2017 IL App (1st) 150502-U

No. 1-15-0502

Order filed September 12, 2017

Second 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. 14 CR 11929
	)	
SWANTELL BLUE,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance affirmed over his contention that the State failed to prove him guilty beyond a reasonable doubt. We vacate the Violent Crime Victims Assistance Fund fine and order the mittimus corrected to reflect the proper amount of presentence incarceration credit.

¶ 2 Following a bench trial, defendant Swantell Blue was convicted of delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)) and sentenced to seven and a half years' imprisonment. He was also found guilty of two counts of resisting or obstructing a peace

officer (720 ILCS 5/31-1(a) (West 2014)), a misdemeanor, and sentenced to time served. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of delivery of a controlled substance. Defendant further contends that the trial court failed to award him the proper amount of presentence custody credit and improperly assessed various fines and fees. For the following reasons, we affirm the judgment, vacate the Violent Crime Victims Assistance Fund (VCVA) fine, and order the mittimus corrected.

¶ 3 At trial, the State's theory of the case was that defendant was guilty by accountability of delivery of a controlled substance. Chicago police officer Peter Chambers testified that around 7 p.m. on June 11, 2014, he was on duty as part of a narcotics surveillance team watching the corner of Huron and Lotus. Chambers observed defendant standing between the curb and the sidewalk on Lotus. A juvenile, later identified as D.E., was nearby.[1] Chambers was approximately 20 feet away from defendant and D.E. and nothing obstructed his view. A woman, later identified as Harastein Burns, approached defendant and spoke with him before handing him what appeared to be a scratch-off lottery ticket. Defendant then spoke with D.E., although Chambers could not hear the exchange. Defendant made a gesture towards a residence located behind him at 707 Lotus. Chambers demonstrated the gesture in open court by clenching his fist with his thumb out and pointed behind him. After making the gesture, D.E. walked toward the residence out of Chambers' sight. He returned shortly thereafter and tendered a "small item" to Burns.

¶ 4 Burns initially walked away but then returned to defendant and spoke with him again and pointed to the lottery ticket. Defendant, after scratching the ticket, handed Burns a second "small

[1] D.E. is referred to as a co-defendant throughout the trial, but is not a party to this appeal.

item." Burns placed the items in her pocket and Chambers radioed enforcement officers his observations of the transaction, Burns' physical description, and her direction of travel. Chambers described Burns as wearing a gray jogging suit and a pink bandana, and carrying a toilet seat.

¶ 5 Several minutes later, Chambers observed another woman, later identified as Karen Howard, approach defendant. After Howard and defendant spoke, defendant gestured again to D.E., who walked toward the residence. After a few seconds, D.E. returned and handed Howard a small item in exchange for money. Howard placed the item in her pocket and left. Chambers radioed enforcement officers with a description of Howard and her direction of travel. He described Howard as wearing a black velour jogging suit with dreadlocks and "a large patch of gray on top."

¶ 6 Defendant subsequently walked out of Chambers' sight. Another man, later identified as Michael Harris, walked to the area and waited. After several minutes, defendant reappeared and handed D.E. a plastic bag. D.E. removed several items from the plastic bag and tendered them to Harris. After viewing the transaction, Chambers radioed his enforcement team and gave them a description of Harris.

¶ 7 Chambers then radioed his enforcement team again with a description of defendant and his location. He observed enforcement officers place defendant under arrest. Chambers also radioed the enforcement team regarding D.E. and eventually broke his surveillance to identify him. Following the arrests, Chambers returned to the police station and identified Burns, Howard, Harris, and defendant.

¶ 8 While processing defendant with Officer Hamik, Chambers requested that he remove his property from his pockets. Defendant told Chambers to remove the property, but when Chambers attempted to reach into defendant's pockets, defendant slapped his hand away. Chambers then attempted to gain control over defendant by grabbing his arm, but defendant ripped his arm away. Eventually, Chambers and Hamik handcuffed defendant to the wall and emptied defendant's pockets. They recovered $296 in cash from defendant's pockets and various other personal items.

