

No. 1-15-0744

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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. 13 CR 23517
)	
ELFEGO BAILEY,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justices Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction for delivery of a controlled substance and reject his claim that he received ineffective assistance of counsel.

¶ 2 Defendant Elfego Bailey was convicted after a bench trial of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)). On appeal, Mr. Bailey argues that his trial counsel was ineffective for failing to object to testimony regarding Mr. Bailey's possession of

prerecorded funds after the delivery. We affirm.

¶ 3

BACKGROUND

¶ 4 Mr. Bailey and codefendant Pearly Johnson were charged by indictment with one count of possession of a controlled substance, two counts of delivery of a controlled substance, and one count of possession of a controlled substance with intent to deliver. Mr. Bailey was tried alone and the following evidence was presented.

¶ 5 Chicago police officer Marc Lapadula testified that, at approximately 3:30 p.m. on November 18, 2013, he was working on a team conducting controlled narcotics purchases in the area of 649 North Spaulding Avenue. He noticed a man, later identified as Mr. Bailey, standing on the steps of a residential building on the west side of the street. Officer Lapadula exited his vehicle and approached Mr. Bailey, who asked what he needed. Officer Lapadula responded that he needed “yellow bags,” which referred to the way heroin was commonly packaged in the area. Mr. Bailey told him to wait and gestured towards Officer Lapadula’s vehicle. Officer Lapadula sat inside his vehicle with the windows down. Mr. Bailey asked him “how many,” to which Officer Lapadula responded, “four.” Mr. Bailey then called out to a black woman across the street, later identified as Ms. Johnson, “hey, yo, get him four.”

¶ 6 Ms. Johnson then approached the passenger side of Officer Lapadula’s vehicle and asked him “you need four, right?” She handed Officer Lapadula four tinfoil packets in exchange for \$40 of prerecorded funds. Officer Lapadula drove away and radioed his team members that he was involved in a positive narcotics purchase. He later returned to the scene and identified the two subjects detained by enforcement officers. Officer Lapadula returned to the police station and inventoried the four tinfoil packets he received from Ms. Johnson. He further retrieved two additional tinfoil packets recovered from Ms. Johnson and inventoried them.

¶ 7 Officer Nestor DeJesus testified that, on November 18, 2013, he was working as a surveillance officer on a team conducting controlled narcotics purchases in the area of 649 North Spaulding Avenue. He observed Officer Lapadula arrive in his vehicle and park on Spaulding Avenue. Officer Lapadula approached a man, identified in court as Mr. Bailey, and engaged him in conversation. Officer Lapadula returned to his vehicle and Officer DeJesus saw Mr. Bailey motion and yell something to a black woman, later identified as Ms. Johnson, on the other side of the street. Ms. Johnson then approached the passenger side of Officer Lapadula's vehicle and engaged in a hand-to-hand transaction before Officer Lapadula drove away.

¶ 8 Officer DeJesus then observed Ms. Johnson cross the street, hand United States currency to Mr. Bailey, and immediately return to her side of the street. Officer DeJesus told the enforcement officers to detain both subjects. When Ms. Johnson was being detained, Mr. Bailey began to walk away westbound on Huron Street. Officer DeJesus maintained visual surveillance on Mr. Bailey, who was soon detained.

¶ 9 Chicago police officer Manny Borkowski testified that, on November 18, 2013, he was working as an enforcement officer on a team conducting narcotics purchases. Officer Borkowski received information from Officer DeJesus, proceeded to 3401 West Huron Street, and detained Mr. Bailey, who Officer Borkowski identified in court. Officer Lapadula drove past and informed Officer Borkowski that the subject detained was the individual involved in the narcotics transaction. Officer Borkowski then searched Mr. Bailey and recovered \$219, of which \$40 matched prerecorded funds listed on the funds sheet he had received from Officer Lapadula. Another officer searched Ms. Johnson and recovered two tinfoil packets containing suspect heroin.

