

No. 1-12-1721

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 18070
	)	
JAMES MITCHELL,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Conviction of delivery of a controlled substance affirmed over defendant's challenge to the sufficiency of the evidence; defendant cannot raise plain error on review regarding the admissibility of certain evidence where he invited any error below; mittimus corrected; judgment affirmed.

¶ 2 Following a bench trial, defendant James Mitchell was convicted of delivery of a controlled substance and sentenced to six years' imprisonment. On appeal, he contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt, and that the trial court

relied on inadmissible hearsay as substantive evidence. He also requests that the mittimus be corrected to reflect the offense of which he was convicted.

¶ 3 The charges filed against defendant in this case arose from an ongoing narcotics investigation by Chicago police on the west side of the city. At trial, Chicago police officer Darryl Smith testified that on August 20, 2011, he was part of an undercover narcotics team charged with purchasing narcotics in the area of 4036 West Maypole Avenue in Chicago. At 8:10 a.m., Officer Smith went to that location and saw defendant, who he identified in court, wearing a red baseball cap, red shirt and blue jeans. Defendant walked in his direction, yelling, "[y]ellow, yellow," which, he explained, is street terminology for yellow bags containing heroin. Officer Smith asked defendant for five yellow bags of "blow," another street term for heroin, and defendant reached into his pants pocket, and retrieved them. The officer then gave defendant \$10 in prerecorded funds for five yellow bags containing a white powdery substance, which the officer suspected was heroin. After the purchase, the officer walked away, and informed his narcotics team that there was a positive narcotics buy from defendant.

¶ 4 Officer Smith then returned to the police station where he viewed a photo array from Officer Haggerty, and identified defendant. Officer Smith testified that he signed the sheet of paper with defendant's photograph, and that prior to viewing the photo array he signed an advisory form, which indicated that defendant may or may not be in the photo spread line-up.

¶ 5 On cross-examination, Officer Smith testified that he did not recall if the shirt defendant was wearing was short- or long-sleeved, or if his shirt and baseball cap had any markings on them. He also did not recall if defendant had any facial hair or exactly where on his person defendant retrieved the narcotics. Officer Smith noted that defendant did not have any tattoos

that were in his view, and recalled that he was 5'8" to 5'10" tall, weighed approximately 205 pounds, and appeared to be 30 to 40 years old. The officer also testified, in contrast to his testimony on direct examination, that he gave defendant \$50 for the heroin, and further noted that the transaction lasted only minutes.

¶ 6 Officer Smith further stated that he filled out a police report in which he listed defendant's address and date of birth. In response to defense counsel's question as to where he obtained that information, Officer Smith stated that he got it from a contact card that had been previously generated by police. Officer Smith further stated that he viewed the photo array at 9:47 a.m., after he signed the photo advisory form, and signed the photo array at 10:40 a.m.

¶ 7 Chicago police officer Bridges testified that on August 19, 2011, he was working as an undercover narcotics buy officer in the area of 4036 West Maypole Avenue, and had purchased narcotics that day. He also saw defendant in that area, "[m]illing around with the other guys." Officer Bridges noted that defendant had been "out on the scene numerous days."

¶ 8 Officer Bridges further testified that on August 20, 2011, he was part of a surveillance team, and had a clear view of the transaction that Officer Smith was involved in from 30 feet away. He observed Officer Smith engage defendant in conversation, then conduct a hand-to-hand narcotics transaction. Officer Bridges also identified defendant in court as the person he saw on August 19, 2011, wearing the same clothing he wore the previous day, *i.e.*, a red baseball hat, red short-sleeved t-shirt, and blue jeans. Officer Bridges continued to observe defendant, who remained at the scene after Officer Smith left, and noted that defendant was the only other person present during the transaction.

¶ 9 On cross-examination, Officer Bridges also stated that he included the fact that he had

seen defendant the day before in his police report. However, when defense counsel noted that the report did not indicate such, but rather that defendant was "previously identified on a field stop and a contact card was filled out on August 19th 11:51 by Officer[s] DeFranco and Loretto," Officer Bridges responded that those were his enforcement officers, and that he had not included his August 19, 2011 sighting of him in his report. Officer Bridges further stated on cross-examination that he was able to identify defendant based on his clothing, and also recognized his face, and that he had brown eyes. He did not recall if there were any scars on his face or facial hair. The parties then stipulated that the recovered suspect narcotics tested positive for heroin, and weighed 1.4 grams.

