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FIRST DIVISION
Rule 23 filed April 7, 2014
Modified upon denial of rehearing May 27, 2014

No. 1-13-0546
2014 IL App (1st) 130546-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|----------------------------------|---|---------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | No. 11 CR 01152 |
| |) | |
| LAVERRIC DONALDSON, |) | Honorable |
| |) | Thomas J. Hennelly, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* Evidence at trial was not sufficient to prove defendant guilty of delivery of a controlled substance under an accountability theory.
- ¶ 2 Defendant Laveric Donaldson was convicted of delivery of a controlled substance under an accountability theory. On appeal, defendant argues that the evidence at trial was insufficient to prove him guilty of the offense. We reverse.
- ¶ 3 In October 2010, a team of Chicago police officers planned to conduct an undercover narcotics purchase. The team included two surveillance officers, an undercover buy officer, and

two enforcement officers. According to the plan, the surveillance officers would observe a location where they suspected narcotics transactions were occurring. After identifying a suspected seller, the surveillance officers would notify the undercover officer, who would then approach the seller and purchase narcotics. When the transaction was complete, the surveillance officer would leave the area and notify the enforcement officers, who would then arrest the seller.

¶ 4 Officers Louie and Daniels were tasked to perform surveillance during the operation, and when they arrived in the area they set up separate surveillance points. According to both officers, they saw two men standing on a nearby street corner. One of the men was identified as Jermaine Webb and the other was defendant. The officers testified that they observed the men for about 10 to 15 minutes. While the officers watched, they saw what they believed to be four or five narcotics transactions. During each apparent transaction, an unknown person would approach Webb and engage in conversation. Webb would then leave the corner and walk a short distance down the street. Although Officer Louie was unable to see where Webb went, Webb remained in view of Officer Daniels, who testified that Webb walked to a parked car and retrieved a small plastic bag from the ground near the rear driver's side. After removing items from the bag, Webb replaced the bag and returned to the corner, where both officers saw Webb pass something to the unknown person, who then left the scene. Upon his return, Webb would also converse with defendant. During the course of the transactions, defendant remained on the corner and did not accompany Webb to the car.

¶ 5 Believing that Webb was selling narcotics, the surveillance officers radioed the undercover officer, Officer Bishop, who was waiting nearby in an unmarked car. After receiving a description of Webb, Officer Bishop drove to the corner, where Webb approached her. Officer

Bishop asked Webb for two “blows” (slang for heroin), and Webb once again walked over to a nearby parked car and retrieved some items by the rear driver’s side tire. When Webb returned, he handed Officer Bishop a bag containing what was later determined to be heroin. Officer Bishop then gave Webb a \$20 bill whose serial number the team had previously recorded, and she left the scene.

¶ 6 During the transaction, Officer Bishop only saw Webb and did not see defendant. According to the surveillance officers, who witnessed the entire transaction, just prior to Officer Bishop’s arrival defendant had left the corner and crossed the street, where he remained until Officer Bishop departed. After she left, however, both surveillance officers saw Webb cross the street to rejoin defendant. Officer Daniels (but not Officer Louie) saw Webb hand defendant some money, and then the two walked back across the street together.

¶ 7 After leaving the area, Officer Bishop radioed to the team that a successful narcotics transaction had occurred. Officer Kuykendall, one of the enforcement officers, testified that he received a description of the alleged sellers and was told that a confirmed narcotics transaction had taken place. When he and his partners arrived at the buy location, they apprehended defendant and Webb, who fit the descriptions Officer Kuykendall had received. After searching the pair, Officer Kuykendall discovered that defendant had the prerecorded \$20 bill, as well as other bills, for a total of around \$100. Officer Kuykendall did not arrest defendant and Webb at that time, however, because the team planned to gather additional evidence about narcotics transactions in the area before making a series of arrests. Officer Kuykendall let defendant and Webb go after gathering identifying information about them, and defendant and Webb were arrested pursuant to warrants several months later and were charged with delivery of a controlled substance.

¶ 8 Webb appears to have accepted a plea bargain (the record is not entirely clear on that point), but defendant proceeded to a jury trial, where he was convicted of delivery of a controlled substance under an accountability theory. The circuit court sentenced defendant to seven and a half years in prison, and defendant appealed.

¶ 9 The only issue on appeal is whether the evidence at trial was sufficient to convict defendant of delivery of a controlled substance under an accountability theory. When reviewing a challenge to the sufficiency of the evidence, we must “consider[] all of the evidence in the light most favorable to the prosecution” and “must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime.” *People v. Brown*, 2013 IL 114196, ¶ 48. “[A] reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. [Citations.] Although these determinations by the trier of fact are entitled to deference, they are not conclusive. Rather, a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. [Citations.]” *Id.* This same standard of review applies regardless of whether the defendant receives a bench or jury trial (*Id.*) and whether the evidence is direct or circumstantial (*People v. Pollock*, 202 Ill. 2d 189, 217 (2002)).

¶ 10 The State tried defendant based on an accountability theory, which is governed by section 5-2 of the Criminal Code of 1961 (720 ILCS 5/5-2 (West 2010)). As relevant here, the section states:

“When accountability exists. A person is legally accountable for the conduct of another when:

* * *

(c) 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 (West 2010).

