

No. 1-10-3628

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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 22576
)	
MARVIN HUMBERT,)	Honorable
)	Neera Lall Walsh,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment

ORDER

Held: The trial court erred in allowing hearsay testimony regarding statements made by an anonymous declarant; however, this error was harmless where there was no reasonable probability a jury would have acquitted defendant absent the testimony. Further, it was not error to impose a three-year term of mandatory supervised release as required under Class X sentencing though defendant was convicted of a Class 1 felony, as the mandatory supervised release term is part of the sentence. Finally, the mittimus should be amended to reflect the correct offense for which defendant was convicted.

¶ 1 Defendant Marvin Humbert was charged by information with two counts of possession of a controlled substance with intent to deliver. Following a jury trial, defendant was convicted of possession of cocaine with intent to deliver and sentenced to eight years in prison.¹ On appeal, defendant contends that the trial court erred when it allowed the State to elicit testimony from police officers regarding the substance of an out-of-court statement made by an anonymous declarant. Defendant also contends that the trial court erred in imposing a three-year term of mandatory supervised release (MSR) attaching to Class X felonies when defendant was found guilty of a Class 1 offense, which attaches only a two-year term of MSR. Finally, defendant asks that the mittimus be corrected to reflect the correct name and felony classification of his offense. For the reasons that follow, we affirm the judgment of the trial court, but amend the mittimus.

¶ 2 BACKGROUND

¶ 3 On November 17, 2009, defendant was arrested for possession of a controlled substance at 4817 West Gladys Avenue in Chicago, after Chicago police officers spoke to an anonymous citizen who informed them that a black man wearing an orange hat, brown vest, and blue jeans was selling drugs at that location.

¶ 4 Prior to defendant's trial, the State informed the court that it anticipated a hearsay objection to the officers' testimony regarding what they were told by this citizen, who would not be called to testify. The State argued that this conversation would go to show the officers' course of conduct rather than the truth of the matter asserted, while defendant maintained such

¹ Prior to trial, the State nolle-prossed the count of possession of a controlled substance with intent to deliver within 1000 feet of a place of religious worship.

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testimony would nevertheless be considered for its truth by the jury and thereby prejudice the defendant. The court stated that it would allow the testimony to show the course of conduct.

¶ 5 At trial, two police officers testified for the State regarding the statements of the anonymous citizen. First, police officer Jose Rojas testified that he was in the area of 4817 West Gladys Avenue at 10:20 p.m. on November 17, 2009, when he learned from fellow Officers Pachnick and Manjarrez that someone was selling narcotics at that location. Defendant made a hearsay objection to this testimony, which was overruled after the State responded that they were merely relating the course of conduct of Officer Rojas. The State then elicited additional testimony from Officer Rojas regarding what he learned from Officers Pachnick and Manjarrez:

"THE STATE: And you spoke with whom?

OFFICER ROJAS: Officer Manjarrez.

THE STATE: And what did he relate to you?

OFFICER ROJAS: There was a subject selling narcotics at the location of
4817 West Gladys.

THE STATE: Did you receive a description of this person?

OFFICER ROJAS: Yes.

The STATE: And what was the description you received?

OFFICER ROJAS: It was a male Black wearing a orange hat, brown puffy
vest, and blue jeans."

Officer Rojas went on to testify that upon receiving this information of suspected narcotics transactions, he and his partner, Officer Ortega, set up surveillance approximately 50 feet from

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the residence at 4817 West Gladys, where he saw a man he identified in court as defendant. The State proceeded to inquire as follows:

"THE STATE: And can you tell us what he was wearing?

OFFICER ROJAS: Yes, sir. The exact same description given to us.

THE STATE: And what would that be?

OFFICER ROJAS: Orange hat, brown puffy vest, and blue jeans."

¶ 6 Officer Pachnick testified similarly. Specifically, he stated that he was on duty with Officer Manjarrez on the night of November 17, 2009, in the area of Adams Street and Cicero Avenue, when he was confronted by an anonymous citizen. Defendant objected to the State's question regarding what the citizen related to Officer Pachnick, which the court overruled. Officer Pachnick then testified that the citizen informed him "that there was a male Black wearing an orange hat, brown vest, blue jeans standing at 4817 West Gladys selling narcotics."

The following exchange ensued:

"THE STATE: And when you received that information what did you and Officer Manjarrez do?

OFFICER PACHNICK: We then relocated to that area to see if that individual was at that location.

The STATE: And did you have the occasion to see an individual who matched that description?

OFFICER PACHNICK: Yes.

The STATE: And by matching that description, what was that individual

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wearing?

OFFICER PACHNICK: He was wearing a orange hat with a brown vest and blue jeans."

