FIFTH DIVISION
JULY 22, 2016

No. 1-14-1132

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 15730
	)	
MARTY DEAR,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his conviction for delivery of a controlled substance, less than one gram.

¶ 2 Following a bench trial, defendant Marty Dear was found guilty of delivery of a controlled substance and possession of a controlled substance. He was sentenced to six years' imprisonment for the delivery conviction and a concurrent three-year term on the possession count. On appeal, defendant contests the sufficiency of the evidence to sustain his conviction for delivery of a controlled substance. For the following reasons, we affirm.

¶ 3 Defendant's convictions arose from the July 21, 2013, sale of heroin in the area of Kildare Avenue and Madison Street in Chicago, Illinois. After his arrest, defendant was charged with: (1) possession of heroin, 1 to 15 grams, with the intent to deliver within 1000 feet of a school; (2) possession of heroin, less than one gram, with the intent to deliver within 1000 feet of a school; (3) delivery of heroin, less than one gram, within 1000 feet of a school; (4) possession of heroin, 1 to 15 grams, with the intent to deliver; (5) possession of heroin, less than one gram, with the intent to deliver; and (6) delivery of heroin, less than one gram. The court convicted defendant on counts V and VI. On count V, the court entered a conviction for "possession of a controlled substance less than 15 grams."

¶ 4 At trial, Officer Jeremiah Forsell testified that at around 5 p.m. on the day in question, he was on site as a surveillance officer for a "controlled buy" in a known "high narcotics area." From his covert vehicle, he observed defendant outside of a Family Dollar store wearing a blue Yankees hat, a gray and white striped t-shirt, and blue shorts. He witnessed defendant "engage[] in several suspect hand-to-hand narcotics transactions." When asked to describe the transactions, Officer Forsell testified that defendant would briefly converse with individuals on foot and in vehicles and then exchange items for United States currency. Officer Forsell was able to observe the items tendered to the individuals on foot and suspected they were narcotics. After witnessing approximately five transactions, he radioed for an undercover officer to come make an attempt to buy, and described the transactions and defendant to his team.

¶ 5 Officer Forsell further testified that after his message, he observed Officer Nestor DeJesus arrive in a covert vehicle, walk toward defendant, and engage him in conversation. He witnessed Officer DeJesus receive an item in exchange for "1505 funds" (prerecorded funds),

return back into his vehicle, and leave the scene. He then heard Officer DeJesus transmit a radio message verifying that a positive narcotics transaction had taken place and describing defendant at his last location. A short time later, defendant disappeared into the Family Dollar for about five minutes. When he emerged, Officer Forsell requested enforcement officers to detain defendant. Officer Nicholas Duckhorn arrived on the scene in a police vehicle about two minutes later. Defendant ran, and Officer Duckhorn pursued him on foot as his partner followed in the vehicle. They apprehended defendant about one block away. Officer Forsell then observed Officer DeJesus drive past and heard Officer DeJesus confirm over the radio that defendant was the subject who engaged in the narcotics transaction with him.

¶ 6 On cross-examination, Officer Forsell testified he was about 10 feet from defendant during the controlled buy and believed that defendant retrieved the heroin from the right pocket of his shorts. He maintained surveillance of defendant until he was taken into custody. Officer Forsell did not observe defendant with bags or other items when he exited the Family Dollar, nor did he observe defendant dispose of anything from his pockets during the pursuit.

