

**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).

FIRST DIVISION  
FILED: MARCH 11, 2013

No. 1-11-0671

---

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 19647
	)	
DONALD WATKINS,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 Held: The trial court did not commit reversible error in tendering jury instructions or suppressing a police surveillance location, and the State proved the defendant guilty beyond a reasonable doubt. However, the defendant's conviction for a lesser-included offense must be vacated under one-act, one-crime principles.
- ¶ 2 The defendant, Donald Watkins, appeals from his jury trial convictions and 7-year prison sentence for possession with intent to deliver a controlled substance within 1,000 feet of a school (School PCSI) and possession with intent to deliver a controlled substance over one gram (PCSI). On appeal, the defendant argues that (1) the State failed to prove that he possessed the drugs within 1,000 feet of a school; (2) the trial court erred by tendering a verdict form allowing the jury to find the defendant guilty of the lesser offense of possession of a controlled substance (PCS) without a corresponding "not guilty" form; (3) the trial court erred by failing to tender a jury instruction

No. 1-11-0671

detailing the elements of PCS; (4) the court erred in suppressing as privileged the precise location of the police surveillance position in this case; and (5) his PCSI conviction must be vacated under the one-act, one-crime rule. The State concedes the last argument. For the reasons that follow, we vacate the defendant's PCSI conviction and order that the defendant's mittimus be corrected to reflect only a School PCSI conviction. We otherwise affirm the trial court's judgment as modified.

¶ 3 In November 2009, the defendant was charged with School PCSI and PCSI. In August 2010, he filed a motion for pre-trial disclosure of the surveillance location police used just before his arrest. In that motion, the defendant argued that the State's case rested exclusively on the ability of police officers to observe the drug transactions with which he was charged, and thus that his right to confront witnesses required that he be allowed to investigate the surveillance location. In its argument on the issue, the State asserted that the State would present additional evidence, including physical narcotics evidence it recovered at the scene of the defendant's arrest. The State also noted that application of a qualified privilege would preserve the surveillance location for future police use. After an in camera discussion with the surveilling police officer, the court ruled that the interests of public safety outweighed the defendant's need to learn the precise surveillance location, and he denied the defendant's motion.

¶ 4 The State's first witness at trial, Officer Kuri of the Chicago Police Department, testified that, on the date of the defendant's arrest, he was in the area of 2951 West Adams, a known drug-sales area near a school. Kuri recalled that he took up a surveillance position while three other officers waited on the ground. Kuri said that the weather was clear that day and that his view from his position was unobstructed. Kuri described his position as elevated and approximately 150 feet to the west of the defendant. From his position, Kuri saw a woman approach the defendant at approximately 2942 West Adams, speak with him, and give him money. The defendant then "crossed the street over to 1951 at the base of a fence," bent over, retrieved an item from a piece of paper, and then returned to the woman to give her the item. Kuri estimated that the paper was 60 to 75 feet from the spot where the defendant and the female first spoke. Approximately 5 minutes

No. 1-11-0671

later, Kuri witnessed a similar transaction, and he directed the other officers to arrest the defendant and recover the paper near the fence. The paper was later revealed to contain narcotics. Kuri testified that there was a school approximately 600 feet from the area in which the defendant entered into his drug transactions. On cross-examination, Kuri stated that he first saw the defendant at approximately 2941 West Adams, but he later corrected himself and stated that the address was 2942 West Adams.

¶ 5 Officer Patrick Staunton, one of the three enforcement officers who worked with Kuri on the defendant's arrest, testified initially that the defendant was arrested at 2942 West Wilcox. However, in response to the very next question, he corrected himself by stating, "Excuse me. It was not 2842 West Wilcox. It was 2942 West Adams." Staunton testified that police recovered approximately \$20 in U.S. currency, but no drug paraphernalia, in a post-arrest search of the defendant.

¶ 6 William Marley, an investigator for the State's Attorney, testified that he measured the distance between 2951 West Adams and the nearby school. He measured the distance as 649 feet. He also testified that 2942 West Adams is closer to the school than 2951.

