2016 IL App (1st) 141818-U

FIFTH DIVISION
APRIL 22, 2016

No. 1-14-1818

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 5014
	)	
EDWARD JENNINGS,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction of delivery of a controlled substance over his contentions that the trial court improperly admitted police testimony about prerecorded funds used to buy a controlled substance without laying a proper foundation and that the testimony was predicated on inadmissible hearsay; we remand the matter for resentencing where defendant was improperly sentenced as a Class X offender.

¶ 2 Following a bench trial, defendant Edward Jennings was convicted of delivery of a controlled substance and sentenced, as a Class X offender, to eight years' imprisonment. On appeal, defendant contends that the trial court erred in admitting a police officer's testimony

concerning the prerecorded funds that were used to purchase the controlled substance because the State failed to lay a proper foundation. Defendant also contends this testimony was inadmissible hearsay. He finally contends that this court should reduce his mandatory supervised release (MSR) term to the two-year term required for a Class 2 offense as he is currently serving a three-year MSR term for a Class X sentence that defendant claims was improperly imposed.

¶ 3 At the simultaneous bench trial of defendant and codefendant Deante West, Officer Scott Slechter testified that he and several officers were near South Campbell Avenue in Chicago at approximately 9:43 a.m. on February 18, 2012, to make a controlled narcotics purchase. Slechter approached a woman named Catrese, who was never arrested, and told her that he wanted to purchase "some rocks." She called an unknown person on her cell phone, asked Slechter how many he wanted, and, after Slechter replied two, told the person on the phone "two CD's," which is a street term for crack cocaine. Catrese directed Slechter to wait with her near the bus stop at 63rd Street and Campbell Avenue. About 5 to 10 minutes later, a blue Dodge Challenger drove up and Catrese and Slechter approached it. West was the driver of the vehicle and defendant was the passenger.

¶ 4 Officer Slechter testified he gave West $20 of Chicago police department "1505" funds. As Slechter's memory was exhausted regarding the denominations of the 1505 funds, the State showed him an "inventory slip," which refreshed his memory that he gave West two $10 bills. Slechter initially testified that West handed the money to defendant, but later testified he did not observe where the $20 went after he gave the money to West. West then gave Slechter a business card containing the name of a plumbing company and two cell phone numbers. Defendant next

handed West two clear plastic baggies containing suspect crack cocaine, which West gave to Catrese. Catrese gave Slechter one of the baggies and then started to walk away. Slechter told Catrese to give him the other bag, and she complied. The items remained in Slechter's possession until he returned to the police station where they were inventoried.

¶ 5 Slechter radioed enforcement officers and described the incident. Slechter returned to his vehicle and learned that officers stopped the vehicle occupied by defendant and West on West 61st Street. Slechter drove to where defendant and West were detained, and made a positive identification of both men over the radio.

¶ 6 Officer Haidari testified that he was an enforcement officer working with Officer Slechter near South Campbell Avenue. Through a radio transmission, Slechter indicated that he had made a narcotics purchase and gave a description of the vehicle involved in the transaction. Haidari stopped the vehicle on West 61st Street and observed West driving the vehicle with defendant in the passenger seat. Haidari removed both men from their vehicle and brought them to the front of his vehicle. Slechter "made a pass by" and made a positive identification of both men, by radio transmission, as the individuals who sold him the suspected narcotics. Haidari then placed both men under arrest.

¶ 7 Officer Haidari performed a custodial search on West and defendant. He recovered the two $10 bills used in the undercover purchase from defendant's pocket. Haidari indicated that both $10 bills were "1505 funds," with one containing the serial number IL88432726A and the other containing the serial number IL89623257A. Both bills were subsequently inventoried. An additional $150 was also recovered from defendant, which was later returned to him.

¶ 8 The parties stipulated that forensic chemist Linda Raiford would testify that she tested the contents of one of the two bags recovered, found it weighed .2 gram, and found that the substance tested positive for cocaine.

¶ 9 The State rested and defendant moved for a directed finding, which was denied. Defendant did not present any evidence.

¶ 10 Following closing arguments, the trial court found defendant guilty of delivery of a controlled substance. In so finding, the court stated that the officers' testimony and their identifications of West and defendant were credible.