¶ 10 The parties stipulated that Kristine Dillow Benak, a chemist at the Illinois State Police

crime lab, would testify that she received an inventory containing four items and testing of the items revealed the presence of 0.7 grams of heroin. She would further testify that she received another inventory containing two items, which tested positive for 0.4 grams of heroin.

¶ 11 The trial court granted a directed verdict to Mr. Bailey on three counts but found Mr. Bailey guilty of one count of delivery of a controlled substance on the theory that he was accountable for the sale that was made by Ms. Johnson to Officer Lapadula. The court noted that very specific language was used in the conversation between Mr. Bailey and Officer Lapadula. Officer Lapadula said he wanted “yellow bags,” a street term for heroin, and Mr. Bailey asked “how many?” After Officer Lapadula said he wanted “four,” Mr. Bailey called out to Ms. Johnson to bring Officer Lapadula “four.” Ms. Johnson then exchanged four packets for \$40 in prerecorded funds. The court noted that, when Mr. Bailey was stopped, he had the \$40 in prerecorded funds in his possession.

¶ 12 The trial court denied Mr. Bailey’s written motion for a new trial, concluding that the fact that Mr. Bailey was not “actually [] the person that handed the controlled substances to the undercover officer does not relieve him of responsibility. It’s more than sort of pointing out somebody else. This was clear cooperation of two individuals that were accountable for each other’s actions.”

¶ 13 The trial court sentenced Mr. Bailey to four-and-a-half years’ imprisonment.

¶ 14 JURISDICTION

¶ 15 Mr. Bailey was sentenced on February 11, 2015, and timely filed a notice of appeal the same day. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6,

2013)).

¶ 16

ANALYSIS

¶ 17 On appeal, Mr. Bailey argues that he received ineffective assistance of counsel because his trial attorney failed to object to evidence that Ms. Johnson transferred prerecorded funds to Mr. Bailey, after the sale of heroin was complete. Mr. Bailey contends that, as he was tried under a shared intent theory of accountability, any evidence of what happened after the completion of the delivery of the controlled substance cannot be used to prove his guilt. The State responds that Mr. Bailey was tried under a common design theory of accountability and that the evidence regarding the prerecorded funds was relevant to a determination of accountability for the delivery of a controlled substance. While we agree with Mr. Bailey that he was tried under a shared intent theory of accountability, this evidence was nonetheless admissible and there was no error by his counsel.

¶ 18 A defendant has a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In order to establish ineffective assistance of counsel, the defendant must show both that (1) his trial counsel's representation was deficient and (2) the deficiency prejudiced the defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland*, 466 U.S. at 694).

¶ 19 The fundamental problem with Mr. Bailey's claim here is that there was no basis for an objection to the prerecorded funds evidence, and his lawyer could not have been ineffective for failing to make such a meritless objection.

¶ 20 To sustain a conviction for delivery of a controlled substance based on a theory of accountability, the State must prove beyond a reasonable doubt that (1) the defendant ordered, abetted, solicited, agreed, or attempted to aid another in the planning or commission of the

delivery, (2) his participation took place before or during the commission of the delivery, and (3) he possessed the concurrent, specific intent to promote or facilitate the commission of the offense. See 720 ILCS 5/5-2 (West 2012); *People v. Martinez*, 278 Ill. App. 3d 218, 223 (1996).

¶ 21 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)). This is in contrast to shared intent cases, in which the State is required to show that a defendant shared the specific intent of another actor. *Id.* at ¶ 21. Although the parties spend much of their briefs discussing these two theories, it does not matter which theory the State was proceeding on. Mr. Bailey’s argument fails because it confuses limitations on when a criminal defendant can be accountable for another’s criminal actions with what is admissible relevant evidence.