¶ 7 Officer Pachnick went on to testify that he conveyed the information he received from the anonymous citizen to Officers Rojas and Ortega, who proceeded to set up surveillance near the location of 4817 West Gladys Avenue.

¶ 8 During Officer Rojas' surveillance, he observed two individuals approach defendant separately in the span of 10 minutes. Each individual would have a conversation with the defendant and tender defendant some amount of money. Defendant would put the money in his back pocket and then reach inside his vest to retrieve a dime-sized object, which he would tender to the individual. Based on his years of experience performing narcotics surveillance, Officer Rojas believed these were narcotics transactions, and he immediately radioed for enforcement officers to approach defendant.

¶ 9 Officer Pachnick then arrived on the scene and detained defendant. While performing a pat-down, Officer Pachnick recovered an unknotted bag containing 13 smaller zip-lock baggies from the inner right pocket of defendant's brown vest, each of which contained what was later determined to be cocaine. Officer Ortega also searched defendant on the scene and testified that he recovered \$13 in United States currency from defendant's rear pants packet.

¶ 10 Defendant was subsequently arrested and taken to the police station, where Officer Larocca read defendant his Miranda rights in Officer Rojas' presence. Officer Rojas testified that defendant then stated that he was trying to sell the "rocks" he had for a \$40 profit. This statement

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was not transcribed, videotaped or otherwise memorialized.

¶ 11 After hearing closing arguments and rebuttal, during which time the State repeated the substance of the statements made by the anonymous citizen, the jury found defendant guilty of possession of cocaine with intent to deliver. Defendant filed a posttrial motion, arguing, among other things, that the trial court erred in allowing police officers to testify as to what they were told by an anonymous citizen. The court denied defendant's motion and ultimately imposed a sentence of eight years with a three-year term of MSR. The motion to reconsider sentence was denied and defendant timely filed this appeal.

¶ 12 ANALYSIS

¶ 13 Defendant's primary arguments on appeal surround the admission of testimony relating to the substance of statements made by an unidentified citizen that implicated him in the offense for which he was charged. Initially, defendant maintains these statements constituted hearsay and should not have been admitted.

¶ 14 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Simms*, 143 Ill. 2d 154, 173 (1993). It follows that where an out-of-court statement is introduced for a purpose other than to prove the truth of the matter asserted, the statement is not hearsay. *Id.* Therefore, a police officer may testify about statements made by witnesses where the testimony is not offered to establish the truth of the matter asserted, but instead used to show the investigative steps taken by the officer that led to defendant's arrest. *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997). However, it is not sufficient for the profferer of this testimony to make the conclusory statement that the testimony is being offered to show "investigative steps" or the

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"course of the investigation." *People v. Warlick*, 302 Ill. App. 3d 595, 599 (1998); see also *People v. Shorty*, 408 Ill. App. 3d 504, 511 (2011) ("[a]n explanation by the prosecutor that he or she is only offering the testimony to show why police officers did what they did should not be the end of the discussion.") Rather, the trial court must determine whether the out-of-court statement has any relevance to an issue in the case and, if so, whether this relevance outweighs the risk of unfair prejudice to the defendant. *Id.* The trial court's admission of Officer Rojas' and Pachnick's testimony is subject to review for an abuse of discretion. See *People v. Ward*, 101 Ill. 2d 443, 456 (1984).

¶ 15 We have cautioned that "cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. *The need for the evidence is slight, the likelihood of misuse great.*" *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (quoting Kenneth S. Brown, *et al.*, McCormick on Evidence § 249, at 734 (Edward W. Cleary ed., 3d ed. 1984) (Emphasis added)). Of particular concern is the situation where, as here, the hearsay statement goes to the heart of the offense and directly addresses whether the defendant was committing the crime for which he was charged. See *Warlick*, 302 Ill. App. 3d at 600 (collecting cases).

¶ 16 We find *People v. Jura*, 352 Ill. App. 3d 1080 (2004), cited by defendant, instructive on this point. There, the defendant was charged with unlawful use of weapon by a felon, and the State elicited testimony from three police officers regarding the contents of a radio call alerting the officers to a person with a gun. *Id.* at 1082-84. Specifically, the State asked each officer to

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testify to the location of the armed man, his description, and whether defendant matched the description. *Id.* We held that this testimony constituted inadmissible hearsay because it went beyond what was necessary to explain police procedure when it revealed the type of crime reported and the description of the offender. *Id.* at 1086. Further, we explained that generally, hearsay identifying the defendant as the one who committed the crime does not fall under the police procedure exception. *Id.* at 1087 (citing *People v. Rivera*, 277 Ill. App. 3d 811, 820 (1996)). Instead, in order to show investigative steps or police procedure, we held that the prosecution "merely needed to demonstrate that the officer was on duty, received a radio call, and as a result of that call proceeded to the alley behind 38th Street." *Id.* at 1086.

