

No. 1-13-0843

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 1536
)	
AUBREY JOHNSON,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirm the trial court's judgment because although the officer's statement was hearsay and did not fall into the "explanatory exception" to the hearsay rule, the evidence at trial was not closely balanced; accordingly, the erroneous admission of the statement did not amount to plain error and counsel was not ineffective for failing to object to the statement's admission. However, we correct defendant's mittimus to reflect the accurate conviction.

¶ 2 Following a bench trial, defendant, Aubrey Johnson, was convicted of delivery of a look-alike substance and sentenced to two years in prison. He appeals, asserting the trial court erred

by allowing inadmissible hearsay and that his mittimus should be corrected to reflect the accurate conviction. For the following reasons, we affirm the trial court's judgment and correct the mittimus.

¶ 3 Defendant was charged with delivery of a look-alike substance (720 ILCS 570/404(b) (West 2010)) and delivery of a look-alike substance within 1,000 feet of a school (720 ILCS 570/404(b), 407(b)(3) (West 2010)). At trial, Officer Wojciech Lacz testified he went to make an undercover narcotics purchase in the area of 505 South Lockwood at around 11:45 a.m. on December 27, 2011. There, he observed defendant and his codefendant, Arron Jones, standing together on the sidewalk.¹ Lacz drove up to defendant and Jones and "basically asked if they were up," which Lacz explained meant he was asking if they were selling narcotics. Both men nodded their heads. Lacz then ordered "four blows," meaning heroin, and the men nodded their heads again. Defendant turned to Jones and said, "I will get the blows this time. You do the lookout." The two men then walked to the corner of Congress and Lockwood. When they reached the corner, Jones remained there, looking around, as defendant walked eastbound out of Lacz's view.

¶ 4 Lacz testified that after about a minute passed, Jones left the corner, walked back to Lacz's car, and said something to the effect of, "[defendant] is getting your blows." Afterward, Jones returned to the same corner. Approximately one to two minutes later, Lacz observed defendant walk out of an alley near 513 South Lockwood. Defendant shouted and motioned to Jones, who ran over to defendant. Defendant then tendered in his left hand "some small unknown items," which Lacz could not see. Thereafter, both individuals walked in Lacz's direction. Jones gave Lacz four folded pieces of tinfoil containing a white powder substance,

¹ Codefendant Jones had a separate appeal which we resolved in a dispositional order (No. 1-13-0552).

and Lacz gave Jones \$40, consisting of two prerecorded \$20 bills. Jones then walked back to defendant, and both men continued walking northbound. Lacz did not see the men exchanging anything as they walked away.

¶ 5 After defendant and Jones walked away, Lacz radioed in a positive narcotics transaction to his team, providing a description of defendant and Jones and the direction in which they had walked. Five minutes later, Lacz heard over the radio that his team had stopped an individual at 5323 West Congress. Lacz went to that location and positively identified Jones. He then continued driving, relocating to Harrison, just south of Lockwood, where he observed defendant "trotting southbound on Lockwood" then entering a convenience store on Harrison. Officers went inside the convenience store and came out with defendant, who Lacz positively identified. Later, at the station, Lacz saw one of the two \$20 bills he had given Jones. He also inventoried the four tinfoil packets. The parties stipulated that Christine Dilobenak at the Illinois State Police Crime Lab would testify that she tested one of the four recovered items, and it did not test positive for narcotics.

¶ 6 Police Sergeant Peter Arpaia testified that he supervised the undercover buy and observed the transaction between Lacz and defendant and Jones. Arpaia did not lose sight of either Jones or defendant until Jones was detained by police officers. He never saw Jones hand defendant money, nor did he see any enforcement officers take money off of Jones.

¶ 7 Chicago police officer Mark Eldridge testified that he detained Jones after receiving a radio communication. He then relocated to a store at 5300 West Harrison and detained defendant, who did not resist arrest. At that time, Eldridge did not recover a \$20 bill on defendant. After defendant was arrested, Eldridge reentered the store and spoke with the clerk, who stated that defendant bought a can of pop with a \$20 bill. The clerk showed Eldridge the

\$20 bill, which contained the same serial number as the prerecorded money. Defendant did not object to this testimony. Eldridge inventoried the bill and returned it to Lacz.