¶ 11 At sentencing, the court stated that defendant was a Class X offender as he had two prior Class 2 or higher felony convictions, including one for aggravated unlawful use of a weapon (AUUW). The court sentenced defendant to eight years in the Illinois Department of Corrections (IDOC), and then denied his oral motion to reconsider sentence.

¶ 12 On appeal, defendant contends that the police testimony about prerecorded funds was entered without a proper foundation and constituted inadmissible hearsay. Defendant specifically asserts that the officers testified that he possessed the same prerecorded $10 bills that Officer Slechter gave West in an alleged drug transaction without explaining how they knew the bills were prerecorded funds, *i.e.*, there was no evidence indicating that the serial numbers matched those on a prerecorded funds sheet, or that the serial numbers on the bills given to West matched those recovered from defendant.

¶ 13 Defendant concedes that he forfeited this claim by failing to object at trial or including it in the written posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues that

we should consider it as plain error. Plain error is a clear and obvious error where either the evidence was closely balanced, or the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The first step in plain error analysis, however, is to determine whether any error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

¶ 14 The admission of evidence is within the trial court's sound discretion and should not be reversed absent a clear showing of abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 115 (2001). A trial court abuses its discretion when its decision is arbitrary, fanciful or unreasonable, or where no reasonable person would agree with the court's view. *People v. Taylor*, 2011 IL 110067, ¶ 27. "Relevance is a threshold requirement that must be met by every item of evidence," and evidence that is irrelevant is inadmissible. *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). Relevant evidence makes the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence. *People v. Patterson*, 192 Ill. 2d 93, 115 (2000). When a defendant contends the State failed to lay the proper foundation for the admission of evidence, his failure to make a timely and specific objection deprives the State of the opportunity to correct any foundational deficiency before the trial court. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 34 (citing *People v. Woods*, 214 Ill. 2d 455, 470 (2005)).

¶ 15 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, that is offered in evidence to prove the truth of the matter asserted. *People v. Leach*, 2012 IL 111534, ¶ 66 (citing Ill. R. Evid. 801(a), (c) (eff. Jan. 1, 2011)). Hearsay evidence is generally inadmissible due to its lack of

reliability (*People v. Olinger*, 176 Ill. 2d 326, 357 (1997)), and the fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant (*People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005)). It is well settled that hearsay evidence, if admitted without objection, is to be considered and given its natural probative effect. *People v. Foster*, 190 Ill. App. 3d 1018, 1026 (1989) (citing *People v. Collins*, 106 Ill. 2d 237, 263 (1985)).

¶ 16 Here, the evidence showed Officer Slechter gave West $20 of "1505" funds. When Slechter could not remember the denominations of the 1505 funds, the State showed him an "inventory slip," which refreshed his memory that he gave West two $10 bills. Officer Haidari said he recovered two $10 bills from defendant's pocket, and both were "1505 funds." Haidari then listed the serial numbers of both bills and testified that they were inventoried. The foregoing testimony was sufficient for a reasonable trier of fact to infer that Slechter purchased drugs from the offenders using two prerecorded bills, and Haidari later recovered two prerecorded bills from defendant upon his arrest. It was therefore probative of defendant and West's identities as two of the individuals who sold Slechter cocaine. Accordingly, the trial court did not err by admitting relevant evidence of the prerecorded funds.

¶ 17 Defendant nevertheless asserts that the State failed to lay a proper foundation for the admittance of the officers' testimony regarding the prerecorded funds because he did not demonstrate a connection between the prerecorded funds and the crime charged. Defendant, citing to *People v. Rivas*, 302 Ill. App. 3d 421 (1998), maintains that a proper foundation for prerecorded funds testimony is laid when evidence is presented that (1) the buying officer previously checked out confiscated funds from a police custodian, (2) the serial numbers on

those bills were transcribed onto a police generated prerecorded funds sheet, (3) the serial numbers on the bills given to the defendant matched those on the funds sheet, and (4) such matching funds were thereafter recovered from the defendant. *Rivas*, 302 Ill. App. 3d at 427, 432.

