

No. 1-12-2378

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 5955
	)	
ANTHONY BRYANT,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Harris and Justice Liu concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* The trial court did not abuse its discretion in denying the defense's request to disclose a police surveillance location where the transcript of the *in camera* hearing supported the State's argument for non-disclosure and the exact location was not necessary for the defense to cross-examine the surveillance officer.
- ¶ 2 Following a jury trial, defendant Anthony Bryant was convicted of possessing between 15 and 100 grams of heroin with intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)) and was sentenced to seven years in prison. The trial court also imposed various fines and fees. On appeal, defendant contends the trial court erred in denying the defense's request that the State

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disclose the surveillance location from which an officer saw him conduct three drug transactions.

We affirm defendant's conviction but modify the amount of fees owed.

¶ 3 In May 2011, defense counsel filed a pre-trial motion to compel disclosure of the surveillance location used by Chicago police in observing defendant. The motion asserted that knowledge of the surveillance location was "relevant and helpful to the defense," and non-disclosure would hinder the defense's ability to question the police about their observations. The State responded the surveillance location should not be disclosed due to officer and civilian safety and because the identification of defendant was not at issue. After an *in camera* hearing at which Chicago police officer Matthew Bouch testified, the trial court held the surveillance location would not be disclosed for reasons relating to citizen and police officer safety.

¶ 4 At trial in June 2012, Bouch testified he had conducted "hundreds" of narcotics surveillances as part of a tactical team, which also included several enforcement officers. At about 11:30 a.m. on March 25, 2011, Bouch was conducting surveillance at 3712 West Grenshaw Street in Chicago in response to complaints about narcotics sales in the area. Bouch was in an elevated location between 120 and 150 feet away from the ground. Using binoculars, Bouch watched as a person approached defendant and handed him money after a brief conversation. Defendant retrieved a black glove from under a bush near an abandoned building at 3704 West Grenshaw and took a white object from the glove. Defendant placed the glove back under the bush and handed the white object to the person, who then walked away. Defendant remained in the vicinity of 3712 West Grenshaw, where he was approached two or three minutes later by a second individual, with whom he conducted a similar exchange.

¶ 5 After witnessing the second exchange followed by a third similar transaction, Bouch contacted his enforcement officers and said he had observed narcotics sales. Bouch met two

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officers and they proceeded by car to 3712 West Greshaw. Bouch related the details of the transactions and a description of the seller to two enforcement officers, Officer Beckman and Officer Gallagher, who arrested defendant. Bouch directed an officer to the bush near 3704 West Greshaw, and a black glove was recovered that contained several zip-top plastic bags of suspect heroin. Some of the bags were marked with a dollar sign or a spade symbol.

¶ 6 Bouch stated he observed defendant for about 15 minutes and nothing impeded his view of defendant while he conducted the transactions. Bouch identified the object handed to defendant as money because of its "size, shape and color" as viewed through binoculars. Bouch said no one else approached the shrubbery near 3704 West Greshaw during this time. Bouch explained that his team members did not detain the buyers after they walked away from defendant because the investigation was focused on the narcotics seller, as opposed to the purchasers, and also because requiring one or more enforcement officers to pursue buyers would leave Bouch without backup.

¶ 7 On cross-examination, Bouch stated that when he was looking through his binoculars at 3712 West Greshaw, where the exchanges occurred, he could not simultaneously view 3704 West Greshaw, where the glove was hidden. Bouch said the weather was clear on the day in question. During the surveillance, Bouch did not see anyone other than defendant and the three people who approached him. When Bouch first viewed defendant, he did not see drugs in defendant's hand or hear defendant shout anything to solicit a drug sale.

¶ 8 Bouch described defendant as standing 6 feet tall and weighing between 190 and 200 pounds with a "darker complexion" and short hair. The officer said he viewed defendant for about 15 minutes and could identify his face but could not describe anything distinctive about

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defendant's features. Bouch did not recall any characteristics about the people who approached defendant other than their race and gender.

