2018 IL App (1st) 153224-U
No. 1-15-3224
Order filed February 13, 2018

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	No. 14 CR 4164
v.	)	
	)	Honorable Mary Colleen Roberts,
WALTER TERRY,	)	Judge Presiding.
	)	
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin over defendant's contention that the State failed to prove he intended to deliver at least 15 grams of heroin.

¶ 2 Following a jury trial, defendant Walter Terry was found guilty of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin (720 ILCS 570/401(a)(1)(A) (West 2014)) and sentenced to six years in prison. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he intended to deliver at least 15 grams of heroin. He therefore requests we reduce his conviction to possession of a

controlled substance with intent to deliver at least 1 gram but less than 15 grams of heroin. We affirm.

¶ 3 At trial, Chicago police officer Beckman testified that he had been a police officer for 10 years and was on the Tactical Team, where he "combat[s] narcotics activity, gang activity." On February 7, 2014, he was working on the Tactical Team and, at about 7 a.m., observed defendant running northbound around the 800 block of North St. Louis Avenue. Defendant looked in Beckman's direction, reached into his pocket, "discarded a soft ball sized brown object to the ground, which landed in the snow," and kicked snow over that object. Beckman exited his squad car, approached defendant for a field interview, and announced his office. Defendant stopped and Beckman went to recover the object.

¶ 4 Beckman recovered "one brown paper bag containing a knotted clear plastic bag." The "knotted" bag contained "18 mini ziplock bags with red bulldog logos, each containing a white powder substance, suspect heroin." The brown paper bag also contained "an additional loose 11 clear mini ziplock bags with red bulldog logos, each containing a white powder substance, suspect heroin," and "two mini ziplock bags with white tape, each containing a white powder substance, suspect heroin." The 18 bags contained in the knotted clear plastic bag and the 11 mini ziploc bags that were loose in the brown paper bag had purple tape on them. Defendant was placed into custody and patted down to ensure he did not have any weapons.

¶ 5 While on the way to the police station, after defendant received his *Miranda* rights, defendant stated: " ' you guys got me. I'm going to take my weight.' " At the police station, another officer recovered $196 in United States Currency from defendant's pants pockets. Beckman handed the items he had recovered from the ground to his partner, Officer Clarke, who

placed the narcotics in an inventory bag, counted the items, and generated a unique inventory number.

¶ 6 Beckman testified that the "800 block of North St. Louis" was an area known for "high volume of narcotics activity, as well as gang activity." Beckman testified that he had experience in investigating narcotics cases and arresting people who sell narcotics. He had made over 2,000 narcotic arrests and had arrested between 1500 to 1600 "narcotic sellers." Based on his experience, he was familiar with how narcotics are packaged.

¶ 7 Beckman testified that heroin packaged for sale was "usually packaged in the mini ziplock bags" and "[i]t could also be packaged in small tin foil packets." He had "also seen heroin in small little capsules." Beckman was familiar with "logos" and, in his experience, when heroin was "packaged for sale with logos," "[e]ach narcotics spot location usually has a specific design on their mini ziplock bags. If it's red bulldog logos or clear baggies, those logos are used to identify a narcotic location, to identify their product." He had seen red bulldog logos used for the "800, as well as 900 block of North St. Louis."

¶ 8 In response to the question, "how much is usually contained in an item packaged for sale, or in a bag packaged for sale," Beckman testified it is "one jab." A "jab" means "narcotics that are ready, packaged for street level sale" and "one jab" consists of "13 baggies per knotted plastic bag." Usually sellers start with "one jab." He testified that sellers "go through the jab of narcotics and they hand in their money. They take whatever money that they obtain from selling the narcotics. Then they get another jab, which is another clear plastic bag, usually containing 13 to 14 bags."

