2017 IL App (1st) 14-3249-U

No. 1-14-3249

Order filed November 17, 2017

Sixth Division

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. 12 CR 17249
	)	
MARCUS JOHNSON,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for possession of a controlled substance with the intent to deliver, over his contention that the evidence was insufficient to prove possession beyond a reasonable doubt. The trial court did not abuse its discretion in admitting physical evidence present at defendant's arrest.

¶ 2 Following a jury trial, defendant Marcus Johnson was found guilty of possessing 15 to 100 grams of a controlled substance (heroin) with the intent to deliver, and sentenced to 6½ years' imprisonment. 720 ILCS 570/401(a)(1)(A) (West 2012). On appeal, defendant contends

that his conviction should be reversed because it is based on insufficient evidence, and that the trial court erred in admitting irrelevant evidence. We affirm.

¶ 3 Defendant was arrested on August 30, 2012, while Chicago police officers executed a search warrant at 7324 South Phillips Avenue, apartment 1S. He was subsequently charged by indictment with a single count of possessing 15 to 100 grams of a controlled substance with the intent to deliver.

¶ 4 Before trial, defendant filed a motion to suppress evidence and statements. He also sought to exclude evidence used to distribute narcotics which was contained in a gym bag. Defendant argued that admission of the gym bag, and its contents, would be prejudicial because the State could not establish his connection to the bag. In particular, defendant argued that he was merely within proximity of the gym bag, and that the State was unable to show that he possessed the bag.

¶ 5 At the hearing on defendant's motion to suppress, Officer Edwin Carreras testified that he, and eight other officers, executed a search warrant of apartment 1S on August 30, 2012. After knocking and announcing "police" at the front door, the officers made a forced entry. Carreras and the officers entered the living room. From the living room, Carreras saw defendant, who was holding a black plastic bag, run out through the back door of the apartment. The back door led outside to a landing with an open wooden staircase. Carreras chased defendant up the staircase to the third floor of the apartment building. During the chase, defendant threw the black plastic bag over a railing. Carreras later learned that the black plastic bag contained 84 zip-top bags of heroin, and narcotics packaging material.

¶ 6 On the third floor, Carreras followed defendant into an apartment. When asked if defendant used a key to enter the apartment, Carreras testified "I don't think he did." Carreras

detained defendant in the kitchen area, where there was a gym bag on the floor. The gym bag contained different size zip-top bags (some were "sandwich" sized, while others were as small as "inch by inch"), a grinder, and "possibly dormin"—a sleeping aid used to mix heroin. The contents of the gym bag were clearly visible. No one else was inside the apartment, and no photos were taken of it. Carreras did not obtain any proof of residency from the third floor apartment.

¶ 7 The trial court denied defendant's motion *in limine*. In doing so, the court noted that the contents of the gym bag were "less prejudicial" because they were not "evidence of a crime," but instead were "things that might be used in a crime." The court also noted that the gym bag had significant probative value because defendant tried to use the third floor apartment to evade police, which shows defendant "apparently believed it was a place that he was familiar with and that affords him the potential for some kind of safe harbor from the encroaching officer."

¶ 8 Defendant presented an oral motion to reconsider, arguing that mere proximity to an object was not enough to show possession. In denying defendant's motion to reconsider, the court clarified that while mere proximity was not enough to establish possession beyond a reasonable doubt, the standard governing the admissibility of evidence is relevance and not proof of possession beyond a reasonable doubt.

¶ 9 At trial, Officer Edwin Utreras testified that on August 30, 2012, shortly after 9:40 a.m., he and eight other officers executed a search warrant at the apartment. The officers entered the apartment building, knocked on the door to the apartment, and yelled "police, police." After about 30 seconds, Officer John Zinchuk used a 60-pound ram bar to break through the apartment's door. Utreras walked a couple of feet into the living room, looked to his right, and noticed defendant standing 10 to 15 feet away from him in the kitchen area. Defendant stood

briefly, for "maybe a second or two," before fleeing through a back door. Outside of the back door was a landing with a staircase leading upstairs. As Utreras followed defendant upstairs, he saw defendant throw a black bag over the railing towards a tree. While continuing to follow defendant, Utreras yelled at Zinchuk that defendant had thrown a bag.