¶ 9 Defense counsel questioned Bouch about his surveillance location, asking if he viewed defendant from behind a window. Bouch said his sight was not obstructed by a window or a screen. Bouch again stated he was in an elevated location. Defense counsel asked if he was "in a building or on a stairway." The State's objection to that question was sustained, and defense counsel asked the officer if there was "even a window" between him and the street where he observed defendant. Bouch replied there was no window. The court sustained the State's objection to the question of whether Bouch was on the same side of the street as the building at 3712 West Grenshaw.

¶ 10 Bouch said Grenshaw was a one-way street with parking on both sides of the street. The court sustained the State's objection to the question of whether Grenshaw Street was "between" Bouch and defendant. Defense counsel said the question related to "obstructions," and the court responded that counsel had "asked questions about obstructions." Bouch said vehicles were parked on the street but his view was unobstructed.

¶ 11 Bouch lost sight of defendant for two minutes after leaving his surveillance point. Bouch acknowledged he could not see the denominations of the money accepted by defendant or the number of white objects he handed to each buyer and that no drugs were recovered from those buyers. Defense counsel asked why Bouch did not instruct the enforcement team to detain the third buyer, and Bouch cited concern about alerting people to that surveillance location, which was still used by police.

¶ 12 Chicago police officer Nick Beckman testified the 3700 block of Grenshaw was chosen for surveillance because it is known for a high volume of narcotics sales. Bouch described the

suspect to Beckman and Gallagher, and that description was consistent with defendant's appearance. Beckman offered testimony consistent with Bouch as to the surveillance and the recovery and chain of custody of the black glove, which held seven pieces of plastic containing 46 small zip-top bags containing suspect heroin. A search of defendant after his arrest revealed \$203 in cash.

¶ 13 A forensic chemist testified that 16 of the bags recovered from the glove contained a total of 15.9 grams of heroin. The defense presented no evidence. The jury returned a guilty verdict.

¶ 14 On July 13, 2012, defense counsel filed a motion for a new trial asserting, *inter alia*, that the trial court erred in denying the defense's motion to reveal the surveillance location used by Officer Bouch. On July 23, 2012, counsel filed an amended motion containing the same argument. However, on July 31, 2012, the date of defendant's sentencing, counsel withdrew both of those motions. The court then sentenced defendant to seven years in prison and imposed various fines and fees.

¶ 15 As a threshold matter, we address the State's contention that defendant forfeited any challenge to the trial court proceedings when counsel withdrew both post-trial motions containing the issue of the surveillance location disclosure. To preserve a claim for review, a defendant ordinarily must object at trial and also include the alleged error in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We do not find defendant forfeited this issue, because *Enoch* includes an exception to forfeiture for constitutional issues that were raised at trial but were not preserved in a post-trial motion. See *People v. Cregan*, 2014 IL 113600, ¶ 18 (noting the possibility that those issues would later be raised in a post-conviction petition). Here, defendant raises an issue concerning his constitutional right to confront the witnesses against

him. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. 1, § 8. We therefore consider defendant's substantive arguments in this appeal.

¶ 16 Defendant contends the trial court erred in denying his motion to disclose the surveillance location used by Bouch. He argues his conviction should be reversed and this case remanded for a new trial at which his counsel can fully question Bouch about his observations.

¶ 17 Defendant first argues the evidentiary privilege protecting the disclosure of a police officer's surveillance location should be rejected as a matter of law. He points out that the Illinois Supreme Court has not discussed the surveillance location privilege and two states, Delaware and Washington, have rejected the privilege. Even though our supreme court has not spoken on the matter, this court has formed a consistent body of law over the last two decades regarding the need to limit the introduction of this evidence. Accordingly, we reject defendant's contention that the surveillance location privilege cannot be applied in the absence of a ruling by this state's highest court. See generally *Blood v. VH-1Music First*, 668 F.3d 543, 546 (7th Cir. 2012) (permitting federal courts to give "proper regard" to decisions of the state's lower courts where the state supreme court had not spoken directly on an issue).