¶ 17 Similarly, here, the officers needed only to state that they spoke to an unidentified citizen, and as a result of that conversation they implemented surveillance near 4817 West Gladys Avenue. The State provides no reason why it was necessary to elicit testimony from the officers regarding the anonymous citizen's description of the offender or the particular crime that was being committed. Nor does the record reveal any reason to ask each officer if defendant met the description provided by the anonymous citizen other than to prove the truth of the matter asserted, namely, that defendant was the individual selling drugs at 4817 West Gladys Avenue.

¶ 18 The State's attempts to distinguish *Jura* are unpersuasive. Specifically, the State's contention that the testimony in the case *sub judice* was offered "in passing" and was "not used substantively" is belied by the record. For example, when Officer Rojas testified that he set up surveillance near 4817 West Gladys Avenue after he learned that "someone" was selling narcotics in this area, the State pressed him on this point, asking him to provide details regarding

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the suspect's description and subsequently asking him if defendant met that description. The State repeated this process with Officer Pachnick, querying whether defendant met the description provided by the anonymous citizen and then asking Officer Pachnick to repeat what defendant was wearing.

¶ 19 Moreover, just as in *Jura*, the State referred to the hearsay in both its opening and closing statements. In its opening statement, the State informed the jury that defendant fit the anonymous citizen's description. Then, in closing, on rebuttal, the State again repeated the substance of the statement to the jury, stating that the officers received a tip from a concerned citizen that a man in an orange hat and brown vest was selling drugs. The repetition of the hearsay and reliance on the statements in opening and closing arguments was precisely what troubled us in *Jura*, 352 Ill. App. 3d at 1088-89,1093, and what leads us to conclude that the statements of the citizen were improperly used as substantive evidence here.

¶ 20 *People v. Banks*, 237 Ill. 2d 154 (2010), cited by the State, does not compel a different result. There, the State introduced a flash message a police officer received identifying a car that was taken in a carjacking and a shooting. *Id.* at 180. The supreme court held that testimony as to why the officer was looking for the car was admissible where it was used to explain the urgency behind the ensuing chase and the reason for placing the defendant, the driver of the car, under arrest. *Id.* at 181. More significantly, the court explicitly distinguished *Jura* on the grounds that the flash message did not identify the defendant. *Id.* at 181-82. Here, because the statements of the anonymous citizen did describe defendant with specificity and did not satisfy a relevant, non-hearsay purpose, we hold that they were admitted in error.

¶ 21 This error was further compounded by the trial court's failure to issue a limiting instruction to the jury to consider the citizen's statements only as an explanation of what caused the officers to act, and not to accept the statements as true. See *People v. Trotter*, 254 Ill. App. 3d 514, 527-28 (1993) (limiting instruction is required where hearsay is elicited to explain the course of an investigation). In the absence of such an instruction, nothing prevents the jury from considering the statement as substantive evidence, regardless of the purpose for which it was offered. *People v. Rodriguez*, 275 Ill. App. 3d 274, 283 (1995). However, any objection to the trial court's error in this regard is waived, as there is no evidence such an instruction was requested at trial. See *People v. Rush*, 401 Ill. App. 3d 1, 16 (2010).

¶ 22 Even assuming *arguendo*, this error was properly preserved along with the error in admitting the out-of-court statements of the anonymous citizen, we agree with the State that these errors were harmless. In evaluating the harmlessness of the admission of hearsay evidence, we consider whether there was a reasonable probability that a jury would have acquitted a defendant absent the hearsay testimony. *People v. Sims*, 192 Ill. 2d 592, 629 (2000) (quoting *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990)). There is no such probability in the instant case. Officer Rojas testified that from a surveillance location approximately 50 feet away, he had an unobstructed view of defendant tendering two individuals a dime-sized object from the inner right pocket of his vest in exchange for money. Based on his extensive prior experience in narcotics surveillance, he believed these were narcotics transactions. Officer Pachnick then testified that when he arrived on the scene in response to Officer Rojas' radio call, he detained defendant and recovered baggies of what was later identified as cocaine from defendant's inner

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vest pocket.

