SECOND DIVISION
February 14, 2017

No. 1-14-2209

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. 13 CR 20504
	)	
EMANUEL GIBSON,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession of cannabis with intent to deliver and the trial court did not abuse its discretion in imposing a sentence of 24 months of intensive probation.

¶ 2 Following a bench trial, Emanuel Gibson, the defendant, was convicted of possession of cannabis with intent to deliver and sentenced to 24 months of intensive probation. On appeal, defendant challenges the sufficiency of the evidence to convict, arguing that he was mistakenly identified. Defendant also contends that the trial court abused its discretion in sentencing him

because it relied on an improper aggravating factor, *i.e.*, prior arrests that did not result in conviction.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from a narcotics surveillance operation conducted by Chicago police officers on September 17, 2013, which resulted in the arrest of defendant and three other men, Cory McAbee, Derrick Walker, and Oshawn Henderson. Following the arrest, defendant, McAbee, and Walker were charged with possession with intent to deliver more than 30 but less than 500 grams of cannabis. Prior to trial, defendant filed a motion to disclose the officers' point of surveillance. After conducting *in camera* interviews with two officers, the trial court denied the motion. Defendant thereafter proceeded to a bench trial without the codefendants.

¶ 5 At trial, Chicago police officer Robert Coutinho testified that around 9 p.m. on the evening in question, he was working as part of a "saturation team," the purpose of which was "to get rid of narcotic sales in the 3200 block of Congress." Officer Coutinho, a surveillance officer, was in radio communication with a second surveillance officer, Wayne Novy, and with four enforcement officers, two of whom were A. Iramiya and Chongho Chon. Officer Coutinho and Officer Novy set up surveillance in separate locations near 3260 West Congress Parkway. Officer Coutinho testified that his location was elevated and that the area was lit with streetlights on West Congress Parkway, Spaulding Avenue, and the alley. He made observations with the aid of binoculars.

¶ 6 Officer Coutinho testified that during his surveillance, he observed Henderson standing on the sidewalk at 3260 West Congress Parkway, about 150 feet from his surveillance location.

Henderson was yelling, "Weed, weed" to passing motorists and pedestrians.[1] Based on his 16 years of experience as a police officer, Officer Coutinho understood that "weed" was a street term used in the sale of cannabis. Officer Coutinho also saw McAbee and a man identified in court as defendant, standing at the mouth of the alley at 3260 West Congress Parkway. Defendant was about 50 or 60 feet away from Henderson.

¶ 7 While Officer Coutinho watched, a car approached Henderson. Henderson conversed briefly with the driver and directed the car toward defendant. After defendant and the driver had a brief conversation, the driver handed defendant an unknown amount of money. Defendant went over to an electric pole, removed items from a plastic Ziploc bag at the base of the pole, returned to the car, and handed the objects to the car's occupant. The car then drove off.

¶ 8 Officer Coutinho saw a second car approach Henderson. Again, Henderson had a short conversation with the car's occupants. The car then drove toward defendant and stopped. The car's passenger got out and briefly conversed with defendant. Defendant went to the electric pole, removed items from the plastic bag, returned to the passenger, and handed him the retrieved objects. The passenger got back in the car, which drove away.

¶ 9 Next, Officer Coutinho observed a pedestrian approach Henderson and engage him in conversation briefly. Henderson directed the man northbound to McAbee, who was on Spaulding Avenue. The man approached McAbee, spoke with him briefly, and handed him money.

[1] Initially, Officer Coutinho testified that two individuals were standing on the sidewalk and yelling, "Weed, weed." However, for the bulk of Officer Coutinho's testimony, he referenced only Henderson as standing on the sidewalk and calling out to passing motorists and pedestrians. We also note that while at one point, the transcript reflects Officer Coutinho said someone named "Anderson" was yelling, "Weed, weed," the parties do not dispute that the officer was actually referring to Henderson.

McAbee walked to a fence about 25 or 30 feet away from the electric pole, removed items from a bag, returned to the waiting man, and gave him the items. After this exchange, the man walked away. A second pedestrian then approached Henderson. Officer Coutinho testified that he observed a similar transaction involving Henderson, the pedestrian, and McAbee, with the same series of events, after which the second pedestrian left the area.