¶ 9 In open court, Chambers identified photographs of D.E., Burns, Howard, and Harris. Chambers had participated in hundreds of narcotics investigations, and based on his experience, he believed that the interactions with Burns, Howard, and Harris were narcotics transactions.

¶ 10 On cross-examination, Chambers acknowledged that he saw "small items" that he believed to be drugs during the transactions with Burns and Howard, but could not identify them as drugs during surveillance. However, Chambers observed defendant give Harris a bag prior to the transaction with Harris, which was consistent with narcotics packaging, but Chambers could not see cocaine in the bag. Chambers later testified on cross-examination that the small items he saw during the various transactions were in bags, but he did not testify to that on direct examination because it was not asked of him. He believed he described the items as bagged in the police reports that he completed after the investigation. He also described the bags as having a blue tint in the police report, but could not tell they were blue bags when he was conducting surveillance. However, he was close enough to defendant to observe that Burns handed him a scratch-off lottery ticket. Defendant did not have the lottery ticket on his person when he was arrested, so it was not reflected in the inventory sheets. Chambers did not see defendant discard

the lottery ticket, but when defense counsel asked whether defendant possibly cashed the ticket when he disappeared from view for several minutes, Chambers answered, "Yes."

¶ 11 Officer Kevin Graney testified that on June 11, 2014, he was part of an enforcement team, along with Officers Hamik and Jozefczak, for narcotics surveillance. Chambers was the surveillance officer that night and was in constant communication with the enforcement team. Around 7 p.m., they received a radio communication from Chambers to stop a black woman who was wearing a jogging suit, a pink bandana, and holding a toilet seat. Based on that description, they approached Burns for a field interview. Burns reached into her pocket, pulled out a clenched fist, and an object fell to the ground. Graney recovered the object, which was a blue tinted bag containing suspected cocaine. He also recovered from Burns a second bag containing suspected cocaine. The officers arrested Burns and transported her to the police station.

¶ 12 After relocating to Huron and Lotus, Graney and Jozefczak received another communication from Chambers with the description of a black woman wearing a velour jogging suit with dreadlocks and a white or gray patch at the top of her head. Based on that description, they stopped Howard for a field interview. Jozefczak informed Howard that they believed she purchased narcotics, and she directed the officers to her right coat pocket. Jozefczak recovered a blue tinted ziploc bag containing suspected cocaine from Howard's pocket, and the officers arrested her.

¶ 13 Graney and Jozefczak again returned to Lotus and Huron around 7:43 p.m. and received a third communication from Chambers regarding a suspect involved in a narcotics transaction. Chambers described the suspect as a black man wearing a black shirt with a lime green design. The officers observed Harris, who matched the description, and approached him for a field

interview to inquire about the suspected narcotics purchase. Harris stated that he "messed up today" and directed Graney to his pants pocket where Graney recovered three blue tinted ziploc bags containing suspected cocaine. The officers arrested Harris, and Graney kept custody of the recovered bags until they returned to the police station where Officer Hamik inventoried them.

¶ 14 After he returned to Lotus and received a communication from Chambers, Graney arrested defendant. Graney identified photographs of Burns, Howard, and Harris in court.

¶ 15 On cross-examination, Graney testified that the officers recovered two items from Burns, one item from Howard, and three items from Harris, all of which were contained in blue ziploc bags. The ziploc bags were approximately an inch by half an inch in size. Graney acknowledged that when defendant was arrested, he was not in possession of narcotics or blue ziploc bags. He additionally acknowledged that the blue ziploc bags were "possibly" easily identifiable from a distance, but stated that he would not have been able to recognize them from a distance of 20 feet. He further acknowledged that he did not observe defendant deliver drugs.

¶ 16 The parties stipulated that, if called, Elaine P. Harris would testify that she is a forensic chemist trained by the Illinois State Police. She tested three inventories with methods commonly accepted in field of forensic chemistry. The first inventory contained one item and tested positive for .1 gram of cocaine. The second inventory contained three items. Of the three items, Harris tested one, which tested positive for .1 gram of cocaine. The final inventory contained two items, which tested positive for .2 grams of cocaine.