¶ 7 Officer DeJesus testified that he was directed to an address on the 4200 block of West Madison Street, where he exited his undercover vehicle and walked up the sidewalk toward defendant, who was also on foot. Defendant was dressed in a blue Yankees hat, a striped shirt, and blue shorts. Officer DeJesus told defendant he wanted to purchase "money bags." Defendant responded, "How many?" Officer DeJesus was familiar with the term "money bags" as a result of previous narcotics purchases the police had conducted in the area. The term was commonly used in the area to refer to small ziplock bags of heroin imprinted with green dollar sign logos. Officer DeJesus requested one "money bag" and defendant tendered one ziplock "bag of money bag logo

heroin" to Officer DeJesus in exchange for $10 in 1505 funds. Placing the ziplock bag in his pocket, the officer returned to his vehicle, where he verified the narcotics transaction to his team via radio, describing defendant and his last location. About 15 minutes later, he drove to where defendant was being detained and identified him as the subject who sold him the heroin. He then returned to the station with the ziplock bag and inventoried it under number 12958806. Later, he received additional items of suspect heroin from Officer Duckhorn and inventoried those items under numbers 12958817 and 12958813.

¶ 8 On cross-examination, Officer DeJesus testified that another black male and two females were also at the scene when he arrived for the controlled buy. The $10 in 1505 funds were not recovered. Defendant was facing him when he stopped his vehicle 50 feet away from the location where defendant was detained for about 30 seconds and identified defendant.

¶ 9 Officer Duckhorn testified that he and his partner headed to the Family Dollar on Madison Street in response to Officer DeJesus' message confirming the controlled narcotics transaction. The message described defendant as a 200-pound, 5' 11" black male wearing a Yankees hat, gray-and-white striped shirt, and blue jean shorts. Officer Duckhorn arrived at the scene of the controlled buy in a marked police vehicle, and defendant fled. He ran after defendant and his partner followed in the vehicle. Defendant retrieved several items from his right pant pocket and threw them to the ground. Defendant was apprehended after about one block. Officer Duckhorn left defendant with his partner and recovered three ziplock bags of suspect heroin marked with dollar signs from where he had observed defendant discard items. He brought the bags back to the station and gave them to Officer DeJesus to inventory. At the station, he searched defendant and found an additional bag of suspect heroin and a $20 bill in the

right pocket of his shorts, which he also gave to Officer DeJesus to inventory. Officer DeJesus showed him the bag he purchased. The packaging of all five of the ziplock bags was identical.

¶ 10 On cross-examination, Officer Duckhorn testified that he observed other individuals when he arrived at the Family Dollar, but only defendant ran. Both he and his partner were present when defendant was handcuffed. While Officer Duckhorn remained at that location, he did not observe Officer DeJesus.

¶ 11 It was stipulated, in relevant part, that the five packets of suspect heroin inventoried in this case showed a positive presence of heroin: (1) number 12958806, purchased and inventoried by Officer DeJesus contained 0.4 grams; (2) number 12958817, the three packets recovered by Officer Duckhorn at the scene, contained a total of 1.1 grams; and (3) number 12958813, the packet recovered from defendant when searched at the station, contained 0.4 grams. The State rested and defendant's motion for a directed finding was denied.

¶ 12 Defendant testified that he went to the area of Kildare and Madison to purchase heroin for his own use at about 5:30 p.m. on the day in question. He was in his mid-forties and had been a heroin user for over nine years. According to defendant, he purchased some heroin from a "fellow seller. We call him Bugzie, Bugs." Defendant claimed that a few seconds after the purchase, the police pulled up. Defendant and Bugs ran, but only Bugs escaped. Two officers apprehended defendant but one of them walked off. Defendant claimed he was searched twice: once at the scene, and then later at the police station, where the heroin he bought was recovered from his left pocket. Defendant denied selling heroin, tossing anything away during the chase, and going into the Family Dollar.

¶ 13 On cross-examination, defendant testified that he was wearing a blue and gray Yankees hat, a striped gray shirt, and gray khaki shorts. Bugs was wearing blue jeans and a gold and blue shirt, but Bugs had dreadlocks, so he could not wear a hat. Defendant estimated that he spent "a good 40 bucks" per day on his heroin habit, but admitted he was unemployed. He claimed to support himself by washing cars at the car wash. Defendant's 2006 conviction for possession of a controlled substance was admitted as rebuttal evidence for the limited purpose of impeaching his credibility.

