2017 IL App (2d) 160470-U
No. 2-16-0470
Order filed August 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1842
FRANKIE W. LEWIS,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to prove defendant guilty beyond a reasonable doubt, and the trial court did not err by denying defendant's motion to dismiss the indictment or by denying defendant's motion to withdraw his jury waiver. Affirmed.

¶ 2 Following a bench trial, defendant, Frankie W. Lewis, was convicted of delivery of a controlled substance. He was sentenced to serve six years in prison. He appeals his conviction, contending that there was insufficient evidence of his guilt. He also contends that the trial court erroneously denied his motions to: (1) dismiss the State's indictment; and (2) withdraw his jury waiver. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 6, 2014, defendant was indicted along with his codefendants Adam Neeley and Matthew Fitting on one count of unlawful delivery of a controlled substance. The State alleged that defendant knowingly and unlawfully delivered to another between 15 and 100 grams of a substance containing cocaine. See 720 ILCS 570/401(a)(2)(A) (West 2014). Neeley and Fitting are not parties to this appeal.

¶ 5 On December 15, 2015, defendant filed a motion to dismiss the charge. He argued that the State was violating his due process rights by charging him with a crime based on hearsay, and that no reasonable trier of fact could find him guilty of the offense beyond a reasonable doubt. In support, defendant asserted that he was never found with any drugs, and that the police had not witnessed him taking part in any drug-related transactions.

¶ 6 On February 23, 2016, following arguments, the trial court denied defendant's motion to dismiss. The trial court proceeded to admonish defendant of his right to a jury trial and defendant executed a signed jury waiver. The parties agreed to a trial date of May 9, 2016.

¶ 7 On May 9, 2016, as the bench trial was set to begin, defense counsel moved for a continuance. He informed the trial court that he was not ready to proceed, explaining that he did not have adequate time to prepare with defendant. The trial court denied the motion, noting that it had been approximately 18 months since defendant's indictment, and that defense counsel had been given almost three months to prepare for trial.[1]

[1] Defendant asserts that, after the trial court denied his motion for a continuance, it denied his verbal motion to withdraw his jury waiver. However, this exchange does not appear in the report of proceedings, nor does any written motion appear in the record.

¶ 8 The evidence at trial established generally that Adam Neeley was arrested for attempting to sell cocaine to an undercover police officer. In exchange for a reduced sentence, Neeley agreed to help the authorities identify his drug supplier. The police recorded Neeley making two phone calls to an unidentified individual whom Neeley claimed was defendant. As alleged by the State, Neeley and defendant arranged to meet at a Citgo gas station to exchange the money from Neeley's recent drug sale. Shortly after Neeley's second phone call, officers observed defendant leave his home and drive toward the Citgo station. However, the officers stopped defendant and arrested him before he got to the Citgo station, and the State did not introduce any phone records to corroborate Neeley's testimony that he had in fact called defendant's phone number. Defendant maintained at trial, as he does in this appeal, that the State's circumstantial evidence was insufficient to prove that he was the unidentified individual on the recorded phone calls with Neeley.

¶ 9 The State's first witness was Vincente "Vince" Roman, a special agent with the Lombard Police Department. He testified as follows. In October 2014, Roman was working undercover as "Vince." He had purchased cocaine from Neeley on multiple occasions, communicating through text message, phone calls, and in person. On October 20, 2014, he contacted Neeley with a request to purchase four ounces of cocaine. As was customary, Neeley had to talk to his supplier. Neeley later contacted Roman and said that he could provide two ounces right away, with the other two ounces coming shortly thereafter. Neeley and Roman agreed to meet the next day, October 21, at a McDonald's parking lot in Hinsdale, to exchange two ounces of cocaine. On October 21, prior to the meet, Neeley informed Roman that the price of the delivery would be reduced because it was about three grams short of two ounces. Neeley then arrived at the meet in a vehicle with an unknown individual who was later identified as Matthew Fitting. Neeley got

into the passenger seat of Roman's car and handed him a bag containing a white powdery substance. When Neeley asked for the money, Roman gave his fellow officers a predetermined signal to arrest Neeley.

¶ 10 Roman identified the State's first exhibit as the same bag that he was given by Neeley. He admitted that he never submitted the bag for fingerprint testing, and that he was not aware of whether any other officer had submitted the bag for such testing. Roman also admitted that he had never heard Neeley mention defendant's name during any of their previous exchanges. Rather, the first time that he had ever heard defendant's name was after Neeley's arrest.