¶ 9 Beckman testified that, in this case, he recovered 31 small plastic baggies containing suspect heroin, which was an amount he would "[a]bsolutely not" see for personal use. He testified an amount for personal use was "usually in the amount of one to two bags on their person." Asked whether there was "anything significant about there being 31 bags recovered in this case," Beckman responded, "Yes. The significance is it's a large amount of narcotics that - - that in my experience, is packaged and ready for street level sale to be distributed or sold."

¶ 10 Chicago police officer Clarke testified similarly to Beckman regarding recovering the "brown paper bag containing 31 mini ziplock bags of suspect heroin" dropped by defendant, which Clark inventoried pursuant to Chicago police department policy.

¶ 11 Chandra Girtman, a forensic scientist, qualified as an expert in the field of drug chemistry. Girtman testified she received the evidence bag, which contained "31 plastic bags that had powder in them," one empty plastic bag, and one empty brown bag. She created four "plastic bags" from these items. She placed the empty plastic bag and the empty paper bag in separate plastic bags. In the bag Girtman labeled as "Exhibit 3," she placed 29 plastic bags with a powder substance. In the bag she labeled as "Exhibit 4," she placed "two plastic bags plus the packaging they were in and the powder." She testified that, of the total 31 items, she "analyzed all of them."

¶ 12 After Girtman received the evidence and made sure the contents of the evidence bag matched the inventory sheet, she weighed the samples. For the 29 bags of powder in her Exhibit 3, People's Exhibit No. 3(b), she first found the "gross weight." She placed a clean disposable plastic weight dish on the balance and brought it to "0 reading." She testified that "[t]he items are then placed into that, and I get what's first called a gross weight and then from that, I determine how many items I have to work to a certain weight class."

¶ 13 In response to the question, "what was the total weight of the 29 items that you analyzed," she testified that the "total weight after determining how many to analyze, which I analyzed all 29, and after placing the empty plastic packaging back, it was 14.8 grams of powder." She went through the same procedure when she weighed the two bags in her Exhibit 4, People's Exhibit No. 3(c), and determined the "total weight of the two items in 3(c) was .3 grams." The total weight of all the items together was 15.1 grams.

¶ 14 Girtman then performed a "series of color tests on small amounts of the powder from each item." The results of the tests showed an "indication of heroin." She performed a "Gas Chromatograph Mass Spectrometer" which indicated heroin in the amount of 14.8 grams for People's Exhibit No. 3(b) and .3 grams in People's Exhibit No. 3(c). Based on Girtman's education, training, and experience in drug chemistry, it was her opinion that the presence of a controlled substance in People's Exhibit No. 3(b) was 14.8 grams of "a substance containing heroin" and in People's Exhibit No. 3(c) it was .3 grams "a substance containing heroin." She testified that the total weight of the controlled substance of heroin was 15.1 grams.

¶ 15 Following argument, the jury found defendant guilty of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin. The court subsequently denied defendant's motion for a new trial and sentenced him to six years in prison.

¶ 16 Defendant contends that the State did not prove him guilty of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin. He concedes that the evidence established that he intended to deliver the 29 bags that had purple tape and were labeled with the red bulldog logo, which Beckman testified was associated with selling in the 800 and 900 blocks of North St. Louis Avenue. He however asserts the evidence did not establish that he

intended to sell the two other bags of heroin that had no logo and white tape, not purple tape. He claims that, because the 29 bags "marked for sale" only weighed 14.8 grams, the State did not prove he intended to deliver 15 or more grams of heroin. Defendant requests that we reduce his Class X conviction to the lesser offense of possession of a controlled substance with intent to deliver 1 gram but less than 15 grams of heroin, a Class 1 offense (720 ILCS 570/401(c)(1) (West 2014)).

¶ 17 When we review the sufficiency of the evidence, the question 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, all reasonable inferences from the record are drawn in favor of the State. *People v. Johnson*, 2013 IL App (4th) 120162, ¶ 20. "The trier of fact determines the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence." *People v. Branch*, 2014 IL App (1st) 120932, ¶ 9. We will not retry a defendant (*People v. Clinton*, 397 Ill. App. 3d 215, 220 (2009)) and will only reverse a conviction if the "evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt" (*Branch*, 2014 IL App (1st) 120932, ¶ 9).