¶ 14 The court found defendant guilty of possession of a controlled substance, less than 15 grams, and delivery of a controlled substance, less than one gram. The court determined "the officers' testimony as to the identification of [defendant] to be very credible," and noted that Officer Duckhorn corroborated the clothing description provided by both of the other officers, and that defendant admitted to wearing a Yankees hat, a striped shirt, and shorts. The court accepted the State's explanation for the missing 1505 funds, noting that defendant had the opportunity to "disappear" the funds while he was out of sight in the Family Dollar.

¶ 15 In denying defendant's motion for a new trial, the court reiterated its credibility finding in relation to the police and their consistent descriptions of defendant. The court again noted that defendant had the opportunity to discard the 1505 funds in the Family Dollar. The court rejected defendant's contention that he was merely a buyer.

¶ 16 On appeal, defendant contests the sufficiency of the evidence to sustain his conviction for delivery of a controlled substance. He argues that the trial court erroneously rejected his testimony that he was present at the scene as a buyer, not a seller, and challenges the credibility and weight afforded to the testimony at trial in light of sparse physical evidence. Defendant also

argues that his acquittal on the charges involving possession with intent to deliver and his conviction for simple possession cast further doubt on the sufficiency of the evidence to sustain his conviction for actual delivery.

¶ 17 When a defendant challenges the sufficiency of the evidence to sustain his conviction, 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. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In a bench trial, the trial court determines the credibility of the witnesses, weighs the evidence, draws reasonable inferences therefrom, and resolves any conflicts in the evidence. *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 62. Accordingly, reviewing courts must allow all reasonable inferences from the record in favor of the prosecution and may not overturn a conviction based on insufficient evidence unless the proof is so improbable or unsatisfactory that a reasonable doubt exists. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009); *People v. Williams*, 193 Ill. 2d 306, 338 (2000). This standard reflects the superior position of the trial court to appraise witness credibility through observation of their demeanor at trial. *People v. Reed*, 80 Ill. App. 3d 771, 781-82 (1980).

¶ 18 To sustain defendant's conviction for delivery of a controlled substance, the State was required to prove beyond a reasonable doubt that defendant knowingly delivered a controlled substance weighing less than one gram. 720 ILCS 570/401(d) (West 2012).

¶ 19 In the instant case, the evidence, viewed in the light most favorable to the prosecution, was sufficient to prove defendant guilty of delivery of a controlled substance. At trial, Officer Forsell testified that while working as a surveillance officer, he witnessed defendant conduct

about five transactions. He suspected the items tendered to pedestrians in exchange for money were drugs and requested an undercover officer for a controlled buy. Officer DeJesus, the undercover officer, testified that he approached defendant and expressed his desire to purchase "money bags." When defendant asked how many Officer DeJesus wanted, he indicated one. At that point, defendant gave the officer one "bag of money bag logo heroin," and the officer gave defendant $10 in 1505 funds. Officer DeJesus pocketed the bag, returned to his vehicle, and radioed his team. Soon thereafter, he identified defendant as the person who sold him the "money bag" and inventoried the item he purchased, which was later determined to contain 0.4 grams of heroin. Officer Forsell corroborated Officer DeJesus' version of events with his testimony that he observed the transaction take place. Further corroboration was provided by defendant's admission that he was wearing clothing almost exactly like what was described by the officers. Thus, the evidence presented by the State supports a finding that defendant delivered a controlled substance. We cannot say that the evidence is so improbable or unsatisfactory that it raises a reasonable doubt as to defendant's guilt. *Cardamone*, 232 Ill. 2d at 511; *Williams*, 193 Ill. 2d at 338. Defendant's challenge to the sufficiency of the evidence is not persuasive.

