2018 IL App (1st) 152588-U

No. 1-15-2588

Order filed January 16, 2018

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. 13 CR 15776
	)	
RORY YELVINGTON,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant waived his challenge involving the weight of the heroin he delivered to an undercover officer, as he stipulated to the State forensic scientist's testimony that the substances recovered were positive for heroin and weighed 3.3 grams.

¶ 2 Following a bench trial, defendant Rory Yelvington was convicted of one count of delivery of more than 1 gram but less than 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2012)) and one count of possession of more than 1 gram but less than 15 grams of heroin (720

ILCS 570/402(c) (West 2012)).[1] The trial court sentenced defendant to concurrent terms of four and three years' imprisonment, respectively. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of delivery of more than one gram of heroin, as the stipulation regarding the forensic scientist's testimony did not expressly state that she tested the 10 of the 15 packets individually for the presence of heroin. Defendant does not raise a challenge to his conviction for possession. We affirm.

¶ 3 At trial, Chicago police officer Nicholas Cortesi testified that on July 22, 2013, he was working undercover with the narcotics division. He was "conducting a separate investigation" in an unmarked car near Roosevelt Road and Springfield Avenue in Chicago when a man, identified in court as defendant, drove up beside his vehicle. Defendant introduced himself as "Shorty" and said, "I know you're waiting for your guy, but take my number down. I got good deals. I will give you a free sample." He told Cortesi that he would give him 14 "blows," which Cortesi understood to mean heroin, for $100. Cortesi took defendant's phone number and promised to call him.

¶ 4 The next day, July 23, 2013, Cortesi called the number defendant had given him. Defendant answered, and they "discussed purchasing heroin." Defendant instructed Cortesi to go to Roosevelt and Independence and then call him back. Cortesi was working with the support of a team of six to eight additional officers working in surveillance and enforcement roles. One of those officers, Officer Cathleen McCann, provided Cortesi with prerecorded money.

¶ 5 Cortesi drove to Roosevelt and Independence and called the number again. Defendant instructed him to go to Fillmore Street and Independence, which Cortesi did. Once there,

[1] Defendant was found not guilty of two additional counts of the indictment that alleged he was within 1,000 feet of a school when the offenses occurred.

defendant told Cortesi he was in the black truck ahead of Cortesi's vehicle, tapped his brake lights, and instructed Cortesi to follow him. The two cars drove west on Fillmore and then north to Arthington Street before stopping. They parked and defendant exited the black truck and approached Cortesi's front passenger's side window. Defendant reached through the car window and he and Cortesi "had a hand-to-hand transaction." Cortesi gave defendant $100 in prerecorded funds and received a plastic bag containing 15 packets of suspect heroin. Defendant returned to his vehicle and drove away.

¶ 6 Cortesi confirmed that the packets contained suspect heroin before he notified the other officers that it had been a "positive hand-to-hand transaction" and that he was leaving the scene. Minutes later, Cortesi drove to 3749 West Roosevelt, where he identified defendant in police custody as the man who had sold him suspect heroin. Cortesi later inventoried the 15 packets under inventory number 12960341.

¶ 7 On cross-examination, Cortesi testified that he never returned to the 3800 block of Arthington after the arrest. He knew defendant lived on the block where the hand-to-hand exchange took place, although he did not know where on the block he lived.

¶ 8 Officer Cathleen McCann testified that on July 23, 2013, she was working with a team of officers conducting a controlled purchase. McCann gave $100 in prerecorded funds to Cortesi, who was working as the undercover officer, before he left for the controlled purchase. As a part of the surveillance team, McCann drove to approximately Arthington and Independence and parked. She observed Cortesi and followed him from there to approximately 3845 West Arthington, where he parked behind a black vehicle. McCann drove past the two cars, parked a couple of houses down, and watched the two cars behind her through her car's mirrors. McCann

observed a man, identified in court as defendant, exit a black car, walk up to Cortesi's car, and reach inside his car's window. Defendant got back into his car and drove away, past McCann, but stopped again. Defendant exited, approached an unknown vehicle, and did "the same thing" with that vehicle, *i.e.*, "[g]oes up to the passenger's window." McCann saw "defendant reach in, hand something to an unknown person and then got back into his car."

¶ 9 McCann radioed enforcement officers and continued to follow defendant south on Independence. When officers stopped defendant's vehicle south of Roosevelt, defendant got out, threw a bag to the ground, and started running. Officer Kevin Connelly arrived and recovered the item that defendant had thrown on the ground. McCann never went back to the 3800 block of Arthington.

¶ 10 Officer Kevin Connelly testified that on July 23, 2013, he was working as an enforcement officer. McCann radioed Connelly and told him to proceed to a location, where he discovered a black sports utility vehicle (SUV). McCann directed him to where the item had been thrown. Connelly recovered a "[b]lack plastic bag containing seven green tinted Ziploc bags containing suspect heroin" which he inventoried under inventory number 12960332.

