

No. 1-13-2596

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. 12 CR 9036
)	
ARTEZ WOODS,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 **Held:** The trial court was within its discretion to deny defendant's motion for a mistrial after a State witness violated an order *in limine* by telling the jury that cannabis was recovered from defendant upon his arrest. In addition, defendant's claim of counsel's ineffectiveness involves matters outside the record on appeal.

¶ 2 Following a jury trial in 2013, defendant Artez Woods was convicted of delivery of a controlled substance (heroin) and was sentenced to three years in prison. On appeal, defendant contends the trial court abused its discretion in denying his motion for a mistrial after a testifying

police officer violated the court's order *in limine* by testifying that a different controlled substance, namely cannabis, was recovered from defendant during a custodial search. Defendant also argues he was denied the effective assistance of counsel because his counsel described in opening statement what the testimony would show but did not ultimately present evidence to support that version of events. For the reasons set out below, we affirm.

¶ 3 Defendant was charged with one count of delivery of a controlled substance (heroin) for an offense occurring on April 21, 2012. Before trial, defendant filed motions *in limine* to prevent any reference to his three prior drug convictions or the recovery of cannabis from him upon his arrest. The trial court ruled that defendant's prior felony convictions for delivery of a controlled substance in 2005 and possession of a controlled substance in 2010 could be admitted for impeachment purposes without mention of the nature of those offenses. During that discussion, the assistant State's Attorney remarked that "there was cannabis found on the defendant [] but we are not going to go into that."

¶ 4 In opening statement, the prosecution described a drug transaction in which defendant purportedly sold heroin to an undercover officer, who paid for the contraband with a pre-recorded \$20 bill. In the defense opening statement, counsel described defendant going about a normal day on April 21, 2012, and walking out of an apartment building on Goethe Street in Chicago.

¶ 5 Defense counsel's opening statement continued as follows:

"So [defendant] is going down the hall to get out to the street and he is approached [by] someone who asked him if he has change, do you have change for a 20

[dollar bill], and he did, gave them change for a 20 and went about his way, didn't think anything of it, no big deal.

He got out the apartment door, nothing happens. He's walking down the street, he goes to his mother's house. The son wants to get a juice or something from the mini-mart next to his apartment, so he takes his 4-year-old son over to the mini-mart. They go to the mini-mart, they get what they want to get there, he pays for his transaction, he comes out of the mini-mart with his 4-year-old son.

A couple other people in the area, but at that point he sees a car speeding down the street, wrong way down a one-way street coming towards him. It's not a marked police car. People get out of the car in front of him. They're not in police uniform but they have guns drawn. His 4-year-old son grabs him behind his legs and he goes daddy, daddy, guns, at which point Mr. Woods and three or four other people are put up against the building. And Mr. Woods still doesn't know what is going on.

Fortunately for him and his son, Mr. Woods' mother happened to be in the area and she took his son and took care of him while Mr. Woods went off to the police station. And later that day, Mr. Woods is charged. And that is how we've come here today.

We ask you to keep an open mind. As the court has reminded you time and time again, Mr. Woods has the cloak of innocence as he sits there. He's innocent until the State can prove him guilty beyond a reasonable doubt. And we believe that will not happen, that there is reasonable doubt in this case. And you will see that when you see and you hear the evidence that comes before you.

And we would ask at the end of this case, after everything is completed and you go back to deliberate, you will find that the State has not met their burden beyond a reasonable doubt and you will find Artez Woods not guilty of this charge."

¶ 6 The State presented two witnesses who described a drug transaction. Chicago police officer Mark Smith testified that at about 11:44 a.m. on April 21, 2012, he was working as an undercover narcotics buy officer at 414 West Goethe, which was an apartment building for low-income residents. Officer Smith testified he was dressed as a "bum" in a dirty t-shirt and jeans and carried a \$20 bill with a serial number that had been recorded by police.

¶ 7 Officer Smith spoke to a woman in the courtyard of the building, and the woman led him to an apartment and knocked on the door. The person who answered the door directed the woman and Officer Smith to a nearby doorway, where defendant was standing with a boy. Officer Smith asked defendant for \$20 worth of heroin, and defendant handed him a purple zipper-top plastic bag of suspect heroin in exchange for the \$20 in pre-recorded funds. Officer Smith returned to his area and reported a narcotics transaction to the officers working on the enforcement team, describing the seller as wearing a black hooded shirt and blue jeans and stating he was accompanied by a child.

