2011 IL App (2d) 090138-U
No. 2-09-0138
Order filed September 7, 2011
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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 01—CF—879
ERNEST GWINN,	)	Honorable John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The admission of hearsay statements at defendant's trial was harmless error; the trial court considered only relevant and reliable evidence at the sentencing hearing; and trial counsel was not ineffective for failing to move for substitution of judge.

¶ 1 Following a jury trial, defendant, Ernest E. Gwinn, was convicted of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2000)) for a March 2001 incident. The trial court imposed a sentence of 31 years' imprisonment. Defendant appealed his conviction and raised numerous issues, including that the trial court erred by admitting

evidence regarding his possible role in the disappearance and destruction of various exhibits from the courtroom. This court agreed with defendant's contention regarding the missing exhibits and reversed and remanded the cause for a new trial. *People v. Gwinn*, No. 2—04—0099 (2006) (unpublished order under Supreme Court Rule 23). On remand, defendant proceeded by way of a bench trial. The trial court found defendant guilty of unlawful possession of a controlled substance with the intent to deliver and sentenced him to 25 years' imprisonment. On appeal, defendant argues that the trial court erred by admitting prejudicial hearsay during the trial and by considering unreliable hearsay evidence at the sentencing hearing. In addition, defendant argues that his trial counsel was ineffective for failing to object to hearsay testimony and for failing to move for a substitution of judge. We affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Pretrial

¶ 4 Prior to defendant's retrial, defense counsel moved to limit the State's presentation of hearsay testimony of an informant (Tony Robinson) through various police officers. Defense counsel argued that although such hearsay had been admitted during defendant's first trial, it was now barred under *Crawford v. Washington*, 541 U.S. 36 (2004), which was decided after defendant's first trial. The State countered that *Crawford* did not require the trial court to change its previous approach to the admission of hearsay testimony. The trial court denied defense counsel's motion, reasoning that the statements were admissible as an explanation of the investigatory steps of the police. Because defendant had not at this point waived his right to a jury trial, the court also noted that it would provide limiting instructions where appropriate.

¶ 5 Defendant subsequently waived his right to a jury trial, and a bench trial commenced on September 16, 2008. We summarize the evidence relevant to defendant's arguments on appeal.

¶ 6 B. Bench Trial

¶ 7 During the State's opening argument, the prosecutor commented that the court would hear from the police agent who worked with the informant in that case:

> "Agent Nichols will tell you that he spoke to a man who was a confidential informant at the time, a man whose name is Tony Robinson, and Mr. Robinson had a series of phone calls right there in the presence of Agent Nichols, and as a result of those phone calls, [Robinson] spoke to Agent Nichols and told Agent Nichols that a man by the name of Gene was going to be coming to the Walgreens on Belvidere and Lewis later that evening."

Defense counsel objected at this point, and the trial court overruled the objection.

¶ 8 Detective Vince Nichols testified first on behalf of the State. At the time of the incident, March 14, 2001, he worked as an agent with the Metropolitan Enforcement Group. That evening, Detective Nichols interviewed Robinson, an informant, at the sheriff's department. Robinson had agreed to assist with a narcotics investigation. They both sat at a table, 1 or 1½ feet apart, and Detective Nichols observed Robinson use his personal cell phone to place a call. The State asked Detective Nichols the following questions:

> "Q. And tell us just what you observed him doing when he made this first phone call.
>
> A. He would scroll through the contact list on his cell phone to the name Gene, G-e-n-e-, and he would push the send button. It was a pre-programmed number.
>
> Q. Did you actually see him doing this on his phone?
>
> A. Yes, I did.

Q. Now, after he selected this pre-programmed phone number for Gene and dialed the number, did he, without getting into what was said, did he appear to have a telephone conversation?

A. Yes.

Q. And after that telephone conversation, what happened next?

A. He told me that he had just spoken-

MR. BREEN [Defense Attorney]: Excuse me, Judge, I don't want to be disruptive, but I think you have ruled pretrial and you just ruled again, but I am going to interpose an objection each time he is quoting Tony Robinson, and I assume it's the same ruling.

THE COURT: You may do that, and if you just want to state the word 'objection' and if there is more grounds to it, you can state it, but if you don't state any grounds, I will just assume that that is your prior argument.

MR. BREEN: Very good, your Honor.

THE COURT: And more of what you argued in the motion *in limine*.

MR. BREEN: Very good.

