No. 1-09-2193

FIFTH DIVISION
March 31, 2011

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. 08 CR 20937
	)	
MYOSHA MCINTOSH,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

O R D E R

HELD: Where jury could have reasonably accepted the testimony of the police officers as a whole as proof of the essential elements of the crime beyond a reasonable doubt, defendant was properly convicted of delivery of a controlled substance.

Following a jury trial, defendant Myosha McIntosh was

convicted of delivery of a controlled substance. On appeal, defendant contends: (1) the State failed to prove her guilty beyond a reasonable doubt; (2) the trial court improperly denied her motion for substitution of judge as a matter or right on untimeliness grounds; (3) the trial court failed to comply with Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to afford each potential juror the opportunity to express their understanding of the *Zehr* principles; and (4) her mittimus should be amended to reflect she was convicted of delivery of a controlled substance, not delivery of a controlled substance within 1,000 feet of a school. For the reasons that follow, we affirm defendant's conviction and remand the cause solely for the trial court to amend her mittimus to reflect a conviction for delivery of a controlled substance.

BACKGROUND

Defendant's conviction stems from a controlled narcotics surveillance and purchase operation conducted by Chicago police on October 16, 2008, near the corner of 700 South Independence Avenue. Chicago police officer Shawn Singleton testified that at around 11 a.m. on October 16, 2008, he drove by defendant while she was standing near the southeast corner of Lexington and Independence. Officer Singleton said defendant was dressed in a red hat, dark top, dark jacket and red pants. Officer Singleton

parked his car and walked down Independence towards defendant. When Officer Singleton walked up to defendant, he asked her whether she "was working." Defendant responded "what do you need?" When Officer Singleton replied "rocks," which is a street term for crack cocaine, defendant told him "it will be two minutes, I got blows," which is a street term for heroin. Before Officer Singleton could respond, defendant opened her hand and showed him two "small clear ziplock baggies with yellow and black 'Batman' logos printed on them." Each bag contained a white powdery substance that Officer Singleton suspected was heroin. Officer Singleton told defendant "I will take them blows for right now." Defendant then handed Officer Singleton the two baggies in exchange for $20, which consisted of two $5 bills and one $10 bill in prerecorded funds. Officer Singleton testified two other individuals, one male one female, were near defendant when she sold the drugs to him. Neither were wearing a red hat or red pants.

After defendant handed Officer Singleton the suspect drugs, he placed them in his pocket and walked back towards his car. When Officer Singleton reached the car, he informed the controlled buy team members that he had made a positive purchase of heroin. Officer Singleton also provided a description of defendant as "a short pudgy female with a red hat, dark top, and

red pants." Officer Singleton testified the transaction was not photographed, videotaped or audio-recorded. The prerecorded funds were never recovered.

Chicago police officers William Pierson and Robin McGee testified they saw defendant engage in several drug transactions while working as surveillance officers on October 16, 2008, including the controlled purchase conducted by Officer Singleton. Both officers testified they were in separate covert vehicles parked at different locations nearby.

Officer Pierson said that shortly after he arrived at his surveillance location, he saw two women and one man standing on the corner of Independence Boulevard and Lexington Street. He said he watched several people walk up and start a brief conversation with defendant. Defendant would then walk maybe a few feet, reach into her pant's pocket, and then hand the person a small item in exchange for an unknown amount of money. Defendant would then place the money in her right jacket pocket. Officer Pierson said that he noticed defendant would "engage in conversation" with the other female on the corner from time to time, and that the other male on the corner would walk towards defendant as suspected buyers approached and then would walk back a few feet. Officer Pierson said that at some point during his surveillance, he also saw defendant walk onto the porch of a

house located near the corner where some other people were standing. Shortly after, defendant walked back off the porch onto the sidewalk near the corner. Based on his observations, Officer Pierson said defendant appeared to be selling narcotics. Officer Pierson described defendant as being female and wearing "a red hat similar to like the fisherman's hat with the rim all around; she had on glasses, a dark jacket with a hoody, and bright red pants, black gym shoes."