¶ 18 The surveillance location privilege affects the constitutional right of a criminal defendant to confront witnesses against him, which includes the right to cross-examination. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. 1, § 8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004). While a trial court may not deprive a defendant of the right to question witnesses, the court may limit the scope of cross-examination. *People v. Frieberg*, 147 Ill. 2d 326, 357 (1992). The defendant's right to cross-examine a witness is satisfied when the defendant is permitted to expose the fact finder to facts from which it can assess the credibility and reliability of a witness. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The trial court is given broad discretion to limit

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the scope of cross-examination at trial, and the court's restriction of cross-examination will not be reversed absent an abuse of discretion resulting in manifest prejudice. *People v. Price*, 404 Ill. App. 3d 324, 330 (2010).

¶ 19 In Illinois, an evidentiary privilege for surveillance locations was first recognized in *People v. Criss*, 294 Ill. App. 3d 276, 280-81 (1998), which recognized its use in other jurisdictions as an extension of the informant's privilege, both of which seek to protect the secrecy of information used by law enforcement to track down offenders. *Criss* noted that a defendant could overcome the privilege by demonstrating the disclosure of the location was material or necessary to his defense and the need for the information outweighed the public's interest in the secrecy of the location. *Id.* *Criss* concluded the failure to recognize a qualified privilege "would seriously cripple legitimate criminal surveillance and endanger the lives of police officers and those who allow their property to be used for criminal surveillance." *Id.* at 281. The court noted that disclosure of a surveillance location should be "decided on a case-by-case basis, balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense." *Id.*

¶ 20 Accordingly, the State enjoys a qualified privilege regarding the disclosure of covert surveillance locations. *Quinn*, 332 Ill. App. 3d at 43; *Criss*, 294 Ill. App. 3d at 281. The State bears the initial burden of proof in invoking the privilege, and the State meets that burden by presenting evidence to the court that the surveillance location was either: (1) on private property with the permission of the owner; or (2) in a location that is useful or whose utility would be compromised by disclosure. *Price*, 404 Ill. App. 3d at 332.

¶ 21 In evaluating whether the privilege applies, the trial court should hold an *in camera* hearing outside the defendant's presence in which the State witness must reveal the surveillance

location from which the defendant was observed and make a preliminary showing that disclosure of the location would harm the public interest. *People v. Knight*, 323 Ill. App. 3d 1117, 1127 (2001). In considering the public interest in non-disclosure, the court should weigh the crime charged, the possible defenses and the potential significance of the privileged information. *Quinn*, 332 Ill. App. 3d at 43.

¶ 22 If the State has carried its burden, the defendant can overcome the privilege by demonstrating the need for disclosure. *Criss*, 294 Ill. App. 3d at 281. In seeking disclosure at a pre-trial hearing, as occurred in the instant case, the defendant must make a "strong showing that the disclosure of the location is material or necessary to his defense and that his need for the information outweighs the public's interest in keeping the location secret" in order for disclosure of the location to be compelled. *Id.*; see also *Price*, 404 Ill. App. 3d at 332. A lower standard applies when the State first attempts to invoke the privilege at trial; at that stage, a defendant need only show the location would be "relevant and helpful" to his defense or "essential to the fair determination" of the cause to overcome the privilege. *Id.*, citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Contrary to defendant's representation that he sought disclosure of the surveillance location at trial, that information was the subject of a pre-trial motion filed by the defense, and accordingly, is subject to the more stringent standard of showing that the disclosure is "material or necessary" to the defense and that the defense's need to know the location outweighs the public's interest in secrecy. See *Criss*, 294 Ill. App. 3d at 281.

¶ 23 In the case at bar, after the defense's pre-trial motion, the trial judge held an *in camera* hearing in which the officer identified the surveillance location and explained the reasons not to reveal it, allowing the court to consider whether the disclosure of the location would harm the public interest. See *Knight*, 323 Ill. App. 3d at 1127; see also *People v. Britton*, 2012 IL App

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(1st) 102322, ¶ 24. After hearing Officer Bouch's *in camera* testimony, the trial court concluded the surveillance location would not be disclosed based on "both citizen and police officer safety." The record on appeal includes the sealed transcript of the *in camera* proceeding, which we have reviewed, and we find it supports the State's burden. Defendant therefore was required to make a strong showing that his need to know the surveillance location was material or necessary to his defense or that it outweighed the public interest in keeping the location secret. See *Price*, 404 Ill. App. 3d at 332.

