2013 IL App (5th) 110487-U

NO. 5-11-0487

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 10-CF-292
	)	
RHONDA G. ATTEBERRY,	)	Honorable
	)	Michael D. McHaney,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Conviction and sentence affirmed where the defendant forfeited argument and plain-error doctrine does not apply to testimony regarding past police dealings with the defendant, the defendant did not receive ineffective assistance of counsel, the circuit court did not err by restricting the cross-examination of a witness due to defendant's insufficient offer of proof, and there was sufficient evidence for a rational jury to find the defendant guilty beyond a reasonable doubt. Cause remanded for the trial court to enter a new sentencing order to reflect a credit against the $750 fine imposed in the amount of $5 for each of the five days the defendant was confined in jail prior to her sentencing.

¶ 2 The defendant, Rhonda G. Atteberry, appeals her July 7, 2011, jury conviction of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and possession of drug paraphernalia (720 ILCS 600/3.5 (West 2010)) and her subsequent sentence of three years' confinement in the Illinois Department of Corrections, followed by one year of mandatory supervised release. For the following reasons, we affirm her conviction and sentence. We also remand with directions for the trial court to enter a corrected sentencing order reflecting a credit against the $750 fine in the amount of $5 for each of the five days

the defendant was confined in jail.

¶ 3 FACTS

¶ 4 On October 14, 2010, the defendant was charged by a two-count information. Count I was for unlawful possession of controlled substances, in violation of section 402(c) of the Illinois Controlled Substances Act (720 ILCS 570/402(c) (West 2010)). Count II was for unlawful possession of drug paraphernalia, in violation of section 3.5 of the Illinois Drug Paraphernalia Control Act (720 ILCS 600/3.5 (West 2010)). A jury trial was held on July 7, 2011, at which the following testimony and evidence was adduced.

¶ 5 Brad Reuter testified that he is employed as an officer for the Centralia police department and was on duty at 1 a.m., on October 14, 2010. At that time, he was sitting in his patrol car, which was parked across the street from Party Liquors, an establishment described by Reuter as a "drug haven." While sitting in his patrol car, Reuter observed a vehicle pull into the parking lot of Party Liquors and drive away shortly thereafter. At that point, Reuter recognized the driver as the defendant. The prosecutor asked Reuter, "And without getting into specifics as to why, but did you know [the defendant], were you familiar with her?" Reuter replied, "We have dealt with her numerous times." Reuter then identified the defendant in the courtroom. The defense counsel never objected to this colloquy.

¶ 6 Reuter testified that he followed the vehicle until the defendant turned left down an alley without using a turn signal. Accordingly, Reuter initiated a traffic stop. Reuter described the defendant's behavior as "defeated" when he approached and began speaking to her. He learned that the passenger in the front seat was the defendant's daughter, Danielle Pineda, and the passenger in the back seat was Stanley Cohen, Pineda's boyfriend. Reuter testified that the defendant acknowledged that she was the owner of the vehicle and consented to a search. By that time, fellow Centralia officers Steven Whritenour and Blake Dukes, and Sergeant Cripps from the Marion County sheriff's office, had arrived on the scene

to assist. Reuter testified that after the defendant consented to the search, the occupants were removed from the vehicle and he opened the driver's side door. He immediately saw a white flaky substance in the driver's seat, which he believed to be crack cocaine. Reuter collected the substance, tested it with a field-test kit, and sealed it in an evidence bag. He directed Officer Dukes and Sergeant Cripps to search Pineda and Cohen and he placed the defendant under arrest. Reuter testified that after he brought the defendant to the police department for booking procedures, she told him that she abused drugs and used crack cocaine.

¶ 7 On cross-examination, defense counsel asked Reuter if he was familiar with Stanley Cohen, and Reuter replied in the affirmative. Defense counsel continued, asking Reuter how he was familiar with Cohen. The State objected and a side-bar conference was held on the record and outside the presence of the jury. At that time defense counsel presented no offer of proof or evidence regarding how or to what extent Officer Reuter was familiar with Cohen. Rather, defense counsel presented the following statement, which essentially described his theory of the case: "There is a lot of differences. [*sic*] There is three people in the car [*sic*], obviously if there is cocaine in the car, presumably someone possessed it at some point. And [*sic*] to just leave it out there hanging, I think I'm allowed to inquire. It's not saying [*sic*] it's Stanley's or it's Danielle's, I'm allowed to raise the speculation that it's possible it's other peoples [*sic*]." The State's objection was sustained.

