

No. 1-11-3365

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of Cook County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 10 CR 10424 |
| |) | |
| GANDY SUGGS, |) | |
| |) | Honorable Michael J. Howlett, Jr. |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant’s conviction for delivery of a controlled substance is reversed and the case is remanded for a new trial, because the trial court erred in finding the disclosure of the surveillance location was subject to a privilege. Because we remand the case for a new trial, defendant’s remaining issue is moot.

¶ 2 Following a jury trial, defendant Gandy Suggs was found guilty of delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)) and possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The trial court imposed concurrent sentences of six years’ incarceration and five years’ incarceration for the controlled substance delivery conviction and the simple possession conviction, respectively. On appeal, defendant raises two claims: (1) the trial court improperly denied defendant’s cross-examination of the testifying surveillance officer as to his surveillance location; and (2) his trial counsel was ineffective for failing to interview or call a

witness who would have testified that defendant did not sell drugs. In the alternative, he argues that this court should remand this case for an evidentiary hearing on defendant's claim that his trial counsel was ineffective because the trial court did not appoint a new attorney to represent defendant at those post-trial proceedings. For the following reasons, we reverse defendant's conviction for delivery of a controlled substance and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 Defendant, Gandy Suggs, was charged by information with one count of delivery of a controlled substance and one count of possession of a controlled substance. In essence, the State alleged that a surveillance officer, Rolando Ruiz, observed defendant engaging in a narcotics transaction with Ricky Barlow.¹ Defendant filed a motion *in limine* seeking to be allowed to cross-examine Ruiz with respect to his surveillance location. The trial court then held an *in camera* colloquy with Ruiz with no attorneys present, which was transcribed by a court reporter. Following the colloquy, the trial court ordered the transcript of the *in camera* proceedings sealed, and finding "threshold" relevancy to the surveillance location, asked the State for argument on its position. The State responded by arguing that defendant's motion should be denied because cross-examination as to the precise surveillance location would jeopardize both officer safety and any future investigations that the police would wish to conduct in that location. The State added that the location had been used in the past, at the time of the hearing, and would be used in the future. Defendant countered that it needed to cross-examine as to the precise location because Ruiz claimed to be only 25 feet

¹ Barlow was arrested with defendant and charged with possession of a controlled substance, but the State dismissed this charge by *nolle prosequi* at a preliminary hearing. Barlow is thus not a party to this appeal.

away but Ruiz was not seen by defendant or Barlow. The trial court asked whether the State was willing to disclose any specific information that would respond to defendant's argument, but the State refused. The trial court then found the surveillance location to be privileged but allowed defendant to question Ruiz regarding the distance to the purported transaction, as well as the height, lighting, and presence of any obstructions. The matter then proceeded to trial.

¶ 5 At trial, Ruiz testified that, from his surveillance location, he saw defendant walking up and down the 5200 block of West Chicago Avenue at around 6:25 p.m. on May 4, 2010. Ruiz did not disclose his precise location, only stating that he was 20 to 25 feet from defendant, and that Ruiz had an unobstructed view in clear daylight of defendant. Ruiz could not recall what defendant was wearing, only stating that defendant was in civilian clothing.

¶ 6 At some point, Ruiz saw a black man (who was later identified as Barlow) walk up to defendant from the west. Ruiz observed Barlow and defendant speak briefly, but Ruiz could not hear what either was saying. At the end of the conversation, Ruiz saw Barlow hand defendant U.S. currency, and then defendant dropped a dark item into Barlow's hand, but Ruiz admitted he did not know what specifically defendant gave to Barlow. According to Ruiz, Barlow then turned and walked away to the west. Ruiz contacted enforcement officers, providing them with a physical description of Barlow, and remained in his surveillance location.