THE COURT: And I will consider it and at that point either sustain or overrule.

MR. BREEN: Okay. And I believe I just objected to the last question.

THE COURT: Right, and that was overruled."

¶ 9 According to Detective Nichols, Robinson told him that: he had just spoken with Gene and ordered four ounces of cocaine; Gene had agreed to deliver the cocaine to Robinson; and Gene wanted Robinson to call back in about 40 minutes. When Robinson called back, Detective Nichols observed Robinson again scroll through the contact list to the name Gene and push the send button.

The State elicited from Detective Nichols the following information:

"Q. And without getting into the contents of any conversation he may have had, did it appear to you that he was having a telephone conversation as a result of that phone call?

A. Yes, it did.

Q. And then after that phone call, what, if anything, did Mr. Robinson tell you?

A. Mr. Robinson told me that Gene had-

MR. BREEN [Defense Attorney]: Objection again, your Honor.

THE COURT: The objection is overruled, and I will consider it for the limited purpose. You may answer.

THE WITNESS: Gene had asked him or Gene had told him that he would be at the Walgreens at Lewis and Belvidere in Waukegan in about 15 minutes.

Q. [Assistant State's Attorney]: Did he give you - did Mr. Robinson give you any information with regard to the type of vehicle that Gene would be driving?

A. Yes, he did.

Q. What did he say?

A. He said that he drives a gold Dodge four-door.

Q. Did he give you any information with regard to what this Gene looked like, his physical appearance?

A. He said he was a male black with tight braided hair in his 30s.

Q. Did he also indicate to you anything about whether this Gene would be traveling alone?

A. He indicated that Gene would usually travel with his girlfriend.

MR. BREEN: I think I have objected.

THE COURT: Yes, and I will consider that you objected to that as well. The objection is overruled."

¶ 10 Detective Nichols testified that he relayed this information to his supervisor, Kevin Grampo, and agents set up surveillance near Walgreens. Because no vehicle or person matching the above description showed up at Walgreens, Robinson made a third phone call. In relation to that call, the State asked:

"Q. And at the time that [Robinson] made the third phone call, were you and he still in the same location that you had been in for the previous two phone calls?

A. Yes, we were.

Q. And did you see him do anything with his cell phone?

A. Again, he scrolled through the contact list to the name Gene and pushed the send button.

Q. Without getting into the contents of anything that he might have said, did it appear to you that after he dialed that number, he had a telephone conversation?

A. Yes, it did."

Robinson advised Detective Nichols that Gene was minutes away from Walgreens.

¶ 11 Police officer Tim Gretz was one of the officers conducting surveillance that night; he sat in an unmarked squad car in the Walgreens parking lot. Around 11:30 p.m., Officer Gretz saw a gold, four-door Dodge drive slowly through the parking lot, flashing its lights. Officer Gretz did not see anyone in the car other than the driver. The Dodge did not stop but exited the parking lot, driving southbound on Lewis. Shortly thereafter, Officer Gretz was instructed by radio to look for a 5' 2"

Black female in her 20's. Other officers had stopped the Dodge and recovered a purse, which led them to believe a female was involved and in the vicinity of the Walgreens. Officer Gretz then drove to the Home Depot parking lot across the street and saw a female matching that description near the entrance to the Home Depot.

¶ 12 Officer Brian Peters, also part of the surveillance team, was parked in an unmarked car in the Home Depot parking lot. Officer Peters learned by radio that the Dodge was driving southbound on Lewis. He located the vehicle, observed it flash its lights several times, and effected a traffic stop. Defendant, the driver and only person in the car, provided identification upon his request.

¶ 13 Police officer John Willer arrived at the scene where defendant was stopped. When he asked defendant his name, defendant answered "Ernest Gwinn." When asked if he had a middle name, defendant replied "Eugene." Officer Willer asked for proof of insurance, and defendant said that he did not have insurance because it was a rental car. Defendant gave Officer Willer the rental agreement, which was in the name of "Shay Causey," whom defendant said was his girlfriend. Defendant was asked to exit the vehicle, and he complied while holding his cell phone. Defendant agreed to a pat-down and placed his cell phone on the trunk of the vehicle. No weapons or narcotics were found during the pat-down.