¶ 17 Defendant testified that he has three prior convictions for possession of narcotics. At 7 p.m. on June 11, 2014, defendant was near Lotus and Huron with friends. He was arrested at approximately 8 p.m. Although he was not employed, the police recovered approximately $290

from him. Prior to his arrest, he was "just standing there" on the corner for approximately 30 minutes with D.E. and a few other people. Defendant denied engaging in narcotics transactions with Burns, Howard, and Harris.

¶ 18 At the police station, an officer asked defendant to remove the money from his pocket and he replied, "For what?" Defendant asked to see a "white shirt," meaning a sergeant, and the officers told him "no" and attempted to take the money from his pocket. When defense counsel asked if defendant slapped the officer's hand, defendant responded, "Not that I can recall." However, defendant acknowledged pulling away from the officer.

¶ 19 On cross-examination, defendant testified that he received the $296 from his child's mother. He acknowledged that D.E. is "somewhat" his friend, and that D.E. is 17 years old, while defendant is 30 years old. D.E. lives in the neighborhood surrounding Huron and Lotus and knows people around that area. Defendant recalled seeing a woman with a toilet seat, but denied that she gave him a lottery ticket. He acknowledged that D.E. gave the woman something, but he did not know what D.E. gave her. He further acknowledged that he refused to empty his pockets at the police station.

¶ 20 The defense rested, and the State sought to introduce evidence of three of defendant's prior convictions in rebuttal. The three prior convictions were all Class 4 convictions for possession of a controlled substance in case numbers, 11 CR 16335, 08 CR 18259, 06 CR 18873.

¶ 21 Following closing arguments, the court found defendant guilty of all charges. The court stated,

> "[U]nder the State's theory, the defendant he simply aided and abetted the delivery of controlled substance through the actions of [D.E.]. There is ample

circumstantial evidence to prove. There's also ample evidence to show that the defendant knowingly resisted or obstructed arrest."

¶ 22 Defendant filed a motion for judgment notwithstanding the verdict and a motion for a new trial. The court denied both motions. The State noted that, based on his criminal history, defendant was required to be sentenced as a Class X offender. The court subsequently merged the three delivery counts and sentenced defendant to seven and a half years' imprisonment with three years of mandatory supervised release. For the misdemeanor counts of resisting or obstructing a peace officer, the court sentenced defendant to time served. Defendant filed a motion to reconsider the sentence, which the court denied. This appeal followed.

¶ 23 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he delivered a controlled substance. Defendant does not challenge the propriety of his convictions for resisting or obstructing a peace officer.

¶ 24 On a challenge to the sufficiency of the evidence, we inquire " '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 omitted.) *People v. Davison,* 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison,* 233 Ill. 2d at 43) and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens,* 237 Ill. 2d 311, 334 (2010).

¶ 25 In order to sustain a conviction for delivery of a controlled substance based on accountability, the State must establish beyond a reasonable doubt that defendant: (1) solicited, aided, abetted, agreed or attempted to aid another in the planning or commission of the delivery; (2) participated before or during the commission of the delivery; (3) and had the concurrent, specific intent to promote or facilitate the commission of the offense. 720 ILCS 5/5-2(c) (West 2014); *People v. Martinez*, 278 Ill. App. 3d 218, 223 (1996). Accountability may be established through a defendant's knowledge of and participation in a criminal scheme, even though there is no evidence that he directly participated in the criminal act itself. *People v. Perez,* 189 Ill. 2d 254, 267 (2000). However, a defendant's mere presence at the scene of a crime does not render him accountable. *Id.* at 268.

¶ 26 To establish that a defendant possessed the intent to facilitate or promote 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. "Under the common-design rule, if 'two or more persons 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 (quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995)).