¶ 24 Defendant contends Officer Bouch's location was material to his defense. Defendant points out that Bouch testified he lost sight of the seller for two minutes while leaving his surveillance point and was unable to provide a detailed physical description of the offender. He further argues the only evidence that connected him to the drugs was Bouch's testimony that he saw defendant take the items from the glove and deliver them. He argues that no drugs were recovered from him and the recovery of heroin from the glove only means the drug was being sold on the street but does not establish he was the seller.

¶ 25 The protection of a specific surveillance site, when the defense is aware of the officer's general location, has been upheld where the defense has sufficient information to question the surveillance officer. *Quinn*, 332 Ill. App. 3d at 44. In these cases, a defendant must demonstrate a need for disclosure, not merely that the information would possibly prove useful. *Criss*, 294 Ill. App. 3d at 281. Defendant has not shown the disclosure of the exact surveillance location used by Bouch was necessary to his defense. Defendant relies on *Knight*, which we do not find comparable to the facts here. In *Knight*, the officer's ability to identify the defendant as the drug seller was countered by a church pastor's testimony that the defendant was unloading a van in the location where he was arrested, in addition to testimony that a man wearing a jacket similar to

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the defendant was selling drugs in the area. *Knight*, 323 Ill. App. 3d at 1120-21. Moreover, the surveillance officer in *Knight* only observed a single transaction, lost sight of the defendant for a few minutes, and did not recover any money from the defendant despite having testified he saw the seller accept money during the transaction. *Id.* Here, in contrast, Bouch testified that the only people he observed on the street during the transactions were defendant and the three purchasers. He also reported that defendant returned to the bush three times to retrieve drugs from the glove, and \$203 in cash was recovered from defendant.

¶ 26 Unlike in *Knight*, no evidence was presented that challenged Bouch's ability to observe the scene. See *People v. Reed*, 2013 IL App (1st) 113465, ¶ 23 (court did not abuse discretion in denying motion to disclose exact surveillance location where officer provided his distance from defendant, level of elevation, type of lighting, lack of obstructions and use of binoculars). Bouch testified that he was in an elevated position between 120 and 150 feet away from defendant and that his view was unobstructed. Defense counsel was allowed to ask Bouch if he observed the transactions from behind a window, and the officer stated he was not behind a window or a screen. The officer viewed defendant for about 15 minutes. Bouch described the man he observed engage in three hand-to-hand transactions as being 6 feet tall and between 190 and 200 pounds and having short hair and a dark complexion. That description is consistent with defendant's physical characteristics and photograph contained in the arrest report in the record. Although Bouch left his surveillance site for an estimated two minutes to meet the enforcement officers, Bouch described defendant to those officers before the arrest, and the recovery of narcotics from under the bush was consistent with Bouch's surveillance. Based upon this record, the trial court did not abuse its discretion in denying defendant's pre-trial motion to disclose the officer's specific surveillance location.

¶ 27 Defendant's remaining contention on appeal is that even if his conviction is affirmed, this court should reduce the trial court's imposition of a \$304.50 assessment for the violent crime victims assistance (VCVA) fund (725 ILCS 240/10(b) (West 2010)). Effective July 16, 2012, Public Act 97-816 replaced the prior calculation of VCVA assessments to a set amount of \$100 for any felony conviction. Defendant was sentenced on July 31, 2012. Defendant points out, and the State correctly concedes, that he should be sentenced under the law as it was in effect at the time of his sentencing. Therefore, the \$304.50 VCVA assessment imposed against defendant should be reduced to \$100.

¶ 28 Accordingly, we direct the circuit court to correct the fines and fees order in this case to reflect a \$100 VCVA assessment. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus). The trial court's judgment is affirmed in all other respects.

¶ 29 Affirmed; fines and fees order modified.