2017 IL App (1st) 150401-U

No. 1-15-0401

Order filed September 1, 2017

Fifth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 13 CR 17670
	)	
CYNTHIA KING,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Any error in the trial court's exclusion of certain defense-elicited evidence at trial as hearsay was harmless beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Cynthia King was convicted of possession of a controlled substance (15 to 100 grams of heroin) and sentenced to four years' imprisonment. On appeal, defendant contends that the court erred in excluding certain evidence elicited by the

defense on the basis that it was inadmissible hearsay. The State responds that the evidence was properly excluded and that its exclusion was harmless beyond a reasonable doubt. We affirm.

¶ 3 On August 12, 2013, the circuit court issued a search warrant to search a described woman known only as "Cent," and a certain first-floor apartment, for heroin and related documents, paraphernalia, and money. Defendant was subsequently charged with possession of a controlled substance (15 to 100 grams of heroin) with intent to deliver, allegedly committed on or about August 12, 2013.

¶ 4 In her opening statement at trial, defense counsel argued in part that the evidence would show that the heroin at issue was possessed by a Mr. Dodds, including that the court "will hear information that he told the police that he wanted to be a confidential informant and they would then consult the *** State's Attorney's Office to see if that was a possibility."

¶ 5 At trial, Officer Nicholas Duckhorn testified that he and other officers executed the search warrant at the apartment on August 12. When he entered one of the bedrooms, he saw defendant and Chester Dodds sitting on opposite sides of the bed. Dodds was on the side closest to the dresser. Duckhorn told them to raise their hands, and defendant complied but Dodds put his hands into his pockets. Duckhorn then found on Dodds a straw containing white powder he suspected to be heroin. After defendant and Dodds were removed from the bedroom, Duckhorn searched it and found a lease for the apartment bearing defendant's name. Elsewhere in the apartment, he found letters addressed to defendant at that address. In the kitchen, he found a grinder, sifter, and bags of packaging.

¶ 6 On cross-examination, Duckhorn testified that the packaging found in the kitchen was not tested for narcotics residue, nor was any money found. While two letters were recovered, other letters were present but not recovered. Duckhorn spoke briefly with Dodds. When defense

counsel asked "And he told you during that conversation that he wanted to…," the State made a hearsay objection. Defense counsel argued that the conversation was not offered for the truth of the matter asserted therein but to show bias and motive for arresting defendant rather than Dodds. However, counsel did not describe the conversation's content in her argument nor make an offer of proof as to its content. The court sustained the objection, finding that the conversation did not involve defendant but a "third party who is not in court and *** in order for me to believe that a statement somehow goes to this witness's mode of bias I would have to sort of accept the statement as being offered for the truth of the matter asserted within the statement."

¶ 7 Officer Arletta Kubik testified to participating in the execution of the search warrant. She entered the same bedroom as Duckhorn did, and also saw defendant and Dodds seated on opposite sides of the bed with Dodds "right next to the dresser." Kubik noticed a black bag next to the nightstand on defendant's side of the bed. After defendant was removed from the bedroom, Kubik found inside the black bag 91 plastic bags of a substance she suspected to be heroin. She also saw atop the dresser three plastic bags of a substance she suspected to be heroin.

¶ 8 Officer Matt Borkowski testified to recovering and inventorying 91 bags of powder from next to the nightstand and three bags of powder from the top of the nightstand, as directed by Kubik. He also recovered from a dresser in the bedroom a black bag containing a grinder, sifter, and packing tape. On cross-examination, Borkowski testified that the grinder was not tested for narcotics residue.

¶ 9 The parties stipulated to forensic testing of the recovered bags: 40 of the 91 bags tested positive for 15.7 grams of heroin, and the three bags tested positive for 0.9 grams of heroin. The parties also stipulated that the powder in Dodds's straw tested positive for heroin.

¶ 10 Following closing arguments, the court found defendant guilty of possession of a controlled substance. While the amount of suspected heroin could be evidence of intent to deliver, no large sums of money were found, and the paraphernalia could have been used for innocent purposes such as grinding coffee. The mail was not decisive that the apartment was defendant's but the lease was, and indeed the lease could have been sufficient to impute the 91 bags to defendant even if she was not in the apartment at the time. However, the three bags from the dresser could as easily have been Dodds's as defendant's, the court found.