¶ 7 After testimony from a forensics analyst, the State rested its case. The trial court denied the defendant's motion for a directed verdict, and the defense presented no witnesses. In the jury instruction conference, the defense asked that the jury be given the option to convict him of PCS, a lesser-included offense; the court granted the request over the State's objection. Following closing argument, the trial court explained the jury's options to it:

"Under the law, a person charged with [School PCSI] and [PSCI] may be found, one, not guilty of [School PCSI], and not guilty of [PSCI]; or two, guilty of [School PCSI] and guilty of [PSCI]; or three, not guilty of [School PCSI], and guilty of [PSCI]; or four, not guilty of [School PCSI], and not guilty of [PSCI], and guilty of [PCS].

Accordingly, you will be provided with four verdict forms pertaining to the charges of [School PCSI] and [PSCI].

One, not guilty of [School PCSI], and not guilty of [PSCI].

No. 1-11-0671

Two, guilty of [School PCSI], and guilty of [PCSI].

Three, guilty of [PCSI] and not guilty of [School PCSI].

Four, not guilty of [School PCSI] and not guilty of [PCSI] and guilty of [PCS]."

¶ 8 Following deliberation, the jury returned its verdict finding the defendant guilty of School PCSI and PCSI. The defendant was sentenced to a 7-year term of imprisonment. He now timely appeals.

¶ 9 The defendant's first argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt of School PCSI, because it presented insufficient evidence that his drug sales took place within 1,000 feet of a school. When a defendant challenges the sufficiency of the evidence, the appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004). In such a case, it is not the role of the reviewing court to retry the defendant. *People v. Sutherland*, 223 Ill.2d 187, 242, 860 N.E.2d 178 (2006). A criminal conviction will not be set aside on the grounds of insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287 (1996). In reviewing the evidence we will not substitute our judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242; *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262 (2005). The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Sutherland*, 223 Ill. 2d at 242.

¶ 10 The defendant asserts that the distance element of PCSI was not proven here because the State's witnesses provided inconsistent and confusing accounts of his actual location. To support this argument, the defendant points out that the police officers who testified cited not only 2942 West Adams and 2951 West Adams, the locations where the defendant met his customers and where he

No. 1-11-0671

stashed his drugs, but also three additional addresses: 2842 West Wilcox, 2942 West Wilcox, and 2941 West Adams. According to the defendant, the witnesses' mention of these five addresses prevented the State from conclusively establishing a single point from which to start its 1,000 foot measurement. Thus, the defendant argues, the State's single measurement, from the 2951 West Adams address, was insufficient to prove that his sales took place within 1,000 feet of a school. We disagree. The three additional addresses the defendant mentions were all disavowed by the police witnesses who mentioned them initially, so that their testimony taken as a whole left unmistakably clear their position that the defendant met customers at 2942 West Adams and stored drugs at 2951 West Adams. The State presented testimony that the 2951 West Adams address was less than 700 feet from a school and that the 2942 West Adams address was even closer. Given this evidence, we have no reason to question the jury's finding that the defendant sold his drugs within 1,000 feet of a school.

¶ 11 The defendant's second argument on appeal is that the trial court committed reversible error by submitting a jury verdict form allowing the jury to find him guilty of PCS without submitting a corresponding "not guilty" form. In the defendant's view, this alleged oversight robbed the jury of the option of acquitting him of all three submitted offenses. We disagree with the defendant's interpretation of the record. As noted above, the trial court informed the jury that it had four options for its verdict: it could find the defendant guilty of both School PCSI and PCSI, find him guilty of neither, find him guilty of PCSI but not School PCSI, or find him guilty of neither but enter a guilty verdict on PCS. The second of these options represents total acquittal. For that reason, and because the options were clearly explained to the jury, we reject his argument that he was deprived of any rights due to the failure to instruct the jury in a manner that allowed him to be acquitted of all the offenses presented.