¶ 8 About 10 minutes later, defendant was detained by the enforcement officers, who called Officer Smith to their location, where he identified defendant as the man who sold him the narcotics. A forensic scientist testified the plastic bag Officer Smith received from defendant contained .2 gram of heroin. On cross-examination, defense counsel asked Officer Smith if he saw defendant leave the building with his son, and the officer replied he did not. When counsel

1-13-2596

asked the officer if there was a grocery store or mini-mart on Evergreen Street near where defendant was arrested, Officer Smith said yes.

¶ 9 Chicago police officer Benny Chinchilla testified he was working as an enforcement officer in the transaction and was in constant radio contact with Officer Smith. Officer Smith described the seller as a black male who was 6 feet tall and weighed 160 pounds with a medium complexion and wearing a black hooded shirt and blue jeans. Officer Smith reported to Officer Chinchilla that defendant was walking in the 400 block of Evergreen.

¶ 10 Officer Chinchilla testified that he and another member of the enforcement team approached defendant, who was accompanied by a young boy. During that encounter, the enforcement team received verification from Officer Smith that defendant sold him the contraband, and defendant was placed under arrest. A \$20 bill recovered from defendant's pocket bore the serial number of the pre-recorded funds used by Officer Smith.

¶ 11 The prosecutor then asked Officer Chinchilla if anything was recovered from defendant other than the \$20 bill, and the officer responded, "Cannabis." Defense counsel objected, and the court ruled as follows:

"Objection sustained. Ladies and gentlemen, there's nothing in these charges having anything to do with cannabis. That answer is stricken. Disregard the question and the answer. Has no bearing or merits in this case."

¶ 12 The prosecutor then asked the officer if any money was recovered from defendant other than the pre-recorded funds, and the officer replied that \$256 was recovered from defendant's pants pockets.

¶ 13 After Officer Chinchilla's testimony, the following discussion took place outside the presence of the jury:

"[Defense Counsel]: I'm very concerned with regard to the mention of cannabis in this case. We did a motion *in limine*, State said they would not do that. I think it was – clearly they should have notified their witness not to make any mention of that. I don't think it's a bell we can unring.

THE COURT: Can the State please answer the question as to why in the world that would come out with the testimony [] of this officer?

[Assistant State's Attorney]: We weren't trying to elicit that, we were trying to elicit additional money that was on the defendant. And we did not – in fact I can put of record because I'm an officer of the court, we told the officer not to get into the cannabis. I don't know if he was mistaken or he didn't understand what the question was. We were clearing [*sic*] only trying to get into the additional money, which is what we followed up with immediately."

¶ 14 The court stated, "I don't see that the State did this on purpose" and asked defense counsel if she wished to make a motion for a mistrial. Defense counsel made a motion for a mistrial and to strike Officer Chinchilla's testimony. The State responded that the court instructed the jury immediately not to take the cannabis reference into consideration and argued that the officer's entire testimony should not be stricken. The State also pointed out that it followed the cannabis reference with a question about the additional funds recovered from defendant. The court denied the defense motion for a mistrial.

¶ 15 After the State concluded its case-in-chief, defense counsel told the court that the defense rested. Outside the presence of the jury, the court informed defendant of his right to remain silent and his right to decide whether or not to testify, stating the decision belonged only to him. The court asked defendant if he discussed with counsel the possibility of testifying, and defendant responded yes and that he had decided not to testify. The following colloquy then took place:

"THE COURT: Okay. You understand you were sitting there, that your lawyer in opening statement made some reference that you were going to testify and give an explanation as to why you had the [\$20 bill with the pre-recorded serial number] and that's not going to happen. The jury can't use the opening statement as evidence so that's not going to be in the case. You understand that?

DEFENDANT: Yes.

THE COURT: She won't be able to argue that point. You understand that?

DEFENDANT: Yes, sir.

THE COURT: So even – you still want to not testify, is that right?

DEFENDANT: Yes.

THE COURT: Defense rests."

¶ 16 After deliberations, the jury found defendant guilty of delivery of a controlled substance.

¶ 17 On appeal, defendant first contends the trial court abused its discretion in denying the defense's motion for a mistrial when Officer Chinchilla violated the trial court's order *in limine* by testifying that cannabis was recovered from him upon his arrest. He argues his conviction should be reversed and his case remanded for a new trial.

¶ 18 Defendant contends the court's ruling constituted error because even though the court admonished the jury to ignore the testimony, he was prejudiced by the testimony that he had cannabis on his person. Defendant argues the prejudice to his case was "undeniable" and this court must presume the jury convicted him for the instant offense of the delivery of heroin based on the forbidden reference to cannabis. The State responds that the court's immediate instruction to the jury cured any potential harm from the officer's isolated remark.