¶ 8 Steven Whritenour testified that he is employed as an officer for the Centralia police department. He confirmed that he assisted Reuter with the defendant's traffic stop and search in the early morning hours of October 14, 2010. When he arrived on the scene, Whritenour searched the defendant's purse, which was located next to the driver's seat, and found a compact, within which was a small mirror that had what appeared to be razor marks and a small trace of white residue on it. He also discovered in the defendant's purse a "crack pipe," which was a small metal pipe with bite marks on it. Whritenour explained that he found a

homemade filter inside the pipe, into which chunks of crack cocaine are placed and then smoked through the pipe. Whritenour collected the compact and pipe as evidence on the basis of his belief that they were drug paraphernalia.

¶ 9 Blake Dukes testified that he is employed as a patrolman for the Centralia police department. He confirmed that he assisted Reuter with the defendant's traffic stop and search on October 14, 2010. When he arrived on the scene, Dukes searched Stanley Cohen's person and found nothing drug-related. He testified that Sergeant Cripps searched Danielle Pineda's person and found nothing drug-related on her.

¶ 10 Joel Gray testified that he is employed as a forensic scientist with the Illinois State Police. His specific duty is to analyze evidence for the presence of controlled substances. After being tendered as an expert, Gray testified that after testing the substance which was found in the driver's seat of the defendant's vehicle, he concluded to a reasonable degree of forensic certainty that it contained cocaine base.

¶ 11 Danielle Pineda testified that she is the defendant's daughter. She confirmed that she was with the defendant and Stanley Cohen when the defendant was arrested on October 14, 2010. On the previous day, October 13, 2010, Pineda was in the defendant's vehicle with Cohen, outside the presence of the defendant. She wanted to go to Centralia, so she asked the defendant if she and Cohen could borrow the car. The defendant agreed, so Pineda and Cohen left with the car around 6:30 p.m. Cohen drove her to Centralia, dropped her off at approximately 6:45 p.m., and left with the defendant's car until about midnight on October 14, 2010, when he picked her up. When they returned to the defendant's house, Pineda asked the defendant to drive them into town to buy some liquor. The defendant agreed. The defendant was driving, she was in the passenger seat, and Cohen was in the back seat. After stopping at the liquor store, they pulled out of the parking lot and, according to Pineda, "immediately pretty much got stopped." The defendant was arrested. Pineda testified that

she did not put the cocaine in the defendant's car, nor did she see Cohen do so. She also denied seeing cocaine while she was in the defendant's car with Cohen the evening before the defendant's arrest.

¶ 12 After deliberations, the jury found the defendant guilty of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) (count I) and guilty of possession of drug paraphernalia (720 ILCS 600/3.5 (West 2010)) (count II). On August 12, 2011, after her posttrial motion for a new trial was denied, the defendant was sentenced to three years in the Illinois Department of Corrections, followed by one year of mandatory supervised release plus costs on count I, and was ordered to pay a $750 fine plus costs on count II. The defendant filed a timely notice of appeal. Additional facts will be provided as necessary in our analysis of the issues on appeal.

¶ 13 ANALYSIS

¶ 14 As a threshold matter, we note that the State concedes that the defendant is entitled to $5 for each of the five days she was confined in jail prior to sentencing, to be credited against the $750 fine imposed by the trial court for her conviction on count II. We agree and therefore need not address the defendant's issue regarding the same on appeal. The two remaining issues are restated as follows: (1) whether the defendant is entitled to a new trial, where testimony was allowed which showed that the police had dealt with the defendant in the past, and (2) whether the defendant is entitled to a new trial, where defense counsel was restricted from cross-examining a police officer regarding his familiarity with Stanley Cohen.