¶ 10 Officer Coutinho testified that defendant and McAbee both started yelling, "Re-up, re-up," which he understood to mean, "Get more stuff." In response, Walker, who had been standing alongside Henderson, ran to the alley at 3312 West Congress Parkway and retrieved a plastic bag from underneath a big bush. Walker took items from the plastic bag and ran to defendant and McAbee and gave them items. McAbee went back to the fence and hid his plastic bag, and defendant hid his plastic bag by the electric pole.

¶ 11 At this point, Officer Coutinho radioed enforcement officers and directed them to detain "the individuals on the corner." He observed enforcement officers arrive and detain the "defendants." Officer Coutinho and his fellow surveillance officer, Officer Novy, broke surveillance and walked to the area of 3312 West Congress Parkway. There, Officer Novy retrieved the large plastic bag that was hidden under the bush. Officer Novy gave the bag to Officer Coutinho, who determined it contained four smaller plastic bags, each of which contained 24 plastic Ziploc bags of suspect cannabis. Officer Coutinho kept those items in his care, custody, and control at all times.

¶ 12 Officer Coutinho testified that he relocated to where "the individuals" were being detained and identified them as the people he had seen involved in narcotics transactions. Back at the police station, Officer Iramiya and Officer Chan gave him a plastic bag containing 17 plastic

Ziploc bags of suspect cannabis and a Cheetos bag containing 18 plastic Ziploc bags of suspect cannabis. Officer Coutinho kept these items in his care, custody, and control and inventoried them. The bag recovered from underneath the bush was given inventory number 13005090, the Cheetos bag was given inventory number 13005102, and the third bag was given inventory number 13005106.

¶ 13 On cross-examination, Officer Coutinho stated that he could not recollect the clothing, hairstyle, height, or weight of the individual he had identified as defendant. He acknowledged that other than artificial street lighting, it was dark out, and that he was observing four different individuals during his surveillance, some of whom were 30 feet apart from each other. He explained that while he was using binoculars, at the same time, he could also watch with the naked eye. Officer Coutinho acknowledged that the area was residential, but stated that he did not notice any people out on the street "walking around" other than the two buyers he had earlier described. He explained, "It's a known narcotics location for the sale of cannabis and usually it's -- usually people come around there that purchase cannabis." Officer Coutinho also stated that none of the buyers were stopped because he wanted to continue watching the transactions.

¶ 14 On redirect examination, Officer Coutinho testified that from the time he notified enforcement officers to move in until they arrived at the scene, he did not lose sight of defendant. In addition, when Officer Coutinho relocated to the area where the offenders were being detained, he identified defendant to the enforcement officers. Officer Coutinho also stated that when defendant was detained, there were only four individuals on the corner: defendant, McAbee, Walker, and Henderson.

¶ 15 Chicago police officer A. Iramiya testified that on the evening in question, he was working with a narcotics surveillance team as an enforcement officer. That night, he was in radio communication with the surveillance officers, Officer Coutinho and Officer Novy. At some point, he was directed to move into the area of 3260 West Congress Parkway and detain "individuals" who had been described to him. Officer Iramiya testified that he and his team stopped some individuals, including defendant, who he identified in court. Officer Coutinho then directed Officer Iramiya and another enforcement officer, Officer Chon, to a utility pole. Officer Iramiya saw Officer Chon retrieve a clear plastic bag containing 17 smaller Ziploc bags of suspect cannabis from the ground at the base of the pole. Officer Coutinho next directed Officer Iramiya and Officer Chon to a fence, where Officer Iramiya recovered a potato chip bag containing 18 smaller Ziploc bags of suspect cannabis.

¶ 16 Officer Iramiya testified that the surveillance officers relocated to the area where the suspects were detained and positively identified them. After defendant and the other detained men were placed in custody, a custodial search of defendant revealed $174. Officer Iramiya testified that at the police station, he and Officer Chon gave Officer Coutinho the bags they had recovered.

