

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).

2017 IL App (4th) 160175-U

NO. 4-16-0175

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 9, 2017

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DONALD L. EMERY,)	No. 15CF30
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant’s *pro se* motion to withdraw his guilty plea.

¶ 2 In January 2015, after police orchestrated a controlled buy of cocaine, the State charged defendant, Donald L. Emery, with two counts of criminal drug conspiracy (cocaine) (720 ILCS 570/405.1 (West 2014)) and two counts of unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(d)(i) (West 2014)). Defendant eventually pleaded guilty to one count of unlawful delivery of a controlled substance. The trial court sentenced him to 18 years in prison.

¶ 3 In September 2015, defendant *pro se* filed a timely motion to withdraw his guilty plea, and in October 2015, he filed a supplemental motion to withdraw his guilty plea. In the supplemental motion, defendant raised the following arguments: (1) defendant entered his plea under duress by the State; (2) defendant was denied his right to counsel; (3) the State charged

defendant with “false charges”; and (4) defendant did not commit the offense to which he had pleaded guilty.

¶ 4 At the March 2016 hearing on defendant’s supplemental motion to withdraw his guilty plea, defendant sought to admit as evidence portions of the police reports pertaining to his arrest, along with an affidavit of his codefendant claiming defendant’s innocence. The trial court sustained the State’s objections to both exhibits as hearsay. At the conclusion of the hearing, the court denied defendant’s supplemental motion to withdraw his guilty plea.

¶ 5 Defendant appeals, arguing that (1) the trial court abused its discretion by excluding the police reports and the affidavit; (2) the trial court erred by denying defendant’s motion to withdraw his guilty plea; (3) defendant’s due process rights were violated; and (4) the State committed prosecutorial misconduct before the grand jury. We disagree and affirm.

¶ 6 I. BACKGROUND

¶ 7 A. The Charges and Guilty Plea

¶ 8 In January 2015, the State charged defendant with two counts of criminal drug conspiracy (cocaine) and two counts of unlawful delivery of a controlled substance (cocaine).

¶ 9 In July 2015, defendant, proceeding *pro se*, pleaded guilty to one count of unlawful delivery of a controlled substance in exchange for the State’s agreement to dismiss the other three charged counts. The factual basis alleged that on January 8, 2015, a confidential source working with the Bloomington police department made a controlled buy of cocaine involving defendant and his codefendant, James Patterson. According to the State, the confidential source spoke to Patterson by telephone and arranged to meet him at an apartment. After Patterson and the source met at the apartment, defendant arrived and sold the source cocaine for \$80 in marked money. As defendant drove away from the scene, police stopped his car and found \$60 of the

buy money in his possession. After the State finished reciting the factual basis, defendant stated that he believed the State could produce the described evidence at trial. The trial court accepted defendant's guilty plea.

¶ 10 In August 2015, the trial court conducted a sentencing hearing. Because of defendant's criminal history, the court sentenced him as a Class X offender to 18 years in prison.

¶ 11 B. Defendant's Motions To Withdraw His Guilty Plea

¶ 12 In September 2015, defendant *pro se* filed a motion to withdraw his guilty plea, and in October 2015, he supplemented that motion. The supplemental motion claimed that (1) defendant entered his plea under duress by the State; (2) defendant was denied his right to counsel; (3) the State charged defendant with "false charges"; and (4) defendant did not commit the offense to which he pleaded guilty.

¶ 13 In November 2015, defendant requested counsel, which the trial court appointed. In February 2016, defendant—through appointed counsel—filed a motion to withdraw his guilty plea.

¶ 14 At a March 2016 hearing on the February 2016 motion, defendant moved to proceed *pro se*. The trial court granted his motion and allowed appointed counsel to withdraw. The court confirmed that defendant wished to proceed on his October 2015 *pro se* supplemental motion to withdraw his guilty plea. The hearing then proceeded on that motion. Defendant moved to admit into evidence police reports and an affidavit of Patterson averring that defendant "had no involvement in any conspiracy" and "did not deliver any drugs."