¶ 14 In order to test defendant's cell phone, Officer Willer called Detective Nichols to request that Robinson call Gene, "the subject we had gotten earlier the information about, who was supposed to have delivered the narcotics." Defense counsel objected to "that part of it, Gene, the person who was supposed to deliver narcotics, in regards to that." The court overruled the objection, saying that it would "not consider it for any identification purposes but solely for the purposes of this witness' conduct." Detective Nichols, who was still at the police station with Robinson, watched Robinson

scroll through his contacts to Gene and press the send button. Officer Willer observed defendant's cell phone ring. This procedure was performed a second time, and defendant's cell phone rang again.

¶ 15 Defendant consented to a search of the vehicle, and Officer Willer found a denim purse on the floor of the passenger seat. Inside the purse was a driver's license belonging to "Quinesha Roshay Causey." When asked who the driver's license belonged to, defendant answered that it belonged to his girlfriend, who was at home in Zion. Defendant further stated that Causey knew that he was driving her vehicle.

¶ 16 Police officer Chad Roszkowiak testified that he retrieved Causey's driver's license from Officer Willler. He then drove to Home Depot to see if the license belonged to the female found near the entrance of Home Depot. It was a match; the female at Home Depot was Causey. After Officer Roszkowiak noticed a bulge in the crotch area of Causey's pants, she pulled out a black knit glove from her groin area. Inside the glove was a clear plastic bag containing cocaine.

¶ 17 When Officer Willer learned from the other officers that they had found Causey at the Home Depot, he relayed this information to defendant. Defendant then denied knowing Causey.

¶ 18 The State rested, and defendant did not present any witnesses. During closing argument, the State highlighted the circumstantial evidence of defendant's guilt, noting that it was "not referencing a word that the confidential informant [Robinson] made, not a word, because obviously, that's not offered for the truth of the matter asserted, and it wasn't offered for that and the Court is not going to take it for that."

¶ 19 The trial court found defendant guilty of possessing the cocaine with the intent to deliver. In reaching its decision, the court stated that it "considered only the evidence received in this case

for the substantive purpose, if it was received as substantive evidence, and I did not consider any evidence that was allowed over objection for any purpose other than the limited purpose that I permitted it to be heard." In particular, the court noted that "the police were at the area of Walgreens at Lewis and Belvidere based upon what they were told was arranged by an informant. I have not considered in any way what was said but only that they were there based upon information that they were investigating." The court then summarized what facts it did rely on finding defendant guilty.

¶ 20 C. Sentencing

¶ 21 At the sentencing hearing, the State called two witnesses in aggravation: police officers Robert Delameter and Anthony Joseph. Officer Delameter, who had worked as a police officer in Missouri, testified that in 1998, he arrested defendant at the train station in Kansas City. The reason for the arrest was defendant's possession of a duffel bag containing cannabis, heroin, and cocaine. Officer Delameter admitted that defendant had moved to suppress the evidence in that case; that he had prevailed on appeal; and that the charges had been dropped. Defense counsel subsequently objected to Delameter's testimony on the basis that the Missouri case had been dismissed. In response to this objection, the court stated that defense counsel was free to argue why the court should not consider that case in imposing a sentence.

¶ 22 Waukegan police officer Anthony Joseph testified next about a 2003 witness intimidation case involving defendant. The investigation entailed traveling to Atlanta, Georgia, to check on residence locations for a witness in that case. Officer Joseph stated that he was looking for a witness named Tanya Allen. The State then asked Officer Joseph "about a different woman" named Laturie Presley, who lived in a suburb of Atlanta, Georgia. Officer Joseph testified that he went to Presley's residence for an interview, during which she related that she had dated defendant; that she was the

victim in a battery case with defendant in 1995; and that defendant had approached her prior to the trial in that case in order to help her leave the State so that she could not testify against him.

¶ 23 The State then sought to admit grand jury transcripts of Joy Baker, dated January 22, 2003, and February 19, 2003. The transcripts indicated that defendant had beat Baker with a shoe, causing her to report to the emergency room and receive six stitches; that he had choked her until she passed out; that he had beat her with a belt; and that he had beat her on numerous other occasions.

¶ 24 Defense counsel objected to these transcripts on the basis that Baker was not subject to cross-examination, especially because some of the allegations in the transcripts were "very serious." The State responded that the transcripts were admissible at the sentencing hearing so long as they were relevant and reliable. According to the State, Baker's allegations that defendant had repeatedly beat her and then paid witnesses to leave and not testify against him were relevant. The State further argued that the transcripts were reliable because they were based on testimony given under oath, and because they were admitted in defendant's prior sentencing hearing. The court admitted the transcripts, noting that it was a matter of weight over admission.

