ 57. It is within the sound discretion of the trial court to determine the admissibility of other crimes evidence, and its decision will not be disturbed absent a clear abuse of that discretion. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010). A trial court's determination constitutes an abuse of discretion if it is arbitrary, fanciful or unreasonable, or if no reasonable person would reach the same conclusion as the court. *People v. Norwood*, 362 Ill. App. 3d 1121, 1129 (2005). We do not find this to be such a case.

¶ 17 Before trial, the trial court sustained defendant's objection to the State's request to introduce testimony that defendant engaged in a drug transaction 20 minutes after the undercover drug buy. In doing so, the trial court cautioned trial counsel to "tread lightly" in the cross-examination of the officers in order not to open the door to that testimony. At trial, the State confined its direct examination of Rivera accordingly, and elicited only that he continued his surveillance after the undercover buy. However, during cross-examination of Rivera, trial counsel elicited testimony that implied the narcotics mission and the identification of defendant in particular, was compromised by the decision to forgo an immediate arrest because it allowed defendant to flee the scene. To rebut that suggestion on redirect examination, the State elicited testimony from Rivera that the enforcement officers were unable to detain defendant because he

fled the scene "immediately after that hand to hand transaction" with an unknown Hispanic male. In our view, the trial court properly determined that defendant opened the door for the admission of that testimony. *Norwood*, 362 Ill. App. 3d at 1135. Further, the probative value of that testimony outweighed its prejudicial nature where, on re-cross, trial counsel elicited from Rivera that the unknown Hispanic male was not detained and searched, and thus he could not be certain that a drug transaction had occurred. *Norwood*, 362 Ill. App. 3d at 1135.

¶ 18 Regarding defendant's alternate claim that trial counsel rendered ineffective assistance by opening the door to other crimes evidence, it is noteworthy that counsel's effectiveness is determined by the totality of his conduct, and, as a court of review, we will not inquire into areas involving the exercise of judgment, discretion, trial tactics, or strategy. *People v. Edwards*, 301 Ill. App. 3d 966, 981 (1998). Neither mistakes in trial strategy, nor the fact that another attorney might have handled things differently, alone, amount to ineffective assistance; and, considering the overwhelming evidence of defendant's guilt, the disputed testimony did not open the door to a flood of other crimes evidence or so color the jury as to compel a conviction regardless of the evidence presented on the charged offense. *People v. Alvarado*, 2011 IL App (1st) 082957, ¶¶ 49-52.

¶ 19 As for defendant's further claim that trial counsel was ineffective for failing to seek a limiting instruction about other crimes evidence, we observe that counsel's decision not to do so was a strategic decision made so as not to highlight the evidence which, while proper, portrayed defendant in a negative light. *People v. Jackson*, 391 Ill. App. 3d 11, 34 (2009). "Limitation may take the form of sustaining an objection to certain questions or arguments made by the prosecutor, giving a limiting instruction at the time the testimony is given, or giving a written jury instruction at the conclusion of the case." *People v. McKown*, 236 Ill. 2d 278, 305 (2010). As the State points out, the trial court sustained trial counsel's objection to the reference of

another "sale of heroin" during the State's rebuttal closing argument and instructed the jury to disregard any evidence not supported by the evidence. Any prejudice which might have resulted was thus offset by the trial court's admonishments to the jury, and as a result, defendant's claim of ineffectiveness necessarily fails. *People v. Manley*, 222 Ill. App. 3d 896, 911-12 (1991).

¶ 20 Defendant next contends that the trial court abused its discretion in sentencing him to 12 years' imprisonment. He argues that this sentence was excessive given the nature of the offense itself, his nonviolent criminal history, and rehabilitative potential.

¶ 21 It is well established that the sentence imposed by the trial court is entitled to great deference, and where, as here, the sentence is within the statutory limits for the offense, we may not alter it in the absence of an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We also may not reweigh the sentencing factors considered by the trial court or substitute our judgment for that of the trial court simply because we would have weighed the factors differently. *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011).

¶ 22 Here, the transcript of proceedings shows that the trial court considered the subject mitigating factors as they were argued by trial counsel (*People v. Kolakowski*, 319 Ill. App. 3d 200, 217 (2001)), and, we observe that mitigating factors do not automatically require the court to sentence defendant to a term less than the maximum (*People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010)). We also acknowledge defendant's discussion of various studies showing that the mass incarceration of African American men for nonviolent drug offenses has increased, rather than decreased, inner-city crime. However, as the State points out, at issue is the propriety of the sentence imposed in this case, and in announcing its sentencing decision, the trial court specifically stated, "I've considered the arguments of counsel and considered all the factors in aggravation and mitigation, including the defendant's social history, his family history, his capacity for rehabilitation." This history also contained six prior felony convictions related to

controlled substances that were profit-motivated. Based on the record, the trial court did not abuse its discretion in imposing a sentence six years above the minimum and well within the statutory limits. *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 45.

¶ 23 Lastly, defendant contends that the period of MSR should be reduced to the two-year MSR term associated with the underlying Class 2 conviction. We disagree.

¶ 24 The appellate courts of this state have previously and consistently rejected the precise issue defendant raises here (see, e.g., *People v. Anderson*, 272 Ill. App. 3d 537 (1995); see also *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Watkins*, 387 Ill. App. 3d 764 (2009)), including those that have considered the issue in light of the supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000) (see, e.g., *People v. Lampley*, 2011 IL App (1st) 090661-B; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); see also *People v. Holman*, 402 Ill. App. 3d 645 (2010); *People v. McKinney*, 399 Ill. App. 3d 77 (2010); *People v. Watkins*, 387 Ill. App. 3d 764 (2009); *People v. Allen*, 409 Ill. App. 3d 1058 (2011); *People v. Lee*, 397 Ill. App. 3d 1067 (2010)). We reject defendant's contention that these cases were wrongly decided, and hold, consistent with our prior decisions, that defendant was properly ordered to serve three years of MSR as a Class X offender. *Rutledge*, 409 Ill. App. 3d at 26.

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.