¶ 7 One of the enforcement officers, Roberto Ruiz, testified that he located Barlow, placed him into custody, and recovered six small black-tinted plastic bags containing a white rock-like substance. Roberto Ruiz also subsequently went to North Lockwood Avenue in response to another radio communication from Ruiz (the surveillance officer), and saw defendant toss an item "onto the

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ground” that was recovered by another enforcement officer, Michael Fitzgerald. The item included 23 small plastic bags each containing a white rock-like substance, and the small plastic bags were similar in appearance to the bags recovered from Barlow. On cross-examination, Roberto Ruiz conceded that, although there are police cameras in the area, they did not investigate to determine whether this transaction was video recorded. He also admitted that no attempt was made to obtain any fingerprint or DNA evidence.

¶ 8 Chicago police officer Joseph Ceglarek testified that he inventoried the suspected cocaine that had been recovered. On cross-examination, Ceglarek could not recall when the arrests took place, nor on what street he was at the time of defendant’s arrest. When asked to describe what defendant was wearing at the time of the arrest, Ceglarek merely responded, “Clothes.”

¶ 9 Michael Fitzgerald, a sergeant with the Chicago police department, testified that he went to North Lockwood Avenue in response to the surveillance officer’s (Ruiz’s) radio message. There, he and other officers approached defendant, and Fitzgerald saw defendant throw a small black item about the size of a tea bag “over a fence.” Fitzgerald recovered the item, which he said was a clear plastic bag containing 23 smaller, dark-colored bags containing a white rock-like substance. Fitzgerald admitted that his police report did not indicate that defendant had thrown an item over a fence, but Fitzgerald explained that the report was only a summary.

¶ 10 Illinois State Police forensic scientist Tiffany Neal testified on behalf of the State as an expert in the field of forensic chemistry. Neal opined that, within a reasonable degree of scientific certainty, that the white rock-like substance in the plastic bags purportedly recovered from defendant and Barlow contained cocaine.

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¶ 11 At the conclusion of the State’s case, the trial court denied defendant’s motion for a directed verdict, and defendant elected not to present evidence. After closing arguments and jury instructions, the jury began its deliberations. Following deliberations, the jury found defendant guilty of both counts. The jury was then polled, being asked, “Was this then and is this now your verdict?” Two jurors responded that it was not their initial verdict, but it was at that time.

¶ 12 Prior to sentencing, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of trial counsel. Over the next several months, defendant’s *pro se* motion was presented to numerous judges. Following argument, the trial court denied defendant’s motion without appointing new counsel. The case proceeded to sentencing.

¶ 13 During the sentencing hearing, the trial court was informed that defendant was to be mandatorily sentenced as a Class X offender due to his criminal history. At the close of the hearing, the trial court imposed concurrent terms of six years’ imprisonment for the delivery of a controlled substance conviction, and five years’ imprisonment for the simple possession conviction.

¶ 14 This appeal follows.

¶ 15 ANALYSIS

¶ 16 Defendant first contends that he was denied his right of confrontation. Specifically, he argues that the trial court improperly denied defendant’s cross-examination of the surveillance officer as to his surveillance location because the officer’s testimony was the “linchpin” of the State’s evidence against him. The State responds that defendant has forfeited this issue, and that defendant failed to show that the disclosure of the location was necessary for his defense or that disclosure outweighed the public’s interest in keeping the location secret.

¶ 17 At the outset, we must address the State’s forfeiture argument. It is a well-settled rule that, in order to preserve a claim for appellate review, an appellant must raise the issue both at trial and in a post-trial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Although defendant raised this issue in his pretrial motion *in limine*, defendant failed to raise the issue in his post-trial motion. Accordingly, this claim is forfeited.

