

**NOTICE**

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2015 IL App (4th) 130827-U

NO. 4-13-0827

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

June 30, 2015

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
MICHAEL L. TROTTER,	)	No. 13CF12
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Holder White and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed defendant's convictions, finding no plain error to excuse his forfeiture of the issue involving police testimony at trial.

¶ 2 In July 2013, a jury found defendant, Michael L. Trotter, guilty of three counts of unlawful delivery of a controlled substance. In September 2013, the trial court sentenced him to concurrent terms of 10 years in prison on each count.

¶ 3 On appeal, defendant argues his convictions must be reversed and the cause remanded for a new trial based on improper police testimony. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2013, the State charged defendant by information with three counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)), alleging he knowingly delivered a substance containing cocaine on three separate occasions. Defendant

pleaded not guilty.

¶ 6 In July 2013, defendant's jury trial commenced. Lincoln police officer Matthew Comstock testified he met Brian Mullenbach in the fall of 2012 after Mullenbach had been arrested for driving on a revoked license. In hopes of receiving consideration on his case, Mullenbach stated he could purchase cocaine from a black male named "Mike" who he believed lived at the Budget Inn in Lincoln. Mullenbach provided Comstock with Mike's phone number. During the testimony, the following exchange occurred between Comstock and the prosecutor:

"Q. Did you do any research from your department on your end to determine who Mike is in order to further the investigation.

A. Yes. I had a rough idea who Mike was from other street intelligence, but through the phone number I did a check through our system and that system showed that Michael Trotter was the owner of that phone number provided by [Mullenbach].

\* \* \*

Q. And based upon then the research that you did, did you obtain a photograph of that Michael Trotter in order to show to Brian Mullenbach?

A. Yes.

\* \* \*

Q. And did Brian Mullenbach indicate that was the Mike that he was referring to?

A. Yes."

¶ 7 Once defendant was identified, Comstock set up a plan to conduct a controlled buy using Mullenbach to make the purchase. The first controlled buy took place on October 29, 2012. Mullenbach contacted defendant seeking to purchase \$100 worth of cocaine. Comstock drove Mullenbach to an area near the Budget Inn. Officers observed Mullenbach meet a black male, and Mullenbach returned to Comstock's vehicle within 10 minutes. The two returned to a prearranged location, and Mullenbach handed over the suspected cocaine he had purchased.

¶ 8 Comstock stated he set up a second controlled drug buy between Mullenbach and defendant on November 12, 2012. Comstock provided Mullenbach with \$100 and placed a recording device on him. The transaction took place near the Fifth Street Food Mart in Lincoln. While waiting in a park across the street, Comstock saw defendant walk by and meet with Mullenbach. After the meeting with defendant, Mullenbach met with Comstock and gave him the suspected cocaine he had purchased.

¶ 9 Comstock stated he set up a third controlled drug buy between Mullenbach and defendant on November 14, 2012. Meeting at a prearranged location, Comstock searched Mullenbach for currency and contraband and, finding none, gave him \$100 and outfitted him with a recording device. Comstock then drove Mullenbach to the Ayerco gas station in Lincoln to meet defendant. Upon arrival, Comstock observed defendant sitting in the driver's seat of a maroon sport utility vehicle. Mullenbach entered defendant's vehicle and returned to Comstock's vehicle approximately a minute later. At the prearranged location, Mullenbach provided Comstock with a plastic bag containing suspected cocaine.

¶ 10 Comstock stated he interviewed defendant in January 2013 following his arrest. In Comstock's testimony regarding the interview, the following exchange occurred:

"Q. And again what was his response after you continued

to confront him about this?

A. He told me that he had a hard time finding employment.

That he was not selling the drugs for him, but that they were for someone else. I asked him to name that person and he did not. He explained to me that he could—his supplier at times had been a male he knew in Chicago as Bill.