¶ 11 To prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13. Intent may be inferred from the character of the defendant's acts and the circumstances surrounding the commission of the offense. *People v. Perez*, 189 Ill. 2d 254, 266 (2000). See also *People v. Taylor*, 164 Ill. 2d 131, 142 (1995) (taking into account the defendant's actions surrounding the perpetration of the crime when discussing accountability). Under the common-design rule, if two or more people engage in a common criminal design or agreement, 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 and all are equally responsible for the consequences of the further acts. *Fernandez*, 2014 IL 115527, ¶ 13.

¶ 12 Of note, mere presence of a defendant at the scene of the crime does not make the defendant accountable for the offense. *Taylor*, 164 Ill. 2d at 140. Moreover, presence at the scene plus knowledge that a crime was being committed, without more, is also insufficient to establish that the defendant is accountable. *Id.* Nonetheless, active participation has never been a requirement for finding a defendant accountable, and one may aid and abet without actively participating in the overt act. *Id.* Ultimately, however, unless the defendant intends to aid in the commission of a crime, no guilt will attach. *Perez*, 189 Ill. 2d at 268.

¶ 13 There is no question that the evidence was sufficient to prove that Webb committed the crime of delivery of a controlled substance. However, the evidence was insufficient to find that defendant shared Webb's criminal intent or was engaged in a common design with him to sell drugs. The officers' testimony established that defendant remained on the street corner while Webb went back and forth to a vehicle and conducted four or five transactions. Defendant then crossed the street and was not present for Webb's transaction with Officer Bishop. On cross-examination, the two surveillance officers, Officer Louie and Officer Daniels, acknowledged that they did not observe defendant participate in the transactions in any way. Officer Louie testified as follows:

“Q. And you already stated you never saw [defendant] receive any money from Mr. Webb?

A. Yes. That's correct, yes.

Q. And you couldn't hear any of the conversations that were taking place?

A. That's correct.

Q. You didn't see [defendant] making any gestures towards passing by vehicles to attract their attention?

A. No.

Q. You didn't see him—you didn't hear him yelling anything as far as rocks or blows?

A. No.

Q. And the prior transactions prior to Officer Bishop, you never saw [defendant] receive any money from Mr. Webb on those prior occasions either; is that fair to say?

A. No.

Q. Okay. And you never saw [defendant] go to the location where Mr. Webb was going, where the suspect narcotics were?

A. No.”

¶ 14 Officer Daniels testified almost identically:

“Q. I want to take you back just briefly and ask you about some of your observations that you saw prior to Officer Bishop making her controlled purchase?

A. Okay.

Q. You stated you saw four to five transactions. You never saw or heard [defendant] soliciting or trying to wave down vehicles, did you?

A. No.

Q. You never saw him—You never heard him say anything, did you?

A. No, I didn’t.

Q. You didn’t see him go over to the parked car where the narcotics were, did you?

A. No.”

¶ 15 After the transactions, defendant received money from Webb. During his portion of the encounter, Officer Kuykendall discovered that defendant had the prerecorded \$20 bill, among other bills, for a total of around \$100.

¶ 16 As a whole, the evidence shows that defendant was present during Webb's drug transactions and then was given money, which included the proceeds from Webb's sale to Officer

Bishop. Even when viewed in the light most favorable to the prosecution, this evidence failed to establish defendant's intent to aid or abet Webb. The officers could not hear the contents of defendant's conversation with Webb and did not observe defendant have anything to do with selling drugs, such as interact with buyers or retrieve drugs. Indeed, defendant was not even present for one of the transactions. Although defendant may have known the nature of Webb's activities, defendant's knowledge and presence at the scene are insufficient to establish accountability. *Taylor*, 164 Ill. 2d at 140. Further, the single piece of evidence of defendant's participation—his receipt and possession of money that included the prerecorded \$20 bill—only raises a suspicion that he was involved, and suspicions and probabilities cannot sustain a conviction. *People v. Mason*, 211 Ill. App. 3d 787, 790 (1991). See also *People v. Roppo*, 234 Ill. App. 3d 116, 127-28 (1992) (no accountability for delivery of a controlled substance where defendant was seen passing an object to a co-defendant who made a cocaine delivery to an undercover agent, but the defendant was not present or mentioned at other drug transactions involving the co-defendant and the undercover agent); *People v. Rouser*, 199 Ill. App. 3d 1062, 1066 (1990) (insufficient evidence of intent to deliver where the defendant possessed \$250 in marked money, but "no evidence was presented that the defendant had anything to do with the sale" of drugs).

¶ 17 In reaching this result, we are not persuaded by the State's reliance on *People v. Tinoco*, 185 Ill. App. 3d 816 (1989). There, the defendant's position "transcended that of a mere observer" where, beyond collecting funds used to purchase drugs, defendant was an active participant during multiple transactions. *Tinoco*, 185 Ill. App. 3d at 823. Defendant discussed the quality and quantity of the drugs with an undercover officer and appeared whenever a co-defendant told the undercover officer that this "source" was present. *Id.* at 823-24. Here, by

contrast, there was no evidence of what Webb and defendant were discussing and defendant was never observed to have interacted in any way with either the drugs or buyers. In light of the lack of evidence of defendant's intent to assist with Webb's drug sales, the evidence was insufficient to find defendant guilty based on a theory of accountability.

¶ 18 For the foregoing reasons, the judgment of the circuit court is reversed.

¶ 19 Reversed.