¶ 18 Defendant, however, argues that we may review this issue under the plain error doctrine. This doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error when either “(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.” *People v. Herron*, 215 Ill. 2d 167, 187 (2005). If the evidence is close, defendant must prove “prejudicial error,” *i.e.*, that the error alone severely threatened to tip the scales of justice against him. *Id.* If the evidence is not close, defendant must show that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Id.* We must first, however, determine whether any error occurred, because in the absence of error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

¶ 19 The Sixth Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him.” See U.S. Const., amends. VI, XIV; see also Ill. Const. 1970, art. I, § 8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *Pointer v. Texas*, 380 U.S. 400 (1965) (holding that the confrontation clause is applicable to the states via the fourteenth amendment). The right to cross-examination is not absolute, however. The trial court

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is given broad discretion to limit the scope of cross-examination at trial, and we will not reverse a trial court's decision as to the scope of cross-examination absent an abuse of discretion. *People v. Enis*, 139 Ill. 2d 264, 295 (1990). As noted above, the State responds that the trial court properly limited cross-examination based on the "surveillance location privilege."

¶ 20 The State has a qualified privilege regarding the disclosure of secret surveillance locations. *People v. Criss*, 294 Ill. App. 3d 276, 281 (1998). The need for disclosure is decided on a case-by-case basis, balancing the public interest in keeping the location secret with a defendant's interest in preparing a defense. *Id.* A defendant's right to cross-examine as to the surveillance location becomes more important where the witness is more critical to the State's case. *People v. Knight*, 323 Ill. App. 3d 1117, 1127-28 (2001). Further, disclosure of a surveillance location will be compelled at trial if the allegedly privileged information is material to the issue of guilt. *Id.* Where the State's case against a defendant turns almost exclusively on an officer's testimony, disclosure must "almost always" be ordered. *Id.* at 1128. In other words, although a qualified privilege is available at trial, disclosure is presumed when the case against the defendant is based "primarily on eyewitness testimony." *People v. Price*, 404 Ill. App. 3d 324, 331 (2010). Furthermore, if the officer's testimony is uncorroborated, the application of the privilege will seriously weaken the defendant's ability to cross-examine the officer on key factual issues. *Knight*, 323 Ill. App. 3d at 1128. "The only instances in which nondisclosure would positively not be necessary is where 'no question is raised about a surveillance officer's ability to observe or where a contemporaneous videotape provides the relevant evidence.'" *Id.* (quoting *State v. Reed*, 101 Wash. App. 704, 716 (2000)).

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¶ 21 When the State invokes this privilege, it bears the initial burden of proof and must demonstrate that the surveillance privilege should apply in a given case. *Price*, 404 Ill. App. 3d at 331. The State carries its burden of proof by presenting evidence to the court that the surveillance location was either (1) on private property with the permission of the owner, or (2) in a location that is useful and whose utility would be compromised by disclosure. *Id.* at 332. Where, as here, this privilege is invoked at trial, “due process requires that *** the defendant need only show that the location is ‘relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause’ in order to overcome the privilege.” *Id.* at 332-33 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

¶ 22 Turning to the case before us, we find that the trial court erred in applying the surveillance location privilege. Here, the State charged defendant by information with delivery of a controlled substance, and not possession with intent to deliver. The State’s case hinged entirely upon the testimony of Ruiz, the surveillance officer, who was the only one of the State’s witnesses who observed the purported delivery of cocaine from defendant to Barlow. Thus, since the State’s case against defendant turned exclusively on Ruiz’s testimony, disclosure under such circumstances must “almost always” be ordered, and disclosure is only “positively not *** necessary” where there is no question regarding the surveillance officer’s ability to observe or where there is a video recording of the relevant evidence. *Knight*, 323 Ill. App. 3d at 1128. The State presented no video recording of the alleged delivery, and the surveillance officer’s ability to observe was squarely in question, especially given the fact that Ruiz testified that he saw only one “dark item” transferred to Barlow, but Barlow was stopped shortly thereafter with multiple dark-tinted plastic bags on his person. The

State charged defendant with *delivery* of a controlled substance, and what was central to the State's case was Ruiz's observation of the dark item transferred, not the identity of the transferor (defendant). Before the trial court, the State asserted that the surveillance location could not be disclosed to defendant, but its proffered reasons vaguely referred to officer safety and future investigations. Nothing in the record before us, including the sealed transcript of the *in camera* hearing which we have reviewed, supports the State's claim that disclosure would jeopardize either officer safety or future investigations. The State's assertion is thus without merit, and the trial court erred in barring disclosure.

