

SECOND DIVISION
December 8, 2015

No. 1-14-0236

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 14227
)	
ANDRE ALEJANDRO,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

- ¶ 1 *Held:* No plain error in court admitting hearsay evidence of recorded currency in delivery of a controlled substance case where failure to object deprived State of opportunity to lay a formal foundation, testimony established list of recorded currency to be a business record, and evidence was not closely balanced. Fines and fees order corrected.
- ¶ 2 Following a 2013 jury trial, defendant Andre Alejandro was convicted of delivery of a controlled substance and sentenced to four years' imprisonment with fines and fees. On appeal, defendant contends that the court erred in admitting hearsay evidence that currency found in his

possession upon arrest had been recorded. He also seeks presentencing detention credit against his fines. For the reasons stated below, we grant relief regarding fines and otherwise affirm.

¶ 3 Defendant was charged with delivery of a controlled substance – less than one gram of cocaine – allegedly committed on or about March 13, 2012.

¶ 4 At trial, police officer Marco Mar testified to his duties in, and various aspects of, investigating narcotics sales including the use of recorded funds. He explained that recorded bills are "money that is used by the police department by undercover officers, and all these funds are documented with their serial numbers typed on paper and then they are given an individual specific inventory number" and that this is done "for the purpose that on occasions the serial numbers are then matched up with enforcement officers that sometimes, if we deem necessary, we make an identification stop. *** They detain the individual that I purchase narcotics from, and then they kind of match up the serial numbers."

¶ 5 On the day in question, Officer Mar and several other officers were investigating complaints of drug sales in the area of Racine and Leland Avenues, Chicago. At about noon, Officer Mar was in that neighborhood in civilian clothes and an unmarked car when he phoned a number he had learned earlier in the investigation. He spoke with a man and arranged to purchase \$80 of cocaine from the man at a nearby intersection. A few minutes later, defendant arrived at the intersection in a black Dodge Avenger, wearing a black baseball cap, a gray hooded sweatshirt, blue jeans, and black-and-white gym shoes. Officer Mar approached defendant and, as they walked along the street, defendant handed Officer Mar four clear bags of a white rock-like substance and he handed defendant \$80 in four \$20 recorded bills of particular serial numbers. Officer Mar recognized defendant's voice as the man in his earlier call. Officer Mar returned to his car after the transaction and radioed a description of defendant to other

officers. Several minutes later, he received a radio call prompting him to drive about six blocks away. There, Officer Mar saw two officers, the driver of the black Dodge he saw earlier, and defendant. He drove past without stopping. Later that day, Officer Mar and another officer inventoried the four bags and their contents, and Officer Mar viewed a photographic array from which he identified defendant as the man who sold him the four bags. Officer Mar's report did not mention that the driver of the Dodge was detained along with defendant. He did not investigate the telephone number he called, nor the license plate number of the black Dodge though he had it. While about \$500 in recorded bills used in the operation were inventoried, the recorded bills used in the transaction with defendant were not recovered and thus not inventoried.

¶ 6 Officer Michael Killeen testified that he was the surveillance officer working with Officer Mar on the day in question and had a view of the intersection where Officer Mar was waiting. A black Dodge arrived at the intersection and a man in a black baseball cap, gray hooded sweatshirt, blue jeans, and black gym shoes exited while the driver stayed in the car. At trial, Officer Killeen identified defendant as the man who exited the car. Officer Mar met defendant and they then walked away from the intersection. Officer Killeen could see defendant hand something to Officer Mar (but not what it was) and saw Officer Mar hand defendant currency. Officer Killeen reported a suspected drug transaction to other officers by radio and then followed defendant as he walked away from the intersection. After less than a minute, defendant re-entered the black Dodge, which was still being driven by another person. Officer Killeen followed the Dodge in an unmarked car and saw nobody exit or enter the Dodge until it stopped and both defendant and the driver exited. As they walked together, Officer Killeen called other officers who stopped them. As the officers spoke with defendant and the driver, Officer

Mar drove past. Officer Killeen's report did not mention that he followed defendant as he rode in the Dodge, and Officer Killeen did not investigate the license plate number of the Dodge though he had it.

¶ 7 Officer John Xiques testified that he was one of the two officers who stopped defendant as he walked with another man, based on radio reports from other officers. Upon stopping defendant, Officer Xiques asked him for identification and "anything on him that he shouldn't have," and he provided identification and four \$20 bills. The bills had particular serial numbers which matched numbers listed on the pre-recorded sheet and the numbers on the bills that Officer Mars said he gave to defendant in exchange for the drugs. Officer Xiques stepped away to record the information regarding defendant's identification on a contact card and check the serial numbers of the currency against a list. Because he was not arresting defendant, Officer Xiques returned the currency as well as the identification to defendant and then told him and the man with him that they could leave. Officer Xiques's partner detained the other man stopped with defendant and Officer Xiques did not deal with him. (The parties stipulated that Officer Xiques's partner did not prepare a contact card for the other man stopped with defendant.)