¶ 12 The defendant's third argument on appeal is that the court committed reversible error by submitting a PCS verdict form without an accompanying form explaining the elements of PCS. We note the State's observation that the defense either failed to raise this issue via timely objections and

No. 1-11-0671

a post-judgment motion or actually invited any error by preparing the jury instructions at issue. Normally, such omissions would preclude our consideration of the defendant's arguments. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988); *People v. Villareal*, 198 Ill. 2d 209, 227, 761 N.E.2d 1175 (2001). However, the defendant asserts that, to the extent he failed to preserve his arguments properly for appeal, we should consider them either under the plain-error doctrine or as instances of ineffective assistance of counsel. “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred 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 occurred 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, 870 N.E.2d 403 (2007). An ineffective-assistance-of-counsel argument, on the other hand, is presented to vindicate an accused's constitutional right to capable legal representation at trial. *People v. Wiley*, 165 Ill.2d 259, 284, 651 N.E. 2d 189 (1995). Under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel will prevail only where he is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill.2d 504, 525, 473 N.E. 2d 1246 (1984) (adopting *Strickland*). To succeed under either test, the defendant must demonstrate that he suffered some prejudicial error. That is, to establish plain error, the defendant must first demonstrate reversible error (*Piatkowski*, 225 Ill.2d at 565), and, in this context, to establish ineffective assistance of counsel, a defendant must demonstrate that counsel's advocating an additional instruction would have changed the result of his trial (see *Albanese*, 104 Ill. 2d at 525). We find no such prejudicial error here, and so, even through the lenses of plain error or ineffective assistance of counsel, we see no grounds for reversing the defendant's convictions.

¶ 13 To the extent the court gave an incomplete PCS instruction, we conclude that the error was

No. 1-11-0671

harmless in light of the remaining instructions tendered to the jury. In the instructions relating to the two offenses with which the defendant was charged, School PCSI and PCSI, the court explained that both charges required the State to prove that the defendant knowingly possessed with intent to deliver a substance containing cocaine. The School PCSI instruction added an element for proximity to a school. In addition to these instructions, the court submitted a separate instruction defining actual and constructive possession. Based on these instructions, we conclude that the defendant cannot establish that the lack of a specific elements instruction on PCS left the jury so confused that it was unable to render a verdict on that crime.

¶ 14 The defendant counters that the instructions as given denied the jury "the ability to make a knowing decision of guilt on a lesser included charge," so that it was "essentially directed to find [the defendant] guilty of [PCS]." The defendant's characterization is based in part on his position, rejected above, that the trial court did not provide the jury with the option to find the defendant not guilty of all three crimes. Nevertheless, the defendant also seems to argue that, by failing to list the elements of PCS, the trial court kept it from considering those elements and thus removed the elements from its consideration. For support of this proposition, the defendant refers us to *People v. James*, 255 Ill. App. 3d 516, 626 N.E.2d 1337 (1993). In *James*, the jury was tendered three instructions on two crimes: a "guilty" form for aggravated arson, a "guilty" form for arson, and a "not guilty" form for aggravated arson. *James*, 255 Ill. App. 3d at 528. The defendant argued that the court's failure to tender a "not guilty" form for regular arson deprived the jury of the option of finding him not guilty of that lesser crime. *James*, 255 Ill. App. 3d at 528. We held that there was a "reasonable probability that this error had the effect of removing from the jury's consideration the elements of [regular] arson and conveying the message to the jury that it was their duty only to determine whether the aggravating factor of the greater offense was present, thus directing a verdict of guilty on the charge." *James*, 255 Ill. App. 3d at 528.

¶ 15 We see a critical distinction between this case and *James*. Here, unlike in *James*, the jury was provided the option of finding the defendant not guilty of all the raised offenses. The only

No. 1-11-0671

possible omission from the jury instructions pertained to the amount of explanation they gave regarding a lesser included offense that was otherwise fully presented as a verdict option. Thus, the instructions here did not, in effect, direct the jury to find that all the elements of the lesser-included offense had been established. Further, for the reasons stated above, we conclude that amount of explanation the tendered instructions provided on the topic of possession of a controlled substance gave the jury sufficient information to consider a PCS verdict. For that reason, we reject the defendant's argument that an incomplete presentation of the PCS offense to the jury deprived him of a fair trial.

¶ 16 The defendant's fourth argument on appeal is that the trial court erred in suppressing Kuri's surveillance position. The defendant acknowledges that he failed to raise this issue in a post-trial motion, and the parties dispute whether the defendant must establish plain error in order to avoid forfeiture of the issue. However, even under plain error review, our first step is to determine whether any reversible error occurred at all. *People v. Patterson*, 217 Ill. 2d 407, 444, 841 N.E.2d 889 (2005). We find no reversible error here.