¶ 8 Paul Lambert, an investigator with the Cook County State's Attorney's office, testified he measured the distance between 505 South Lockwood and Lewis Armstrong School as 480 feet.

¶ 9 Following the presentation of evidence, the trial proceeded to closing arguments. During its argument, the State commented as follows:

"Officer Eldridge, that enforcement officer, testified to exactly that when he went into that convenience store, there behold was [defendant], the only one in there standing at the counter. Which we understand from the testimony and evidence of the officer, Johnson had just bought a pop from that store clerk. That store clerk gave Officer Eldridge that \$20 bill that he bought that pop with and sure enough it was serial number EF51211310E, the same prerecorded \$1505, \$20 bill used in the transaction and undercover officer should be noted that that 20 dollar bill was given to Jones and recovered from [defendant] which is further evidence that these two individuals were working in concert together in a delivery of this look alike substance."

¶ 10 On this evidence, the trial court found defendant guilty of delivery of a look-alike substance and not guilty of delivery of a look-alike substance within 1,000 feet of a school. Defendant filed a motion for new trial, alleging, among other things, that it was "conjective [*sic*] and hearsay to suggest the store keeper received the marked money from" defendant. In January

2013, the court denied defendant's motion and sentenced him to two years in prison. This appeal followed.

¶ 11 On appeal, defendant first asserts his conviction should be reversed because Eldridge's testimony that a store clerk told him defendant paid for a pop with a \$20 bill was inadmissible hearsay. The State responds that the testimony was properly admitted where it explained the course of a police investigation.

¶ 12 Initially, defendant concedes that he did not object to Eldridge's testimony at trial; accordingly, defendant has forfeited review of the alleged hearsay statement. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (To preserve an issue for appellate review, a defendant must object both at trial and in a written posttrial motion). Nonetheless, defendant urges this court to review his claim pursuant to the plain-error doctrine, contending the evidence at trial was closely balanced. In the alternative, defendant asserts that counsel was ineffective for failing to object to the inadmissible hearsay.

¶ 13 Pursuant to the plain-error doctrine, we may consider unpreserved claims of error when a clear or obvious error occurred and either (1) the evidence is so closely balanced the error alone threatened to tip the scales of justice against defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our first step in plain-error review is to determine whether error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 14 In criminal prosecutions, a defendant has the right to be confronted with the witnesses against him. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Hearsay, which is an out-of-court statement offered to establish the truth of the matter asserted, is generally inadmissible at trial. *People v. Tenney*, 205 Ill. 2d 411, 432 (2002). However, testimony about an out-of-court

statement is not hearsay where it "is offered for the limited purpose of showing the course of a police investigation." *People v. Williams*, 181 Ill. 2d 297, 313 (1998). To establish his course of conduct, an officer may testify he had a conversation with an individual and subsequently acted on that information; however, the officer may not testify as to the substance of the conversation with the individual because that would be inadmissible hearsay. *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010).

¶ 15 It is within the trial court's discretion to determine whether evidence is relevant and admissible. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010). Thus, we will not overturn a court's decision to admit evidence unless the decision is "arbitrary, fanciful, or unreasonable." *Id.*

¶ 16 We agree with defendant that the statement in this case was inadmissible hearsay. Officer Eldridge went beyond testifying that he had a conversation with the clerk and, thereafter, obtained a \$20 bill from the clerk. Rather, he testified to the substance of their conversation, explaining that the clerk told him defendant used a \$20 bill to purchase a pop. Moreover, Eldridge's testimony about the clerk's statement was offered to prove the truth of the matter asserted. See *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993) (Under the investigatory exception, an officer's testimony may not be used to place into evidence the substance of an out-of-court statement for the purpose of establishing the truth of its contents). Defendant's purchasing of a pop with one of the prerecorded \$20 bills that Lacz gave to Jones for "four blows" was evidence that connected defendant to the transaction between Jones and Lacz. Notably, the State used the clerk's statement substantively in its closing, asserting that the clerk gave Eldridge "that \$20 bill that [defendant] bought that pop with," which was the same bill Jones had been given and thus constituted "further evidence" that Jones and defendant "were working in concert together in a delivery of this look alike substance." See *People v. Jura*, 352

Ill. App. 3d 1080, 1088-89 (2004) (emphasizing that it "could accept the State's argument that it used hearsay merely to explain the investigation undertaken by the police" if the State had not, among other things, relied upon the hearsay in its closing argument).