Following the controlled buy, Officer Pierson watched defendant engage in several other hand-to-hand drug transactions. Officer Pierson testified that the team did not immediately arrest defendant because they wanted to see if she would "go to a drug stash spot, which is common." Officer Pierson then saw three males approach defendant. After defendant and the three males had a short conversation, Officer Pierson watched as they began walking northbound on Independence Boulevard. Officer Pierson saw defendant and the three males engaged in "some kind of hand-to-hand transactions" while walking together.

When asked how drug dealers typically dispose of money from their transactions, Officer Pierson said that, based on his experience, he had learned "with a lot of street sales, the seller does not want to hold on to the money." He said "one reason is because they want to get rid of the money so [the

police] don't recover it. Another reason is because they usually have a person higher than them that collects money because, if they get arrested, they don't want them to have possession of all the money they have made for the day, so usually somebody picks up the money and gets rid of the money."

Officer McGhee testified that from where she was positioned, she could not see defendant engaging in any transactions prior to the controlled buy. Officer McGhee said that after the controlled buy was conducted, she saw defendant "kept walking back and forth. She talked to a couple of people that were probably females, and then she met up with two or three other guys."

Chicago police officer Brian Konior testified that after he received a radio call from Officers Singleton and Pierson, he and his partner drove to the scene and approached defendant. Officer Konior said defendant was wearing a red hat, dark jacket and red pants. Officer Konior could not recall exactly what the male and female standing on the corner near defendant were wearing, but he did remember neither were wearing red. After Officer Singleton identified defendant at the scene, she was placed in handcuffs, placed in the police car and transported to the Homan Square police station. Officer Konior testified no drugs or money were found on defendant when she was arrested.

Officer McGee testified she also conducted a custodial search of defendant at the station. Defendant's personal items were inventoried and placed in a locked container. Officer Singleton testified he inventoried the drugs purchased from defendant, placed them in a heat-sealed plastic bag, and assigned the evidence inventory number 11469234. Officer Singleton said he did not request the baggies be fingerprinted because "there was no question that the Defendant delivered those narcotics to me."

Illinois State Police Forensic Chemist Tina Joyce testified she received an evidence bag with the inventory number 11469234, which contained two smaller ziplock bags, to test for the presence of a controlled substance on October 21, 2008. The contents of one of the two ziplock bags weighed .175 gram. Although she did not weigh the other bag, she estimated it weighed the same. She said that based on her expert opinion, within a reasonable degree of scientific certainty, the contents of the ziplock bags tested positive for heroin.

Officer Jennifer Muniz testified for the defense that she was working intake at the Cook County Department of Corrections on October 17, 2008. She was assigned the duty of checking in the personal property of recently-admitted female inmates. Officer Muniz testified that when defendant was processed that

day, she received a sealed bag from defendant that contained eyeglasses, shoestrings and an envelope with $16.10.

The jury found defendant guilty of unlawful delivery of a controlled substance. Following a sentencing hearing, the trial court sentenced defendant to a six-year prison term. Defendant appeals.

ANALYSIS

I. Reasonable Doubt

Defendant contends the evidence the State presented at trial was insufficient to prove him guilty of the offense beyond a reasonable doubt. Specifically, defendant contends the officer's testimony at trial that defendant was engaged in selling narcotics was inherently unbelievable because the State failed to produce corroborating evidence of any narcotics or money recovered from defendant after her arrest.

On review, the relevant question is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004); *People v. Ornelas*, 295 Ill. App. 3d 1037, 1049 (1998). It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw

reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is justified. *People v. Moore*, 171 Ill. 2d 74, 94 (1996).

To sustain a conviction for the unlawful delivery of a controlled substance, the State must prove defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2008); *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009). Delivery is defined as "the actual, constructive, or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2008); *Brown*, 388 Ill. App. 3d at 108.

