2017 IL App (2d) 150659-U
No. 2-15-0659
Order filed July 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DERRICK L. JOHNSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 12-CF-1757 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly instructed the jury to disregard testimony that was nonresponsive, and, although the court erred in sustaining a hearsay objection, that error was harmless, as essentially the same testimony was otherwise admitted and the evidence as a whole was not close.

¶ 2 After a jury trial, defendant, Derrick L. Johnson, was convicted of unlawfully delivering cannabis (720 ILCS 550/5(d) (West 2012)) and sentenced to 120 days' periodic imprisonment and 40 months' probation. On appeal, defendant contends that the trial court erred in sustaining the State's objections to two questions asked of his witness. We affirm.

¶ 3 At trial, the State first called Jeff File, who testified as follows. On July 13, 2012, he was a State police officer assigned to a regional narcotics task force that was investigating Krisada Mark Cheung. That day, at 3:55 p.m., File and Inspector Mark Crumlett, posing as potential marijuana purchasers, met Cheung at his workplace. Defendant was not there. File told Cheung that he wanted to buy four ounces of cannabis. Cheung responded that he could sell File that amount for $1,300 after he got off work. File called Cheung later, and they agreed to meet outside the Target in North Aurora. At 4:51 p.m., File called Cheung, and Cheung agreed to sell File only two ounces of marijuana, for $700. At 5:21 and 5:35, they again spoke by phone and agreed to meet outside the Target.

¶ 4 At 5:55, as File was riding with Crumlett, he and Cheung spoke by phone once more. Two minutes later, File and Crumlett entered the Target lot and parked. Another car parked two or three spaces north. File recognized Cheung as the driver; the other occupants were two black men, one in the front passenger seat and the other in the backseat directly behind Cheung. File walked toward the car. Cheung and the front passenger motioned File to enter, but File declined and went up to the driver's window. Cheung said that the window was broken. He rolled down the window by the backseat passenger, whom File identified in court as defendant.

¶ 5 File testified further as follows. By defendant's feet was a clear, airtight freezer bag containing what appeared to be cannabis. Referring to the bag, File asked " 'Can I see it?' " Defendant told File to give Cheung the money. File did not do so but repeated his request. Defendant told him to give Cheung the money and defendant would simultaneously hand him the package. File handed Cheung the money; as he did so, defendant picked up the package from the floorboard and handed it to File. File asked whether "it weighed right," *i.e.*, he was getting the quantity promised; defendant responded that it did and that he had "watched them weigh it

out." File tucked the package under his shirt and returned to Crumlett's car. Before arriving at the Target parking lot, he had not had any contact with defendant.

¶ 6 File testified that, on September 24, 2012, he and a sergeant interviewed defendant at the police station. Defendant said that his brother, Travis Johnson, had been the third person in the car. Defendant wrote out answers to a series of questions. In them, he stated in part as follows. Cheung picked him up at the community college and then drove to the Target. There had been cannabis in the car, placed under Cheung's seat. Defendant handed the cannabis to File. File gave money to Cheung. Defendant did not remember telling File to hand the money to Cheung. He did not tell File that he had seen the cannabis being weighed out. Following the transaction, defendant went home.

¶ 7 Crumlett testified as follows. Before July 13, 2012, he had known Cheung, the target of his investigation. Defendant had not been involved in the investigation up to that point. The meeting that day was intended to introduce File to Cheung so that File could start buying cannabis from him. After parking at the Target, Crumlett saw the other car drive up and recognized Cheung as the driver. Two other men were in the car: defendant was sitting directly in back of Cheung, and Travis was in the front passenger seat. Two of the men waved at the undercover officers to come over. File exited, walked over to the driver's side, and started a conversation. File then moved back and spoke through the rear window. Defendant handed File an object, which File put underneath his shirt. File then returned to Crumlett's vehicle.

¶ 8 Inspector Timothy Cooney testified that he had assisted with surveillance on July 13, 2012. His description of the transaction was similar to Crumlett's.

¶ 9 Rhonda Earl, a forensic scientist with the Illinois State Police crime lab in Rockford, testified that the contents of the package weighed 55.3 grams and tested positive for cannabis. In her expert opinion, the substance was cannabis.

¶ 10 The State rested. Defendant called Travis. On direct examination, he testified as follows. On July 13, 2012, he drove to Cheung's apartment. They were planning to go to the Fox Valley Mall that evening, with Cheung driving. Defendant was at basketball practice at the community college; he called and asked Travis for a ride home. Travis agreed that Cheung would drive defendant home later.

¶ 11 Travis testified that, after Cheung picked up defendant, Travis sat in the front passenger seat and defendant sat in back of Cheung. Cheung insisted on "making a stop which led to going to Target." At this point, the examination continued:

> "Q. All right. Did [Cheung] tell you or [defendant] in this meantime what he was doing at Target?
>
> A. No.
>
> MR. COYLE [Assistant State's Attorney]: Objection, hearsay.
>
> MR. SPARKS [defense attorney]: It goes to the effect on the listeners and what [defendant] and Travis knew about what was going on at that time."