¶ 10 Jeanine Avant testified that she is a licensed nurse and works at a Methadone clinic. In August 2011, defendant was her boyfriend and lived with her and her two sons. She further testified that on August 16, 2011, defendant was cutting their grass when something stuck in his foot. They went to the hospital that evening where a foreign object was removed from his foot, and he received stitches and pain medication.

¶ 11 Avant also testified that between August 17 and August 20, 2011, defendant was walking with a limp, and that he used a cane from August 16 to August 25, 2011. On August 19, 2011, defendant was in bed when she left the house for work, and his knee was swollen. On the following day, she worked from 6 a.m. to 12 p.m., which required her to leave the house at 5 a.m. She acknowledged that she was not at home at 8 a.m. on August 20, 2011, and testified that when she returned home at 2 p.m. that day, defendant was in bed.

¶ 12 Avant further testified that on August 21, 2011, defendant "got real sick, all of a sudden he looked pale, [and] he was sweating." Avant and her sons brought defendant to the hospital

where he was admitted to the emergency room and received an IV infusion and a tetanus shot for an infection that he had contracted from not taking the previously prescribed antibiotics. The attending doctor told Avant that if they had waited another day defendant would have died. Defendant was prescribed antibiotics and painkiller medication.

¶ 13 The parties stipulated that medical records from Saint James Hospital showed that defendant was treated at the hospital on August 16, 2011, and released on August 17, 2011. The records also indicate that defendant was diagnosed with a laceration to his right foot, and treatment included removal of a foreign body and an antibiotics prescription. Defendant was readmitted on August 21, 2011, and diagnosed with right knee and ankle pain, and an abscess over his right patella (kneecap). The treatment included a tetanus shot, and defendant was instructed to continue taking the antibiotics before his discharge on August 22, 2011.

¶ 14 During closing arguments, defense counsel asserted, in relevant part, that there was no evidence showing how Officers Smith and Bridges knew defendant was the offender, information on where the photograph in the photo array came from, or testimony from the "contact officer." Counsel argued that "[t]here is no description that is given" by the officers, and that the contact card states defendant's address, and date of birth, but that this information did not come from the officers viewing defendant during the incident in question.

¶ 15 The State objected that the contact card was never made a part of the record or admitted into evidence. The court responded that it heard the argument regarding the contact card and to continue with closing argument. Defense counsel argued in rebuttal that there was no description of defendant by Officers Bridges and Smith, and that Officer Bridges noted in his supplementary report that two other officers had "contact" with defendant the day before, but he

failed to note that he had contact with defendant, which was impeachment.

¶ 16 At the close of evidence, the court found defendant guilty of delivery of a controlled substance. The court noted that Officer Smith identified defendant in a photo array as the person from whom he purchased the heroin, that Officer Bridges recognized defendant wearing the same outfit he had seen him in the day before, then observed him engage in a narcotics transaction with Officer Smith. The court also found that Avant testified credibly regarding defendant's wound, the subsequent infection and how he was treated, but that there were basically six identifications in this case: identifications from Officers Bridges, DeFranco and Loretto on August 19, 2011, as reflected in the contact card, and then by Officer Smith on August 20, 2011. The court concluded that defendant was out there on August 19, 2011, as evidenced by the fact that the contact card was generated then, so his assertion that he was laid up is immediately negated by the contact card and the identifications made of him on both August 19 and 20, 2011.

¶ 17 Defendant filed a motion for a new trial, alleging, in relevant part, that the court erred when it found that Officers Loretto and DeFranco identified him where neither officer testified at his trial, were never subject to cross-examination, nor made an in-court identification of him. Defendant alleged that the court erred when it found that Officer Bridges' hearsay testimony, relating to Officers Loretto and DeFranco and their preparation of a contact card, was an identification of him. The trial court denied defendant's motion, finding that it did not err in relying on the testimony regarding what the "other officers" had observed, as it was the course of their investigation, and not hearsay.

¶ 18 On appeal, defendant first contends that the evidence was insufficient to prove him guilty

beyond a reasonable doubt. He maintains that the identifications of him were unreliable where the officers did not provide any details of the offender's features, and that their identifications were "significantly impeached" and contradicted in light of the unrefuted medical evidence establishing that he could not be the person the officers saw because they did not notice that he was in a great deal of pain, had difficulty simply walking without a limp or a cane and appeared pale and weak.

¶ 19 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375. For the reasons that follow, we do not find this to be such a case.

¶ 20 Defendant maintains that the officers' identifications of him as the offender were unreliable as evidenced by the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the witnesses' opportunity to view the offender at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of the witnesses' prior description of the criminal; (4) level of certainty of the witnesses at the identification confrontation; and (5) length of time between the crime and identification. When applied to the evidence in this case, we find that these factors weigh in favor of the reliability of the eyewitnesses' identification of defendant as the offender.