¶ 10 On the third floor, defendant opened the door to an apartment. Utreras managed to stop the door to that apartment from closing, and followed defendant inside. Utreras located defendant in the kitchen area of the apartment and placed him into custody. As Utreras did so, he noticed that five feet away from defendant was a big, black, open gym bag, containing "numerous narcotics mixing materials." Utreras recovered the gym bag, which contained a small grinder, Dormin pills, and small zip-top bags. Utreras, who has made 500 to 1000 arrests involving narcotics, testified that these materials are used to package and mix heroin.

¶ 11 On cross-examination, Utreras acknowledged that a grinder, sieve, plastic bags, and the box of Dormin recovered from the gym bag were not tested for defendant's fingerprints. Utreras did not see defendant touch the gym bag. Utreras only searched the kitchen of the third floor apartment. Utreras did not know who lived in the third floor apartment, and did not obtain proof that defendant lived in the apartment. Utreras also did not obtain proof that defendant lived in apartment 1S, and could not recall in which direction the back screen door of apartment 1S opened. In addition, Utreras did not recall whether officers recovered keys from defendant. Utreras acknowledged that the officers did not take photographs of the third floor apartment, but that they did take pictures of apartment 1S. On redirect examination, Utreras testified that, in his experience, waiting too long to execute a forced entry, after knocking, can give individuals the opportunity to destroy evidence.

¶ 12 Zinchuk testified that, on the date in question, he was among the team of officers that executed a warrant at the apartment. His testimony corroborated Utreras' testimony. Right after entering the apartment, Zinchuk saw defendant, at a distance of 15-20 feet away, standing "in like an eat-in kitchen area" down a short hallway, holding a black plastic bag. Zinchuk acknowledged that, from his vantage point, it would not have been possible to see the back door in the kitchen. The black bag defendant tossed while fleeing the officer landed in some tree branches. Zinchuk recovered the bag, inside of which were 84 zip-top bags, each containing suspect heroin. The bag also contained empty capsules, some plastic bags, and Dormin. Zinchuk recalled that the back door had a metal screen, but could not recall in which direction the metal screen opened.

¶ 13 Officer Troutman, an "evidence officer," also testified that he was among the officers that executed a search warrant at the apartment. Troutman explained that he was responsible for recovering and inventorying items other officers discovered during the execution of the search warrant. During the search of the apartment, Utreras provided Troutman with a gym bag, containing narcotic manufacturing and packaging materials. In addition, Zinchuk provided Troutman with a black bag, containing heroin, Dormin, and packaging materials. Troutman kept the recovered items in his care and custody until he inventoried them at the police station. Troutman testified that all of the items were in the same condition as when they were recovered.

¶ 14 On cross-examination, Troutman acknowledged that, as an evidence officer, he photographs the areas where officers execute a search warrant. Troutman did not photograph the third floor apartment because it was not within the scope of the search warrant. Troutman did not find evidence defendant resided at apartment 1S. Money was not recovered from defendant.

¶ 15 Fella Johnson, a forensic scientist with the Illinois State Police Crime Laboratory, testified about the tests she performed on 50 powder-filled bags inventoried by Troutman. Johnson concluded, to a reasonable degree of scientific certainty, that the powder amounted to a total of 16.1 grams of heroin.

¶ 16 At the close of the State's case, the trial court denied defendant's motion for a directed finding.

¶ 17 Debra Butler testified that she lived at the apartment since 2011 with her husband. On August 30, 2012, sometime after 9:40 a.m., she was in her bedroom reading a book when officers entered her apartment. She did not give anyone permission, other than her husband, to use the apartment. When asked if she knew defendant, she responded "Now, I do." The front door to her apartment leads into a living area, and from that area, it is not possible to see into the kitchen and dining area because a wall obstructs the view. The back door has two doors on it—a wooden door and a metal door. The metal door opens to the right, and, when it is fully opened, it is not possible to access the stairs leading up.

¶ 18 On cross-examination, Butler testified that a short entrance connects the living room and kitchen. Other than seeing defendant leave her building on a prior occasion, she was not familiar with him, and did not see him enter her apartment immediately before the officers executed the search warrant.

¶ 19 Based on this evidence, the jury found defendant guilty of possession of a controlled substance with intent to deliver. The circuit court denied defendant's motion for a new trial, and sentenced him to 6½ years' imprisonment. The circuit court denied defendant's motion to reconsider sentence.

¶ 20 We first consider whether the trial court erred by admitting the gym bag into evidence. Defendant contends that the court erred in admitting the bag into evidence because the State failed to connect the bag to him or the offense. In support of this argument, defendant points out that he did not live in the third floor apartment where the gym bag was found, the bag and its contents were never tested for fingerprints, and there is no evidence that he touched or held the bag.