¶ 19 A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that the continuation of the proceedings would defeat the ends of justice. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). A trial court has broad discretion in determining the propriety of declaring a mistrial, and the court's denial of a mistrial will not be disturbed on review absent a clear abuse of that discretion. *Id.*; see also *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 140. An abuse of discretion exists only when the trial court's ruling is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court. *People v. Patterson*, 2014 IL 115102, ¶ 114.

¶ 20 A violation of a ruling on a motion *in limine* will constitute grounds for a mistrial "only when the violation effectively deprived the defendant of his right to a fair trial." *People v. Jacobs*, 405 Ill. App. 3d 210, 219 (2010). On appeal, the defendant must show the prejudicial effect on the jury resulting from the violation of the order *in limine* was so great as to constitute reversible error. *Id.*

¶ 21 A court can usually cure an inadmissible statement from a witness by sustaining an objection or instructing the jury to disregard what it has heard. *Patterson*, 2014 IL 115102, ¶ 114. In this case, immediately after the officer violated the order *in limine* by mentioning

cannabis, the trial court sustained defense counsel's objection, telling the jury that "there's nothing in these charges having anything to do with cannabis" and directing the jury to disregard the question and the answer. The brief reference to cannabis did not prejudice defendant's case such that a mistrial should have been declared. See *People v. Hall*, 194 Ill. 2d 305, 341-42 (2000) (response of State witness that violates *in limine* order, when isolated, did not require mistrial where trial court sustained objection of defense counsel and admonished jurors to disregard the question and answer). Moreover, here, the trial court instructed the jury at the end of the trial to disregard questions to which objections were sustained, as did the judge in *Hall*.

¶ 22 The State presented evidence that Officer Smith bought heroin from defendant as an undercover officer with a pre-recorded \$20 bill. That money was recovered from defendant, who was wearing clothing described by Officer Smith to the enforcement team who detained defendant. The substance purchased by the officer tested positive for heroin. Defendant also had \$256 in cash on his person. Given that evidence, we disagree with defendant's speculative position that the jury convicted him of the delivery of heroin based on the isolated reference to cannabis by Officer Chinchilla, as opposed to returning that verdict based upon the weight of the State's case. Thus, the trial court did not abuse its discretion in denying the defense motion for a mistrial.

¶ 23 Defendant's remaining contention on appeal is that his counsel was ineffective in describing a version of events in opening statement but not presenting any witnesses or evidence in support of that theory. In opening statement, defense counsel described a scene in which defendant walked outside with his son onto the street to go to a mini-mart and made change for a stranger in exchange for a \$20 bill, when police stopped and arrested him. In particular,

defendant directs attention to defense counsel's representation that he obtained the \$20 pre-recorded bill by giving an unidentified person change for that bill shortly before his arrest and then did not call any witnesses to prove such an exchange took place.

¶ 24 The State responds that defense counsel brought out facts on cross-examination consistent with the scenario described in opening statement. The State further argues the record is "inconclusive" as to whether counsel's decision to change course from the theory that was set out in opening statement was based on "trial strategy, defendant's choice to remain silent and not testify, or incompetence."

¶ 25 Claims of ineffective assistance of counsel are judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of the ineffective assistance of counsel, a defendant must show both that: (1) counsel's performance was deficient, meaning it was objectively unreasonable under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant. *Id.* at 687; *People v. Domagala*, 2013 IL 113688, ¶ 36. Counsel's performance must be evaluated based on the entire record, not on isolated instances of alleged incompetence raised by the defendant. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 114.

¶ 26 The failure of defense counsel to provide testimony promised during opening statements does not constitute *per se* ineffective assistance. *People v. Wilborn*, 2011 IL App (1st) 92802, ¶ 80. However, counsel's performance can be deficient if the failure to present promised testimony was foreseeable to counsel, *i.e.*, if counsel was aware prior to trial that the defendant would not testify and thus not provide testimony to support the described scenario. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 29; *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004).

1-13-2596

Here, defense counsel described a version of events in opening statement that only could have been attested to by defendant, because the man that gave defendant the \$20 bill was unknown or unidentified. From this record, we are unable to conclude whether counsel's opening statement was sound trial strategy and whether defendant's decision not to testify was foreseeable. Thus, this issue is more suitable for determination in a post-conviction proceeding, where matters outside the common law record can be considered. See *People v. Winkfield*, 2015 IL App (1st) 130205, ¶ 28.

¶ 27 Accordingly, for all of the reasons stated herein, the judgment of the trial court is affirmed.

¶ 28 Affirmed.