¶ 25 Defense counsel presented evidence in mitigation, including defendant's work history at Commonwealth Edison, his training certifications, statements from his 12 children and his mother, his participation in classes while incarcerated, and defendant's statement to the court.

¶ 26 After reviewing the evidence in aggravation and mitigation, the trial court imposed a sentence of 25 years' imprisonment. In explaining its decision, the court stated that it was considering only evidence from the retrial, not the first trial. Despite no statutory factors in mitigation, the court found that his children "truly loved" him; that he was intelligent based on his certifications for technical training; that several family members and friends had submitted letters on his behalf; and that he had

become involved in classes while incarcerated. The court identified as aggravating factors the need to deter others; the fact that his conduct of distributing drugs threatened serious harm to the community; and his criminal history, which consisted of a prior felony conviction for drugs, unsuccessful probation, convictions of reckless conduct and assault, and the 1998 Missouri case in which his duffle bag was found with an "absolutely significant amount of narcotics." The court further stated that defendant had a history of violence against women, as evidenced by Baker's transcripts from 2002 and 2003, and that defendant had sent money to witnesses for the purpose of getting them to leave and not testify against him.

¶ 27 Defendant's posttrial motion and motion to reconsider sentence were denied. Defendant timely appealed.

¶ 28 II. ANALYSIS

¶ 29 A. Hearsay

¶ 30 Defendant's first argument on appeal is that the trial court erred by allowing the State to elicit testimony from Detective Nichols about the substance of his conversation with the informant Robinson.

¶ 31 Hearsay is an out-of-court statement that is offered to establish the truth of the matter asserted, and it is generally not admissible unless an exception applies. *People v. Robinson*, 391 Ill. App. 3d 822, 834 (2009). In *People v. Gacho*, 122 Ill. 2d 221, 300 (1988), the supreme court acknowledged the investigatory procedure exception to the hearsay rule. In that case, the officer testified that he talked to the victim at the hospital for a few minutes, and then he and his partner went to Chicago to look for Robert Gacho, the defendant. *Id.* at 247-48. The supreme court held that such testimony was permissible but cautioned that had the substance of the conversation that

the officer had with the victim been testified to, it would have been objectionable as hearsay. *Id.* at 248.

¶ 32 In *People v. Jones*, 153 Ill. 2d 155 (1992), the supreme court revisited this exception to the hearsay rule once again. There, the defendant was convicted of armed robbery and aggravated unlawful restraint. *Id.* at 157. The victim in that case testified that two armed men forced her into her car at gun point, drove to an alley where they stole her jewelry, ordered her out of the car, and then drove away. *Id.* at 159. Two nights later, officers received a report of a car stripping in progress. *Id.* The officers drove to the scene and saw two men stripping the victim's car. *Id.* One man, Fred Colvin, was captured, and the other man escaped. *Id.* Officers' testimony made it clear that they learned the defendant's name after speaking with Colvin. *Id.* While conceding that the officers had testified regarding the substance of their conversation with Colvin, the supreme court distinguished *Jones* from *Gacho*. *Id.* at 160. Unlike *Gacho*, the substance of the conversation in *Jones* did not go to the very essence of whether the defendant was the man who committed the crime, *i.e.* armed robbery. *Id.* at 160-61. In other words, the supreme court reasoned that the substance of the conversation with Colvin, if offered to prove the matter asserted, showed that the defendant was involved in the *car stripping*; it provided nothing to help the State prove the defendant's guilt in the *armed robbery* case. *Id.* Rather, the testimony "simply showed the jury how the officer and the detective came to suspect the defendant" in the armed robbery case. *Id.* at 161.

¶ 33 Both *Gacho* and *Jones* make clear that the substance of an out-of-court statement or conversation is inadmissible if it goes directly to the matter in controversy, which in this case is whether defendant possessed the cocaine with intent to deliver. At the outset, we note that it was permissible for Detective Nichols to testify regarding his observation of the informant Robinson

calling someone named "Gene" on his cell phone and having a conversation. Unfortunately, the prosecution went far beyond that, however, in having Detective Nichols testify to the substance of his conversations with Robinson. See *People v. Feazell*, 386 Ill. App. 3d 55, 65 (2007) (there is a distinction between an officer testifying to the fact that he spoke to a witness without disclosing the contents of the conversation and an officer testifying to the contents of the conversation).