¶ 21 The evidence presented at trial shows that Officer Smith saw defendant on Maypole Avenue and heard him yelling, "[y]ellow, yellow," a street term for heroin. Officer Smith then approached defendant and asked him for five bags, which defendant tendered to him in exchange for a sum of money. Officer Smith's attention was clearly focused on defendant and provided a general description of him. Defendant was also wearing apparel which was the same as that observed by Officer Bridges the day before. In addition, Officer Smith had an excellent opportunity to view defendant throughout the exchange where they were only a few feet away from each other (*People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)), and Officer Bridges, who had previously observed defendant on numerous occasions in the area, observed them from a distance of 30 feet. Thus, the evidence shows that the attention of both officers was focused on defendant throughout the transaction, and Officer Bridges continued to observe him after the transaction, and before he returned to the police station. The first and second *Biggers* factors are thus satisfied.

¶ 22 As to the accuracy of the description, Officer Smith recalled that defendant was 5'8" to 5'10" tall, weighed approximately 205 pounds, and appeared to be 30 to 40 years of age. The record shows that defendant was 5'11", weighed 240 pounds, and was 35 years old, thus showing that the description was sufficiently accurate and satisfied the third *Biggers* factor.

¶ 23 Officers Smith and Bridges were also certain in their identifications of defendant. Officer Smith identified defendant in a photo array within hours after the incident, and again at trial, and Officer Bridges identified defendant at trial, eight months after the incident. *People v. Malone*, 2012 IL App (1st) 110517, ¶36, citing *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972)

(identifications found reliable under longer periods of time between incident and identification).

This evidence satisfies the certainty and time factors set out in *Biggers*.

¶ 24 Defendant contends, nonetheless, that the scientific consensus is that confidence is a poor predictor of accuracy of an identification, citing to journals. In doing so, defendant is attempting to interject expert opinion to undermine the reliability of the identifications made by the eyewitnesses. None of this evidence, however, was presented at trial, nor subject to cross-examination, and we remind that, on review, a reviewing court must determine the issues before it on the record made in the trial court. *People v. Mehlberg*, 249 Ill. App. 3d 499, 532 (1993). Thus, as in *Mehlberg*, we will not consider these secondary materials on appeal. *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994).

¶ 25 Defendant contends, however, that the reliability of the identifications made by the officers was diminished by the fact that they did not give a detailed description of him and did not notice any limp or that he was suffering from an infection. He maintains that his limp was very noticeable and that the police should have noticed it if they had actually observed him conduct the transaction. The contention might have some merit if the record reflected circumstances that indicated that defendant engaged in activity that would indicate a difficulty in walking which would have been noticed. The testimony indicated a simple narcotics transaction where the officer approached the seller, obtained the drugs and left the area. Under these circumstances, we fail to understand why the witnesses would notice anything unusual about defendant's gait. In any event, this contention deals with credibility and the weight of the evidence, which was correctly resolved in favor of the prosecution. *People v. Vasquez*, 313 Ill. App. 3d 82, 102-03 (2000).

¶ 26 The record shows that Officer Smith gave a detailed description of defendant, including his attire, age, weight and height. Officer Bridges recognized defendant from the day before, and noted that he was wearing the same outfit. Although Officer Bridges could not recall whether defendant had scars, he recognized defendant's face and noted that he had brown eyes. Where, as here, there are strong positive identifications, any discrepancies or omissions in the description of defendant merely go to the weight of the identification testimony to be decided by the trier of fact (*People v. Slim*, 127 Ill. 2d 302, 308-09 (1989)), and here we find that the cited omissions did not raise a reasonable doubt of his identity as the offender (*People v. Lewis*, 165 Ill. 2d 305, 357 (1995); *People v. Tomei*, 2013 IL App (1st) 112632, ¶50).

¶ 27 We also find defendant's proposed alibi evidence similarly lacking. Defendant's girlfriend, Avant, testified to the foot injury defendant sustained on August 16, 2011, which, she claimed, left him limping and using a cane. However, she could not account for his whereabouts in the 8 a.m. hour of August 20, 2011, because she left for work at 5 a.m. and did not return until 2 p.m. Therefore, and contrary to defendant's contention, Avant did not establish an alibi for defendant during the time of the incident. *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009).