At a sidebar, defendant argued that, by "the effect on the listeners," he was referring to a "question the jury's going to have to answer, whether or not [defendant] knew [that] what he was handing the officer was in fact cannabis; and what [Cheung] told him regarding that goes to [defendant's] knowledge of what was going on at the time." The judge responded, "Okay. That's exactly hearsay then" and sustained the State's objection.

¶ 12 Defendant's attorney then asked Travis, "Did you know why you were going to Target that evening?" Travis responded, "No."

¶ 13 Travis testified further as follows. After Cheung parked at the Target, the undercover vehicle drove up. File exited on Travis's side but walked around to the driver's side. Because the driver's window would not roll down, Cheung rolled down the back window where defendant was sitting. There was no conversation between File and defendant. Defendant handed File a package. The package had been "put under the seat by [Cheung]." Cheung had said nothing to defendant about what was in it. After File took the package, Cheung turned around and grabbed something. Defendant did not converse at all with the officer. Travis had not seen Cheung put the package into the car.

¶ 14 Travis testified that defendant never received any money from the transaction. Travis never saw Cheung weigh out any cannabis that day. After the transaction, Cheung drove defendant home, and he and Travis drove to the Fox Valley Mall. Asked whether he had been aware that a cannabis delivery had just taken place, Travis testified, "I had the idea."

¶ 15 Travis testified on cross-examination as follows. Just before the exchange, the package had been "pushed underneath to [defendant]." It had been underneath Cheung's seat, Travis was "guessing," because "that's where [defendant] got it from." Asked whether phone calls had been made to Cheung during the ride to the Target, Travis testified that he was not aware of any such calls. Defendant gave File the package just before Cheung received what Travis assumed was the money. Defendant did not say that he did not want to give the package to the officer, and he did not hand it to Cheung or Travis.

¶ 16 On redirect examination, Travis testified that possibly five seconds elapsed between when Cheung pushed the package from under the seat and when File took the package. Thirty seconds elapsed before Cheung had what Travis understood to be the money in his hands.

¶ 17 On re-cross-examination, the State asked, "How did [Cheung] push the package underneath the seat? Can you describe that?" Travis responded, "He reached under his seat and pushed it back, and told [defendant] hand this to the officer—well, he didn't say officer; he said hand it to the guy." The State asked that Cheung's statement be stricken as "beyond the question that the [S]tate was asking." The court granted the request and instructed the jury to disregard Cheung's statement "as opposed to the description of the package being slid."

¶ 18 After Travis testified, defendant made the following offer of proof:

> "If Travis Johnson were called to testify, he would testify that while [defendant] was in the vehicle from [the community college] to the Target that's in question, [Cheung] did not tell either [defendant] or Travis that they were going to make a cannabis delivery, whether there was cannabis in the car, or [that] cannabis was involved in any way with regard to that trip to the Target.
>
> Additionally, Travis Johnson would also testify that *** Cheung instructed [defendant] to *** hand that to the officer, and that is referring to a package that was located under the seat at [defendant's] feet, and the same package that [defendant] did in fact hand to the officer."

¶ 19 Defendant rested. In rebuttal, File testified that at no time did he see Cheung push a package from underneath his seat to defendant. When File walked up to Cheung's car, he could see the package on the floorboard next to defendant.

¶ 20 In closing argument, the State noted the evidence that defendant had known that he was delivering cannabis. This included File's testimony that he called Cheung several times while defendant was in the car; that, when he asked Cheung, " 'Can I see it?,' " defendant told him to give Cheung the money; that defendant said that he had seen the product weighed out; that the cannabis was in a clear plastic bag; and that defendant picked up the package from the floorboard right next to him. Knowledge could also be inferred from the circumstances: a stranger parked nearby, approached the car, refused to get in, and apparently handed money to Cheung in exchange for a package. In arguing that the State had not proved guilty knowledge, defendant noted that, before the transaction, the investigation had not involved him in any way. Further, he received no money from the deal, and he had been in the car only because Cheung and Travis had agreed to pick him up and give him a ride.

¶ 21 After the jury found defendant guilty, he moved for a new trial. His motion contended in part that the court erred in sustaining the State's hearsay objection when defendant asked Travis whether Cheung had told either him or defendant what he was going to do at Target. According to defendant, the offer of proof showed that Travis's answer would not have been hearsay. Also, defendant contended, Cheung's instruction to defendant to hand the package to File was not hearsay. The trial court denied defendant's motion. After a hearing, the court sentenced him to 120 days' periodic imprisonment and 40 months probation. He timely appealed.

