

NOTICE
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2012 IL App (4th) 110410-U

Filed 8/14/12

NO. 4-11-0410

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
RONALD W. THIELE,)	No. 10CF144
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where barred testimony was inadmissible and inconsistent with defendant's trial theory, any error that resulted from the discovery-violation sanction was harmless error beyond a reasonable doubt.
- ¶ 2 Where defendant had an extensive criminal history, including numerous violations of the Illinois Controlled Substance Act, the trial court did not abuse its discretion by sentencing defendant to 41 years' imprisonment for unlawful possession of a controlled substance with the intent to deliver.
- ¶ 3 In June 2010, a grand jury indicted defendant, Ronald W. Thiele, with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1), (d) (West 2010)) and one count of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)). After a January 2011 trial, a jury found defendant guilty of all three charges. Defendant filed a posttrial motion, asserting, *inter alia*, he was denied a fair trial

by the barring of the testimony of his sister, Jessica Brown, as a sanction for a discovery violation. At a joint March 2011 hearing, the Livingston County circuit court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 10 years and 25 years on the unlawful-delivery-of-a-controlled-substance counts and 41 years for unlawful possession of a controlled substance with the intent to deliver. Defendant filed a motion to reconsider, which the court denied.

¶ 4 Defendant appeals, asserting the trial court erred by (1) excluding Brown's testimony and (2) sentencing him to an extended-term sentence for unlawful possession of a controlled substance with the intent to deliver under section 408(a) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/408(a) (West 2010)). We affirm.

¶ 5 I. BACKGROUND

¶ 6 The unlawful-delivery counts alleged that, on May 24 and 27, 2010, defendant knowingly delivered heroin to a confidential source (later identified as Tace Meints). The unlawful-possession-with-the-intent-to-deliver count asserted that, on May 29, 2010, defendant knowingly possessed with the intent to deliver 15 grams or more but less than 100 grams of a substance containing heroin. The State notified defendant that, under section 408(a) of the Act, he was eligible for an extended-term sentence on all three counts.

¶ 7 At the beginning of defendant's January 2011 trial, the State made an oral motion *in limine*, seeking to prohibit the introduction of a document allegedly showing threatening text messages from Meints to Brown. The State asserted it was not on defendant's discovery disclosure, and defense counsel made the prosecutor aware of it about 15 minutes before trial. Defense counsel stated he did not intend to use the document, just to ask the witness, Brown,

questions. The State then noted Brown and the topic had not been disclosed in discovery. Defense counsel stated Brown was listed in a police report, which had been tendered to the State. In his answer to discovery, defendant had stated he may call as a witness any of the people named in the police reports and other documents tendered by the State to defendant. The State argued that neither Brown nor the contents of the text messages had ever been disclosed, and thus the State had never interviewed Brown. The trial court found defendant had not complied with discovery, granted the State's motion *in limine*, and barred defendant from calling Brown as a witness. Defense counsel then noted Brown was there and could be interviewed by the State. The court noted defendant's trial was already behind schedule and would not delay the trial further for the State to conduct interviews.

¶ 8 The evidence presented at defendant's trial that is relevant to the issues on appeal is set forth below. Meints testified on behalf of the State and described the two controlled buys he made from defendant. On cross-examination, Meints testified that, prior to defendant's arrest, Meints was at defendant's house once or twice a week for two or three months. Meints had known defendant his entire life and grew up with him. Meints admitted storing his motorcycle at defendant's house for a week but denied having clothes there. Meints also denied using heroin every time he was at defendant's home. Meints testified he helped defendant out around his house doing such things as putting up cabinets, mowing the yard, and helping defendant work on his truck. Meints also occasionally "hooked" defendant up with a job. Moreover, Meints testified that, two weeks before the first controlled buy, the police approached him at his house and stated they were having problems with defendant. The police wanted to search Meints's room, but Meints refused. He later went and met with the police. During the meeting, they

"lined everything up" for the controlled buys.

¶ 9 When defense counsel asked Meints about the police investigating Meints's alleged threats against defendant's family members, the State objected. The trial court held a sidebar, and defense counsel asserted the testimony went to Meints's motivation for the buys. Defense counsel stated he was going to argue he got a deal because the police did not do anything about the threats. The court sustained the objection. After Meints's testimony before the jury, the court allowed defense counsel to make an offer of proof out of the jury's presence. During the offer of proof, Meints testified that, on September 17, 2010, the Livingston County sheriff's department responded to his home about a complaint of him making threats. Meints was never arrested or charged with anything after the complaint. Defense counsel argued the jury should hear the incident because it goes to bias or motivation. He noted Meints got in trouble with the police department that was using him as a confidential informant, and the police looked the other way. Defense counsel alleged the jury should determine whether Meints got a benefit for his cooperation. The court denied defendant's motion, noting no evidence was presented showing the same officers were involved in the investigation of defendant and the investigation of Meints's threats.