¶ 15 As to the police reports, the State objected on two grounds. First, the State argued that the reports were incomplete and did not include the portions addressing defendant's involvement in the offense. Second, the State argued that introducing evidence of any kind was

inappropriate during a hearing on a motion to withdraw a guilty plea. Defendant responded that the police reports were relevant to his claim that he did not commit the offense to which he pleaded guilty. The trial court sustained the State's objection to the police reports.

¶ 16 As to the Patterson affidavit, the State objected, arguing that the affidavit contained hearsay. The trial court sustained the State's objection, agreeing that the affidavit contained hearsay and explaining that the State had the right to cross-examine Patterson about the statements he made in the affidavit. After the State presented evidence, the trial court denied defendant's motion to withdraw his guilty plea.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant *pro se* on appeal argues (1) the trial court abused its discretion by excluding the police reports and the affidavit; (2) the trial court erred by denying defendant's motion to withdraw his guilty plea; (3) defendant's due process rights were violated; and (4) the State committed prosecutorial misconduct before the grand jury. We address those arguments in turn.

¶ 20 A. Defendant's Proffer of Police Reports and the Affidavit

¶ 21 Defendant argues that the trial court abused its discretion by sustaining the State's objections to defendant's proffer of the police reports and the affidavit. We disagree.

¶ 22 "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted ***." *People v. Williams*, 181 Ill. 2d 297, 312-13, 692 N.E.2d 1109, 1118 (1998). Hearsay evidence is generally inadmissible because of its lack of reliability, unless it falls within one of the exceptions to the rule against hearsay. *People v. Tenney*, 205 Ill. 2d 411, 432-33, 793 N.E.2d 571, 584-85 (2002). Police reports are generally inadmissible for purposes other than im-

peachment because they contain conclusions and hearsay. *Kociscak v. Kelly*, 2011 IL App (1st) 102811, ¶ 25, 962 N.E.2d 1062. The “fundamental purpose” of the hearsay rule “ ‘is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered.’ ” *People v. Boling*, 2014 IL App (4th) 120634, ¶ 118, 8 N.E.3d 65 (quoting *People v. Carpenter*, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963)).

¶ 23 We review a trial court’s evidentiary rulings for an abuse of discretion. *People v. Patterson*, 2014 IL 115102, ¶ 114, 25 N.E.3d 526. A court abuses its discretion only if its decision was “arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court.” (Internal quotation marks omitted.) *Id.*

¶ 24 In this case, defendant offered the excerpts of the police reports for the truth of what they asserted, not for impeachment purposes. Therefore, the reports were hearsay, which is generally inadmissible. Defendant has suggested no exception that might allow the trial court to nonetheless admit the reports, and we are aware of no such exception.

¶ 25 Further, the police reports offered by defendant were incomplete. They therefore failed one of the most fundamental inquiries a trial court should consider when deciding whether to admit evidence: “Would the proposed evidence assist the [court] in resolving questions of fact?” (Internal quotation marks omitted.) *Maffet v. Bliss*, 329 Ill. App. 3d 562, 574, 771 N.E.2d 445, 455 (2002). The incomplete excerpts of the police reports associated with defendant’s arrest and conviction would not have assisted the court. Instead, they could only obfuscate the facts surrounding defendant’s arguments that he should be allowed to withdraw his guilty plea. The court did not abuse its discretion in sustaining the State’s objection to the police reports.

¶ 26 As to the Patterson affidavit, it likewise contained hearsay. The affidavit contained out-of-court statements made by Patterson, which defendant offered for their truth—

sion of the facts or of the law, or if there is doubt of the guilt of the accused and the ends of justice would better be served by submitting the case to a trial. [Citation.] The court’s decision is reviewed only for abuse of discretion. [Citations.]”

A trial court abuses its discretion only if it “[1] acts arbitrarily, fancifully, and without conscientious judgment; [2] in view of all the circumstances, exceeds the bounds of reason [citation]; [3] issues an order with which no reasonable person would agree [citation]; [4] applies an incorrect legal standard [citation]; or [5] makes a decision based on an inadequate record [citation].” (Emphasis omitted.) *In re Miroslava P.*, 2016 IL App (2d) 141022, ¶ 35, 52 N.E.3d 470.