¶ 17 The parties stipulated that with regard to inventory number 13005090 (the bag recovered from the bush), the total estimated weight was 81.2 grams and 37 of 96 items tested positive for 31.3 grams of cannabis; that with regard to inventory number 13005102 (the Cheetos / potato chip bag recovered by the fence), the total estimated weight was 15.1 grams and 12 of 18 items tested positive for 10.1 grams of cannabis; and that with regard to inventory number 13005106 (the bag recovered by the pole), the total estimated weight was 15.1 grams and 12 of 17 items

tested positive for 10.37 grams of cannabis. The parties further stipulated that a proper chain of custody was maintained at all times.

¶ 18 Defendant made a motion for a directed finding, which was denied by the trial court.

¶ 19 Defendant testified that on the date in question, he was a 28-year-old high school graduate, had an associate's degree, and had worked construction. Around 9:30 p.m., he was walking from a friend's home at 3335 West Van Buren Street toward the subway station at West Congress Parkway and South Kedzie Avenue. His route took him past 3250 West Congress Parkway. When asked to describe the area, defendant stated, "It's an expressway right there. It's a side street. It's a park, and at the end of the park it's a subway station." He estimated that there were over 20 people walking around the area, as it was a "summer night." He had $154 on him.

¶ 20 Defendant testified that as he got to the end of the park, he was cut off by a police officer and detained. When he asked the officer why he was being stopped, the officer replied that he "fit the description" because he was wearing a black hat. Defendant told the officer that his hat was dark blue, to which the officer responded that once they got to the station, everything would be worked out from there.

¶ 21 Defendant denied selling drugs or cannabis that evening, and denied that the money he was carrying was proceeds from drug sales.

¶ 22 In closing, defense counsel questioned Officer Coutinho's identification of defendant. Counsel noted that the drug transactions occurred at night, in an area lit only by streetlights, 150 feet from Officer Coutinho's surveillance location. He argued that because Officer Coutinho was observing the transactions through binoculars from a distance, it was "common sense" that the officer had to take his eyes off certain objects and locations in order to look at others. Counsel

argued that other people were coming and going in the area; that Officer Coutinho was unable to describe the clothing, height, or weight of the person he identified as defendant; and that defendant's testimony in his own defense had not been impeached.

¶ 23 Following closing arguments, the trial court found that the State had not proved defendant accountable for the charged offense, possession with intent to deliver more than 30 but less than 500 grams of cannabis. However, the trial court did find defendant guilty of possession with intent to deliver more than 10 but less than 30 grams of cannabis, a Class 4 felony. The trial court subsequently denied defendant's motion to reconsider.

¶ 24 At sentencing, the trial court indicated it was in possession of the presentence investigation (PSI) report. When the trial court asked for arguments in aggravation and mitigation, the prosecutor responded, "Just that he has had several arrests in his background, Judge." Defense counsel highlighted defendant's age; that he had graduated high school and earned an associate's degree; that he intended to earn a degree in physical therapy; that his prior employment included construction, rehabbing, and installation of sprinkler systems; and that he had a close relationship with his family, in particular his mother, who had been in court consistently.

¶ 25 The trial court then made the following statement:

> "Well, I must say now taking a look at the PSI, the defendant has had quite a number of arrests for cannabis offenses alleged. It appears that perhaps he was quite lucky in the past having covered the branch courts and knowing how a lot of these cases are handled or maybe he just wasn't guilty and the evidence wasn't

> there, but it is striking the number of arrests. If you want to be the weed man, we can send you to the penitentiary.
>
> * * *
>
> We've got a cell for you. This is a striking number. And perhaps the defendant was lulled into the belief that he would always get his weed cases thrown out, but that didn't happen here. This isn't my first time looking at this, but this is pretty striking."

¶ 26 After confirming with the attorneys that defendant was facing a potential sentence of imprisonment, the trial court asked defendant if he had anything to say. In allocution, defendant stated that "this whole thing" had put his life on hold; that he was ready to get out, redeem himself, and go on with his life; and that the police had arrested the wrong person based on a misunderstanding and his being in the wrong place at the wrong time.

¶ 27 The trial court stated that for purposes of sentencing, it had considered the evidence at trial; the gravity of the offense; the PSI report; the financial impact of incarceration; all evidence, information, and testimony in aggravation and mitigation; any substance abuse issues and treatment; the potential for rehabilitation; the possibility of sentencing alternatives; defendant's statement in allocution; and all hearsay presented deemed relevant and reliable. The trial court thereafter sentenced defendant to two years of intensive probation. Defendant did not file a motion to reconsider sentence.