¶ 18 Despite defendant's claim, the *Rivas* court did not outline such a test for the proper admission of testimony regarding prerecorded funds. Nevertheless, to the extent the State did not elicit similar testimony from the officers about the prerecorded funds, defendant could have objected at trial regarding any alleged deficiency in laying the foundation for the evidence. If defendant had made a timely objection, the State could have cured any alleged defect in laying the foundation by further questioning the officers regarding how the prerecorded funds were checked out, transcribed, and whether the serial numbers on the bills given to West and recovered from defendant matched those on a funds sheet. Furthermore, the State could have admitted a funds sheet into evidence under the past recollection recorded or business record exceptions to the hearsay rule. See *People v. Strother*, 53 Ill. 2d 95, 101 (1972) (finding that although the prerecorded funds sheet, which was introduced to prove that the serial numbers recorded were in fact those of the currency used in the controlled purchase, may have been hearsay evidence, it was properly admitted under the past recollection recorded exception to the hearsay rule); *Rivas*, 302 Ill. App. 3d at 432 (prerecorded funds sheet qualifies as a business record as the "document is not likely to indicate a bias or prejudice against defendant"). We acknowledge, as defendant points out in his reply brief, that there was no evidence presented at trial of the existence of a prerecorded funds sheet. However, had defendant made a timely

objection, the State would have been given an opportunity to produce a funds sheet, thus curing any defect.

¶ 19 Even assuming, *arguendo*, the trial court erred in admitting the testimonial evidence of the prerecorded funds, we find that the evidence was not closely balanced and thus the error did not rise to the level of plain error to overcome forfeiture. Defendant was convicted of delivery of a controlled substance, which requires the delivery of narcotics. Whether money was exchanged in return for the narcotics is not an element the State is required to prove. See 720 ILCS 570/401 (West 2012); see also *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997) ("[T]here is no requirement that pre-recorded or marked funds used in a narcotics transaction be recovered for a conviction to stand"). Officer Slechter's unrefuted trial testimony showed that defendant handed West two clear plastic baggies containing suspect crack cocaine, which West gave to Catrese. Catrese then gave Slechter one of the baggies immediately, and the other one after defendant and West drove away. After defendant was apprehended by Officer Haidari, Slechter identified defendant as one of the individuals who delivered narcotics to him. The trial court specifically found such identification reliable where it was 9:43 in the morning and light outside. The trial court found that the identifications did not lack credibility. The vehicle containing defendant was stopped blocks away minutes later. See *People v. Lewis*, 165 Ill. 2d 305, 356 (1995) ("a single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification"). The recovered $10 bills were not important to the issue of whether defendant delivered narcotics to Slechter.

¶ 20 Defendant nevertheless emphasizes that the case was close as only one of the two bags he allegedly delivered tested positive for cocaine, and Officer Slechter admitted that he commingled the first bag he received directly from West (via Catrese) with the second bag Catrese gave him after she had started to walk away from him with her back turned, where her hands were not visible. In so arguing, defendant relies, in part, on evidence elicited during West's cross-examination of Slechter, *i.e.*, that Catrese's hands were not visible as she walked away from Slechter. As defendant did not adopt this testimony, it is not a part of his record and he cannot now rely on it. See *People v. Canulli*, 341 Ill. App. 3d 361, 367-68 (2003) ("The purpose of appellate review is to evaluate the record presented in the trial court, and review must be confined to what appears in the record."). Even so, defendant provides no reason why this evidence makes the case a close one, and, to the extent he is attempting to imply that he only provided the bag that did not test positive for cocaine, such a claim is speculative and not based on the evidence, particularly where the second bag was never tested by the chemist.

¶ 21 Furthermore, in an attempt to show the police arrested the wrong men, defendant highlights that the evidence showed neither of them had any narcotics on their person or in their automobile immediately after the transaction occurred, no business cards similar to the one West gave Officer Slechter were recovered upon their arrest, and nothing on the business card Slechter had showed it belonged to defendant or West. However, there was no question that police officers stopped the vehicle involved in the transaction after Slechter provided its description and that of its occupants via radio transmission, and it was stopped blocks from the scene. Significantly, Slechter's identification of defendant and West was reliable as the trial court found

it to be credible. Defendant's assertions that the identification of defendant was lacking because Slechter's in-court identification of him was predicated on a 30-second interaction that occurred more than two years before trial, without a contemporaneous lineup or photo array, are unpersuasive.