¶ 18 To prove defendant guilty of possession of heroin with intent to deliver, the State had to prove that (1) he had knowledge of the presence of the heroin, (2) he had possession or control of the heroin, and (3) he intended to deliver the heroin. 720 ILCS 570/401(c) (West 2014); see *Branch*, 2014 IL App (1st) 120932, ¶ 10.

¶ 19 Defendant was convicted of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin, which is a Class X felony. 720 ILCS 570/401(a)(1)(A)

(West 2014). The Code of Criminal Conduct also contains an offense for possession of a controlled substance with intent to deliver between 1 and 15 grams of heroin, which is a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2014). Therefore, because the class of defendant's offense depends on the amount of controlled substance defendant intended to deliver, the weight of the recovered heroin is an essential element of the offense. See *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 20 The element of "intent to deliver" is generally established by circumstantial evidence, as direct proof of it is rare. *Branch*, 2014 IL App (1st) 120932, ¶ 10. Courts have considered many factors as probative of intent to deliver. *Branch*, 2014 IL App (1st) 120932, ¶ 10. These factors include whether the quantity of the controlled substance found in a defendant's possession is too large to be considered as being for personal use, the high purity of the drug, the manner in which the substance was packaged, and whether the defendant possessed weapons, large amounts of cash, police scanners, beepers, cellular telephones, or drug paraphernalia. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). These are just examples of factors that courts use to determine intent. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). Whether the evidence was sufficient to prove intent to deliver is "determined on a case-by-case basis" and "there is no hard and fast rule to be applied in every case." *Robinson*, 167 Ill. 2d at 412-14.

¶ 21 There was sufficient circumstantial evidence for the jury to reasonably conclude that defendant possessed all 15.1 grams of heroin with the intent to deliver it. The 15.1 grams of heroin was contained in 31 individual bags. Beckman, who was experienced in arresting people who sell narcotics, testified that 31 small plastic baggies was "absolutely not" an amount for personal use. Based on Beckman's experience, the 31 bags was "a large amount" and was

"packaged and ready for street level sale to be distributed or sold." Thus, based on Beckman's testimony and the manner in which the heroin was packaged, *i.e.*, 31 individual bags, a jury could reasonably infer that defendant intended to sell the 31 bags. See *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 17 (affirming the defendant's conviction for possession of a controlled substance with intent to deliver where the evidence demonstrated, *inter alia*, that the 4.9 grams of heroin was contained in "21 separate packages, with eight of those packages taped together in a line").

¶ 22 Furthermore, $196 in United States currency was recovered from defendant's person. See *Robinson*, 167 Ill. 2d at 408 (large amount of cash is a factor considered probative of a defendant's intent to deliver). In addition, the location in which the officers saw defendant attempt to discard the narcotics was known for a "high volume of narcotics activity," supporting the inference that he intended to deliver the 31 packets. See *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 23 ("Courts in Illinois have noted that presence in an area where drug trafficking is common may support an inference that defendant intended to distribute drugs."). Accordingly, viewed as a whole and in the light most favorable to the State, the evidence was sufficient for the jury to reasonably conclude that defendant possessed the 15.1 grams of heroin contained in the 31 packets with intent to deliver.

¶ 23 As noted previously, defendant does not dispute that he possessed with intent to deliver the 29 bags that had purple tape and red bulldog logos. Rather, he asserts the evidence did not show that he intended to deliver the two bags that had white tape and no logos. We disagree.