¶ 21 Reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 22 The general rule is that physical evidence is admissible provided there is a sufficient connection with the crime and the defendant to make it relevant as evidence. *People v. Free*, 94 Ill. 2d 378, 415 (1983); see *People v. Jones*, 22 Ill. 2d 592, 600 (1961) (admissibility of a gun required consideration of "whether the gun had been sufficiently connected with the crime and the defendant to make it relevant as evidence."). The defendant need not have possessed the physical evidence for it to be admissible. *Jones*, 22 Ill. 2d at 600 (mentioning that possession is not the only circumstance where a weapon is admissible). Rather, in determining whether a sufficient connection has been shown, possession is one factor, but not the only factor, to be considered. *Id.* at 599-600 (1961). It is only necessary that the physical evidence at least be suitable for the commission of the crime, but it is not necessary that the physical evidence be used in committing the crime. *Free*, 94 Ill. 2d at 415-16. Physical evidence may be inadmissible, however, if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. *People v. Pulliam*, 176 Ill. 2d 261, 276 (1997).

¶ 23 Here, the circuit court did not abuse its discretion in admitting the gym bag and its contents into evidence, because the bag had a sufficient connection with both the crime in question and defendant to make it relevant as evidence. At the hearing on defendant's motion, Carreras testified that defendant threw a black plastic bag as he was fleeing officers who were executing a search warrant. Moments after defendant discarded the black plastic bag, he ran into an apartment where he was taken into custody within five feet of a gym bag. Carreras indicated, and the evidence at trial showed, that the gym bag contained materials used to mix and package heroin similar to those that defendant had discarded, *i.e.*, Dormin and packaging materials. Carreras testified that Dormin was a sleeping aid used to mix heroin. Given defendant's connection to these materials, which are suitable for the commission of the crime in question, we cannot say that the court's decision to admit the contents of the gym bag into evidence was arbitrary, fanciful or unreasonable.

¶ 24 Defendant also contends that the State failed to show beyond a reasonable doubt that he possessed a controlled substance with the intent to deliver. Specifically, defendant argues that Utreras's and Zinchuk's testimony was incredible because it conflicts with Butler's testimony, and because their recitation of events was contrary to human experience.

¶ 25 When "a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, 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 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard of review " 'gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Id.* (citing *Jackson*, 443 U.S.

at 319). As a result, a reviewing court will not retry a defendant or substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *Id.* However, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 541-42 (1999).

¶ 26 A conviction for unlawful possession of a controlled substance with the intent to deliver requires a showing that: (1) the defendant had knowledge of the presence of the controlled substance; (2) the drugs were in the immediate possession or control of the defendant; and (3) the defendant intended to sell the drugs. *People v. Sherrod*, 394 Ill. App. 3d 863, 865 (2009). Intent to deliver is usually shown from circumstantial evidence, such as the quantity in possession being too large for personal consumption, the possession of drug paraphernalia, and how a substance is packaged. *Id.* Actual possession exists when testimony shows defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away. *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987).

¶ 27 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant possessed 15-100 grams of heroin with the intent to deliver it. Both Utreras and Zinchuk testified defendant held a black plastic bag, and threw it off the stairs while he fled from the officers. Zinchuk recalled recovering the black plastic bag, and that it contained 84 individually packaged zip-top bags, filled with a substance that appeared to be heroin. The bag also contained materials that can be used to package and mix heroin. Johnson testified that the powder from 50 of the 84 individual bags amounted to 16.1 grams heroin. These facts, by themselves, are sufficient to support defendant's conviction. See *People v. Clark*, 406 Ill. App. 3d 622, 631 (2010) (affirming conviction for possession of

one to fifteen grams of heroin with the intent to deliver where the "[d]efendant carried 24 individual packets of heroin—an amount and packaging technique highly indicative of one's intent to deliver rather than to personally consume."). In addition, defendant leading officers to an open gym bag of materials used to distribute heroin is further evidence that defendant intended to deliver the heroin he possessed.