¶ 11 The State's next witness was Neeley. He testified as follows. Neeley had sold cocaine to Roman on multiple occasions. He had previously known Roman as "Vince." On October 20, when Roman requested four ounces of cocaine, Neeley said that he needed to call his supplier, whom he identified in court as defendant. After he talked to defendant, Neeley told Roman that he could provide only two ounces of cocaine. On October 21, Neeley was accompanied by Fitting. Before the meet with Roman, Fitting drove Neeley to defendant's home to pick up the cocaine. Defendant came to the car and gave Neeley a plastic bag containing a substance that Neeley recognized to be cocaine. Neeley did not pay defendant at that time, as they had agreed that Neeley would return with the money after he "made the deal." Neeley and Fitting then went to Fitting's home to weigh the cocaine. Neeley determined that the package was about three ounces short. He notified defendant and Roman of the shortage. Defendant agreed to sell the cocaine at a reduced price of $1,280. Fitting then drove Neeley to the McDonald's to meet with Roman. When they arrived, Neeley entered the passenger seat of Roman's car and gave Roman the package that he had obtained from defendant. Neeley was then arrested and taken to the

police station. In exchange for a reduced sentence, he agreed to cooperate with law enforcement officials in identifying his source of the cocaine.

¶ 12 The officers instructed Neeley to place two separate phone calls to defendant. Both phone calls were monitored and recorded by police officers. Defendant objected to the recordings being admitted into evidence, arguing that the State had not produced any records to verify that Neeley had in fact dialed defendant's phone number. Moreover, defendant argued, there was nothing to prove that defendant was the person who had answered the calls. The trial court overruled defendant's objection, finding that the lack of authentication would be factored into the weight of the evidence. The recordings were then played for the trial court.

¶ 13 Both phone calls were brief. No names were mentioned and there were no specific drug references. The first call was placed at 9:29 p.m. Neeley confirmed that the unidentified individual was home and stated that he was "on [his] way back." Neeley also asked whether the individual had the "other two." The individual responded that he did not. The second call was placed at 11:24 p.m. Neeley said, "I got that twelve eighty for you." He asked the individual to meet him at a nearby Citgo gas station, explaining that he was stuck with a flat tire. The individual responded, "I got you. Give me like five or ten minutes." Neeley then asked again whether the individual had the "other two," and the individual responded that he would be able to get it "first thing in the morning."

¶ 14 Neeley explained that, during the first call, when he said, "I'm on my way back," he was implying that he was on his way back from making the drug deal. When he said, "I got that twelve eighty for you," he was implying that he had the money from the drug deal. Finally, when he said, "dude wanted the other two," he was implying that the buyer still wanted the other two ounces of cocaine.

¶ 15 Neeley testified that, after he made the first call, the officers asked him for information about defendant. They drove Neeley to defendant's neighborhood and Neeley showed them where defendant lived. Neeley pointed out a red Monte Carlo, which he identified to the officers as defendant's car. The officers then took Neeley to a nearby gas station and directed him to place the second call. During the second call, Neeley told defendant to meet him at a Citgo gas station that was a few blocks from defendant's home. At the direction of the officers, Neeley claimed that he was stuck with a flat tire.

¶ 16 Neeley testified that he used his own cell phone to make the calls to defendant. He knew that he was calling defendant because he had defendant's phone number stored in his cell phone. Even though defendant was never identified by name, Neeley recognized the voice on the other end of the calls to be that of defendant. Neeley explained that the two had gone to school together since junior high. They had also played football together and they had spoken on the phone hundreds of times.

¶ 17 Finally, Neeley explained that there were several gas stations located in an area near defendant's home. This included a Mobile station, a Citgo station, and a Clark station. Neeley testified that he placed the second call to defendant as he sat with officers at the Mobile station. However, he told defendant that he was stuck at the Citgo station; the Citgo station was across the street from the Mobile station. Defendant was ultimately pulled over and arrested in the parking lot of the Clark station, which was between defendant's home and the Citgo station.

¶ 18 Sergeant Andrew Anselm, of the Illinois State Police, testified that he was a member of the team that arrested defendant. On October 21, he was informed that officers had overheard a phone conversation during which Neeley had arranged to pay his drug supplier for two ounces of cocaine. Anselm was provided with defendant's address, picture, and description, as well as a

description of defendant's car. He parked in a minivan with two other agents in a school parking lot directly across the street from defendant's home. Anselm testified that defendant left his home about 20 minutes after Neeley made the second call. Anselm observed that defendant matched the photograph and description that he had been given. Defendant got into a red Monte Carlo and proceeded toward the Citgo gas station. Anselm followed. Shortly thereafter, another officer pulled defendant over into the parking lot of a gas station and placed him under arrest.