In *Brown*, the defendant contended the State failed to prove him guilty beyond a reasonable doubt because the officer's testimony was inherently unbelievable based on the State's failure to produce corroborating evidence of either narcotics or prerecorded funds recovered from the defendant's person following his arrest. The court noted Officer Harris specifically testified at trial that the defendant said he had heroin for purchase. According to Officer Harris, the defendant then walked across the street to a van, handed some money to the co-defendant, retrieved an item, then gave Harris a white powdery

substance which was ultimately found to be .1 gram of heroin. Officer Harris' testimony was corroborated by Officer Person. Noting " 'the testimony of a single witness, if it is positive and the witness credible, is sufficient to convict,' " the court held the prosecution established the defendant knowingly delivered .1 gram of heroin. *Brown*, 388 Ill. App. 3d at 108, quoting *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

With regard to the contention that Officer Harris' testimony was unbelievable because no narcotics or the prerecorded $20 were ever recovered from the defendant following his arrest, the court held "[a]ny infirmities perceived in Harris's testimony went to its weight and to his credibility as a witness." *Brown*, 388 Ill. App. 3d at 108, citing *People v. Hall*, 194 Ill. 2d 305, 332 (2000). The court noted it was for the jury to determine whether there were unresolved questions, and, if so, how those flaws affected the witnesses' credibility as a whole. *Brown*, 388 Ill. App. 3d at 108, citing *Cunningham*, 212 Ill. 2d at 285. "The jury may 'accept or reject as much or as little of a witness's testimony as it pleases.' " *Brown*, 388 Ill. App. 3d at 108, citing *People v. Sullivan*, 366 Ill. App. 3d 770, 782 (2006). The court also noted a plausible explanation as to the missing funds existed because the defendant could have disposed of the money when he went inside a house for a period of time. Additionally,

contrary to the defendant's contention, no witness testified the defendant remained in view of the officers the entire time.

Here, similar to *Brown*, Officer Singleton testified defendant offered him "blows," which is a street term for heroin. Officer Singleton testified defendant then handed him two ziplock bags that contained a white powdery substance in exchange for $20 in prerecorded funds. The white substance in the bags subsequently tested positive for the presence of heroin. Officer Singleton's testimony was corroborated by Officers McGee and Pierson. Although we recognize all of the officers testified at trial that no other narcotics or money were recovered from defendant after her arrest and subsequent custodial search, we note any infirmity in the officers' testimony went to their testimony's weight and to their credibility as witnesses. See *Brown*, 388 Ill. App. 3d at 108. It was for the jury to determine whether there were unresolved questions based on the officers' testimony, and, if so, how those flaws affected the witnesses' credibility as a whole. See *Brown*, 388 Ill. App. 3d at 108.

Moreover, a plausible explanation existed as to why defendant may not have had any money or drugs on her when she was arrested, even though the officers testified they saw defendant conduct multiple hand-to-hand transactions both before and after the controlled buy. Officer Pierson said he saw defendant walk

up the porch of a house after conducting several transactions but prior to Officer Singleton's controlled buy. Both Officer McGee and Officer Pierson also testified defendant was not arrested immediately after Officer Singleton conducted the controlled buy. The officers both testified that they saw defendant and three males walk together after the group buy and engage in "some kind of hand-to-hand transactions." Although defendant contends Officer Pierson's testimony established he never saw defendant hand any money or drugs off to another person, we note Officer Pierson also testified he could not see what defendant handed the three males she talked to after the controlled buy because they were walking away from him at the time and he could only see their backs. Officer Pierson further testified at trial that it was common for sellers to get rid of money if they are out dealing for a lengthy period of time so that police do not recover it if the seller is arrested. While both Officers Pierson and McGee indicated defendant was under steady observation, nothing in their testimony concretely suggests defendant never had an opportunity to hand money or drugs off to another individual during their surveillance of her.