¶ 34 In particular, Detective Nichols testified that Robinson told him that defendant's name was Gene; that Gene had agreed to deliver the cocaine to Robinson; that Gene wanted Robinson to call him back in 40 minutes, which he did; that Gene would be at the Walgreens at Lewis and Belvidere in about 15 minutes; that he would be driving a gold, Dodge four-door car; that Gene was a Black male with tight braided hair in his 30s; that Gene usually traveled with his girlfriend; and later that Gene was only minutes away from Walgreens. Such details of what Robinson told Detective Nichols went beyond what was necessary to explain the officers' conduct but instead went to the heart of whether defendant possessed and intended to deliver the cocaine found on his girlfriend Causey. Because this testimony went to the proof of the matter asserted, it was hearsay.

¶ 35 Our result is consistent with the recent decision in *People v. Shorty*, 403 Ill. App. 3d 625 (2010), a factually similar case. In *Shorty*, the State informed the jury during opening argument that Officer Batterham would testify that a confidential informant told him that the defendant was going to Chicago later that evening to buy heroin; that he would be in a certain vehicle, which was a Blue Toyota Solara, and that he would be traveling with a female who was his girlfriend. *Id.* at 627. Over defense counsel's objection, Officer Batterham then testified that he received information from a confidential informant that the defendant would be making a trip to Chicago that evening to pick up a large quantity of heroin; that the defendant was at the Townehouse hotel; and that he would be

driving a certain type of vehicle. *Id*. at 627. Officer Batterham further testified that he later received information that the defendant did in fact have the heroin and that he would be returning to the Townehouse hotel in the vehicle previously described. *Id.* Despite the trial court's limiting instruction to the jury, the reviewing court determined that the testimony elicited by the prosecutor went far beyond that necessary to explain police conduct and was hearsay. *Id.* at 633.

¶ 36 According to the court, the statements went directly to the matter in controversy, which was whether the defendant possessed the heroin found in the vehicle. *Id.* at 631. The court reasoned that the prosecution could have elicited testimony from Officer Batterham that explained his investigatory procedures without disclosing the substance of the conversations between the officer and the informant and without hearsay as to the defendant's guilt. *Id.* In other words, the prosecutor could have elicited testimony from the officer that a confidential informant provided information that at the time and place in question, a blue Toyota Solara would appear with three occupants, and that the vehicle would contain drugs. *Id;* see also *People v. Singletary*, 273 Ill. App. 3d 1076, 1082 (1995) (where the officer specifically testified that a confidential informant provided the defendant's first name; a brief description of the defendant, the type of vehicle that he would be riding in, and the defendant's intention to go to 2971 South Dearborn and pick up a package of cocaine, the court held that such testimony went beyond what was necessary to explain investigatory procedures and was used to establish the defendant's guilt).

¶ 37 Having determined that the trial court erred by allowing Detective Nichols' to testify about the substance of his conversation with Robinson, our next inquiry is determining whether the error was harmless. The supreme court set out three ways for measuring harmless error: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) examining the other

evidence in the case to see if overwhelming evidence supports the conviction; and (3) determining whether the evidence is cumulative or merely duplicates properly admitted evidence. *People v. Becker,* 239 Ill. 2d 215, 240 (2010). The first approach applies here. See *Shorty*, 403 Ill. App. 3d at 633 (the admission of hearsay evidence is harmless error where there is no reasonable probability that the defendant would have been acquitted absent the hearsay testimony).

¶ 38 In conducting harmless error analysis, we are reminded that this case was a bench trial where it is assumed that the trial judge relied only on competent evidence in making its finding. *People v. Burdine*, 362 Ill. App. 3d 19, 25 (2005). Though the defendant may overcome this assumption by showing that the record affirmatively demonstrates the contrary (*Id.)*, as we discuss, the record is clear in this case that the trial court did not rely on Robinson's conversation with Detective Nichols in finding defendant guilty of the offense. Thus, the error was harmless.