¶ 27 When viewed in the light most favorable to the State, the evidence established that defendant was an active participant in the commission of the narcotics transactions between D.E. and Burns, Howard, and Harris. Chambers observed both Burns and Howard approach defendant, who spoke with each of them prior to gesturing to D.E. D.E. then walked out of sight

toward a residence, and returned with small items. Burns gave defendant a lottery ticket prior to receiving a small item from D.E., and subsequently returned to defendant where he gave her a second small item. Burns was arrested immediately and found to have two small blue tinted bags containing cocaine on or near her person. Similarly, after defendant's gesture, D.E. gave Howard a small item in exchange for money. Howard was immediately arrested and found to be in possession of one small blue tinted bag containing cocaine. Defendant thereafter handed a bag to D.E., and from that bag, D.E. gave several small items to Harris. The enforcement team immediately arrested Harris, who stated that he "messed up," and had three small blue tinted bags containing cocaine on his person.

¶ 28 Defendant's gesture, which apparently signaled D.E. to retrieve and tender narcotics to buyers that defendant solicited, was sufficient to show that he aided and abetted D.E. in the commission of the deliveries to Burns and Howard. Likewise, defendant providing D.E. with the bag from which D.E. tendered several bags containing cocaine to Harris, was sufficient to show that he aided and abetted the commission of the delivery to Harris. Based on the testimony, these acts were the impetus of D.E.'s tendering the narcotics to the buyers, and were therefore in furtherance of a common plan, and sufficient to demonstrate defendant's intent to facilitate the deliveries. *Fernandez*, 2014 IL 115527, ¶ 13. Additionally, defendant's participation in all of the transactions occurred immediately before the commission of the deliveries. Based on this evidence, we cannot say that no rational trier of fact could have found defendant (1) aided and abetted in the commission of the delivery, (2) participated before or during the commission of the delivery, and (3) had the concurrent, specific intent to promote of facilitate the commission of the offense.

¶ 29 Nevertheless, defendant maintains that the Chambers' testimony was so unbelievable that it was insufficient to sustain his conviction for delivery of a controlled substance. Specifically, defendant asserts that Chambers' testimony that he observed only "small items" was inconsistent with the blue tinted bags containing cocaine that were recovered from Burns, Howard, and Harris. Despite defendant's claims to the contrary, Chambers' credibility was an issue for the trier of fact. See *Siguenza-Brito*, 235 Ill. 2d at 228 (It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence."). His claim that Chambers was not credible, standing alone, is insufficient to reverse a conviction. *Id.* Moreover, although Chambers' testimony of what he observed was not as specific as possible, we fail to see how it was inconsistent with the recovered evidence. Graney testified the bags recovered were approximately an inch by half an inch in size; Chambers testified that he observed D.E. tendering "small items" to Burns, Howard, and Harris. Whether the "small items" that Chambers observed D.E. tender to the various buyers were the small blue bags recovered was an inference to be drawn from the evidence, which again was an issue for the trier of fact. See *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court, based on its findings, apparently found Chambers' testimony to be credible, and we will not substitute our judgment for that of the trier of fact, particularly where Chambers' testimony was not so improbable as to create a reasonable doubt of defendant's guilt. *Givens*, 237 Ill. 2d 334.

¶ 30 Furthermore, although defendant claims that there was no physical evidence connecting defendant to the recovered narcotics, that does not necessarily render the evidence insufficient to sustain his conviction. It is well established that "[t]he testimony of a single witness, if it is

positive and the witness credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Here, as discussed above, Chambers' testimony clearly demonstrated that defendant facilitated the various narcotics transactions, and his testimony was not so improbable as to cast doubt on defendant's guilt. We therefore find that defendant has failed to establish that no rational trier of fact could have found the essential elements of delivery of a controlled substance beyond a reasonable doubt.

¶ 31 Defendant next claims, and the State concedes, that the trial court failed to award him the correct amount of presentence incarceration credit. We agree. Section 5-4.5-100(b) provides that offenders shall be given credit "for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014).