¶ 22 Defendant next contends, and the State correctly agrees, that he should not have been sentenced as a Class X offender and his sentence should be amended accordingly. The court found defendant guilty of the Class 2 offense of delivery of a controlled substance pursuant to section 401(d) of the Illinois Controlled Substances Act (720 ILCS 570/401(d) (West 2014)). At trial, defendant's sentence was enhanced based on the mandatory Class X sentencing statute then in effect. See 730 ILCS 5/5-4.5-95(b) (West 2014) (requiring Class X sentencing range for offender convicted of three Class 2 or greater offenses). This was due, in part, to his prior Class 2 AUUW conviction. See 720 ILCS 5/24-1.6(a)(1),(a)(3)(A),(d) (West 2008). In *People v. Aguilar*, 2013 IL 112116, ¶¶ 21-22, our supreme court held that the Class 4 form of AUUW (720 ILCS 5/24-1.6(a)(1),(a)(3)(A),(d)), was not a reasonable regulation but a comprehensive ban that "categorically prohibit[ed] the possession and use of an operable firearm for self-defense outside the home," and thus violated the second amendment.

¶ 23 The supreme court had initially limited its finding of the unconstitutionality to the "Class 4 form" of AUUW. *Aguilar*, 2013 IL 112116, ¶ 21. Recently, in *People v. Burns*, 2015 IL 117387, it clarified its previous decision, explaining: "[i]n *Aguilar*, we improperly placed limiting language on our holding that section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute is

facially unconstitutional. We now clarify that section 24-1.6(a)(1), (a)(3)(A) of the statute is facially unconstitutional, without limitation." *Aguilar*, 2013 IL 112116, ¶ 25.

¶ 24 Based on *Burns*, the State concedes that defendant's AUUW conviction under section 24-1.6(a)(1), (a)(3)(A) was incorrect and he should therefore not have been sentenced as a Class X offender. The State agrees defendant's sentence should reflect the proper sentencing range for a Class 2 felony, *i.e.*, three to seven years. 730 ILCS 5/5-4.5-35(a) (West 2014).

¶ 25 In his opening brief, defendant requested that his sentence be vacated. The State maintains, however, that defendant remains eligible for an extended term of 7 to 14 years. The State thus requests that this court remand for a new sentencing hearing in order to sentence defendant for a Class 2 felony with the consideration that he is eligible for an extended term. Defendant, in his reply brief, disputes the State's claim that he is eligible for an extended term, arguing that he has no prior convictions that can be relied upon to extend his current sentence.

¶ 26 Furthermore, defendant points out in his reply brief that he has completed serving his eight-year sentence and is currently on MSR. He asserts there is therefore no need to remand for a new sentencing hearing. Instead, defendant requests that we use our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) to order the clerk of the circuit court to modify the mittimus to reduce his term of MSR from the Class X-imposed three years to the two years statutorily mandated for his Class 2 conviction. 730 ILCS 5/5-4.5-35(l) (West 2014).

¶ 27 Despite defendant's contentions to the contrary, remandment is required in this case. Defendant is incorrect that there is no reason to remand the matter for a new sentencing hearing as he completed serving his prison term. He is serving his MSR term and thus continues to be in

the "legal custody" of the Illinois Department of Corrections for the duration of his release period. *Barney v. Prisoner Review Board*, 184 Ill. 2d 428, 430 (1998); 730 ILCS 5/3-14-2(a) (West 2012). In order for defendant to receive his requested relief, *i.e.*, a one-year reduction in his MSR, he must first be resentenced to a Class 2 term of imprisonment. See *People v. Baldwin*, 199 Ill. 2d 1, 5 (2002) (a criminal conviction is not a final judgment until the defendant is sentenced). Accordingly, defendant's Class X sentence is vacated and the cause remanded for resentencing. Until the new sentence is imposed, we cannot reach any issue regarding whether defendant was subject to an extended-term sentence or whether he is entitled to a two-year term of MSR. We do acknowledge, however, that the trial court cannot impose a greater sentence on remand. See 730 ILCS 5/5-5-4 (West 2012) (prohibiting the trial court from imposing a more severe sentence on remand, unless circumstances are brought to the attention of the court which occurred after the original sentencing); see also *People v. Pace*, 2015 IL App (1st) 110415, ¶ 154 (remanding the cause for resentencing but noting that the new sentence may not be longer than the original sentence).

¶ 28 Affirmed in part and vacated in part, cause remanded.