No. 2—10—0104
Order filed June 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lee County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—182
RYAN L. PROELL,	)	Honorable Jacquelyn D. Ackert,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of unlawful delivery of a controlled substance, specifically defendant's identity: the evidence conflicted, and the trial court was entitled to credit the State's witness, whose testimony was corroborated by a recording; (2) defendant did not show plain error in the trial judge's failure to recuse herself: although the judge had authorized an overhear, she did not acquire any knowledge of defendant's case outside the trial record; the application pertained to a target other than defendant, and the recording was admitted at trial.

Following a bench trial, defendant, Ryan L. Proell, was convicted of unlawful delivery of a controlled substance within 1,000 feet of a church (720 ILCS 570/407(b)(1) (West 2006)), unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2006)), and unlawful possession

of a controlled substance (720 ILCS 570/402(c) (West 2006)). The trial court sentenced defendant to 9 years' imprisonment on the conviction for the unlawful delivery of a controlled substance within 1,000 feet of a church. Defendant appeals, arguing that (1) the State failed to prove him guilty beyond a reasonable doubt of unlawful delivery of a controlled substance within 1,000 feet of a church, and (2) the trial judge should have recused herself from presiding over the trial, because she authorized the use of the overhear that recorded the drug transaction. For the reasons that follow, we affirm.

BACKGROUND

Defendant was charged with one count of criminal drug conspiracy (720 ILCS 570/405.1 (West 2006)), one count of unlawful delivery of a controlled substance within 1,000 feet of a church, one count of unlawful delivery of a controlled substance within 1,000 feet of a school (720 ILCS 570/407(b)(1) (West 2006)), one count of unlawful delivery of a controlled substance, and one count of unlawful possession of a controlled substance.

At the bench trial, Detective Nicholas Albert of the Dixon police department testified as follows. On March 11, 2008, he met with Damon Messer, who informed Albert that cannabis could be purchased from a woman named Rita Carrillo and that he would assist Albert in a transaction with Carrillo. After Messer sent a text message to Carrillo inquiring whether she could obtain some cocaine and she responded in the affirmative, Albert obtained authorization for the use of an overhear. Messer then made arrangements to meet Carrillo at a business called Red Fox.

Affixed with the recording device and holding $150 in police drug funds, Messer proceeded to Red Fox in his vehicle, with several police units following as surveillance. At Red Fox, Messer picked up Carrillo and the pair drove to a house on the corner of Palmyra and Barker Streets. Albert

was unable to see what occurred at the house although another officer reported to him that defendant got into Messer's vehicle. After stopping at the home, Messer drove to a laundromat. Messer's vehicle remained at the laundromat for a few minutes before leaving. As Messer's vehicle was leaving the laundromat, it was passed by a light blue Ford Taurus occupied by a female going the opposite direction. Messer then turned around, and both vehicles proceeded to the parking lot of the laundromat. While they were parked at the laundromat, defendant exited Messer's vehicle and went over to the Taurus. After a few minutes, defendant returned to Messer's vehicle, at which point Messer drove to a parking lot behind a business called Rhonda's. From his surveillance position, Albert was unable to observe what happened while Messer was parked there. After leaving the parking lot, Messer next stopped at a McDonald's before returning to the residence on Palmyra and Barker to drop off defendant. Messer and Carrillo then drove to the Royal Smoke Shop. While there, a female approached Messer's vehicle. After leaving the shop, Messer dropped off Carrillo at a residence on the corner of Lincoln Way and North Hennepin Avenue. Finally, Messer returned to the Dixon police department.

At the police department, Messer gave Albert a plastic baggie containing a white, powdery substance. Messer told Albert that the transaction occurred in the parking lot behind Rhonda's. Albert measured the distance between the place of the transaction and First Presbyterian Church. The distance was 566 feet.

Sergeant Steve Howell of the Dixon police department testified that he assisted in conducting surveillance of Messer's vehicle on March 11, 2008. While Messer's vehicle was parked in the parking lot behind Rhonda's, Howell observed a black male exit Messer's vehicle and enter a white residence behind Rhonda's. After approximately four minutes, the man returned to Messer's vehicle.

Messer testified as follows. He had a prior conviction of burglary, and, at the time of defendant's trial, a petition for the revocation of his probation was pending. The Lee County State's Attorney's Office agreed to take Messer's cooperation in this case into consideration when addressing that petition to revoke.

On March 11, 2008, Messer arranged to meet with Carrillo to purchase cocaine for $150. Albert equipped Messer with a recording device and provided him with $150 for the purchase of the cocaine. After leaving the police department, Messer picked up Carrillo in the parking lot of Red Fox. Carrillo then directed him to a home on Palmyra. On the way there, Carrillo asked Messer for the $150, so Messer gave it to her. When they arrived at the house, Carrillo called defendant and told him to come out to the car. After a few minutes, defendant exited the house and got into the back seat of the car. Defendant asked Carrillo for $125, which Carrillo gave to him. Defendant then placed a phone call to a female, after which the group drove to a laundromat. During the drive to the laundromat, defendant stated that he did not have a "clock," referring to a scale used to weigh drugs. When Messer asked defendant for his phone number, defendant gave it to him but told him to save it under "Dude."