¶ 24 As defendant points out, Beckman testified that the red bulldog logo on 29 of the bags was used to identify the 800 and 900 blocks of North St. Louis Avenue as the narcotics selling

location. However, contrary to defendant's assertion, this testimony did not show that the lack of logos on the other two bags, *i.e.* no identifying location, establishes that defendant did not intend to sell those two bags. Rather, given that the two bags without logos were contained in the same bag as the other 29 bags, which were clearly intended for sale, a jury could reasonably conclude that defendant intended to sell all 31 individual bags. In addition, while Beckman explained the significance of the red bulldog logos, he did not distinguish between the bags with and without the logos when he specifically testified that 31 bags was a "large amount," it was "packaged and ready for street level sale to be distributed or sold," and was "absolutely not" an amount for personal use.

¶ 25 Defendant asserts that the only evidence explaining why the two bags were marked differently (no logo, white tape) and "set aside" from the other 29 bags (logo, purple tape) was Beckman's testimony that two bags would be a typical amount for a person to carry for personal use. But the evidence does not show the two bags at issue were "set aside." Beckman indeed testified that an amount for personal use was "usually in the amount of one to two bags on their person." But the unlogoed bags were not found separately on defendant's person. Instead, defendant carried them in the same bag as the 29 bags he intended for sale, commingled with the 11 baggies that were not in the "jab." Accordingly, we are unpersuaded by defendant's argument that the State did not prove he intended to sell the two bags that were in the same bag, albeit marked differently, with the other 29 bags he did intend to sell.

¶ 26 Defendant also contends that the forensic scientist's testimony did not establish that the 31 bags of heroin weighed at least 15 grams, as her calculation of the total weight, 15.1 grams, included the weight of the heroin *and* the 31 ziplock bags that contained the heroin. He asserts

that the chemist's testimony was insufficient to show that the weight of the heroin did not include the individual plastic bags, as she did not testify that she removed the powder from each of the individual bags before weighing it, weighed the powder from each ziplock bag separately, or returned any powder to an individual ziplock bag. Defendant claims that the weight added by the 31 ziplock bags "almost assuredly" was more than 100 milligrams, as a "penny weighs 2,500 milligrams." Defendant therefore argues that the State did not establish the total amount of heroin was at least 15 grams.

¶ 27 Viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to support that the recovered heroin weighed 15.1 grams. The jury could reasonably conclude from Girtman's testimony that she separately weighed the contents of the 31 bags of heroin and properly determined the weight of the heroin contained in each ziplock bag without weighing the bag.

¶ 28 When Girtman was asked, in the context of her exhibit 3, "what was the total weight of the 29 *items* that you analyzed," she responded, the "total weight after determining how many to analyze, which I analyzed *all 29*, and after placing the empty plastic packaging back, it was 14.8 grams of powder." The only relevant "packaging" in weighing the heroin would be the ziplock bags in which it was packaged. Thus, Girtman's testimony shows that packaging was "empty" at some point, and the jury could reasonably conclude from her testimony that she weighed the heroin without the packaging. She followed the same procedure with the other two bags.

¶ 29 We recognize that Girtman did not testify that she removed the contents of each bag before she weighed the heroin. However, to the extent that Girtman's testimony was ambiguous because she did not explain how she accounted for the weight of the bags, the jury, as trier of

fact, had the responsibility "to decide on the inferences to be drawn from ambiguous testimony." See *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 25-26.

¶ 30 Moreover, on review, we give deference to the jury's assessment of the evidence, as we must review the sufficiency of the evidence in the light most favorable to the State. *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 25-26. Thus, defendant must "challenge ambiguous testimony during the course of the trial or else risk the application of this rule on appeal." *Id.* Here, during cross-examination, defendant failed to challenge Girtman on how she weighed the heroin. Thus, to the extent defendant failed to clarify any ambiguity in Girtman's testimony, we must give deference to the jury's assessment of the evidence.

¶ 31 Further, Girtman was qualified as an expert in drug chemistry and, where the record is unclear, "we will not presume that an improper procedure was performed." See *People v. Miller*, 218 Ill App. 3d 668, 673 (1991)). The jury could reasonably infer from Girtman's expert testimony that she performed proper procedures and did not include the weight of the ziplock bags when she determined the total weight of the heroin. Thus, viewing the evidence in the light most favorable to the State, Girtman's testimony was sufficient for the jury to reasonably conclude that she properly weighed the heroin and it weighed 15.1 grams.