¶ 19 On cross-examination, Anselm admitted that he had never observed defendant taking part in any drug-related transactions, and that defendant did not possess any drugs at the time of his arrest. Anselm also admitted that he never saw defendant collect any money from Neeley. Finally, Anselm admitted that the arrest team never searched defendant's home, nor did they attempt to obtain a warrant to search defendant's home.

¶ 20 During closing arguments, the State argued that this was a "classic accountability case," and that defendant was accountable for Neeley's conduct during the exchange with Roman. In response, defense counsel argued that the State had failed to prove that Neeley was talking to defendant during the two phone calls, or that defendant was on his way to meet with Neeley at the time of his arrest.

¶ 21 In finding defendant guilty, the trial court focused on the substance of the audio recordings. We present the trial court's ruling in its entirety:

> "THE COURT: All right. The Court had the opportunity to review the evidence that was presented during the course of the trial. This really boils down, to my mind, to the recording because there were numerous things that the police I think could have done to have strengthened their case, which would have made it a lot easier to make a decision in this case.

But it does come down to the recording and what's on the recording and whether the defendant is the person on the recording. That's what it really boils down to in this situation.

Mr. Neeley testified. No question he got a wonderful deal from the State in return for his testimony and his arranging or what he arranged in this particular case. He testified I believe credibly that he made this call, that he called the number that was on his phone to [defendant]. I listened to the recordings again. It's interesting in my mind that neither party has to identify themselves to the other. There is no hi, this is or anything else. Both parties recognize who it is that they are talking to.

Mr. Neeley testified to his knowledge of [defendant]. He has known him since junior high school. He has had numerous conversations with him. [Neeley] [r]ecognized him with the voice.

Now we get to the substance of the conversation itself, which again is couched in terms that this Court has heard many times on overhears and how people discuss these things. They don't openly discuss what is being talked about. But it's known between them what is being referenced.

He talks about the twelve eighty that he has for the person on the other line. He asked whether he has the other two, and the person indicates he doesn't but he will have it later, and tomorrow will be a go. Those are references to drug transactions in this Court's mind. There is no question about that.

Mr. Neeley comes up with a story about the flat tire and that he is at the Citgo station and that the person should come by there to pick up the money. The person indicates he knows where the Citgo station is, and they hang up the conversation, and that

> interestingly enough, within 20 minutes, [defendant] is leaving his house. He gets in his car and heads in the direction at least of the Citgo station.
>
> Would it have been in my mind a much easier case to decide if they had let him go to the Citgo station or even had the transaction exchange of money to take place, certainly, it would have been a stronger case. But the question is, is this proof beyond a reasonable doubt that [defendant] is the person on the other end of the line, and that this is the person that [defendant] has had these various transactions with and was the person who had supplied the particular cocaine at issue, and I believe that that transaction, as indicated in the recording, is proof beyond a reasonable doubt. There is a finding of guilty."

¶ 22 Defendant filed a motion for a new trial, which the trial court denied, and the parties proceeded to a sentencing hearing. The trial court sentenced defendant to serve six years in prison. Defendant now brings this timely appeal.

¶ 23 II. ANALYSIS

¶ 24 Before addressing the merits of this appeal, we note that the State has moved within its brief to strike certain portions of defendant's statement of facts as improperly argumentative. We agree with the State that there are instances where defendant fails to state the facts accurately and without argument or comment. See Ill. S. Ct. R. 341(h)(6) (eff. Jan 1, 2016). We will therefore disregard the improper portions of defendant's statement of facts.

¶ 25 Turning to the merits, defendant contends that his conviction violates the *corpus delicti* rule, and that the State's evidence was otherwise insufficient to prove him guilty beyond a reasonable doubt. He also contends that the trial court erred by denying his motion to dismiss

the indictment and by denying him the opportunity to withdraw his jury waiver. We will address these issues in turn.

¶ 26 In support of his contention that the State's evidence was insufficient, defendant first argues that his conviction violates the *corpus delicti* rule. "The *corpus delicti* of an offense is simply the commission of a crime." *People v. Lara*, 2012 IL 112370, ¶ 17. The *corpus delicti* rule provides that, "[w]here a defendant's confession is part of the proof of the *corpus delicti*, the prosecution must also adduce corroborating evidence independent of the defendant's own statement." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010).