¶ 10 Defendant presented the testimony of his girlfriend, Megan Johns. Johns testified Meints was defendant's friend and coworker. According to Johns, in the two months prior to defendant's arrest, Meints was at defendant's home at least five times a week. Meints also kept clothing and a motorcycle at defendant's home.

¶ 11 At the conclusion of the trial, the jury found defendant guilty of all three charges. Defendant filed a motion for new trial and judgment of acquittal, arguing, *inter alia*, the trial

court erred by finding defendant had committed a discovery violation and then barring Brown's testimony as a sanction.

¶ 12 On March 16, 2011, the trial court held a joint hearing on defendant's posttrial motion and sentencing. The court first denied the posttrial motion and then addressed sentencing. Neither party presented any evidence beyond the presentence investigation report. The report showed defendant was almost 30 years old and unemployed, had married Johns since his trial, and had two children and a stepchild. The report further showed defendant had been convicted of possession of a controlled substance in 2002, in 2003, two separate times in 2004, and two counts in 2007. In 2004, he had also been convicted and received a five-year prison sentence for the following: eight counts of burglary, two counts of residential burglary, four counts of theft over \$300, one count of arson, and one count of aiding and abetting possession of a stolen vehicle. Defendant had been sentenced to prison four times, with the five-year prison sentence being the longest term. Defendant had other traffic and misdemeanor convictions, including possession of cannabis and domestic battery. Both in his statement in the presentence investigation report and in allocution, defendant stated he was a heroin addict and would have used most of the heroin found in his home. Defendant insisted he used more heroin than he sold and was not a big drug dealer. He denied he committed the offenses, of which he was found guilty. The State recommended a sentence of 50 years' imprisonment for unlawful possession of a controlled substance with the intent to deliver, and defendant recommended a 10-year sentence on that conviction. The court sentenced defendant to concurrent prison terms of 10 years and 25 years on the unlawful-delivery-of-a-controlled-substance counts and 41 years for unlawful possession of a controlled substance with the intent to deliver.

¶ 13 Defendant filed a timely motion to reconsider his sentence, asserting his sentences were excessive. After a May 13, 2011, hearing, the trial court denied defendant's motion to reconsider. That same day, defendant filed a timely notice of appeal that listed the nature of the appeal as "sentence, denial of motion to reconsider and other such relief as may be proper and just." The notice of appeal did not use the "[i]f appeal is not from a conviction" language from Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009) and listed the convictions and the date of the final order in this case. Thus, the notice of appeal was sufficient to set out the complained-of judgment included defendant's convictions in addition to his sentences. See *People v. Patrick*, 2011 IL 111666, ¶ 21, 960 N.E.2d 1114, 1119. Accordingly, we have jurisdiction of this appeal under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 14

II. ANALYSIS

¶ 15

A. Discovery Sanction

¶ 16 Defendant first contends the trial court erred by barring Brown's testimony as a sanction for a discovery violation. The State responds the discovery sanction only barred inadmissible evidence and, if any error occurred, it was harmless error. Defendant did not file a reply brief, responding to the State's assertions. We agree with the State that, even if the trial court abused its discretion by prohibiting Brown's testimony as a sanction for a discovery violation, the error is harmless error.

¶ 17

Since the alleged error involves the defendant's constitutional right to present witnesses on his behalf, the error is harmless error if the reviewing court is satisfied beyond a reasonable doubt the error did not contribute to the defendant's conviction. *People v. Levin*, 207 Ill. App. 3d 923, 934, 566 N.E.2d 511, 518 (1991), *vacated in part on other grounds*, 157 Ill. 2d

138, 623 N.E.2d 317 (1993). In this case, defendant attempted to introduce the evidence of Meints's threats against Brown during cross-examination of Meints as evidence of bias or motivation, and the trial court found the evidence inadmissible. Defense counsel was allowed to make an offer of proof and argued the evidence should be admitted because it goes to bias and motivation. Specifically, defense counsel asserted Meints got in trouble with the same police department that was using him as an informant and the police looked the other way. Thus, the jury should be allowed to determine whether Meints received a benefit for his cooperation. The court denied the admission of the evidence, finding defendant had failed to present sufficient evidence that would allow "the stretches" he asserted. Defendant had failed to show the same officer or deputies were involved in the investigation of defendant and threats made by Meints.