¶ 22 On appeal, defendant contends that the trial court erred in (1) sustaining the State's objection when defendant asked Travis whether, during the ride, Cheung said anything about what he intended to do at the Target; and (2) instructing the jury to disregard Travis' testimony that Cheung told defendant to give the package to File. Defendant contends that neither question

involved hearsay and both were relevant to his theory that the State did not prove that he knew that the package that he handed to File contained cannabis. We hold that any error was harmless.

¶ 23 In general, the admission of evidence is within the trial court's discretion and will be reviewed for an abuse of discretion. *People v. Burgund*, 2016 IL App (5th) 130119, ¶ 192. However, when no facts are in dispute, whether a given statement is inadmissible hearsay is a question of law subject to *de novo* review. *Id.*

¶ 24 For convenience, we first address the second alleged error: the trial court's instruction to the jury to disregard Travis's testimony on re-cross-examination that Cheung told defendant to "hand [the package] to the guy." Defendant argues that Cheung's command was not hearsay. The flaw in this argument is that the court did not base its decision on hearsay. The State asked Travis only to describe how Cheung pushed the package from under his seat. Travis did so but then added Cheung's alleged remark. The State objected that this uninvited testimony was nonresponsive; the court agreed. Defendant does not contend that the court erred in relying on this ground. Thus, he has forfeited any contention of error. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Further, the court did not abuse its discretion, as the testimony that it struck was indeed nonresponsive. See *People v. Fritz*, 84 Ill. 2d 72, 80 (1981).

¶ 25 We turn to defendant's other contention of error: that the court erred in sustaining the State's hearsay objection after he asked Travis whether Cheung told either him or defendant "what he was doing at Target." According to the offer of proof, Travis would have testified that Cheung did not tell them that he was going to deliver cannabis, that there was cannabis in the car, or that cannabis was involved in any way in the trip to the Target. We agree with defendant that the court erred in holding that Travis's testimony would have been hearsay. But we agree with the State that the error was harmless.

¶ 26 Hearsay is "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." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Hearsay is inadmissible unless otherwise allowed by rule or statute. Ill. R. Evid. 802 (eff. Jan. 1, 2011). However, testimony about an out-of-court statement that is offered for a purpose other than to prove the truth of the matter asserted is not hearsay. *In re Charles W.*, 2014 IL App (1st) 131281, ¶ 35.

¶ 27 We agree with defendant that the trial court erred. The offer of proof showed that defendant was not seeking to admit a statement at all but to prove that no statement (on the point at issue) had been made. Hearsay is an out-of-court *statement* (Ill. R. Evid. 801(c) (eff. Jan. 1, 2011), not the nonexistence of an out-of-court statement. If there is no statement, there can be no hearsay.

¶ 28 Further, regardless of what Travis might have said in response to defendant's question, it would not have been hearsay. Evidence that is intended to show a person's knowledge or awareness of a circumstance, and not to establish the truth of the circumstance, is not hearsay. *People v. Prather*, 2012 IL App (2d) 111104, ¶ 11. Here, the intent of defendant's question was not to establish the truth of whatever Cheung said about his purpose in driving to the Target. Instead, it was to adduce evidence that defendant did not know that Cheung was planning a drug deal. This was relevant to defendant's defense that he did not *knowingly* deliver cannabis to File. Thus, even absent the offer of proof, the trial court's ruling was based on an error of law.

¶ 29 We conclude, however, that the error was harmless. Although the court did not allow Travis to testify that Cheung said nothing about his reason for going to the Target, he was able to testify that, during the drive, he was unaware of Cheung's purpose. This statement essentially implied that Cheung said nothing about his purpose to either defendant or Travis; had he done

so, Travis would not have been unaware of it. Thus, practically speaking, the jury was told of Cheung's nondisclosure of his intent to sell cannabis, and it would have gained nothing had Travis been allowed to make that point explicit.

¶ 30 Moreover, we agree with the State that the evidence was not closely balanced on the issue of defendant's knowledge. File's testimony, if credited, was overwhelming evidence that defendant knew he was delivering contraband. But even aside from that, there was uncontradicted evidence that defendant was aware of what was going on. The circumstances of the encounter, a hand-to-hand exchange of a package for cash from a stranger in a parking lot, were such that he could hardly have failed to recognize that a drug sale was unfolding. (Travis even admitted that he "had the idea.") There was no evidence (other than Cheung's excluded command) that defendant needed prompting to hand the package to File or that he resisted or hesitated. Moreover, File testified that defendant told him to hand the money to Cheung; in his written statement, defendant did not contradict this claim but said only that he could not remember one way or the other.

¶ 31 Given that the trial court's improper application of the hearsay rule did not prevent defendant from eliciting essentially the same information by other means, and that the evidence was not closely balanced, we conclude that the court's error was harmless. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 32 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 33 Affirmed.