Based on the record before us, we find the jury could have reasonably accepted the testimony of the officers as a whole as proof of the essential elements of the crime beyond a reasonable

doubt. See *Brown*, 388 Ill. App. 3d at 109.

II. Substitution of Judge

Defendant contends the trial court improperly found her motion for substitution of judge by right untimely because she should not have been "charged with the knowledge" that her case was definitely being assigned to Judge Burns until December 22, 2008, the date she first appeared before him and filed the motion.

On October 22, 2008, presiding Judge Bieble issued an order regarding multiple judge reassignments that were to take effect on December 9, 2008. Pursuant to that order, Judge Burns' call was to be reassigned to Judge Hennelly. According to a notation in the half-sheets in the record, Judge Biebel assigned defendant's case to Judge Burns on November 20, 2008. On the same date, however, defendant had her first appearance before Judge Hennelly. On November 24, 2008, Judge Bieble issued an amended order, which stated Judge Burns would continue his call and take over the call of Judge Dernbach effective December 9, 2008. The amended order noted it superceded the October 22 order.

Following the amended order, defendant appeared before Judge Stephenson on December 11, 2008. The half-sheet entry for that date notes Judge Stephenson was appearing for Judge Burns.

Defendant's case was continued to December 22, 2008. Defendant appeared before Judge Burns on December 22, 2008, at which point she filed a substitution of judge as a matter of right under section 114-5(a) of the Illinois Code of Criminal Procedure (Code) (725 ILCS 5/114-5(a) (West 2008)). In support of her motion, defendant alleged she feared she would not receive a fair and impartial trial because of a previous case before Judge Burns. Judge Burns denied the motion, finding defendant was aware the case was assigned to his call on December 11, 2008. Defendant then filed a motion for substitution of judge for cause, which was also denied. The case was transferred back to Judge Burns for trial.

Section 114-5(a) of the Code provides:

> "Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial." 725 ILCS 5/115-5(a) (West 2008).

Section 114-5(a) provides a defendant with the "absolute right" to a substitution of judge upon the timely filing of a

proper written motion for substitution. *People v. McDuffee*, 187 Ill. 2d 481, 487 (1999); *People v. Walker*, 119 Ill. 2d 465, 470 (1988). Because section 114-5(a) impacts a defendant's constitutional right to a fair trial, the provisions of the statute are to be construed liberally. *People v. Evans*, 209 Ill. 2d 194, 216 (2004); *McDuffee*, 187 Ill. 2d at 487. The commencement of the 10 day period is not uniform, however. *Evans*, 209 Ill. 2d at 216. A motion for substitution is timely filed if it is brought within 10 days of the date the defendant could be "charged with knowledge" that the judge at issue had been assigned to his case. *McDuffee*, 187 Ill. 2d at 487. "This examination is case specific and depends upon the record presented in each case." *Evans*, 209 Ill. 2d at 216.

Here, a review of the record establishes defendant's motion to substitute by right was untimely and properly denied by the trial court. We agree defendant should be "charged with knowledge" of the fact that Judge Burns would ultimately serve as the trial judge on December 11, 2008. The record reflects Judge Burns was assigned to defendant's case on November 20, 2008. Although Judge Bieble issued an order on October 22 indicating Judge Burns would be assigned to a different call as of December 9, the record indicates Judge Bieble issued an amended order on November 24 that stated Judge Burns would continue his call and

take over the call of Judge Dernbach effective December 9. The half-sheet indicates that when defendant appeared before Judge Stephenson on December 11, 2008, defendant was specifically made aware that Judge Stephenson was appearing for Judge Burns. The half-sheet notation, mixed with the fact that Judge Biebel's November 24 amended order indicated Judge Burns would continue hearing his call as of December 9, 2008, support a finding that defendant was charged with knowledge that Judge Burns was assigned to his case by December 11 at the latest. Because defendant's motion was filed more than 10 days after December 11, 2008, we find the motion was untimely, and, therefore, properly denied by the trial court. See *Evans*, 209 Ill. 2d at 219.

