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2018 IL App (3d) 150495-U

Order filed November 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,)	Appeal No. 3-15-0495
v.)	Circuit No. 12-CF-2308
ALAN K. O'LARGE,)	Honorable Edward Burmila, Jr.,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.

Justice Lytton concurred in the judgment.

Justice Wright dissented.

ORDER

¶ 1

Held: The State proved defendant guilty of unlawful delivery of a controlled substance based on a theory of accountability beyond a reasonable doubt.

¶ 2

Defendant, Alan O'Large, appeals his conviction for unlawful delivery of a controlled substance. 720 ILCS 570/401(d)(1) (West 2012). On appeal, he asserts the State failed to prove he was connected to the unlawful delivery of drugs beyond a reasonable doubt. We affirm.

¶ 3

FACTS

¶ 4 On October 25, 2012, the State charged defendant with unlawful delivery of a controlled substance, a Class 2 felony. 720 ILCS 570/401(d)(1) (West 2012). The indictment alleged defendant and LaShelle McDonald worked together to deliver crack cocaine on August 13, 2012.

¶ 5 On August 20, 2014, the State tried defendant before a jury. The State presented the following relevant evidence.

¶ 6 Agent Wachtl worked as a police officer in Will County. He was assigned to the Joliet Metropolitan Area Narcotics Squad (MANS). Wachtl was conducting an undercover investigation into McDonald. On August 13, 2012, he contacted McDonald to arrange for the purchase of crack cocaine. He drove McDonald to the Sunshine Food Mart where she said she would meet her supplier. Wachtl contacted other MANS agents to set up surveillance in the general vicinity of the food mart, as Wachtl was unsure exactly where McDonald would meet her supplier. McDonald called her supplier. She received a return phone call, left the car, and walked behind the Sunshine Food Mart. Wachtl could not see McDonald once she walked behind the food mart. She returned and gave Wachtl a baggie containing off-white rock crystals. Wachtl later performed a field test on the substance. It tested positive for cocaine. Wachtl could not see whom McDonald met with behind the Sunshine Food Mart. His fellow MANS agents told him McDonald met a man identified as defendant by another police officer.

¶ 7 Agent Wachtl bought cocaine from McDonald another time a month earlier. During that buy, he went to the hotel at which she was staying. She told him her dealer would bring the drugs to the hotel. MANS agents were conducting surveillance. They saw McDonald approach a white Lexus. Wachtl could not see the driver. The Lexus was not registered to defendant. Wachtl completed the purchase for cocaine. He testified dealers often have many sources.

¶ 8 James Coglianese, a forensic scientist for the State, tested the substance Wachtl received from McDonald on August 13. He confirmed the substance was cocaine.

¶ 9 Officer Richard Trafton was also part of MANS. He surveyed both of Wachtl's buys from McDonald. On August 13, 2012, Trafton drove to the Sunshine Food Mart shopping center. Agent Knezevich rode with him. Trafton saw Agent Wachtl pull into the parking lot. He also saw McDonald exit the car. Trafton drove in the direction McDonald was walking. He drove past an alley in which he saw McDonald approach an African-American male. He said he thought the two had a hand-to-hand transaction. He said it could have been a handshake. He based this belief on the man's and McDonald's outstretched hands. Trafton did not see anything exchange hands.

¶ 10 Officer Trafton caught a glimpse of the man as he walked out of the alley. The man headed east toward Oakland. Trafton pulled into a Citgo as he saw the man head north on Oakland. Trafton approached Joliet Police Officer Lanton. He asked Lanton if he could identify the male walking north on Oakland. Lanton drove north on Oakland. Trafton followed Lanton to ensure Lanton made contact with correct person. Lanton pulled to the side of the road to speak to the man. Trafton met with Officer Lanton after the encounter. Lanton told Tranton the man in question was defendant. Trafton confirmed the man he saw in the alley, and to whom Lanton spoke, was defendant via a photo at the MANS office.