¶ 18 While a witness may be impeached by a showing of bias, interest, or motive to testify falsely, our supreme court has "cautioned that the evidence 'must give rise to the inference that the witness has something to gain or lose by his or her testimony. Therefore, the evidence used must not be remote or uncertain.' " *People v. Cookson*, 215 Ill. 2d 194, 214-15, 830 N.E.2d 484, 495-96 (2005), *superceded on other grounds*, Ill. Rs. Evid. 405, 608 (eff. Jan. 1, 2011) (quoting *People v. Bull*, 185 Ill. 2d 179, 206, 705 N.E.2d 824, 838 (1998)). Speculative evidence is inadmissible to show bias against defendant. See *Cookson*, 215 Ill. 2d at 216, 830 N.E.2d at 496 (citing *Bull*, 185 Ill. 2d at 206, 705 N.E.2d at 837).

¶ 19 On appeal, defendant does not challenge the trial court's denial of Meints' testimony about the threats against Brown. Defendant also does not respond to the State's assertion Brown's testimony about the threats would have been inadmissible at trial and the alleged error is harmless error. In his appellant brief, defendant asserted Brown's testimony

about the threats would have supported defendant's argument Meints set up defendant because the threats show animosity toward defendant and his family. However, Meints's controlled buys of heroin from defendant occurred in May 2010, and the alleged threats did not occur until about four months later in September 2010. In his brief, defendant fails to explain how the threats showed Meints held animosity against defendant four months before the threats took place. Moreover, we note defendant's argument on appeal is different from his argument at trial, where he suggested Meints set up defendant because he had an "incident" with the police. At trial, defendant did not suggest any animosity between Meints and defendant. To the contrary, defendant's evidence showed Meints and defendant were friends and coworkers. During the two months prior to defendant's arrest, Meints had clothes and a motorcycle at defendant's home and visited defendant's home at least five times a week. Accordingly, Brown's testimony about Meints's alleged September 2010 threats is too speculative to show Meints held animosity against defendant in May 2010, and thus the evidence would have been inadmissible at defendant's trial. Since Brown's testimony would have been inadmissible at trial and inconsistent with defendant's trial reason for Meints's alleged set up of defendant, we find the alleged error is harmless beyond a reasonable doubt.

¶ 20

B. Extended-Term Sentence

¶ 21 Defendant last alleges the trial court erred by sentencing him to an extended-term of 41 years' imprisonment for unlawful possession of a controlled substance with the intent to deliver. The State argues defendant was eligible for an extended-term sentence under section 408(a) of the Act and the court did not err by sentencing him to an extended-term of 41 years.

¶ 22

This court has explained appellate review of a defendant's sentence as follows:

" 'A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense.' " *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004) (quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

¶ 23 Unlawful possession of 15 grams or more but less than 100 grams of heroin with the intent to deliver is a Class X felony (720 ILCS 570/401(a)(1) (A) (West 2010)), with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2010)). Under section 408(a) of the Act (720 ILCS 570/408(a) (West 2010)), "[a]ny person convicted of a second or

subsequent offense under this Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Thus, pursuant to section 408(a), defendant was eligible for a sentence of up to 60 years' imprisonment. Defendant does not contest he has several possession-of-a-controlled-substance convictions but argues he has no prior convictions for delivery of a controlled substance. He contends a more appropriate sentence for him is 30 years, the maximum nonextended prison term.

¶ 24 In support of his argument, defendant cites section 100 of the Act (720 ILCS 570/100 (West 2010)), which states the legislative intent for the Act. Section 100 notes, in pertinent part, the legislature did not intend "to treat the unlawful user or occasional petty distributor of controlled substances with the same severity as the large-scale, unlawful purveyors and traffickers of controlled substances." 720 ILCS 570/100 (West 2010). Additionally, it states "guidelines have been provided, along with a wide latitude in sentencing discretion, to enable the sentencing court to order penalties in each case which are appropriate for the purposes of this Act." 720 ILCS 570/100 (West 2010).

¶ 25 Here, defendant's sentence is in the applicable range as extended by section 408(a) of the Act. During his statement in allocution, defendant raised section 100 of the Act, and thus the trial court was aware of it. Moreover, the court's statements at defendant's sentencing hearing indicate the court considered the fact this was defendant's first Class X felony and disagreed with defendant that was a mitigating factor. The court also disagreed with defendant's suggestion he was a petty distributor. Moreover, the court (1) noted defendant's "horrible" record, (2) believed defendant was likely to reoffend, and (3) found defendant was a serious threat to society. The