III. *Zehr* Principles

Defendant contends his sixth amendment right to a trial by a fair and impartial jury was denied when the trial court violated Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to question the prospective jurors as to whether they understood and accepted any of the four principles set forth in *People v. Zehr*, 103 Ill. 2d 472, 483 (1984), and codified in Rule 431(b).

During *voir dire*, the trial court admonished all of the prospective jurors that:

> "Under the law the Defendant is presumed to be innocent of the charge against her.

> This presumption remains with her during every stage of the trial and during the jury's deliberation on the verdict. It is not overcome unless and until the jury is convinced from all the evidence in this case and beyond a reasonable doubt that the Defendant is guilty.
>
> The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. The State carries this burden throughout the trial. The Defendant is not required to prove her innocence. The Defendant may not present any evidence at all. Defendant may rely upon the presumption of innocence."

Although the trial court did not initially mention defendant need not testify during his first set of admonishments, he did mention it in his second address to the venire panel. Notwithstanding, defendant contends the trial court failed to ask the venire either individually or in a group whether they understood and accepted each of the principals, as required under *Zehr*.

Defendant neither objected to the trial court's Rule 431(b) admonishments at trial nor raised the issue in his post-trial motion, however. Accordingly, the State contends defendant

waived the issue. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). Defendant counters that the trial court's failure to adhere to the *Zehr* principles is reviewable here under the "second prong" of the plain error doctrine. Specifically, defendant contends the trial court's failure to comply with Rule 431(b) is of such a magnitude that it denied defendant a fair and impartial trial, irregardless of whether he is able to establish prejudice. Defendant does not contend the evidence presented at trial was "closely balanced."

Under the plain error doctrine, a reviewing court may consider unreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 188-87 (2005). In order to find plain error, we must first find the trial court committed some error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008). Naturally, if the trial court failed to follow Rule 431(b) in this case, an error would have occurred pursuant to *Rodriguez*, opening the door to a plain error analysis.

Defendant notes that after she filed her initial brief, however, our supreme court addressed the issue defendant raises here in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, our supreme court held it could not presume a jury was biased simply because the trial court erred in conducting Rule 431(b) questioning. *Thompson*, 238 Ill. 2d at 615. Although the supreme court recognized a trial before a biased jury is structural error subject to automatic reversal, the supreme court noted failure to comply with the amended version of Rule 431(b) alone does not necessarily result in a biased jury, and, therefore, does not require automatic reversal as structural error. *Thompson*, 238 Ill. 2d at 614-15.

Here, similar to *Thompson*, the prospective jurors received some, but not all, of the required Rule 431(b) admonishments. Defendant has failed to establish that the trial court's violation of Rule 431(b) resulted in a biased jury. Because defendant has failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process, we find the second prong of plain-error review does not provide a basis for excusing defendant's procedural default. Accordingly, we find defendant has forfeited the issue.

IV. Mittimus

Defendant contends, and the State concedes, her mittimus should be corrected to accurately reflect she was convicted of delivery of a controlled substance, not delivery of a controlled substance within 1,000 feet of a school. "Where the mittimus incorrectly reflects the jury's verdict, the proper remedy is to amend the order to conform to the judgment entered by the court." See *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Accordingly, we remand this case to the trial court for the sole purpose of correcting the mittimus to reflect defendant's conviction for delivery of a controlled substance, not delivery of a controlled substance within 1,000 feet of a school as currently listed.

CONCLUSION

We affirm defendant's conviction and sentence. We remand the cause in order for the trial court to correct defendant's mittimus to reflect a conviction for delivery of a controlled substance.

Affirmed in part and remanded in part with directions to correct the mittimus.