When they arrived at the laundromat, defendant got out of the car and went into the building for approximately five minutes. When defendant returned, the group started to leave, but then saw the female they were supposed to meet, so they turned around and returned to the laundromat's parking lot. There, defendant got out of the car and approached the female, whom he spoke with for a few minutes. Messer believed that defendant was obtaining the cocaine from the female, because defendant was not able to give him the drugs until he met with the female. When defendant returned to the car, they proceeded to the parking lot of Rhonda's. When they arrived, defendant went into

one of the nearby apartments. After defendant returned to the car, he handed Messer a clear baggie containing a powdery, chalky substance. On the way to drop off defendant at the house on Palmyra, the group stopped at McDonald's. Messer then drove Carrillo to the smoke shop before dropping her off at an apartment. Messer returned to the police department and gave Albert the baggie that defendant had given him.

The recording obtained through the overhear device Messer wore during the transaction was admitted into evidence.

Rhonda Earl, a forensic scientist with the Illinois State Police, testified that the white, powdery substance in the baggie that defendant provided to Messer tested positive for cocaine.

Defendant provided the following testimony. On March 11, 2008, he lived in Geneva but was in Dixon. He could not remember who gave him a ride from Geneva to Dixon. While in Dixon, defendant stayed with his friend Brandon. He did not know Brandon's last name, nor could he recall Brandon's address, but he knew that Brandon lived across the street from a Shell gas station. Defendant called Carrillo in search of a ride to his friend Megan Steeb's house. Carrillo told defendant that she would call him back when she obtained the ride.

Later that day, Carrillo, accompanied by Messer, arrived at the place where defendant was staying. The group proceeded to the laundromat so that defendant could get the keys to Megan's apartment from Megan. They waited approximately 10 minutes for Megan to show up before they left. As they were leaving, Megan arrived, so they turned around and returned to the laundromat. Defendant got out of the car and retrieved the keys from Megan. They then drove to Megan's house, which was located behind Rhonda's. Defendant went into Megan's house and changed into a pair of basketball shorts, because he was going to meet some friends to play basketball later that day. At

trial, he could not remember what time he played basketball. He also grabbed a rap CD from Megan's house. Defendant could not remember the CD's artist. After stopping at Megan's, the group went to McDonald's before defendant was dropped off back at Brandon's.

Defendant denied taking any money from either Carrillo or Messer, other than the $20 that Carrillo gave to him to pay for the food from McDonald's. He also denied taking any cocaine out of Megan's apartment and giving it to Messer.

In rebuttal, the State introduced into evidence copies of defendant's convictions of armed violence and aggravated driving under the influence.

Following closing arguments, the trial court found defendant not guilty of criminal drug conspiracy and unlawful delivery of a controlled substance within 1,000 feet of a school, but guilty of unlawful delivery of a controlled substance within 1,000 feet of a church, unlawful delivery of a controlled substance, and unlawful possession of a controlled substance. The trial court did not offer any specific factual findings, but did note that it had considered all of the evidence, observed the witnesses, and weighed the credibility of the witnesses. Defendant was sentenced to nine years' imprisonment.

Defendant timely appeals.

ANALYSIS

On appeal, defendant argues that (1) the State failed to prove him guilty beyond a reasonable doubt of unlawful delivery of a controlled substance within 1,000 feet of a church, and (2) the trial judge should have recused herself from presiding over the trial, because she authorized the use of the overhear that recorded the drug transaction. We do not agree with either of defendant's contentions.

1. Sufficiency of the Evidence

We review claims of insufficient evidence to determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *Collins*, 106 Ill. 2d at 261. "[I]t is not the function of this court to retry the defendant." *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt of unlawful delivery of a controlled substance within 1,000 feet of a church because it failed to prove that defendant was the person who delivered the cocaine to Messer. We disagree.

At trial, Messer specifically testified that it was defendant who gave him the cocaine. Defendant argues that Messer's testimony should be disregarded because Messer lacked credibility given his prior criminal conviction of burglary, the pending petition to revoke his probation, and his desire to obtain consideration for assisting the police. In addition, defendant contends that the fact that the police sought an overhear suggests that the police did not believe Messer to be credible and desired a recording to verify whatever Messer would tell them. This contention lacks merit.

As the State points out, defendant does not explain why Messer's testimony must be completely disregarded due to his prior conviction, while defendant's testimony must be believed,

despite his *two* prior convictions. As for Messer's desire to garner favor with the police, the record does not include any reason that Messer would be inclined to falsely inform police that defendant, rather than anyone else, provided the cocaine. In fact, Carrillo was the original target of the investigation. There does not appear to be any reason to believe that Messer would benefit more by telling police that defendant provided the cocaine than he would if he told them that Carrillo provided it. Defendant's claim that the police chose to seek authorization for an overhear because they did not trust Messer to tell the truth is mere speculation. Most important, however, is the fact that credibility determinations are left to the trial court, and we may not substitute our judgment for that of the trial court. *Ortiz*, 196 Ill. 2d at 259. Here, faced with the conflicting testimony of two felons, the trial court chose to believe Messer. We will not disturb that determination.