¶ 11 Text messages between Agent Wachtl and Officer Lanton became an issue at trial. Wachtl sent a text message to Lanton asking if he remembered stopping to talk to defendant on August 13, 2012. He also asked Lanton to testify. Trial counsel for defendant asked for a mistrial because he was unaware of the messages and their content. The judge granted the request. The State retried defendant because the prosecution committed no error.

¶ 12 On August 29, 2014, defendant waived a jury trial. In September 2014, the issue proceeded to a bench trial. Both parties stipulated to the testimony elicited at the jury trial.

¶ 13 McDonald testified she was in prison as a result of her deliveries of a controlled substance to Agent Wachtl. She admitted she called her supplier at the Sunshine Food Mart in order to obtain the crack cocaine. She went to the alley to meet her supplier. She denied defendant gave her the crack cocaine. She said her dealer's name was Country. He was the only person she met behind the food mart. McDonald and O'Large had a previous relationship. They share two children, ages 17 and 23.

¶ 14 Police Officer RJ Knezevich was also part of MANS. He surveyed both of Wachtl's buys from McDonald. On August 13, 2012, he saw Wachtl drive into the parking lot of the shopping center. He saw McDonald exit the truck and walk toward the alley. Officer Knezevich rode in Trafton's car as Trafton drove toward the alley. As the car passed the alley, Knezevich saw McDonald with an African-American male. They both had their hands up in a position indicating they just shook hands. Knezevich could not see anything in either of their hands. Knezevich identified defendant as the man from the alley.

¶ 15 Officer Brian Lanton testified that Officer Trafton approached him for help with identifying a man walking north on Oakland. Lanton pulled alongside defendant when he saw he matched the description. Lanton identified the man as defendant. He previously had contacts with defendant as a result of his patrol duties.

¶ 16 The trial court found defendant guilty of unlawful delivery of a controlled substance under a theory of accountability. 720 ILCS 570/401(d)(1) (West 2012); 720 ILCS 5/5-2(c) (West 2012). The court focused on McDonald's *modus operandi*, which the State established over multiple controlled buys. McDonald always told the buyer she would not have drugs on her. She

would then call her dealer, leave to meet him, and return with drugs. The trial court reasoned defendant acted as an agent for McDonald; *i.e.*, he was behind the Sunshine Food Mart for some reason connected with the sale of the controlled substance. The trial court stated it was inconsequential if defendant actually provided the drugs because “he clearly participated in the delivery of a controlled substance.” The court sentenced defendant to 44 months’ imprisonment.

¶ 17 This appeal followed.

ANALYSIS

¶ 19 On appeal, defendant argues that the State failed to prove him guilty of unlawful delivery of controlled substance beyond a reasonable doubt. 720 ILCS 570/401(d)(1) (West 2012). Specifically, defendant argues the State failed to establish defendant's accountability as to McDonald's delivery of crack cocaine. 720 ILCS 5/5-2(c) (West 2012).

¶ 20 A challenge to the sufficiency of the evidence for a criminal conviction requires this court to consider whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the State proved the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). This court’s role is not to retry defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We will not substitute our judgment for that of the trier of fact, who was tasked with “resolv[ing] conflicts in the testimony, *** weigh[ing] the evidence, and *** draw[ing] reasonable inferences from basic facts to ultimate facts.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence before the trial court must have been so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant’s guilt in order for this court to set aside defendant’s conviction. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008).

¶21 To sustain defendant's conviction of unlawful delivery based on a theory of accountability, the State must have established beyond a reasonable doubt: "(1) that the defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the delivery; (2) that the defendant's participation took place before or during the commission of the delivery; and (3) that the defendant had the concurrent, specific intent to promote or facilitate the commission of the offense." *People v. Deatherage*, 122 Ill. App. 3d 620, 624 (1984). Although mere presence at the scene of the crime is insufficient to sustain a conviction under a theory of accountability, defendant's guilt may be established from his "approving presence at the scene of the crime" intended to aid in the offense. *People v. Saunders*, 206 Ill. App. 3d 1008, 1014 (1990). The State must offer evidence of defendant's conduct that aided the commission of the offense to establish a common design and accountability. *People v. Schlig*, 120 Ill. App. 3d 561, 570 (1983).