¶ 27 Although the State made no attempt to introduce a confession from defendant in this case, defendant argues that the *corpus delicti* rule should be extended to apply to the statements of an accomplice. According to defendant, even though Neeley was acting as an informant at the time he made the phone calls, he was still acting as an accomplice when he told the officers that defendant had supplied the cocaine for his meet with Roman. Defendant argues that Neeley's statement to the officers should be treated the same as a defendant's confession under the *corpus delicti* rule, meaning that the State was required to adduce independent evidence corroborating that defendant had supplied the cocaine for Neeley's meet with Roman. Finally, defendant argues that the audio recordings of the phone calls did not independently corroborate Neeley's statement to the officers; rather, the recordings constituted *dependant* evidence, meaning that the *corpus delicti* rule was not satisfied.

¶ 28 The State counters by noting that our supreme court rejected defendant's *corpus delicti* argument in *People v. McElvain*, 341 Ill. 224 (1930). The defendant in that case was convicted of larceny of a hog. He had been jointly indicted with Cleve Riley. However, the State dismissed the charge against Riley, who then testified at the defendant's trial that he had seen the

defendant kill the hog and place it in his wagon. *Id*. at 226-27. On appeal, the defendant argued that Riley's testimony amounted to a confession that was insufficient to prove the *corpus delicti*. Our supreme court held that this argument was meritless, as Riley was no longer a defendant in the case when he testified, and there had been no attempt to introduce a confession of the defendant. *Id*. at 229. Furthermore, even if Riley was considered an accomplice, "a conviction for larceny may be had upon the uncorroborated testimony of an accomplice, provided the jury believe the testimony of such accomplice is true." *Id*. (citing *People v. Frankenberg*, 236 Ill. 408 (1908)).

¶ 29 Our research does not reveal any cases since *McElvain* that have squarely considered whether the *corpus delicti* rule is applicable to any statements other than a defendant's confession. However, our courts have repeatedly held that the testimony of an accomplice witness can be sufficient to sustain a criminal conviction. See *People v. Tenney*, 205 Ill. 2d 411, 429 (2002) ("We recognize that the testimony of an accomplice witness has inherent weaknesses and should be accepted only with caution and suspicion. Nevertheless, the testimony of an accomplice witness, whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt."); see also *People v. Zambrano*, 2016 IL App (3d) 140178, ¶ 26; *People v. Carrilalez*, 2012 IL App (1st) 102687, ¶ 32; *People v. Rojas*, 359 Ill. App. 3d 392, 399 (2005). These holdings implicitly reject any notion that the *corpus delicti* rule could be applied to the statements of an accomplice.

¶ 30 We also disagree with defendant that the concerns underlying the *corpus delicti* rule are implicated with Neeley's statements in this case. The *corpus delicti* rule evolved due to a historical mistrust of out-of-court confessions that is generally attributed to: "(1) some individuals' tendency to confess, for various psychological reasons, to offenses that they did not

commit or that did not occur, and (2) the unreliability of coerced confessions." *Lara*, 2012 IL 112370, ¶ 19. Here, Neeley was caught during the commission of a crime, and in exchange for a reduced sentence, he agreed to identify his drug supplier. There is no risk that Neeley falsely confessed to committing a crime that may or may not have occurred. Defendant points to Neeley's admission during cross-examination that he was scared after he was arrested, and argues that Neeley was motivated to falsely identify his drug supplier in an effort to receive a reduced sentence. However, these circumstances do not necessitate application of the *corpus delicti* rule. Rather, they are simply factors to be considered in weighing the sufficiency of the evidence.

¶ 31 For all of these reasons, we reject defendant's argument that the *corpus delicti* rule should be extended to apply to the statements of an accomplice. Therefore, the State was not required to adduce evidence that independently corroborated Neeley's statement to police that defendant supplied the drugs for the meet with Roman. See *Sargent*, 239 Ill. 2d at 183. The upshot is that this appeal turns on a straightforward analysis of the sufficiency of the evidence.

¶ 32 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry him. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (adopting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, " 'the relevant question 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.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). We will not substitute our judgment for that of the fact finder on questions regarding the weight to be given a witness's testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and the reasonable inferences to be drawn from the testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242

(2006). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). We will not reverse a conviction on grounds of insufficiency unless the evidence was "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261.

¶ 33 Here, the State argues that defendant was legally accountable for Neeley's crime of unlawfully delivering cocaine to Roman. See 720 ILCS 570/401(a)(2)(A) (West 2014). "A person is legally accountable for the conduct of another when *** either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2014). "Evidence of accountability may be circumstantial." *People v. Calderon*, 369 Ill. App. 3d 221, 235 (2006).