¶ 39 First, defense counsel repeatedly objected and even had a standing objection to Detective Nichols' testimony regarding what Robinson told him. In overruling the objections, the court stated that it was considering the evidence for the limited purpose of the investigative steps of the officers. Second, during closing argument, the State made it clear that it was not referencing one word from Robinson to prove its case, because the court would not be considering such evidence. Finally, the court, in explaining its guilty finding, stated that it considered only evidence received for a "substantive purpose;" it did not consider any evidence that was allowed over objection except for the limited purpose for which it was introduced. That the court did not improperly rely on the hearsay testimony is further evidenced by the following remarks of the court: "the police were at the area of Walgreens at Lewis and Belvidere based upon what they were told was arranged by an

informant. I have not considered in any way what was said but only that they were there based upon information that they were investigating."

¶ 40 The court went on to say that its guilty finding was based on the following evidence: the police locating a particular vehicle that entered the parking lot of Walgreens; the vehicle driving slowly and not stopping but flashing its lights; the vehicle passing by the Home Depot where Causey was found standing at the entrance, despite the store being closed; defendant, after being stopped, saying that his middle name was Eugene and providing the officer with a rental agreement in Causey's name; defendant telling the officer that Causey was his girlfriend and that she knew that he was driving the vehicle; defendant's cell phone ringing both times Detective Nichols observed Robinson call Gene on his cell phone; the open purse in the vehicle containing Causey's driver's license; officers at Home Depot observing a bulge in Causey's pants; and Causey handing over a glove that contained a plastic bag with cocaine. From this record, it is clear that the trial court did not rely on hearsay statements made by Robinson but on the evidence it could properly consider. Thus, the error in admitting the hearsay was harmless. See *Shorty*, 403 Ill. App. 3d 625, 633-34 (despite the introduction of hearsay, the error was harmless because there was no reasonable probability that the jury would have acquitted the defendant based on the evidence at trial absent the hearsay testimony).

¶ 41 To the extent that defendant also argues that the admission of Detective Nichols's hearsay statements violated the rule set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), which ensures a defendant the right to confront the witnesses against him under the confrontation clause, we reach the same result. *Crawford* violations are subject to harmless-error analysis (*People v. Patterson*, 217 Ill. 2d 407, 428 (2005)), and for the reasons already discussed, the challenged hearsay did not

contribute to defendant's conviction. See *People v. Nugen*, 399 Ill. App. 3d 575, 586-87 (2010) (assuming the statement was hearsay admitted in violation of the confrontation clause, errors are considered harmless where there is no reasonable possibility the outcome would have been different had the hearsay been excluded).

¶ 42 In a related argument, defendant argues that his trial counsel was ineffective for failing to object to Officer Willer's testimony about defendant's name. Officer Willer testified that, after defendant was pulled over, he asked him his name and if he had a middle name. Defendant replied that his name was "Ernest Gwinn," and that his middle name was "Eugene." Defendant argues that his counsel was deficient for not objecting, because this evidence was "presented for the proof of the assertion that the informer called a person named Gene." We reject this argument for two reasons.

¶ 43 First, defendant has forfeited this argument by failing to clearly define the issue or cite pertinent authority. See *People v. Banks*, 378 Ill. App. 3d 856, 872 (2007) (this court is entitled to have the issues clearly defined and to be cited pertinent authority; arguments that do not satisfy the requirements of Supreme Court Rule 341 do not merit consideration on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

¶ 44 Second, even if the argument were not forfeited, it fails on the merits. To establish that counsel was ineffective, the defendant must show that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant such that, absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). The defendant

must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Petrenko,* 237 Ill. 2d at 496.

¶ 45 Defendant's statement to Officer Willer that his middle name was Eugene constituted an admission. See *People v. Aguilar*, 265 Ill. App. 3d 105, 110 (1994) (the hearsay rule is not a basis for objection when the defendant's own statements are offered against him; in such a case the defendant's statements are termed "admissions"). Because defendant's statement was not inadmissible hearsay, there was no basis for defense counsel to object to this testimony, and defense counsel was not deficient. Moreover, we note that defense counsel did properly object to Officer Willer's testimony about testing defendant's cell phone. Specifically, Officer Willer testified that he instructed Detective Nichols to have Robinson call Gene, "the subject *** who was supposed to have delivered the narcotics." Though the court overruled defense counsel's objection, stating that it would not consider it for any identification purposes but solely for the purpose of Officer Willer's conduct, the record shows that defense counsel consistently objected to hearsay testimony, even moving *in limine* to bar such testimony prior to trial. Thus, we reject defendant's argument that his counsel was ineffective on this basis.