¶ 28 On appeal, defendant first challenges the sufficiency of the evidence to convict, contending that he was mistakenly identified. Defendant argues that Officer Coutinho's testimony was vague, suggests it "was the product of a lie or simply embellished," and questions

the reliability of eyewitness identification testimony in general. He asserts that Officer Coutinho's ability to observe was questionable, given that the alleged transactions took place at night, 150 feet from the officer's surveillance location. He notes Officer Coutinho did not testify that the second buyer gave defendant any money; never testified regarding defendant's proximity to the pole; and could not describe the clothing, hairstyle, height, or weight of the individual he had identified as defendant. Defendant argues that it is unlikely Officer Coutinho did not lose sight of him during his surveillance, given that the officer was tasked with investigating a drug operation involving at least four moving sellers, two buyers in cars, and two pedestrian buyers. Defendant further highlights that no cannabis was recovered from his person, that he was educated and had no prior convictions, that he made no inculpatory statements, and that his trial testimony was not impeached. He argues that his version of events was credible, as he testified with particularity about the route he walked from his friend's house toward the subway station, his construction work explained the cash found on his person, and his testimony that approximately 20 other people were walking around in the area increased the possibility that he was the victim of mistaken identification.

¶ 29 When reviewing the sufficiency of the evidence, the relevant inquiry 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). The testimony of a single witness, if

positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A reviewing court will not reverse a conviction simply because the defendant claims that a witness was not credible. *Id*. Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 30 In this appeal, identity is the paramount issue. Identification of the defendant by a single witness is sufficient to sustain a conviction where the witness viewed the defendant under circumstances that permitted a positive identification. *Slim*, 127 Ill. 2d at 307. Such identification is sufficient even where the defendant presents contradictory testimony, as long as the witness had an adequate opportunity to view the offender and provided a positive and credible identification in court. *Id*. The resolution of a question of mistaken identity depends upon the credibility of the witnesses and the weight of the evidence. *People v. Bowel*, 111 Ill. 2d 58, 65 (1986).

¶ 31 Here, Officer Coutinho, an experienced officer, testified that he observed defendant engage in two drug transactions and then radioed enforcement officers. He stated that he did not lose sight of defendant from the time of his radio transmission until the enforcement officers arrived and detained defendant. After defendant was detained, Officer Coutinho moved from his surveillance post to the location of the detainment and identified defendant to the enforcement officers. Defendant contradicted the officer’s testimony and testified that he was doing nothing but walking to the subway when he was mistakenly arrested. Based on the trial court's finding of guilt, we find that the trial court rejected defendant's version of events in favor of the State's witness. The trial court apparently found Officer Coutinho's testimony credible, which was its

prerogative in its role as the trier of fact. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. The trial court was made well aware of the perceived deficiencies in the State's case during defense counsel's closing argument and made its ruling after considering all of the evidence. We find that the evidence, viewed in the light most favorable to the prosecution, was sufficient to establish that defendant possessed cannabis with the intent to deliver. The evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 32 Defendant's second contention on appeal is that the trial court abused its discretion in sentencing him because it relied exclusively on an improper aggravating factor, specifically, prior arrests that the State failed to "prove up." Defendant asserts that due to his lack of any prior convictions, his young age, his high school diploma, associate degree, and employment history, this court should reduce his sentence from 24 months of intensive probation to first-offender probation under section 410 of the Illinois Controlled Substances Act (720 ILCS 570/410 (West 2012)). Defendant acknowledges that he did not preserve any sentencing issues for appellate review, but nevertheless argues that this court should reach his claims via the plain error doctrine.