¶ 34 We begin by addressing the trial court's finding that Neeley testified credibly. Because Neeley received a reduced sentence in exchange for his cooperation, his testimony must be cautiously scrutinized on appeal. See *People v. Hunt*, 2016 IL App (2d) 140786, ¶ 47. However, beyond his involvement in the crime and his incentive to identify his drug supplier, we see no reason to doubt the veracity of Neeley's testimony. As we will explain, Neeley's version of the events was consistent with those provided by agent Roman and Sergeant Anselm. Furthermore, his testimony that defendant supplied the cocaine for the meet with Roman was supported by the circumstantial evidence in this case: namely, the content of the audio recordings and defendant's actions shortly after the second phone call. Thus, we will not disturb the trial court's finding that Neeley testified credibly. See *Sutherland*, 223 Ill. 2d at 242.

¶ 35 Roman testified that, while working undercover, he had purchased cocaine from Neeley on multiple occasions. Roman also testified that Neeley would typically check with his drug supplier before completing the transactions. This implies that Neeley shared a common criminal design with at least one other person. See *People v. Fernandez*, 2014 IL 115527, ¶ 13 (noting that, when two or more people engage in a common criminal design, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement). Roman also corroborated Neeley's testimony that the price of the delivery would be reduced, because it was about three grams short of two ounces, and that Neeley's supplier could provide another two ounces of cocaine in the near future. This was consistent with the conversations on the audio recordings, as Neeley and the unidentified individual discussed "twelve eighty" and the "other two." Hence, it is reasonable to infer that Neeley was speaking to his drug supplier during the recorded phone conversations.

¶ 36 Moving on, Neeley's cooperation with police led them to obtain a picture and a physical description of defendant, as well as defendant's address and a description of his car—a red Monte Carlo. Neeley then followed the officers' instructions during the phone calls, claiming that he was stuck with a flat tire, and luring the unidentified individual to the nearby Citgo gas station. The individual responded, "I got you. Give me like five or ten minutes." Anselm testified that, about 20 minutes after the second phone call, a person matching defendant's picture and physical description left the home at the address provided by Neeley, got into a red Monte Carlo, and drove toward the nearby Citgo station. These circumstances support the reasonable inference that defendant was the unidentified individual who was speaking with Neeley during the recorded phone conversations.

¶ 37 Defendant disagrees, stressing that the State never introduced any phone records to establish the phone number that Neeley actually dialed. However, Neeley testified that he knew that he was calling defendant's phone number while he was being overheard and recorded by police, explaining that he had defendant's phone number stored in his cell phone, and that he had used his own cell phone to make the calls. Neeley also recognized the unidentified voice on the other end of the phone calls to be that of defendant, explaining that the two had gone to school together since junior high, played football together and spoken on the phone hundreds of times. Contrary to defendant's argument, Neeley's credible testimony and the circumstantial evidence combined to provide a sufficient basis for the trial court's finding that Neeley was talking to defendant during the recorded phone conversations.

¶ 38 Defendant also argues that the trial court erroneously relied on its experiences in other cases to interpret the meanings of the recorded phone calls. He maintains that an expert opinion was necessary to support the finding that the phone calls were related to drug transactions. We disagree. "Triers of fact are entitled to use their knowledge and observations in life when considering the evidence presented." *People v. Jones*, 2017 IL App (1st) 143403, ¶ 38. We have reviewed the audio recordings, and given the context of Neeley's discussions with Roman about a reduced price for the delivery and the possibility of obtaining two more ounces of cocaine, it was reasonable for the trial court to infer that the recorded conversations related to drug transactions.

¶ 39 Finally, defendant argues that the evidence was insufficient to prove that he was on his way to meet Neeley when he was pulled over and arrested. He points out that he was pulled over just a few blocks from his home, in an area adjacent to I-57. According to defendant, the reasonable inference is that the officers stopped him before he got to the Citgo station because

they were afraid that he was actually heading elsewhere, and that he was going to drive by the Citgo station. Again, we disagree. Defendant's theory is premised on an unlikely set of coincidences: he left his home within 20 minutes of Neeley's second phone call to complete an innocent errand that required him to drive toward the Citgo station. It was reasonable for the trial court to reject this explanation for defendant's actions.