¶ 20 Defendant maintains that the trial court erroneously rejected his testimony that he was present at the scene to purchase, but not sell, heroin. Defendant points out several factors that he asserts support his version of events: (1) Officer Forsell did not lose sight of defendant before he was apprehended, but did not observe defendant discard anything during the chase; (2) although Officer Forsell witnessed defendant tender items in exchange for United States currency about five times, only $20 and one packet of drugs were recovered from his person; (3) Officer Forsell

did not request enforcement officers to detain defendant immediately after Officer DeJesus verified the positive narcotics transaction; and (4) the 1505 funds were never recovered.

¶ 21 Defendant's argument amounts to a request that we reweigh the evidence, substitute our judgment for that of the trial court, and independently conclude that he was the more credible witness. However, that is not our function. *Daheya,* 2013 IL App (1st) 122333, ¶¶ 61-62. In this case, the factual issues raised by defendant do not materially dispute the evidence, which established the essential elements of the offense. The testimony of one witness, if positive and credible, is sufficient to convict, even if it is contradicted by the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). As discussed above, Officer DeJesus testified that after he told defendant he was interested in "money bags," defendant gave him one ziplock bag of "money bag logo heroin" in exchange for $10. Officer DeJesus' clear testimony, by itself, established the elements of defendant's offense. The fact that Officer DeJesus' testimony was corroborated by Officer Forsell's testimony that he witnessed the exchange further establishes defendant's guilt.

¶ 22 Of the factual issues raised, defendant's only challenge to Officer DeJesus' testimony is the absence of the 1505 funds. However, physical evidence is not required to sustain a conviction (*People v. Herron*, 2012 IL App (1st) 090663, ¶ 23), and recovery of 1505 funds is not an element of delivery of a controlled substance. *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997). Because the State was not required to produce the prerecorded funds used, defendant's argument focusing on the absence of those funds is not persuasive. *Trotter*, 293 Ill. App. 3d at 619.

¶ 23 Defendant next maintains that his acquittals of the charges involving possession with intent to deliver between 1 and 15 grams and his conviction for simple possession cast further

doubt on the sufficiency of the evidence to sustain his conviction for actual delivery. Based on these acquittals, defendant speculates that the court must not have believed Officer Duckhorn's testimony regarding the discarded heroin. He therefore concludes that the court "plainly" rejected Officer Duckhorn's credibility despite the absence of any such finding.

¶ 24 It is well-settled that in reaching a conclusion of guilt or innocence, the trier of fact may believe portions of a defendant's case and portions of the State's case. *Reed*, 80 Ill. App. 3d at 781. Although the court acquitted defendant of the charges involving possession with intent to deliver between 1 and 15 grams, the court did enter a conviction for "possession of a controlled substance less than 15 grams." 720 ILCS 570/402(c) (West 2012). Accordingly, defendant's conviction for simple possession accommodates Officer Duckhorn's testimony regarding the discarded 1.1 grams and we will not speculate that the trial court determined Officer Duckhorn's testimony was not credible. See *Reed*, 80 Ill. App. 3d at 781.

¶ 25 Defendant also contends that there is a "disharmony" between his acquittals for possession with intent to deliver and his conviction for actual delivery. However, when a conviction is inconsistent with an acquittal, it cannot be known who the error benefits and there is no reason to *assume* the acquittal is the correct verdict. *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003). Other explanations for an apparent inconsistency are far more likely, such as a judge's permissible exercise of leniency in the interest of justice. *People v. McCoy*, 207 Ill. 2d 352, 357-58 (2003). Therefore, reviewing courts need not reject an inconsistent verdict rendered in a bench trial as unreliable, and need not review the record as a whole to rule out confusion on the part of trial judge. *McCoy*, 207 Ill. 2d at 358. Here, defendant is challenging the sufficiency of the evidence in light of this alleged "disharmony" in the court's judgments, rather than asserting

that they are "inconsistent." However, his argument nevertheless relies upon the same improper speculation into the court's reasons for an acquittal in order to draw inferences on the propriety of a conviction, and is therefore, without merit.

¶ 26 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.