Q. So, did [defendant] then admit that he had in fact, maybe not on these particular dates, sold cocaine?

A. He did not admit to these deliveries, no.

Q. Because you didn't specifically reference these deliveries, correct?

A. Correct.

Q. But he did admit to selling cocaine in a general sense?

A. Yes."

¶ 11 Lincoln police detective Tim Kerns testified he provided surveillance of the October 29 transaction. He stated he observed a black male, identified as defendant, leave the Budget Inn and meet with the confidential source. A hand-to-hand exchange took place before the two individuals parted ways. On November 12, 2012, Kerns provided surveillance for the second drug buy and observed defendant meet with Mullenbach. After a hand-to-hand exchange, defendant and Mullenbach went in separate directions. As to both occasions, Kerns testified he told Comstock his observations about the controlled buys. Comstock's report indicated Kerns observed a "black male," but Kerns insisted he identified defendant. On November 14, 2012, Kerns observed Comstock and Mullenbach arrive at the Ayerco gas station.

Thereafter, he observed a maroon-colored vehicle leave, and Comstock indicated the transaction had been completed.

¶ 12 Mullenbach testified he approached the police after he was arrested for driving with a revoked license. Hoping to help himself out, Mullenbach spoke with Officer Comstock and agreed to work as a confidential source. Mullenbach told Comstock he could purchase drugs from a guy named "Mike," who Comstock identified as defendant. On October 29, 2012, Mullenbach met with defendant near the Budget Inn and purchased \$100 worth of crack cocaine. He then turned it over to Comstock.

¶ 13 On November 12, 2012, Mullenbach met defendant at the Fifth Street Food Mart and purchased \$100 worth of drugs. On November 14, 2012, Mullenbach met defendant at the Ayerco gas station and purchased \$100 worth of cocaine. Mullenbach stated he was searched prior to each controlled buy. Although Mullenbach was wearing a recording device during the transactions, defendant was not identified by name on the audio.

¶ 14 Joshua Stern, a forensic scientist with the Illinois State Police, testified he analyzed the substances he received in this case. The substances tested positive for cocaine. None of the bags containing cocaine were tested for fingerprints.

¶ 15 Following closing arguments and a jury question, the jury found defendant guilty on all three counts. In September 2013, the trial court sentenced defendant to concurrent terms of 10 years in prison on each count. Thereafter, defendant filed a motion to reconsider his sentence, which the court denied. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues reversible error occurred when Officer Comstock was allowed to testify that he had a "rough idea" who Mullenbach was talking about when he said he could

buy drugs from a guy named "Mike." Defendant also argues this alleged error was compounded when Comstock testified defendant's phone number was in the system and he had a photograph of him on file.

¶ 18 Initially, we note defendant acknowledges trial counsel failed to make an objection on this issue at trial or raise the issue in a posttrial motion. Thus, the issue is forfeited on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). Defendant, however, asks this court to review the issue as a matter of plain error.

¶ 19 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error when either:

"(1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

¶ 20 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 21 Defendant argues Officer Comstock's testimony impermissibly demonstrated to

the jury that defendant was well known to the police. Defendant cites the following exchange between the prosecutor and Comstock:

"Q. Brian Mullenbach had provided you with the name of an individual named Mike that he claimed he could purchase cocaine from. Is that correct?

A. Correct.

Q. Did you do any research from your department on your end to determine who Mike is in order to further the investigation.

A. Yes. I had a rough idea who Mike was from other street intelligence, but through the phone number I did a check through our system and that system showed that Michael Trotter was the owner of that phone number provided by [Mullenbach].

\* \* \*

Q. And based upon then the research that you did, did you obtain a photograph of that Michael Trotter in order to show to Brian Mullenbach?

A. Yes.

\* \* \*

Q. And did Brian Mullenbach indicate that was the Mike that he was referring to?

A. Yes."

¶ 22 "[A] police officer's testimony of his or her prior acquaintance with a defendant should be avoided unless somehow relevant." *People v. Anderson*, 325 Ill. App. 3d 624, 635,

759 N.E.2d 83, 93 (2001); see also *People v. Thompson*, 2014 IL App (5th) 120079, ¶ 54, 21 N.E.3d 1 (stating "[t]he mere suggestion of prior police acquaintance is susceptible to prejudicial implication"); *People v. Eghan*, 344 Ill. App. 3d 301, 313, 799 N.E.2d 1026, 1036 (2003) (finding testimony from police officers that they called out the defendant by first name and were familiar with him was highly prejudicial). However, "evidence that the arresting officer was previously acquainted with defendant does not necessarily imply a criminal record." *People v. Stover*, 89 Ill. 2d 189, 196, 432 N.E.2d 262, 266 (1982).