In addition to Messer's direct testimony, the audio recording of the transaction, despite defendant's contention to the contrary, supports the inference that defendant was the person who provided the cocaine to Messer. During the ride to pick up defendant, Carrillo asks Messer for the $150. When defendant gets into the car, the following conversation can be heard.

Carrillo: "There's money in the door handle there."

Defendant: "How much you want?"

Carrillo: "One twenty-five."

Defendant then tells Carrillo and Messer that they have to "wait, wait, wait," because "somebody going to pull up in a minute."[1] While waiting for the person to show up, defendant says, "She—she

[1]We note that the transcript of the overhear omits certain portions of the recording and labels others as inaudible. Our analysis of the recording is based on our review of the recording itself, not the transcript, as it was the recording that was admitted into evidence, with the transcript simply to

had to run to the laundromat and then she coming straight here. But then, still once I grab this [unintelligible], we're still gonna have to need a clock." Messer testified that, when defendant mentioned a clock, he was referring to a scale used to weigh drugs. Once defendant completes what he was doing in the residence behind Rhonda's, he can be heard getting back into the car. There is silence for a couple of seconds, and then Messer says, "Nice." Messer and Carrillo then bring defendant to McDonald's before returning him to the residence where they initially met him.

We believe that these portions of the recording allow for the inference that defendant was the person who provided the cocaine to Messer. The money is provided to defendant, defendant inquires how much is wanted, defendant states that he is waiting for someone to show up in order to get what Carrillo and Messer came for, defendant refers to needing a clock/scale before he can provide anything to Messer, and Messer says, "Nice," after defendant returns to the car (after, presumably, weighing the cocaine), as if he were just given something by defendant.

Given Messer's testimony and the contents of the recording, we conclude that a rational trier of fact could find, beyond a reasonable doubt, that defendant was the person who delivered the cocaine to Messer.

2. Recusal

Defendant next contends that the trial judge should have recused herself from presiding over his trial because the fact that she had also authorized the overhear created an appearance of impropriety. We disagree.

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be used as an aid. Thus, defendant's claim that the recording should be discredited because the transcript is inaccurate is without merit.

Acknowledging that he failed to preserve this issue for review by not filing a motion for substitution in the trial court (*People v. Friedman*, 144 Ill. App. 3d 895, 900-01 (1986)), defendant urges us to review the issue under the plain-error doctrine. Under the plain-error doctrine, we may review a forfeited error when either (1) "the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" or (2) "the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The first step in the plain-error analysis is to determine whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

We conclude that defendant has failed to demonstrate that any error occurred. Defendant argues that the trial judge should have recused herself from presiding over the trial because, by presiding over the overhear proceedings, she acquired, outside of the trial record, knowledge of the truth or falsity of the trial allegations. See *In re Moses W.*, 363 Ill. App. 3d 182, 186-87 (2006) (judges who acquire personal knowledge of disputed facts outside of the record should recuse themselves). Defendant has not, however, carried his burden in demonstrating that this is so.

Defendant identifies two sources of extrajudicial knowledge in the overhear procedure: the application and the recording. Under the statute, an application for the use of an overhear must include the facts believed to justify the issuance of an order, including details of the felony that has been, is being, or is about to be committed; the type of communication that is to be monitored; and the identities of the parties who are expected to take part in the communication. 725 ILCS 5/108A—3(a)(2) (West 2008). It is undisputed that, in this case, the intended target of the overhear was Carrillo. Thus, any information presented to the trial judge during the application process would

have related solely to Carrillo and why law enforcement believed that she would be involved in a felony drug transaction. Defendant does not explain how the trial judge's acquisition of knowledge about Carrillo prior to defendant's trial would make it inappropriate for the trial judge to preside over defendant's trial.

The second potential source of extrajudicial information that defendant identifies is the recording produced from the overhear. Under the statute, the judge who issued the order authorizing the overhear is required to listen to the recordings produced to ascertain that the recorded conversations were within the scope of the authorizing order. 725 ILCS 5/108A—7(b) (West 2008). The fact that the trial judge might have listened to the recording prior to trial and thus acquired knowledge about defendant prior to trial is of no matter, as the recording was later admitted into evidence at trial. Defendant makes no contention that anything less than the entire recording was admitted at trial. Accordingly, the trial judge did not acquire any information regarding defendant or the case against defendant that she would not have otherwise acquired during trial.

Given that defendant has failed to show that the trial judge acquired any extrajudicial knowledge about defendant or the case against him, we conclude that defendant has failed to demonstrate that it was error for the trial judge not to recuse herself.

CONCLUSION

For the reasons stated, the judgment of the circuit court of Lee County is affirmed.

Affirmed.