¶ 46 B. Sentencing Hearing

¶ 47 Defendant next challenges certain evidence relied upon by the court at the sentencing hearing. First, defendant takes issue with the grand jury transcripts of Joy Baker. Because the court did not see or hear Baker as a witness, but instead relied on "only cold, dry testimony," defendant contends there was no basis for the court to determine if such evidence was reliable. Defendant further contends that at the sentencing hearing, the State argued only that the transcripts were relevant, not reliable. Second, defendant argues that the court erred by admitting "hearsay" concerning Tanya

Allen. According to defendant, there were no notes concerning Officer Joseph's interview with this "hearsay witness," and there was no proof of reliability. Last, defendant contends that the court erred by admitting evidence of defendant's "alleged possession of drugs" in his federal case, because that evidence was suppressed.

¶ 48 During sentencing hearings, it is well-established that the ordinary rules of evidence are relaxed. *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009). At sentencing, the defendant's guilt has already been settled, and the sentencing judge is charged with the task of determining the type and extent of punishment, within certain statutory and constitutional limits. *People v. Rose*, 384 Ill. App.3d 937, 940 (2008). A court may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense; the source and type of admissible evidence is virtually without limits. *Varghese,* 391 Ill. App. 3d at 873. Evidence may be admitted so long as it is both relevant and reliable. *Id.* Merely because testimony contains hearsay does not render it *per se* inadmissible at a sentencing hearing; a hearsay objection at sentencing goes to the weight of the evidence rather than its admissibility. *Id.*

¶ 49 We are not persuaded by defendant's challenges to the evidence relied on at his sentencing hearing. Regarding Baker's grand jury transcripts, we disagree with defendant's assertion that the State failed to argue that the transcripts were reliable. On the contrary, the State did argue that Baker's transcripts were reliable because they were based on testimony given under oath, and because they were admitted in defendant's prior sentencing hearing. As the State points out, the record on appeal contains the transcripts and common law record pertaining to defendant's separate trial and conviction for home invasion and aggravated domestic battery. Defendant's prior sentencing hearing was a combined hearing in which defendant was sentenced for the possession

with intent to deliver drug conviction (which this court subsequently reversed) and the home invasion/aggravated domestic battery conviction. Both Allen, the victim, and Baker testified in the home invasion/aggravated domestic battery case. After a jury found defendant guilty of the offenses, the State introduced Baker's grand jury transcripts at the sentencing hearing. It is the same trial judge who heard Baker testify in the home invasion/aggravated domestic battery case, who presided over the combined sentencing hearing, and who presided over the retrial in this case. "The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within its sound discretion." *People v. Harris*, 375 Ill. App. 3d 398, 409 (2007). Given the trial judge's familiarity with both of defendant's cases, Baker's transcripts were more than "cold, dry testimony." Accordingly, it was within the trial court's discretion to overrule defendant's objection to Baker's transcripts and deem them sufficiently reliable.

¶ 50 Next, defendant's claim that the trial court improperly considered Tanya Allen's "hearsay" testimony is without merit. At defendant's sentencing hearing, Officer Joseph testified that he investigated a witness intimidation case involving defendant in 2003. The investigation led him to Atlanta, Georgia, where he tried to locate a witness named Tanya Allen. Other than this brief reference of Allen's name in conjunction with the witness intimidation case, Officer Joseph made no other statements regarding Allen. Thus, it is unclear why defendant challenges Officer Joseph's single reference to Allen on the basis of hearsay. Moreover, it is not necessary to hold a mini-trial on the other crime; the State may prove up the defendant's other criminal activity at sentencing by having the investigating officer testify about what the witnesses told him and about what he learned during his investigation of the other crime. Harris, 375 Ill. App. 3d at 410.

¶ 51 Last, the trial court properly considered the Missouri case where drugs were found in defendant's duffle bag. Although the evidence was eventually suppressed and the charges dropped, it was not error for the court to consider it in fashioning a sentence. See *Rose*, 384 Ill. App. 3d at 944 (the exclusionary rule does not apply to the sentencing phase of criminal proceedings, and the trial court may consider previously suppressed evidence at a sentencing hearing). For all of these reasons, the trial court considered only relevant and reliable evidence at defendant's sentencing hearing.