¶ 17 "The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Cruz v. New York*, 481 U.S. 186, 189 (1987). That guarantee, "extended against the States by the Fourteenth Amendment, includes the right to cross-examine witnesses." *Cruz*, 481 U.S. at 189; *People v. Criss*, 294 Ill. App. 3d 276, 279, 689 N.E.2d 645 (1998) (citing *Cruz*). A trial court may not deprive a defendant of the right to question witnesses; however, it may limit the scope of cross-examination. *Criss*, 294 Ill. App. 3d at 279. Indeed, "Illinois recognizes certain limitations on a defendant's right to cross-examine," (*Criss*, 294 Ill. App. 3d at 280), among them a qualified privilege against disclosure of secret police surveillance locations (*Criss*, 294 Ill. App. 3d at 281). The purpose of this privilege is to avoid "seriously cripp[ing] legitimate criminal surveillance and endanger[ing] the lives of police officers and those who allow their property to be used for criminal surveillance." *Criss*, 294 Ill. App. 3d at 281. The privilege also removes a disincentive to property owners who might otherwise facilitate

No. 1-11-0671

police surveillance. Criss, 294 Ill. App. 3d at 281.

¶ 18 Out of respect for a defendant's constitutional rights, however, the privilege has some limitations. Thus, "where the case against [a defendant] turns almost exclusively on [the credibility of a surveilling officer's testimony], disclosure must almost always be ordered." *People v. Stokes*, 392 Ill. App. 3d 335, 340, 910 N.E.2d 98 (2009). Further, even though "[t]he defendant must demonstrate a need for disclosure" in order to pierce the privilege, a court should work to protect the public interest without impairing its fact-finding mission. Criss, 294 Ill. App. 3d at 281. Accordingly, even if a defendant cannot overcome the surveillance location privilege, the impairment should be mitigated by permitting defense counsel to cross-examine the police officers' observations with respect to distance, weather, and any possible obstructions. Criss, 294 Ill. App. 3d at 281. In all, "[d]isclosure should be decided on a case-by-case basis, balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense." Criss, 294 Ill. App. 3d at 281. "The latitude permitted on cross-examination is left largely to the discretion of the trial court[,] and its determination will not be overturned absent a clear abuse of discretion." Criss, 294 Ill. App. 3d at 279-80.

¶ 19 Based on the totality of the circumstances presented by this case, we see no abuse of discretion in the trial court's decision to suppress the surveillance location, nor do we see an unfair deprivation of constitutional rights as a result of the court's ruling. The public interest in maintaining the secrecy of the surveillance location is explained well enough by the above general principles, particularly the value of maintaining the location's secrecy so that it may be used again. In so stating, we reject the defendant's argument that the public would be better served by conspicuous police surveillance; both types of surveillance have their value. As for the defendant's counterveiling interest in cross-examining the witnesses who testified against him, we observe that, although Kuri's specific location was not disclosed, most of its relevant aspects were. Kuri divulged the distance from which he viewed the defendant, the direction from which he viewed the defendant, and whether he encountered any visual obstacles. Defense counsel cross-examined him on these points, and the

No. 1-11-0671

quality of his vantage point was otherwise tested throughout his testimony by questions asking him to describe the scene prior to the defendant's arrest. Further, the State's case did not turn exclusively on Kuri's observations; it also presented physical evidence in the form of the drugs the defendant was selling. Under these circumstances, we conclude that the trial court could reasonably have concluded that the public interest in maintaining the secrecy of the surveillance location outweighed any infringement it caused the defendant's right to cross-examine. We, therefore, find no abuse of discretion in the trial court's ruling, and we reject the defendant's argument that the ruling amounted to reversible error.

¶ 20 The defendant's final argument on appeal is that his dual convictions, for School PCSI and PCSI, violate one-act, one-crime principles. See *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977). The State concedes the point and asks that we vacate the lesser conviction and direct the circuit court to correct the defendant's mittimus to reflect a conviction of only School PCSI. We do so now.

¶ 21 For the foregoing reasons, we vacate the defendant's conviction for possession with intent to deliver a controlled substance, and we direct the circuit court to correct his mittimus to indicate a conviction for only possession with intent to deliver a controlled substance within 1,000 feet of a school. We otherwise affirm the judgment of the circuit court.

¶ 22 Affirmed in part and vacated in part; mittimus corrected.