¶ 33 Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine

in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 (citing *Hillier*, 237 Ill. 2d at 545). Before we consider application of the plain error doctrine, we must determine whether any error occurred. *Wooden*, 2014 IL App (1st) 130907, ¶ 10. This is because without error, there can be no plain error. *Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 34 The mere fact that a trial court has knowledge of prior arrests before imposing sentence does not amount to reversible error because the trial court is presumed to have disregarded incompetent evidence. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 55. To justify reversal, " 'the record must affirmatively disclose that the arrest or charge was considered by the trial court in imposing sentence.' " *Id*. (quoting *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984)). Whether a court relied on an improper factor in imposing sentence presents a question of law that we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. In considering whether reversible error occurred, a reviewing court should make its decision based on the record as a whole, rather than focus on a few words or statements of the trial court. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 34-37.

¶ 35 After carefully reviewing the sentencing hearing transcript, we find that the trial court did not rely on defendant's prior arrests when imposing sentence. At the opening of the sentencing hearing, the prosecutor stated that his only argument in aggravation was that defendant had several arrests in his background. The trial court commented on those arrests, noting that according to paperwork attached to the PSI report, defendant had "quite a number of arrests for cannabis offenses alleged." The court told defendant that if he wanted to "be the weed man," it

could send him to prison, and twice noted that it found the number of cannabis arrests to be "striking." However, this was the extent of the trial court's consideration of the arrests.

¶ 36 After making the above comments, the trial court confirmed that defendant was facing a potential prison sentence and heard defendant's statement in allocution, during which defendant maintained his innocence. The trial court then listed the factors it was considering in fashioning a sentence: the evidence introduced at trial; the gravity of the offense; the PSI report; the financial impact of incarceration; all evidence, information, and testimony in aggravation and mitigation; any substance abuse issues and treatment; the potential for rehabilitation; the possibility of sentencing alternatives; defendant's statement in allocution; and all hearsay presented deemed relevant and reliable. Critically, the trial court did not indicate that it was considering defendant's prior arrests. The trial court also did not impose the prison term it had warned defendant about at the time it mentioned the prior arrests, but rather, imposed a term of probation. In these circumstances, we cannot agree with defendant that the trial court relied on his prior arrests in imposing sentence.

¶ 37 Sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We may not alter a sentence absent an abuse of discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Sentences within the permissible statutory range may be deemed the result of an abuse of discretion only where they are "greatly at variance with the spirit and purpose of the law, or

manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 38 Here, the record indicates that the trial court was well aware of the mitigating factors identified by defendant on appeal: his lack of any prior convictions, his age, his high school diploma, associate degree, and employment history. Not only were these factors included in the PSI report, but defense counsel also highlighted at sentencing that defendant was young, that he had graduated from high school and earned an associate's degree, that he intended to earn a degree in physical therapy, that his prior employment included construction, rehabbing, and installation of sprinkler systems, and that he had the support of his family. Where mitigating evidence has been presented, it is presumed that the trial court considered it. *People v. Sven*, 365 Ill. App. 3d 226, 242 (2006).

¶ 39 Defendant was convicted of a Class 4 felony, which is subject to a term of imprisonment between one and three years (730 ILCS 5/5-4.5-45(a) (West 2012)), probation of no longer than 30 months (730 ILCS 5/5-4.5-45(d) (West 2012)), or 24 months of first-offender probation (720 ILCS 570/410 (West 2012)). In this case, the trial court sentenced defendant to 24 months of probation, during which he would be subject to the Adult Probation Department Intensive Probation Supervision program. This sentence falls well within the range of available penalties. Given the facts of the case, the interests of society, and the trial court's stated consideration of relevant aggravating and mitigating factors, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. Accordingly, we find no abuse of discretion. Because the

trial court did not commit error in sentencing defendant, plain-error analysis does not apply. *Powell*, 2012 IL App (1st) 102363, ¶ 19. Defendant's excessive sentence argument is forfeited.

¶ 40 Anticipating our determination regarding forfeiture, defendant argues in the alternative that trial counsel was ineffective for failing to object to the trial court's reliance on mere arrests in aggravation, failing to argue for first-offender probation, and failing to preserve these errors in a postsentencing motion. Given our determination that the trial court did not commit error in sentencing defendant, we find that counsel was not ineffective. See *People v. Edwards*, 195 Ill. 2d 142, 163-64 (2001) (it is not incompetence for counsel to refrain from raising issues that are without merit). Defendant's claim of ineffectiveness fails.

¶ 41 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 42 Affirmed.