¶ 11 Officer Morris Guerin testified that on July 23, 2013, he was working with the narcotics unit as an enforcement officer. Guerin responded to a radio communication describing a suspect who was driving southbound on Independence. Guerin observed the black SUV matching the description given and curbed the vehicle. A man, identified in court as defendant, opened the driver's side door and fled. Guerin detained defendant "a block to two blocks" away in a vacant lot near Roosevelt and Independence. Cortesi arrived and identified defendant. Guerin placed defendant into custody and recovered money, which he later confirmed was the prerecorded

money given to Cortesi to use in the controlled purchase. Guerin denied ever going back to the 3800 block of Arthington that day.

¶ 12 The parties then proceeded by way of stipulation:

> "[ASSISTANT STATE'S ATTORNEY]: Your Honor, the People have no further live testimony in this matter. At this point in time, we would be proceeding by way of stipulation. It is hereby agreed and stipulated by and between the parties that if called to testify, Dory Binkowski, B-i-n-k-o-w-s-k-i, would testify that she is a forensic scientist employed by the Illinois State Police Division of Forensic Services.
>
> That she received from the Chicago Police Department in a heat-sealed condition inventory number 12960332. She performed tests which are commonly accepted in the field of forensic chemistry on machines which are calibrated and working properly and that it was her opinion to a reasonable degree of scientific certainty that that item tested positive for 1.2 grams of heroin.
>
> This [c]ourt would further hear testimony from Forensic Scientist Binkowski that she also received from the Chicago Police Department inventory number 12960341 in a heat-sealed condition and that she performed tests which are commonly accepted in the field of forensic chemistry on machines which were tested and working properly and that it was her opinion that to a reasonable degree of scientific certainty that those items tested positive for being 3.3 grams of heroin. And that would be—[a]dding those both together for a total of 4.5

grams of heroin, which she found it to be. And then at all times a proper chain of custody was maintained. So stipulated?

[DEFENSE COUNSEL]: So stipulated. I don't think it should be added together. We are talking about some items that were allegedly delivered and some that were allegedly from a bag on the street.

THE COURT: I would agree.

[ASSISTANT STATE'S ATTORNEY]: Barring that, we would also add that in regards to the first inventory 12960332, that there was also an additional estimated amount of .9 grams, which are [*sic*] not analyzed from three items. And in regards to inventory number 12960341, there was an additional 1.6 grams of powder that were not analyzed from five separate items.

[DEFENSE COUNSEL]: So stipulated."

¶ 13 After, the State rested its case. Defendant made a motion for a directed finding, which the court denied.

¶ 14 Defendant testified that, on July 23, 2013, he was living at 3823 West Arthington with his father, Rory Clay. At approximately 5 p.m., he left his house with his infant son, got in his car, and drove towards Independence on his way to his cousin's house, which was located at 1237 South Independence. He went south on Independence and was making a turn when he "noticed a regular blue car jump out in front of [him]." The car had no lights or sirens and defendant "thought somebody was out to harm [him]." He thought he was going to be "ambushed or something" and that someone might try and shoot him. Because he had his son in the car, "the only thing [he] thought to do was get out and run" and keep his "son from catching any fire that

was coming [his] way." He ran and never looked back. He denied participating in any narcotics transaction or ever seeing Cortesi prior to trial. He also denied ever possessing drugs or cash that day.

¶ 15 Defendant's father, Rory Clay, testified that he owns the home at 3823 West Arthington. At approximately 3 p.m. on July 23, 2013, Clay arrived home from work as a Cook County corrections officer. Sometime later, four plain-clothes police officers asked to search his home, but he refused.

¶ 16 In rebuttal, the parties stipulated that defendant's criminal history included a 2006 conviction for possession of a controlled substance and a 2009 conviction unlawful use of a weapon by a felon.

¶ 17 In defendant's closing argument, he argued that, *inter alia*, "the fact these officers denied ever going back [to Clay's home] *** taints all of their investigation and their credibility across the board." In rebuttal, the State responded that, *inter alia*, the testimony of the police witnesses was credible.

¶ 18 The trial court found defendant guilty. Defendant filed a motion for a new trial, arguing, *inter alia*, that the State failed to prove "each and every material allegation of the information beyond a reasonable doubt." The court denied the motion and sentenced defendant to four years' imprisonment for the delivery conviction and three years' imprisonment for the possession conviction, to be served concurrently. This timely appeal followed.

¶ 19 Defendant concedes that he delivered heroin to Cortesi, but contends that the State failed to prove beyond a reasonable doubt that the heroin he gave to Cortesi weighed more than one gram. Specifically, he argues that, "where the State's allegations were that [defendant] delivered

15 bags of heroin and that 10 of those bags were tested, the State was required to prove that Binkowski tested a sample from each of the 10 bags in order for each bag's contents to be included in the total weight" and merely stipulating to the 10 packets' combined weight is insufficient proof of individualized testing. The State responds that, "by stipulating to Binkowski's testimony, defendant has affirmatively waived his claim" and, even if it were not waived, there was sufficient evidence that the heroin defendant delivered to Cortesi weighed more than one gram.

¶ 20 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). It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *Id.* at 228. 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).