¶ 15 *1. Testimony of Past Police Dealings With the Defendant*

¶ 16 The first issue on appeal is whether the defendant is entitled to a new trial, where testimony was allowed which showed that the police had dealt with the defendant in the past. The defendant argues that the testimony at issue implied prior criminal activity. "It is well settled that, to preserve an issue on appeal, a defendant must object to the purported error at

trial and include it in his written posttrial motion." *People v. Glasper*, 234 Ill. 2d 173, 203 (2009). Otherwise, the argument is forfeited on appeal. See *id*.

¶ 17 In this case, the defendant neither objected to the disputed testimony at the trial nor raised any issue in that regard in her posttrial motion. Accordingly, the issue is forfeited. However, the defendant contends that the issue is reviewable for plain error.

> "The plain-error doctrine is a limited and narrow exception to the general rule of procedural default [citation] and allows a reviewing court to consider unpreserved error when one of two conditions is met:
>
> > '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred 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. Walker*, 232 Ill. 2d 113, 124 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 18 However, there can be no plain error where there is no error. It is well established that "evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes." *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Testimony of an officer's acquaintance with a defendant does not inherently imply a criminal history. See *People v. Outlaw*, 388 Ill. App. 3d 1072, 1089 (2009). Such evidence should be avoided only when the motive for inquiring about such an acquaintance is to imply a criminal history. See *id*.

¶ 19 Here, the State's motive in eliciting testimony about Officer Reuter's acquaintance with the defendant was not to imply a criminal history. In fact, the prosecutor was careful not to elicit any testimony in that regard, as reflected in the following question: "And *without*

getting into specifics as to why, but did you know [the defendant], were you familiar with her?" (Emphasis added.) To which Reuter replied, "We have dealt with her numerous times." Immediately thereafter, Reuter identified the defendant in court. We find the testimony was elicited solely for the purpose of identifying the defendant. The State did not mention Reuter's familiarity with the defendant in any other context, nor did it suggest to the jury that Reuter's familiarity with the defendant meant that the defendant had a propensity to commit crimes. Because the State had no motive to solicit evidence for the purpose of implying a criminal history on the part of the defendant and because the testimony was relevant in the context of identifying the defendant in court (see *Wilson*, 214 Ill. 2d at 135), it was not error to allow the testimony.

¶ 20 Even assuming, *arguendo*, that allowing the testimony was error, the plain-error doctrine is still not applicable here because the alleged error is not so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, nor is the evidence so closely balanced that the error alone threatened to tip the scales of justice against the defendant. See *Walker*, 232 Ill. 2d at 124. The defendant argues that the evidence in this case is closely balanced because the cocaine was not found on the defendant's person, there was no direct evidence that she had knowledge of the cocaine, two other people were in close proximity to the cocaine, and Stanley Cohen had sole possession of the vehicle for the six hours preceding the discovery of the cocaine in the driver's seat. We do not agree that the evidence was closely balanced.

¶ 21 The defendant was charged with possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and possession of drug paraphernalia (720 ILCS 600/3.5 (West 2010)). Possession may be actual or constructive. *People v. Scott*, 2012 IL App (4th) 100304, ¶ 19. "If the controlled substance is found on the premises rather than on the defendant, the State can establish constructive possession if it can prove the defendant had

knowledge and control over the premises by virtue of his connection to the premises." *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 14. "Constructive possession of contraband is often found where it is located on premises over which the defendant has control, such as the defendant's home." *Id*. While constructive possession may be inferred from the facts, it is often established entirely by circumstantial evidence. *Id.* ¶ 15. "Where possession has been shown, an inference of guilty knowledge can be drawn from the surrounding facts and circumstances." *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000).

¶ 22 Although the defendant offers other plausible explanations as to how the cocaine got in her car, we are mindful that the trier of fact need not "search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). "When a court reviews the sufficiency of the evidence, the relevant question is '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.) *Id*. at 280 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Moreover, this standard is applied whether the evidence is direct or circumstantial. See *id*.