¶ 22 Mr. Bailey argues that trial counsel was ineffective for failing to object to the testimony that Mr. Bailey received, and was in possession of, the \$40 in prerecorded funds. He argues that, as this was a shared intent case, this evidence was not admissible to show his accountability because it occurred after the delivery of the heroin. In support, Mr. Bailey cites *People v. Dennis*, 181 Ill. 2d 87 (1998), for the proposition that any evidence of acts occurring after the delivery was inadmissible to show his intent to aid in the delivery. While *Dennis* holds that a defendant cannot be responsible, under a shared intent accountability theory, for a crime that he does not

become involved in until after it is complete, *Dennis* does not hold that evidence of interactions occurring after the crime is complete is either irrelevant or inadmissible.

¶ 23 In *Dennis*, our supreme court held:

“[F]or purposes of accountability, the duration of the commission of the offense is defined by the elements of the offense. In this case, we necessarily consider those elements which constitute the offense of armed robbery. Consistent with our accountability statute, a defendant may be held accountable for the commission of armed robbery if, either before or during the commission of the offense, he aided or abetted Jones in ‘conduct which is an element of [the] offense.’ ” *Id.* at 101.

The supreme court found that the trial court in that case had incorrectly instructed the jury that a defendant could be guilty of armed robbery if he helped the robber escape even though escape was not “conduct which [wa]s an element of [the] offense” of robbery. *Id.* at 106-07. Instead, based on the defendant’s testimony that he did not know about the robbery until after the robbery was completed, the defendant may have been guilty only of being only an “accessory-after-the-fact.” *Id.* at 104.

¶ 24 However, our supreme court in *Dennis* did not suggest that proceeds of the crime found on the defendant after the crime was complete or that interactions between two defendants after the crime was complete could not be considered as evidence of intent. The prerecorded funds found on Mr. Bailey were evidence that his actions before the heroin sale were intended to facilitate the sale and supported the State’s theory at trial.

¶ 25 We have certainly recognized the relevance of evidence that a defendant was found with proceeds of the crime in accountability cases. See, e.g., *People v. McComb*, 312 Ill. App. 3d 589, 592-93 (2000) (“continued association with the perpetrator after the criminal act” and

“acceptance of illegal proceeds” are factors to be considered in determination of whether the defendant is accountable for acts performed by another). Here, the trial court could consider the transfer of funds from Ms. Johnson to Mr. Bailey as evidence that they shared an intent to sell drugs. The fact that the crime itself—delivery of a controlled substance—was complete before Ms. Johnson gave some proceeds to Mr. Bailey does not mean that his receipt of that money was inadmissible. Counsel was thus not ineffective for failing to object to the testimony regarding the prerecorded funds found on Mr. Bailey.

¶ 26 Further, even if counsel’s failure to object to this evidence had been error, the admission of the evidence did not prejudice Mr. Bailey. The evidence presented at trial overwhelmingly proved that Mr. Bailey actively assisted and facilitated in delivering a controlled substance even without any evidence of his receipt of the prerecorded funds. Officer Lapadula’s testimony showed that, when he arrived at the scene, Mr. Bailey immediately asked him what he needed. When Officer Lapadula told Mr. Bailey he needed “yellow bags,” a street term for heroin, Mr. Bailey asked him how many he needed. When Officer Lapadula stated he needed four, Mr. Bailey called out to Ms. Johnson and told her to “get him four.” Ms. Johnson gave Officer Lapadula four tinfoil packets containing heroin in exchange for \$40. Officer DeJesus corroborated Officer Lapadula’s account. There was ample evidence, other than the fact that Mr. Bailey was found in possession of prerecorded funds, that Mr. Bailey played a role in Ms. Johnson’s delivery of the drugs to Officer Lapadula. The transfer of money is not an element of the delivery of a controlled substance offense (see 720 ILCS 570/401 (West 2012); 720 ILCS 570/102(h) (West 2012)), and “there is no requirement that pre-recorded or marked funds used in a narcotics transaction be recovered for a conviction to stand” (*People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997)).

¶ 27 Trial counsel did not err in failing to object to the prerecorded funds evidence and, even if counsel erred, Mr. Bailey suffered no prejudice from the alleged error. His ineffective assistance of counsel claim fails to satisfy either prong of the *Strickland* test.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 30 Affirmed.