¶ 32 Here, defendant was in custody from June 11, 2014 until he was sentenced on January 23, 2015. Defendant's mittimus reflects 224 days of presentence credit, although he was actually entitled to 226 days of presentence credit. Accordingly, we order the clerk of the circuit court of Cook County to correct defendant's mittimus to reflect 226 days of presentence custody credit.

¶ 33 Finally, defendant argues that the trial court erred by assessing various fines and fees. Defendant did not raise this issue below, but argues that issues regarding fines and fees are not subject to waiver. The State does not argue that he forfeited appellate review of his challenge to the fines and fees, and has therefore forfeited any forfeiture argument. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State). Therefore, although defendant did not raise this issue in the trial court, we will consider his claims. The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 34 Defendant challenges the $25 court services fee, alleging the plain language of the statute limits the assessment to those convicted of offenses enumerated within the statute (55 ILCS 5/5-1103 (West 2014)), which does not include the offense of which he was convicted. The State counters that prior case law establishes that the court services fee applies to any judgment of conviction, which includes defendant's conviction.

¶ 35 In relevant part, section 5-1103 of the Counties Code provides,

> "In criminal, local ordinance, county ordinance, traffic and conservation cases, [the court services fee] shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty, resulting in a judgment of conviction, or order of supervision, or sentence of probation without entry of judgment pursuant to Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 12-4.3 or subdivision (b)(1) of Section 12-3.05 of the Criminal Code of 1961 or the Criminal Code of 2012, Section 10-102 of the Illinois Alcoholism and Other Drug Dependency Act, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, or Section 10 of the Steroid Control Act." 55 ILCS 5/5-1103 (West 2014).

¶ 36 Defendant was convicted of delivery of a controlled substance, codified in 720 ILCS 570/401(d)(1) (West 2014). We have previously interpreted this statute and concluded that, in criminal cases, it permits the assessment of this fee upon any judgment of conviction. See *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 18; see also *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010). As such, defendant's conviction for delivery of a controlled substance is necessarily encompassed in the statute, and we decline his invitation to re-interpret it.

¶ 37 Defendant next contends, and the State concedes, that the trial court improperly assessed the $20 VCVA fine pursuant to 725 ILCS 240/10(c)(2), which provides that the VCVA fine should not be imposed when any other fine is imposed. The fines, fees, and costs order provides that the $20 VCVA fine was assessed pursuant to 725 ILCS 240/10(c)(1) or (2), which provides for a charge of $25 for a crime of violence, or $20 for a felony or misdemeanor, when "no other fine is imposed." Both parties assert the fine was improper because defendant was assessed various other fines. However, effective July 16, 2012, the statute was amended to eliminate that subsection (Pub. Act 97-816 (eff. July 16, 2012) (amending 725 ILCS 240/10 (West 2010))), and that portion of the fines and fees order is no longer in compliance with the current statute. The statute now provides, in relevant part, that, "When any person is convicted in Illinois of an offense listed below, or placed on supervision for that offense on or after July 1, 2012, the court shall impose the following fines: *** $100 for any felony." 725 ILCS 240/10(b)(1) (West 2014). In other words, the imposition of other fines no longer prevents the trial court from assessing the VCVA fine.

¶ 38 Here, defendant was convicted of a felony on January 23, 2015, and therefore should have been assessed the $100 VCVA fine imposed on felony convictions by statute. See 725 ILCS 240/10(b)(1) (West 2014). However, because the trial court imposed the fine pursuant to the old version of the statute, and because we may not enlarge defendant's sentence, we vacate the $20 VCVA fine. See *People v. Castleberry*, 2015 IL 116916, ¶ 24 (noting that an appellate court is prohibited from increasing criminal sentences on review).

¶ 39 Based on the foregoing, we affirm the judgment of the circuit court of Cook County, vacate the $20 VCVA fine from the fines and fees order, and we order the clerk of the circuit court to correct defendant's mittimus to reflect a presentence credit of 226 days.

¶ 40 Affirmed as modified.