¶ 8 A forensic chemist testified that, of the white rock-like substance in the four inventoried bags, she tested 0.2 grams and found it to contain cocaine.

¶ 9 Upon this evidence and following closing arguments and instructions, the jury found defendant guilty of delivery of a controlled substance.

¶ 10 Defendant filed a posttrial motion challenging the sufficiency of the evidence and the admission of certain testimony by Officer Mar, including allegedly improper hearsay regarding the telephone call, but not the admission of the recorded-currency evidence. The court denied the motion. Following arguments in aggravation and mitigation, defendant was sentenced to four

years' imprisonment with 520 days of presentencing detention credit and \$1,514 in fines and fees.

¶ 11 On appeal, defendant primarily contends that the court erroneously admitted hearsay evidence that the currency found in his post-arrest search had been recorded by the police; that is, the State did not introduce into evidence the list or record of recorded bills upon which Officer Xiques relied. Stated another way, defendant contends that the State "should have attempted to lay the foundation to have the written statements admitted under a hearsay exception" but failed to do so. Defendant admits that he forfeited this claim by not objecting at trial or preserving it in his posttrial motion (see *People v. Leach*, 2012 IL 111534, ¶ 60) but argues that we can consider it as plain error. Plain error is a clear and obvious error where either (1) the evidence was closely balanced or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Id.* Here, defendant contends that the evidence in his trial was closely balanced. The general rule that a conviction may be based on a positive identification by even a single eyewitness who had ample opportunity to observe is applicable to determining whether evidence was closely balanced. *In re M.W.*, 232 Ill. 2d 408, 435 (2009). The first step in plain error analysis, however, is determining whether there is an error at all. *Id.* at 431.

¶ 12 An out-of-court statement, whether oral or written, is hearsay if it is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(a), (c) (eff. Oct. 15, 2015); *Leach*, 2012 IL 111534, ¶ 66. Hearsay is generally inadmissible, with various exceptions by statute and rule. Ill. R. Evid. 802 (eff. Jan. 1, 2011). There is an exception for records of regularly-conducted activities, also called business records, "if made at or near the time by, or from information

transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012). *See also* 725 ILCS 5/115-5(a) (West 2012)(allowing for the admission of business records as evidence). A list of pre-recorded currency bills is a routine, ministerial and non-evaluative matter, its preparation indicates trustworthiness, and it "is not likely to indicate a bias or prejudice against defendant." *People v. Rivas*, 302 Ill. App. 3d 421, 432 (1998). When a defendant contends that the State failed to lay the proper technical foundation for the admission of evidence, defendant's failure to make a timely and specific objection deprives the State of the opportunity to correct any foundational deficiency in the trial court. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 34, citing *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 13 Here, defendant contends that the State failed to lay the foundation for the list of recorded bills as a business record. Defendant acknowledges *Rivas* but argues that in *Rivas* "the funds sheet was introduced properly as a business record" while the list Officer Xiques relied upon here was not. However, by not objecting to Officer Xiques's alleged hearsay regarding the recorded bills – by not raising in the trial court the claim that Officer Xiques relied upon a list without testifying to his personal knowledge of its contents or establishing that it was a business record upon which he could rely – defendant deprived the State of the opportunity to formally lay such a foundation. Also, Officer Mar explained in his testimony that lists of recorded funds are routinely prepared, kept, and used by the police in the course of regularly conducted police business. "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." 725 ILCS 5/115-5(a) (West 2012). We find that

the State established an adequate foundation for the list as a record of regularly-conducted activities (or business record) upon which Officer Xiques could rely. The fact that the State did not introduce the list itself into evidence does not change that the out-of-court written statement upon which Officer Xiques relied falls firmly under a hearsay exception. We therefore find no error.

¶ 14 Moreover, assuming there was error, we find that the evidence was not closely-balanced and thus there was no plain error to overcome forfeiture. Even absent evidence of the recorded bills, Officer Mar's clear testimony to purchasing cocaine from defendant was corroborated by Officer Killeen, who saw the transaction in which defendant tendered something to Officer Mar in exchange for currency and then followed defendant several blocks to the point where he was stopped by Officer Xiques, whereupon Officer Mar identified defendant as the seller. It is irrelevant whether Officer Mar's description of defendant was detailed (or not, as defendant argues) because Officer Killeen saw and followed him from his arrival at the intersection through the transaction and afterwards to the stop. Defendant argues that he "did not have any drugs on him when he was stopped by Xiques," but that is not a relevant consideration where defendant was charged with an earlier narcotics sale, not with possession of narcotics at the time of the traffic stop.

¶ 15 Defendant also seeks credit against his fines from his 520 days in presentencing detention, and the State agrees. 725 ILCS 5/110-14(a) (West 2012)(\$5 credit against fines per day of presentencing detention). In particular, the parties correctly agree that defendant has \$1,080 in creditable fines, leaving \$434 in fees and non-creditable fines.

¶ 16 Accordingly, we direct the clerk of the circuit court to correct the order assessing fines and fees to reflect \$1,080 in presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 17 Affirmed; fines and fees order corrected.