¶ 32 The court in *People v. Lashley*, 2016 IL App (1st) 133401, considered a similar issue. In *Lashley*, the defendant argued that the State failed to prove he possessed more than 15 grams of heroin, asserting the stipulation regarding the weight indicated the chemist weighed the heroin with the plastic bags in which it was packaged. *Lashley*, 2016 IL App (1st) 133401, ¶ 24. Pursuant to the stipulation, in relevant part, the chemist would testify that the "contents" of the 65 tested items were positive for heroin, the "actual weight of those items was 15.2 grams," and

the "total estimated weight of the 83 items would be 19.4 grams." *Id.* ¶ 12. The court affirmed the defendant's conviction, despite finding it "not entirely clear that the chemist weighed both the powder and the bags, or subtracted the weight of the bags from the overall weight of the 65 tested items." *Id.* ¶ 28.[1] Nor could the court be certain what the weight of the bags was, or that they weighed more than .2 grams. *Id.* ¶ 28.

¶ 33 Nevertheless, the court found it "more likely that the weight of the bags did not factor into the chemist's calculation, considering that he was weighing the drugs for the express purpose of preparing evidence for the State's prosecution and weighed just enough of the drugs (15.2 grams) to provide the State with enough evidence to prosecute defendant for possessing between 15 and 100 grams of heroin." *Id.* ¶ 28. Noting that the defendant could have but did not cross-examine on these points and "taking the evidence in the light most favorable to the State and with no contrary evidence put forth by defendant," it found the State presented sufficient evidence to prove that the defendant possessed more than 15 grams of heroin. *Id.* ¶ 29.

¶ 34 Similarly, here, while Girtman did not specifically testify that she removed the contents of the bags before she weighed them, we find it was "more likely that the weight of the bags did not factor into [her] calculation," considering that she was weighing the heroin to prepare enough evidence for the State to prosecute defendant for intent to deliver at least 15 grams of heroin. *Lashley*, 2016 IL App (1st) 133401, ¶ 28. Furthermore, as previously discussed, defendant had the opportunity to cross-examine Girtman on this issue but failed to do so. If defendant had raised a challenge to the weighing procedure, the State would have been able to respond. As it stands, the evidence regarding the weight is unrebutted. *Id.* ¶ 29. Notwithstanding defendant's

[1] The court's conclusion was not based on the fact that, by stipulating to the weight of the heroin, the defendant forfeited review of his challenge. *Lashley*, 2016 IL App (1st) 133401, ¶¶ 23-29.

assertion to the contrary, we do not find *Lashley* distinguishable merely because Girtman gave "detailed testimony about the procedures she followed" whereas the stipulation in *Lashley* was cursory and did not detail the procedures.

¶ 35 We also disagree with defendant's assertion that Girtman's testimony establishes that she weighed "each group of 'items' at the same time" rather than each bag individually. When Girtman received the inventory bag, she separated the 29 bags with red bulldog logos, which she labeled as Exhibit No. 3, from the 2 bags without logos, which she labeled as Exhibit No. 4. Despite these identified groups and labels, throughout Girtman's testimony she consistently referred to the tested bags of heroin in the plural form as "items," implying that she considered them as separate bags rather than a "group" or "exhibit" of items. Further, when asked how many of the 31 items she analyzed, Girtman responded, "I analyzed all of them," *i.e.*, every single bag. And with respect to the exhibit containing the 29 bags, she specifically testified that she "analyzed *all 29*," from which the jury could reasonably infer that she weighed all items separately, not together as a group.

¶ 36 Accordingly, based on the foregoing and viewing all the evidence in the light most favorable to the State, we conclude that the evidence was sufficient for the jury to reasonably conclude that the heroin weighed at least 15 grams.

¶ 37 For the reasons stated above, we affirm.

¶ 38 Affirmed.