¶ 28 Notwithstanding, defendant contends that Officer Smith's identification of him in the photo array was impeached where he indicated in his report that he viewed the array at 9:47 a.m., but did not sign the lineup advisory form or the photo array until 10:40 a.m., *i.e.*, after he viewed the photo array. We observe, however, that Officer Smith testified that he viewed the photo array at 9:47 a.m., after he signed the photo advisory form, and that he signed the photo array at 10:40 a.m. This discrepancy is for the trial court to resolve in making its credibility determination, and that determination will not be disturbed in this case. *People v. Buford*, 235

Ill. App. 3d 393, 405 (1992).

¶ 29 Furthermore, any minor discrepancy in the description of defendant did not render the officers' identification of him unreliable (*Slim*, 127 Ill. 2d at 308-09), and, contrary to defendant's contention, no physical evidence was required to connect him to the crime in light of the strong positive identifications made of him (*People v. Rojas*, 359 Ill. App. 3d 392, 396-99 (2005)). We, accordingly, find that the positive identifications of defendant by the officers were proved reliable under the *Biggers* factors, and that the evidence was sufficient to allow the trier of fact to find that he was proved guilty of delivery of a controlled substance beyond a reasonable doubt. *People v. Malone*, 2012 IL App (1st) 110517, ¶37; *People v. Brown*, 110 Ill. App. 3d 1125, 1128-29 (1982).

¶ 30 Defendant next contends that the court erroneously relied on the contact card as substantive evidence to convict him even though it was never introduced at trial and was inadmissible double hearsay. Because this was the "sole basis" for finding him guilty, defendant claims that the convictions should be reversed and his cause remanded for a new trial.

¶ 31 The State responds that defendant forfeited this issue because he did not object to the testimony regarding the contract card at trial, and has failed to assert plain error. In his reply brief, defendant alleges that this court should review the error under either prong of the plain-error test.

¶ 32 In order to preserve an issue for review, defendant must object at trial and raise the matter in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Reed*, 177 Ill. 2d 389, 393 (1997). Where as here, defendant failed to do so, he has forfeited the issue for review, and we may review his claim only if he has established plain error. *People v. Hillier*,

237 Ill. 2d 539, 545 (2010).

¶ 33 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). To obtain relief, defendant must first show that a clear or obvious error occurred. *Hiller*, 237 Ill. 2d at 545.

¶ 34 Here, as the State points out, the State did not introduce the substance of the contact card into evidence. Rather, the record shows that defendant injected any error into the trial where he raised the contact card during cross-examination of both officers. In particular, he asked Officer Smith where he obtained defendant's address and date of birth, and the officer testified that he got that information from a contact card that had been previously generated by police. When questioning Officer Bridges, the defense raised the fact that a contact card had been created the day before the incident by Officers Loretto and DeFranco. Finally, during closing argument, defense counsel mentioned the contact card, specifically noting that there was a contact card created. Counsel also pointed out that Officer Bridges included information in his police report that Officers Loretto and DeFranco stopped defendant to create the contact card, but that Officer Bridges did not note in his report that he was also present the day before when defendant was seen and stopped in the same area, which, he maintained, impeached the testimony of Officer Bridges. Again, this deals with the issue of credibility and weight to be given to the evidence by the trial court, and nothing argued by defendant in this regard warrants reversal of the finding of the trial court. *Vasquez*, 313 Ill. App. 3d at 102-03.

¶ 35 Under the doctrine of invited error, a defendant may not request to proceed in one manner at trial and then later contend on appeal that the course of action was in error. *People v. Carter*,

208 Ill. 2d 309, 319 (2003). Here, the record shows that defendant elicited information regarding the contact card at trial, and raised it again during closing arguments over the State's objection that the card was never made a part of the record or admitted into evidence. Where defendant elicits the now-alleged hearsay during cross-examination, that evidence may be considered and given its natural probative effect. *People v. Collins*, 106 Ill. 2d 237, 263 (1985), citing *People v. Akis*, 63 Ill. 2d 296, 299 (1976). Under these circumstances, we find that defendant is estopped from raising this issue on appeal (*People v. Harvey*, 211 Ill. 2d 368, 385-86 (2004); *People v. Abdullah*, 336 Ill. App. 3d 940, 950 (2003)), and we decline to review his plain error claim where he invited the error (*People v. Patrick*, 233 Ill. 2d 62, 76-77 (2009)).

¶ 36 Finally, defendant contends, the State concedes and we agree that the mittimus incorrectly reflects that defendant was convicted of manufacture or delivery of heroin greater than 15 grams. We, accordingly, order his mittimus corrected to reflect that he was convicted of delivery of heroin of 1, or more grams, but less than 15 grams of heroin. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 37 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and order the mittimus corrected.

¶ 38 Affirmed; mittimus corrected.