¶ 23 Nonetheless, the State argues this court has previously held that “virtually identical representations” were sufficient to satisfy the State's initial burden, citing *People v. Britton*, 2012 IL App (1st) 102322 in support. The State's reliance, however, is misplaced. In *Britton*, as the specially concurring justice noted, the defendant did not provide this court with a transcript of the *in camera* hearing, and in the absence of a complete record, it had to be presumed that the trial court's ruling had a sufficient legal and factual basis and all doubts had to be resolved against the defendant-appellant. *Id.* ¶ 36 (Epstein, J., specially concurring) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)). Here, by contrast, defendant did provide us with a transcript of the *in camera* hearing, which was filed under seal. As noted above, the need for disclosure is decided on a case-by-case basis. *Criss*, 294 Ill. App. 3d at 281. We have reviewed the entire record, including the sealed transcript, and based upon that review, we hold that the surveillance location privilege was improperly invoked. *Britton* is therefore not “virtually identical” to this case, and as a consequence, the State's reliance upon it fails.

¶ 24 The State’s reliance upon *People v. Bell*, 373 Ill. App. 3d 811 (2007), is equally misplaced. In *Bell*, the trial court never held an *in camera* hearing as to the applicability of a surveillance location privilege, and thus the question presented was whether the trial court should have done so. *Id.* at 820 (holding that the trial court “did not err in not ordering an *in camera* proceeding”). Furthermore, as defendant points out, the defendant in *Bell* was charged with possession with intent to deliver (*Id.* at 812-13), which does not require proof of an actual delivery (*People v. Bonslater*, 261 Ill. App. 3d 432, 442 (1994)). Contrary to the State’s argument, *Bell* is not “extremely similar” to this case, and the State’s reliance upon it is unavailing. Therefore, the trial court erred in limiting defendant’s cross-examination of Ruiz as to his surveillance location.

¶ 25 In addition, we hold that the evidence in this case was closely balanced, thus satisfying the first prong under the plain error doctrine. *Herron*, 215 Ill. 2d at 187. The State presented no physical evidence in support of the conviction. Defendant’s conviction rested solely on Ruiz’s testimony. Although Ruiz insisted he was only 25 feet from defendant, he viewed only a “dark item” transferred from defendant to Barlow, he could not hear anything that was said between defendant and Barlow, and he could not recall what defendant was wearing. Barlow, however, was later found to have numerous dark-tinted plastic bags in his possession. The State claims that Ruiz’s testimony was credible, but as defendant notes, Ruiz’s credibility was improperly enhanced by the trial court’s erroneous application of the surveillance location privilege. On this record, we are compelled to hold that the evidence was closely balanced, and the trial court’s error in limiting cross-examination as to Ruiz’s surveillance location based upon a privilege warrants a new trial.

¶ 26

CONCLUSION

¶ 27 Therefore, we reverse the judgment of the trial court and remand this case for a new trial. Notwithstanding our holding today, and based upon a complete review of the record, we conclude that the evidence, viewed as a whole and in the light most favorable to the State, is sufficient to prove defendant's guilt for the charged offenses beyond a reasonable doubt. Therefore, principles of double jeopardy do not bar defendant's retrial. *People v. Daniels*, 187 Ill. 2d 301, 310 (1999). We further note, however, that we have made no finding as to defendant's guilt that would be binding on retrial. *People v. Jones*, 175 Ill. 2d 126, 134 (1997). Finally, since we are granting defendant a new trial, we need not reach defendant's second argument on appeal that the trial court erred in refusing to appoint new counsel to represent defendant in his *pro se* post-trial claim of ineffective assistance of trial counsel.

¶ 28 Reversed and remanded.