¶ 23 In the case *sub judice*, Officer Comstock's testimony did not constitute direct evidence of any prior or specific criminal activity on defendant's part. Although Comstock stated he had a "rough idea" of defendant and the phone number in the police department's system showed defendant as the owner, Comstock did not describe the specifics of why he had that "rough idea" of who defendant was or why the number was in the system. Comstock could have dealt with defendant on noncriminal matters. The testimony did not provide the jury with direct evidence that Comstock had prior contact with defendant on matters involving the unlawful delivery of controlled substances. We also note the State did not dwell on Comstock's prior acquaintance with defendant or defendant being in the system in further questioning or in its closing arguments to the jury. Thus, we find no error.

¶ 24 Even if Comstock's testimony could be considered inappropriate and therefore error, we find defendant has not shown it amounted to plain error.

"Plain-error review under the closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced: that the

evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial [citation]; or that there was a 'reasonable probability' of a different result had the evidence in question been excluded [citation]." *People v. White*, 2011 IL 109689, ¶ 133, 956 N.E.2d 379.

¶ 25 Here, the State presented overwhelming evidence of defendant's guilt on all three counts. As to the October 29, 2012, controlled buy, Comstock stated he provided Mullenbach with \$100 and drove him to an area near the Budget Inn. Mullenbach met with a black male and later handed over cocaine to Comstock. Detective Kerns testified he observed defendant and Mullenbach engage in a hand-to-hand transaction before parting ways.

¶ 26 As to the November 12, 2012, controlled buy, Comstock provided Mullenbach with \$100. He then observed Mullenbach meet with defendant near the Fifth Street Food Mart. Mullenbach returned with the cocaine he purchased. Kerns also witnessed the transaction.

¶ 27 As to the November 14, 2012, controlled buy, Comstock provided Mullenbach with \$100 and drove him to the Ayerco gas station. Comstock observed defendant sitting in a vehicle and Mullenbach enter. Shortly thereafter, Mullenbach returned and handed over the cocaine he purchased. Mullenbach also testified to each of the three drug buys.

¶ 28 The State's evidence also included defendant's statements made to Comstock during an interview. While defendant did not admit selling cocaine on the three specific dates at issue, he did admit he was a seller of cocaine.

¶ 29 The State presented compelling evidence of defendant's guilt of unlawful delivery

of a controlled substance on three different occasions. Any error in Comstock's testimony did not result in prejudice to defendant because the evidence was not closely balanced. Defendant admits the "State's case seems strong" but claims the jury's questions during deliberations show it "had questions about the strength of the evidence identifying [defendant] as the drug dealer." During deliberations, the jury sent out a note that read "Officer Comstock Testimony Transcript" and "11/12 Comstock Report." The trial court, after conversing with defense counsel and the prosecutor, responded by stating a transcript of Comstock's testimony was not available and the jury should rely on its notes and recollection. The court also responded by stating Comstock's report was not admitted into evidence and was not available.

¶ 30 Defendant's reliance on the jury's questions does not show the evidence was closely balanced. Defendant's claim the question of the "11/12 Comstock report" somehow "focused in on the inconsistency in Sergeant Kerns and Officer Comstock's written report" is nothing more than pure speculation. Moreover, defendant's argument that the State failed to have the bags of cocaine fingerprinted, that Comstock's report was inconsistent with Kerns' testimony, and that defendant was not identified by name in the audio tapes of the last two drug buys, does little to diminish the overwhelming evidence of defendant's guilt. Having determined defendant failed to meet his burden under the plain-error doctrine, we find no basis to relax the forfeiture rule.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 33 Affirmed.