¶ 40 In sum, while we agree with defendant that the State could have done more to strengthen its case, we cannot say that the evidence was "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261. To the contrary, the evidence was sufficient to prove that defendant aided or abetted Neeley with the intent to promote or facilitate Neeley's unlawful delivery to Roman. See 720 ILCS 5/5-2(c) (West 2014); see also *People v. Anders*, 228 Ill. App. 3d 456, 465 (1992) ("A person who arranges or promotes the sale of narcotics is as guilty of the sale as the actual seller of the drug involved.").

¶ 41 Before we conclude, we address defendant's contentions that the trial court erred by denying his motion to dismiss the indictment and by denying him the opportunity to withdraw his jury waiver.

¶ 42 When moving to dismiss an indictment, a defendant generally may not challenge the adequacy and sufficiency of the evidence underlying an indictment. *People v. Hart*, 338 Ill. App. 3d 983, 990 (2003). "When addressing a defendant's motion to dismiss a charge for failure to state an offense, a trial court is limited to assessing the legal sufficiency of the charge and may not evaluate the evidence that the parties might present at trial." *People v. Redwood*, 335 Ill. App. 3d 189, 192-93 (2002). A trial court may dismiss an indictment if the defendant establishes that he has suffered a prejudicial denial of due process, but the defendant must establish that the denial of due process is unequivocally clear, and that the prejudice is actual and substantial.

People v. Holmes, 397 Ill. App. 3d 737, 741 (2010). The trial court's ruling on a motion to dismiss a charge is reviewed *de novo*. *People v. Soliday*, 313 Ill. App. 3d 338, 342 (2000).

¶ 43 Here, defendant cites subsection 114-1(8) of the Code of Criminal Procedure, which provides for the dismissal of an indictment on grounds that the charge does not state an offense. 725 ILCS 5/114-1(8) (West 2014). However, he argues that "*the facts in the present case* (emphasis added) failed to state an offense for an indictment of unlawful delivery of a controlled substance." This is precisely the type of argument that the trial court was precluded from considering. See *Soliday*, 313 Ill. App. 3d at 341-42 (reversing the trial court's grant of a motion to dismiss a charge because the defendant never claimed that there was a failure to state an offense, but instead argued that the evidence was insufficient). Defendant goes on to argue that his due process rights were violated because the State charged him, but he provides no basis for any such violation. In his motion, he argued that the State was violating his due process rights by charging him with a crime based on hearsay. This argument has no merit, as "a valid indictment may be based entirely on hearsay." *People v. Fassler*, 153 Ill. 2d 49, 60 (1992). Thus, the trial court was correct to deny defendant's motion to dismiss the indictment.

¶ 44 Finally, we reject defendant's contention that the trial court erred by denying his motion to withdraw his jury waiver. The State properly notes that the record is devoid of any such written or verbal motion. However, the parties indicated during the hearing on defendant's motion for a new trial that a motion to withdraw the jury waiver had indeed been made. The prosecutor commented that a verbal motion was made on the morning of the bench trial, after the trial court denied defendant's motion for a continuance. She suggested that, by moving to withdraw defendant's jury waiver, defense counsel was actually making a "last-ditch effort" to obtain a continuance. In denying defendant's motion for a new trial, the trial court stated:

> "In terms of the jury demand, as the State points out, the first request was for a continuance which was denied. And then the jury request is made. And I find it hard to believe that you weren't prepared for trial. This case started November 20th of 2014. It was set for trial on February 23rd of 2016, so that was almost a year and-a-half after it started. And then there was another three months between the date the trial was set and the actual trial itself, with preparation time."

¶ 45 Assuming that the motion to withdraw the jury waiver was properly made, defendant's argument is nonetheless meritless. "The question of whether a jury waiver may be withdrawn rests within the discretion of the trial court unless the circumstances indicate the defendant was unaware of the consequences of the waiver." *People v. Hall*, 114 Ill. 2d 376, 414 (1986). Here, defendant makes no argument that he was unaware of the consequences of his jury waiver. Rather, he argues that he was entitled to withdraw his jury waiver because there would have been no resulting prejudice to the State. See *People v. Catalano*, 29 Ill. 2d 197, 203 (1963) (stating that the question of whether a defendant's motion for withdrawal of a jury waiver is timely made involves a consideration of whether it was "made at a time when the granting thereof would result in delay of the trial, would impede justice or prejudice the State, or would inconvenience the witnesses"). However, the trial court appears to have denied defendant's motion on the basis that it would unnecessarily delay the trial, which was an appropriate basis for such a ruling. See *Id*. At any rate, defendant has not shown that the trial court abused its discretion.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 48 Affirmed.