¶ 11 Defendant filed a posttrial motion. She argued in relevant part that the court erred in sustaining the State's hearsay objection to evidence regarding Dodds's conversation with police, because the evidence was not offered for the truth of the matter asserted but to show bias and motive for arresting defendant rather than Dodds. However, the content of the conversation was not described in the written motion or at the motion hearing. The court denied the motion and proceeded to sentencing, where defendant was sentenced to four years' imprisonment.

¶ 12 On appeal, defendant contends that the court erred in excluding as inadmissible hearsay Duckhorn's proposed testimony that Dodds offered to be an informant. The State responds that the exclusion was proper and harmless beyond a reasonable doubt.

¶ 13 Hearsay – a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" – is generally inadmissible. Ill. R. Evid. 801(c) (eff. Oct. 15, 2015), 802 (eff. Jan. 1, 2011). A declarant is a person who makes a statement, and a statement is an oral or written assertion, or nonverbal conduct of a person intended by the person as an assertion. Ill. R. Evid. 801(a), (b) (eff. Oct. 15, 2015). An out-of-court statement offered to prove its effect on the listener or to show why the listener subsequently acted as he did is not hearsay and is admissible. *People v. Brown*, 2017 IL

App (1st) 142877, ¶ 46. Conversely, the hearsay rule generally bars evidence of a third-party declaration of culpability for a defendant's alleged offense unless there is " 'considerable assurance of [its] reliability.' " *People v. Whitfield*, 2017 IL App (2d) 140878, ¶ 114, quoting *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973). We review a trial court's decision regarding the admission of hearsay for abuse of discretion. *Brown*, ¶ 46. An evidentiary error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the judgment, or when no reasonable probability exists that the trier of fact would have acquitted the defendant absent the error. *Whitfield*, ¶ 102.

¶ 14 "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [in] case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Ill. R. Evid. 103(a)(2) (eff. Jan. 1, 2011). "[W]hen a trial court bars evidence, no appealable issue exists unless the denied party makes an offer of proof." *People v. Boston*, 2016 IL App (1st) 133497, ¶ 64, citing *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). "If a criminal defendant claims on appeal that he was not able to prove his case because the trial court improperly barred him from presenting evidence but he failed to make an adequate offer of proof, he forfeits review of the issue on appeal." *Id.*

¶ 15 Here, defendant made no offer of proof in the trial court as to the content of the conversation between Duckhorn and Dodds. Defendant also did not describe the content in her posttrial motion challenging the hearsay ruling. The only time she touched upon the content in the trial proceedings was the opening-statement remark that there would be evidence that Dodds offered to be a confidential informant and "they" (presumably the police) would discuss the matter with the State's Attorney. However, that remark did not by itself inform the court who the

evidence was going to come from and what exactly the evidence was proposed to be, as an offer of proof would have. The court did not know when the State made its hearsay objection to Duckhorn's testimony whether defendant had another source for the evidence mentioned in her opening statement. Conversely, defendant did not make it clear to the court when arguing against the hearsay objection that the evidence she was trying to elicit was the evidence mentioned in her opening statement. If the trial court erred in excluding the evidence at issue as hearsay, because defendant was not offering it for its truth but for its effect on Duckhorn and to provide a pro-defense explanation of Duckhorn's actions, the error was not clear and obvious in light of the incomplete argument presented by the defense. However, the State has not raised forfeiture on appeal and thus has forfeited a forfeiture argument. See *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 28.

¶ 16 That said, we find any error in the exclusion of this evidence harmless beyond a reasonable doubt. Defendant wanted to elicit the evidence to show police bias and motive; to cast doubt upon defendant's arrest for possessing the heroin in the bedroom when Dodds was also in the bedroom. There was, however, an explanation of why the officers chose to arrest defendant rather than Dodds that did not involve the officers' bias or motives. There was evidence that defendant was the tenant of the apartment, and the trial court found that evidence decisive. The court called the lease "extraordinarily strong" evidence and stated that "[e]ven if the defendant had not been there, the discovery of the lease there might have in and of itself shown that the defendant was the one in possession of the 91 bags that were found." Under such circumstances, admission of the evidence at issue would not have affected the outcome of the trial.

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.