¶ 52 C. Substitution of Judge

¶ 53 Defendant's final argument is that his trial counsel was ineffective for failing to move for a substitution of judge. In making this argument, defendant relies on comments by the State and by the trial court at defendant's first sentencing hearing (the combined sentencing hearing on the drug conviction and home invasion/aggravated domestic battery conviction). During that hearing, the State argued:

> "We have that evaluation, the report from that person, Lee Ann Lamadrid from North Lake County, who provides the only psychological workup really that we have of the defendant.
>
> * * *
>
> Instead, Ms. Lamadrid gives us her diagnosis on page 3 that the defendant is of a narcissistic personality - again, he's a manipulator - and that such personality traits are fixed, are permanent. And she sums up the defendant's personality as, and here it is: 'A person who's able to work towards his goals and follows the rules as long as it is in his own interests.' "

In imposing a 31-year sentence for the drug conviction, the trial court stated that "[u]nfortunately, the history that you have shown is that you will offend every chance that you get, that you will do what you think you need to do opportunistically in order to get around, get over or resolve a problem criminally that you find yourself in."

¶ 54 We begin by setting forth the procedural background relevant to defendant's claim. After this court reversed defendant's conviction for the drug conviction, and the case was remanded for a retrial, defendant moved *pro se* for a substitution of judge. In his motion, defendant did not specify any instance of prejudice or bias on the part of the trial judge but instead made conclusory assertions that the trial judge was "prejudiced" due to evidentiary rulings in the first trial that led to reversal on appeal. As previously mentioned, this court reversed defendant's conviction on the basis that the trial court erred by admitting evidence of defendant's role in the disappearance of trial exhibits from the courtroom where there was no concrete evidence linking defendant to their disappearance. On retrial, Attorney Frederick Cohn, who is representing defendant in this appeal, filed an appearance on behalf of defendant and asked the court for time to review defendant's *pro se* motion. Attorney Cohn later adopted defendant's motion, clarifying that it was a motion for cause rather than a motion for substitution of judge as a matter of right. Eventually, Attorney Cohn withdrew from this case to handle postconviction matters in the home invasion/aggravated domestic battery case, and attorney Thomas Breen became defendant's attorney. When the trial court inquired as to the status of defendant's *pro se* motion for substitution of judge, Attorney Breen advised the court that that motion had been withdrawn.

¶ 55 The question now is whether defense counsel was ineffective for not pursuing a motion for substitution of judge. As previously mentioned, the burden on defendant is to show both that his

counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *Petrenko,* 237 Ill. 2d at 496.

¶ 56 A defendant has no absolute right to a substitution of judge for cause. *People v. Hayden*, 338 Ill. App. 3d 298, 309 (2003). In order to prevail on a motion for substitution of judge, a defendant must demonstrate that there are facts and circumstances which indicate that the trial judge was prejudiced. *People v. Jones*, 219 Ill. 2d 1, 17 (2006). Prejudice is defined as animosity, hostility, ill will, or distrust towards the defendant. *Id.* Furthermore, the "defendant must show that bias or prejudice stemmed from an extrajudicial source and that the bias produced an opinion on the merits by the judge that was based on other than what the judge had learned from his participation in the case." *Hayden*, 338 Ill. App. 3d at 309. The movant bears the burden of establishing *actual* prejudice, not simply the *possibility* of prejudice. *Jones*, 219 Ill. 2d at 17.

¶ 57 The record demonstrates that defense counsel was not deficient for failing to move for a substitution of judge. As the State points out, defendant refers to one sentence by the trial court in over 6,000 pages of transcript. Rather than demonstrating bias, this remark is based on defendant's criminal history of intimidating witnesses and/or paying them to leave town and not testify against him. Thus, the comment is supported by the record. With respect to defendant's reliance on comments made by the State, defendant does not explain how they equate to prejudice on the part of the judge. Moreover, at the sentencing hearing following the retrial, the trial court imposed a lesser sentence than after the first trial (31-year sentence versus a 25-year sentence). Because defendant points to nothing in the record showing that his attorney had proof of actual prejudice on the part of the judge, counsel was not ineffective for failing to move for substitution of judge. See *Hayden*, 338 Ill. App. 3d at 310 (defense counsel not ineffective for failing to move to substitute the

judge where nothing in the record showed actual prejudice on the part of the trial judge); see also *People v. Chapple*, 291 Ill. App. 3d 574, 586 (1997) (because the defendant presented no evidence indicating that the trial judge was biased against him, the court could not conclude that the defendant would have succeeded on a pretrial motion for substitution of judge if one had been filed).

¶ 58 III. CONCLUSION

¶ 59 For the aforementioned reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 60 Affirmed.