¶ 31 *2. This Case*

¶ 32 In this case, the trial court did not abuse its discretion by denying defendant’s motion to withdraw his guilty plea.

¶ 33 The trial court did not apply an incorrect legal standard when deciding defendant’s motion to withdraw his guilty plea. The court explicitly addressed all of defendant’s various arguments as to why he should be allowed to withdraw his guilty plea. In particular, the court considered defendant’s argument that he did not actually commit the offense. The court explained that the factual basis it heard when defendant pleaded guilty was sufficient to support his plea. The court explained, “Beyond that, you really haven’t given me any evidence of what your claim of innocence or actual innocence is, what your meritorious defense is, other than to say that you don’t think there was enough in the factual basis.” The court therefore understood that doubt as to defendant’s guilt was an appropriate reason to allow defendant to withdraw his guilty plea. However, the court determined that the admissible evidence presented by defendant did not establish a sufficient doubt as to his guilt. That decision was not fanciful, arbitrary, or unreasonable. The court did not abuse its discretion in denying defendant’s motion to withdraw

his guilty plea.

¶ 34

C. Due Process

¶ 35 Defendant argues that his due process rights were violated “because he has been falsely accused of committing crimes he did not commit and wrongfully convicted on a false charge.”

¶ 36

We note that this argument is essentially the same as defendant’s previous argument. In both, defendant argues that he did not commit the offense at issue and that he should therefore be allowed to withdraw his guilty plea. As we explained above, the factual basis was sufficient to support defendant’s guilty plea. Further, defendant has not produced credible evidence to create a doubt as to his guilt. All he has provided are bare allegations that the investigating officer lied about the events leading to defendant’s arrest. Defendant’s claim that the officer’s statements contradict the audio- and video-recordings of the alleged offense are not persuasive, as the audio- and video-recordings are not included in the record on appeal. “[T]o support a claim of error on appeal[,] the appellant has the burden to present a sufficiently complete record.” *Webster v. Hartman*, 195 Ill. 2d 426, 432, 749 N.E.2d 958, 962 (2001). Absent the appropriate record, we assume the trial court’s decision was in conformity with the law and had a sufficient factual basis. *Id.*

¶ 37

Further, at the guilty plea hearing, the State recited its factual basis, after which defendant asserted his belief that the State could present at trial the evidence alleged in the factual basis. Defendant cannot now baldly claim that the evidence to which he assented was false without providing evidence to support that claim. Defendant’s due process rights were not violated.

¶ 38

D. Prosecutorial Misconduct

¶ 39 Last, defendant argues that the State committed prosecutorial misconduct by “presenting false charges to the grand jury” and “soliciting false testimony” from witnesses before the grand jury. We disagree.

¶ 40 First, the grand jury proceedings were not properly included as part of the record on appeal. As we mentioned earlier, the appellant has the duty to compile a complete record on appeal, and absent a complete record, we will assume the trial court’s decision was proper.

¶ 41 In addition, defendant’s argument fails on the merits. To warrant dismissal of an indictment based on prosecutorial misconduct involving the grand jury, a defendant must show that the alleged misconduct affected the grand jury’s deliberations. *People v. DiVincenzo*, 183 Ill. 2d 239, 257, 700 N.E.2d 981, 991 (1998). The prosecutorial misconduct must rise to the level of “a miscarriage of justice.” *Id.* A due process violation may occur if “the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence.” *Id.*

¶ 42 In this case, defendant has not shown that the State engaged in prosecutorial misconduct. Again, defendant’s bare allegations that the State elicited perjured testimony have no basis in the record and were unsupported by any evidence admitted at the motion to withdraw his guilty plea. Further, the alleged minor discrepancies between the testimony presented to the grand jury and the account contained in the police reports—even if true—were not sufficient to affect the grand jury’s deliberations or cause a miscarriage of justice. Defendant’s argument that the State committed prosecutorial misconduct therefore fails.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court’s judgment.

¶ 45 As part of our judgment, we award the State its \$50 statutory assessment against

defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 46 Affirmed.