¶ 17 In support of its claim that the statement at issue here fell within the "explanatory exception" to the hearsay rule, the State cites *People v. Peoples*, 377 Ill. App. 3d 978, 984-86 (2007), and *People v. Gacho*, 122 Ill. 2d 221, 247-48 (1988). Both cases are inapposite, however, because unlike Eldridge, the officers in *Peoples* and *Gacho* did not testify about the content of the conversations they had; rather, they testified a conversation took place and they then took some subsequent action. See *Peoples*, 377 Ill. App. 3d at 984 (the detective testified that after speaking with the co-defendant, he searched a police computer database for a person named "Chris" who lived or had been arrested in the area of the shooting); *Gacho*, 122 Ill. 2d at 248 (the officer testified that he spoke to a victim at the hospital and afterward he and his partner began to look for "Robert Gacho," the defendant). Indeed, the supreme court explicitly reasoned in *Gacho* that if the officer had testified to "the substance of the conversation" that he had with the victim, "it would have been objectionable as hearsay. The testimony of [the officer], however, was not of the conversation with [the victim] but to what he did and to investigatory procedure." *Gacho*, 122 Ill. 2d at 248. Accordingly, we find *Peoples* and *Gacho* distinguishable and conclude Eldridge's statement that the clerk told him defendant bought a can of a pop with a \$20 bill was hearsay.

¶ 18 Having concluded the trial court erred by admitting the hearsay statement, we turn then to whether the evidence at trial was so closely balanced that the erroneous admission of the statement threatened to tip the scales of justice against defendant. Defendant asserts the evidence was closely balanced because Lacz had only a brief encounter with Jones and defendant

and neither Lacz nor Arpaia were able to identify what, if anything, defendant gave to Jones or what part, if any, defendant played in the transaction.

¶ 19 "In determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence [citation] within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *People v. White*, 2011 IL 109689, ¶ 139). In defendant's case, we conclude that, even without the clerk's statement that defendant purchased a pop with a \$20 bill, the evidence of defendant's guilt was sufficient. In particular, Lacz testified that he ordered "blows" from defendant and Jones and defendant told Jones, "I will get the blows this time." Jones then told Lacz that defendant was getting the "blows." Lacz saw defendant tender "small unknown items" to Jones. Jones subsequently gave Lacz four folded pieces of tinfoil containing a white powder substance. Later, Lacz positively identified defendant entering a convenience store. Thus, although Eldridge's testimony about the clerk's statement bolstered the State's case by connecting defendant to the \$20 bill that Lacz gave to Jones, we disagree that the outcome would have been altered absent such testimony because Lacz's testimony clearly established defendant's part in the transaction between Lacz and Jones. Accordingly, defendant has failed to show the evidence was closely balanced.

¶ 20 Because the evidence was not closely balanced, we also reject defendant's contention that his attorney's failure to object to the clerk's statement constituted ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that he suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. at 668, 687 (1984). To satisfy the prejudice prong, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at

694. Given that Lacz's testimony alone was sufficient to convict defendant, defendant has failed to show the outcome of his trial would have been different if his attorney had objected to Eldridge's hearsay statement.

¶ 21 Defendant next asserts, and the State agrees, that the mittimus should be corrected because it reflects defendant was convicted and sentenced for delivery of a look-alike substance within 1,000 feet of a school, a Class 2 felony (720 ILCS 570/407(b)(3) (West 2010)).

Defendant was actually convicted and sentenced for delivery of a look-alike substance, a Class 3 felony (720 ILCS 570/404(b) (West 2010)). We therefore order the mittimus to be corrected to reflect the offense of which defendant was convicted, *i.e.*, delivery of a look-alike substance.

See *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011) (correcting the defendant's mittimus where it reflected incorrect convictions).

¶ 22 Based on the foregoing, we affirm the trial court's judgment and order defendant's mittimus corrected as indicated.

¶ 23 Affirmed; mittimus corrected.