¶ 28 Defendant nevertheless argues that Utreras and Zinchuk's testimony lacks credibility necessary to establish his guilt. He argues that their testimony of seeing him in the kitchen immediately after entering the apartment was undermined by Butler's description of the layout of the apartment. The jury's decision to accept testimony is entitled to great deference, and testimony will only be found insufficient to support a conviction where the record compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *People v. Kent*, 2016 IL App (2d) 140340, ¶18. Utreras and Zinchuk both corroborated each other's testimony that shortly after entering the apartment, to their right, defendant was standing in the kitchen. Zinchuk testified that he could see defendant down a short hallway, and that from his vantage point, it would not have been possible to see the apartment's back door located in the kitchen. Such testimony is consistent with Butler's testimony that a short entrance connects the living room and kitchen, and that there is an obstruction to the view between the living room and kitchen. In addition, their testimony that defendant ran out the back door is also consistent with Butler's testimony that the upstairs is inaccessible when the metal screen door is fully opened, because it is possible defendant opened the screen door slightly and maneuvered around it to go upstairs. As a result, the record does not compel us to conclude that no reasonable person could have accepted Utreras and Zinchuk's testimony beyond a reasonable doubt.

¶ 29 Defendant also argues that Utreras and Zinchuk not only gave testimony that conflicts with Butler's, but that numerous events laid forth in their testimony were so unbelievable and contrary to human experience that it "taxes the gullibility of the credulous." See *People v. Coulson*, 13 Ill. 2d 290, 296-97 (1958). A reviewing court can reject testimony, undiminished by contradictory evidence or impeachment, when it contradicts the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief. *Id.*; *Mannen v. Norris*, 338 Ill. 322, 327 (1930).

¶ 30 Defendant first claims it is unbelievable that he remained in the kitchen of the apartment until the officers were inside, as the officers knocked and waited about 30 seconds before using a ram to enter the apartment. According to defendant, common sense dictates that a person possessing heroin would not have waited for the police to enter the apartment before leaving. However, there is no evidence that defendant ever expected to hear the police knock on the door. It is plausible he could have stood and remained silent in the apartment because he thought the police would leave rather than make a forced entry. Additionally, Utreras testified that if an officer waits too long to enter a dwelling, it can lead to the destruction of evidence. Therefore, Utreras and Zinchuk's testimony is not beyond the bounds of human belief, as it is plausible that defendant remained in the apartment because he did not have enough time to determine how to discard incriminating evidence.

¶ 31 Defendant also claims that the circumstances surrounding his arrest are so unbelievable that they render Utreras and Zinchuk's testimony incredible. According to defendant, it is contrary to human experience that an individual being chased by multiple officers would lead the officers directly to an open duffle bag of drug paraphernalia, especially if defendant knew he was leading the officers to incriminating evidence. Defendant further claims that it would have made

much more sense for him to run downstairs out the back door, where there were no officers on the ground, rather than lead the officers upstairs. Despite defendant's claims, Utreras and Zinchuk's description of defendant's conduct is not unbelievable, because it can be inferred that defendant was trying to hide from the officers in a place where he was familiar. The evidence at trial showed defendant ran straight to the third floor apartment without making an attempt to hide from the officers in a different spot. Inside the apartment was materials used to distribute heroin, which were also found in the bag of heroin defendant discarded. Officer Troutman, who was responsible for inventorying evidence obtained during the search warrant, did not testify that he inventoried any keys to the third floor apartment. In addition, defendant did not have a significant lead on the officers who were chasing him, as Utreras managed to prevent the apartment door from closing after defendant entered it. Given the absence of keys, and defendant's limited time to escape the officers, it is not unbelievable to infer defendant was familiar with the third floor apartment and knew it was unlocked. Consequently, it is also not unbelievable that defendant would have access to incriminating evidence in a place where he was familiar. Therefore, defendant leading the officers to an apartment with incriminating evidence is not beyond the bounds of human belief because it can be concluded defendant was trying to hide from the officers where he had prior familiarity.

¶ 32 Defendant's final claim is that Utreras and Zinchuk's testimony is unbelievable because, despite finding drug paraphernalia in the third floor apartment, they did not search the third floor apartment, they did not photograph it, and they did not try to determine who leased the apartment. However, Troutman explained that he only photographed what fell within the scope of the search warrant, which did not include the third floor apartment.

¶ 33 Defendant's argument essentially amounts to a request to reweigh the evidence in his favor and substitute our judgment for that of the jury. As mentioned, this we cannot do. See *People v. Cooper*, 194 Ill. 2d 419, 431 (2000) ("a reviewing court will not substitute its judgment for that of the trier of fact on issues of the weight of evidence or the credibility of witnesses."). It is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The jury is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Herrett*, 137 Ill. 2d 195, 206 (1990). Rather, a defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This is not one of those cases.

¶ 34 We affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.