¶ 21 Defendant was found guilty of delivery of more than 1 gram but less than 15 grams of heroin. 720 ILCS 570/401(c)(1) (West 2012). To sustain a conviction for delivery of a controlled substance, the State had to "prove that [the] defendant knowingly delivered a controlled

substance." *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009); see 720 ILCS 570/401 (West 2012).

¶ 22 "When a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver and there is a lesser included offense of possession of a smaller amount, then the weight of the seized drug is an essential element of the crime and must be proved beyond a reasonable doubt." *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996). As defendant was convicted of the offense of delivery of more than 1 gram but less than 15 grams of heroin, a Class 1 felony (720 ILCS 570/401(c)(1) (West 2012)), the offense of delivery of less than one gram of heroin, a Class 2 felony (720 ILCS 570/401(d) (West 2012)), is a lesser-included offense. As the class of defendant's offense depends on the weight of the controlled substance defendant delivered, weight is an essential element of the offense.

¶ 23 In calculating the weight of a controlled substance, the State's forensic scientist need not always test every sample of a substance for the scientist to make a conclusion regarding the composition of the substance as a whole. *Jones*, 174 Ill. 2d at 429. "Rather, random testing is permissible when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested." *Id.* However, if the substance "is not sufficiently homogenous, then a portion from each container or sample must be tested to determine the substance in each container or sample." *People v. Clinton*, 397 Ill. App. 3d 215, 221 (2009). If the recovered substance is "in the form of powder in separate packets, a sufficient number of the seized packets must be tested to establish that the defendant possessed the requisite amount of the illegal drug to prove the weight element beyond a reasonable doubt." *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 14. If the contents of the

packages are commingled before prior to testing, the test results are insufficient to prove the weight element beyond a reasonable doubt. *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 24 As a preliminary matter, the State, citing *People v. Woods*, 214 Ill. 2d 455 (2005), argues that defendant, by stipulating to Binkowski's testimony, affirmatively waived his challenge to the weight of the heroin contained in the 10 of the 15 packets recovered by Cortesi and tested by Binkowski. *People v. Woods*, 214 Ill. 2d 455, 475 (2005) ("A defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence."). In response, defendant argues that *Woods* is distinguishable because that case involved a challenge to the chain of custody, an issue of admissibility, whereas he presents "a challenge to the sufficiency of the evidence as to the overall weight of the narcotics."

¶ 25 The stipulation to Binkowski's testimony that she did not test five packets inventoried under inventory 12960341, combined with Cortesi's testimony that he received and inventoried 15 packets, demonstrates that Binkowski only tested 10 of the 15 packets defendant sold to Cortesi. Binkowski concluded that "those items tested positive for being 3.3 grams of heroin." In stipulating to Binkowski's testimony, defendant stipulated to the identity of the controlled substance (heroin) and to its total weight (3.3 grams). Accordingly, because defendant stipulated to the identity and the total weight of the controlled substance, he is attacking the foundation for the proof of that element—a challenge to the admissibility of the evidence, not its sufficiency. See *People v. Durgan*, 346 Ill. App. 3d 1121, 1130-31 (2004) (" 'Arguably, sufficiency involves absence of proof of a basic element of the crime. Defendant here is not challenging the lack of proof as to the existence of an element of the crime, since [the expert] testified to the identity of the controlled substance. The challenge is to the failure to lay a proper foundation for the proof of that element. This goes to a

determination of its admissibility, rather than sufficiency of the evidence presented.' ") (quoting *People v. DeLuna*, 334 Ill. App. 3d 1, 20 (2002)).

¶ 26 Defendant has therefore waived his challenge to the issue of whether Binkowski tested each packet of heroin individually, as the parties stipulated to Binkowski's testimony that the packets contained 3.3 grams of heroin and defendant cannot challenge the foundation for that testimony. *People v. Besz*, 345 Ill. App. 3d 50, 57 (2003); see also *Durgan*, 346 Ill. App. 3d at 1132 ("because defendant stipulated to [the forensic scientist's] testimony that the substance contained 1.8 grams of cocaine, he cannot challenge on appeal the foundation for [the expert's] testimony").

¶ 27 We note that defendant did not dispute Binkowski's stipulated testimony at trial or in a posttrial motion, and that the stipulation is the only evidence regarding the identity and weight of the recovered packets. The record therefore supports the conclusion that the parties agreed to remove from the case the issues regarding the identity and weight of the packets of suspect heroin. *People v. Miller*, 218 Ill. App. 3d 668, 673 (1991) (declining to scrutinize ambiguous language regarding the weight and contents of the seized substances in the stipulation "where the parties stipulated to this testimony and other than the stipulated testimony, never addressed the issue at trial"); *People v. Williams*, 200 Ill. App. 3d 503, 516 (1990) ("the result of the parties' agreement to present the chemist's testimony by stipulation, in such a brief and summary fashion, was essentially to remove from the case any issue of the expert's qualifications, the chain of custody, or the weight and chemical composition of the suspect materials").

¶ 28 In sum, we find that by entering into Binkowski's stipulation, defendant affirmatively waived review of his claim. Therefore, based on the evidence presented at trial, a rational trier of fact could have found defendant guilty of the offense of delivery of 1 gram or more but less than 15 grams of heroin.

¶ 29 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.