¶ 23 Defendant argues that this evidence was not overwhelming because it was uncorroborated by the arrest of any of the alleged buyers or the recovery of a large amount of money from defendant. However, he cites no authority for the proposition that unimpeached eyewitness testimony, coupled with physical evidence of the crime on defendant's person, requires such corroboration. On the contrary, we have explicitly held that "[w]here there is uncontroverted eyewitness testimony sufficient to sustain a conviction, there is no reasonable probability that the verdict would have been different had the hearsay been excluded." *People v. Pryor*, 181 Ill. App. 3d 865, 870 (1989); see also *Shorty*, 408 Ill. App. 3d at 512 (in drug possession case, where uncontradicted testimony of police officer indicated he saw defendant holding a bag containing heroin, admission of hearsay testimony that a confidential informant informed the officer that defendant had purchased heroin was harmless). Thus, in light of the properly admitted evidence supporting defendant's conviction, we conclude that the admission of the hearsay was harmless error.

¶ 24 Because we find that the error in admitting the testimony was harmless, we need not determine whether such admission also violated defendant's sixth amendment right to confront witnesses, as a violation of the confrontation clause is also subject to harmless error analysis. See *People v. Patterson*, 217 Ill. 2d 427, 428 (2005). Specifically, a constitutional violation is harmless where "it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained." *Id.* In this context, there are three different approaches to measuring harmless error: (1) considering the error to determine whether it may have contributed to the

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conviction; (2) examining the other evidence to determine if overwhelming evidence supports the conviction; or (3) determining whether the erroneously admitted evidence is merely cumulative or duplicative of the properly admitted evidence. *Id.* For the reasons stated above, we hold that the uncontroverted eyewitness testimony of Officer Rojas, coupled with the recovery of cocaine from defendant's person, overwhelmingly supports defendant's conviction.

¶ 25 Defendant next contends that the trial court should have imposed a two-year MSR period instead of a three-year period, because the offense for which he was convicted was a Class 1 felony. We disagree. Because this involves a question of statutory interpretation, our review is *de novo*. *Vuletich v. U.S. Steel Corp.*, 117 Ill. 2d 417, 421 (1987).

¶ 26 Defendant acknowledges that we have previously upheld a three-year MSR period for a Class X offender in both *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000) and *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995). However, he argues that *People v. Pullen*, 192 Ill. 2d 36 (2000), compels a different result. In *Pullen*, our supreme court considered the consecutive sentencing provision and its application to section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code), making certain offenders Class X eligible by background. *Pullen*, 192 Ill. 2d at 37; 730 ILCS 5/5-5-3(c)(8) (West 2008). The supreme court explained that section 5-5-3(c)(8) requires persons subject to its provisions to be sentenced as Class X offenders, *not* that their offenses are to be treated as Class X felonies for sentencing purposes. *Id.* at 43. Therefore, where the defendant was convicted of two Class 2 felonies, but was sentenced as a Class X offender, the maximum permissible sentence imposed should have been based on the maximum permissible sentence for two Class 2 felonies, *not* two Class X felonies. *Id.* at 43-44.

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¶ 27 Importantly, and as defendant concedes, several cases have examined *Anderson* and *Smart* in light of *Pullen*, and nevertheless concluded that a defendant sentenced as a Class X offender due to prior convictions is required to serve the Class X MSR term of three years. See, e.g., *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Holman*, 402 Ill. App. 3d 645, 653 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 81-82 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010). We see no reason to depart from these decisions, notwithstanding defendant's contention that they were wrongly decided. *Lee* is particularly compelling in its conclusion that because an MSR term is part of the sentence pursuant to section 5-8-1(d) of the Unified Code, and the sentence imposed was a Class X sentence under section 5-5-3(c)(8), defendant was necessarily subject to the Class X MSR period. *Lee*, 397 Ill. App. 3d at 1073. Accordingly, we hold that the trial court correctly imposed a three-year period of MSR.

¶ 28 Finally, defendant argues that his mittimus should be amended to correctly reflect the offense and felony classification for which he was convicted. Specifically, the mittimus erroneously states that defendant was convicted under section 407(b)(1) of the Illinois Controlled Substances Act ("Act"), for the Class X offense of "MFG/DEL COCAINE/SCH/PUB HS/PK." 720 ILCS 570/407(b)(1) (West 2010). The State concedes that this charge was dismissed by the prosecution prior to the commencement of trial, and defendant was in fact convicted under section 401(c)(2) of the Act for the Class 1 offense of possession of between 1 and 15 grams of a controlled substance, cocaine, with intent to deliver. 720 ILCS 570/401(c)(2) (West 2010). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan 1, 1967), we order the clerk of the trial court to correct the mittimus to reflect defendant's conviction of the

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Class 1 offense of possession of cocaine with intent to deliver.

¶ 29 Therefore, we affirm the judgment of the trial court and correct the mittimus.

¶ 30 CONCLUSION

¶ 31 Affirmed; mittimus corrected.