¶ 23 Applying these principles to the case at bar, Officer Reuter testified that the defendant acted "defeated" when he pulled her over, the defendant acknowledged that she was the owner of the vehicle, thereby showing control over the vehicle (see *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 14), Reuter found a white flaky substance in the driver's seat, later confirmed to be cocaine, and the defendant told Reuter that she abused drugs and crack cocaine. Officer Whritenour testified that he found in the defendant's purse a mirror with razor marks and white residue on it, along with a crack pipe with a homemade filter inside it. Officer Dukes testified that nothing drug-related was found on either Danielle Pineda or Stanley Cohen. Pineda testified that she did not put cocaine in the defendant's car,

nor did she see Cohen do so. She further denied seeing cocaine while she was in the defendant's car with Cohen the evening before the defendant's arrest.

¶ 24 In reviewing the above evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of possession of a controlled substance beyond a reasonable doubt (see *Jackson*, 232 Ill. 2d at 281) and that the record supports the defendant's conviction. Accordingly, even assuming, *arguendo*, that it was error to allow Reuter's testimony, the evidence was not closely balanced in this case, nor was the error so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. See *Walker*, 232 Ill. 2d at 124. Accordingly, the plain-error doctrine does not apply. See *id*.

¶ 25 In the alternative, the defendant argues that defense counsel's failure to object to Officer Reuter's testimony amounted to ineffective assistance of counsel. "To establish a claim of ineffective assistance of counsel, a defendant must satisfy the familiar *Strickland* test." *People v. Richardson*, 189 Ill. 2d 401, 410 (2000) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "The test is composed of two prongs: deficiency and prejudice." *Id*. "First, the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *Id*. at 411. "Second, the defendant must establish prejudice." *Id*. "The defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Id*. If the defendant fails to satisfy either prong of the *Strickland* test, the ineffective assistance of counsel claim must fail. See *id*. In the instant case, the defendant's ineffective assistance of counsel argument fails because an objection to the testimony would not have changed the outcome of the proceeding because

Reuter's testimony was not error, thereby making any objection to it pointless. See *People v. Lewis*, 88 Ill. 2d 129, 156 (1981) (effective representation does not require counsel to make losing objections).

¶ 26 *2. Restricted Cross-Examination*

¶ 27 The final issue on appeal is whether the defendant is entitled to a new trial, where defense counsel was restricted from cross-examining a police officer regarding his familiarity with Stanley Cohen. "A defendant's right to confront witnesses against him, including cross-examination for the purpose of showing any interest, bias, prejudice[,] or motive to testify falsely is guaranteed by both the federal and state constitutions." *People v. Harris*, 384 Ill. App. 3d 551, 565 (2008) (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). "A defendant's right to confrontation includes the right to cross-examine." *Id.* However, "[t]he trial court has discretion to impose reasonable limits on cross-examination to limit possible harassment, prejudice, jury confusion, witness safety, or repetitive and irrelevant questioning, and we review a defendant's claim of a violation of the confrontation clause under the abuse-of-discretion standard." *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). "A judge may limit the scope of cross-examination, and unless the defendant can show his or her inquiry is not based on a remote or uncertain theory, a court's ruling limiting the scope of examination will be affirmed." *Id.*

¶ 28 "It is well recognized that the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court." *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992). "The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper." *Id.* at 421. "The failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Id.* "A formal offer of proof is typically required; however, an informal offer of proof, involving counsel's

summary of what the proposed evidence might prove, may be sufficient if specific and not based on speculation or conjecture." *Tabb*, 374 Ill. App. 3d at 689.

¶ 29 In this case, defense counsel failed to present an adequate offer of proof, even an informal one, and therefore this issue is waived on appeal. See *Andrews*, 146 Ill. 2d at 420-21. Counsel presented no facts or evidence about what Reuter would have testified regarding how or to what extent he was familiar with Cohen. Instead, counsel made a statement regarding his theory of the case: that the cocaine belonged to either Pineda or Cohen. Although irrelevant to the line of questioning for which he was purportedly making an offer of proof, and thus inadequate to overcome the State's objection to that line of questioning, counsel's theory was sound strategically, and we note that ultimately he was permitted to argue this theory to the jury. The fact that the jury did not believe the theory is a reflection of the strength of the State's case, not any infirmity on the part of defense counsel's representation.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the defendant's conviction and sentence and we remand with directions for the trial court to enter a corrected sentencing order reflecting a credit against the $750 fine in the amount of $5 for each of the five days the defendant was confined in jail.

¶ 32 Affirmed and remanded with directions.