¶22 Here, defendant does not argue he was not present in the alley behind the Sunshine Food Mart. Rather, he submits the State presented insufficient evidence to find that he (1) abetted McDonald in the sale of cocaine or (2) had the concurrent, specific intent to do so. We disagree.

¶23 The record shows that the State presented evidence sufficient to allow the trier of fact to find defendant was more than merely present at the scene of the crime. The fact finder could have reasonably concluded defendant's presence behind the Sunshine Food Mart and interaction with McDonald constituted a design to aid in the offense. McDonald testified she entered the alley to meet her supplier and obtain the crack cocaine. However, she denied defendant was her supplier, insisted she met a man named Country behind the food mart, and that he was the only person present at that time. This testimony is contradicted by Trafton's and Knezevich's

testimony. McDonald and defendant also have a history, including a romantic relationship and two children. These facts provided a reasonable basis to cast doubt over McDonald's testimony.

¶ 24 The State presented evidence indicating defendant and McDonald made hand-to-hand contact behind the Sunshine Food Mart. McDonald told Agent Wachtl that she was going to meet her supplier, as was her pattern established by the previous buy. MANS agents drove by the alley immediately after McDonald entered it. They saw only McDonald and defendant. The trial court did not believe McDonald and defendant met in the alley behind the Sunshine Food Mart by chance. Defendant was either there to give McDonald drugs, as could have been properly adduced by the handshake evidence or as a form of protection in case the buy went wrong. These conclusions were not so improbable as to create a reasonable doubt of defendant's guilt. The statute required the State to prove, at a minimum, defendant "attempted to aid" in the offense. *Deatherage*, 122 Ill. App. 3d at 624. Aiding in the delivery does not require possession of the controlled substance. Defendant would have us reverse his conviction because the State could not prove defendant possessed the crack cocaine. The evidence demonstrates defendant met McDonald behind the Sunshine Food Mart to facilitate the offense whether for protection or otherwise. Because it is not within the province of this court to retry defendant, we will not disturb a conviction borne out by the evidence.

CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 27 Affirmed.

¶ 28 JUSTICE WRIGHT, dissenting:

¶ 29 I respectfully dissent. The evidence presented by the State in this matter may aptly be described as scant, thin, and vaporous. As stated by the majority, mere presence at the scene of

the crime is insufficient to sustain a conviction under the theory of accountability. *Saunders*, 206 Ill. App. 3d at 1014. Furthermore, neither a defendant's consent nor knowledge that a crime was being committed is sufficient to constitute aiding and abetting. *People v. Washington*, 121 Ill. App. 2d 174, 181 (1970).

¶ 30 The State presented no evidence that defendant and McDonald spoke at the scene or communicated with one another through phone calls or text messages at or before both defendant and McDonald were present in the same alley. Instead, one officer testified that as he drove past the alley he saw what "could have been a handshake" because he saw "outstretched hands." Another officer observed the same event and concluded the defendant and McDonald shook hands based on their positions to each other. This fleeting look at the purported transaction, as officers drove past the alley, cannot be construed as conclusive circumstantial evidence of defendant's guilt. Had the State corroborated that defendant received funds from McDonald, while acting as her supplier, the outcome may be different. If the prosecution could establish that McDonald did *not* have any contraband on her person before entering the alley and encountering defendant, the State's case would have been stronger.

¶ 31 A defendant's accountability may certainly be proven by and through circumstantial evidence. *People v. Bolar*, 229 Ill. App. 3d 560, 562 (1992). However, the inferential leaps required to sustain a conviction based on accountability in this case are great and go beyond reasonable inferences. I would hold that the evidence presented at trial did not fulfill the burden of proof beyond a reasonable doubt required to establish defendant's guilt.