2018 IL App (3d) 160256-U

Order filed December 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0256 Circuit No. 11-CF-366
KEMA L. FAIR,	)	Honorable Albert L. Purham Jr., Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion in admitting defendant's prior convictions to show intent, knowledge, or lack of mistake. When viewed in the light most favorable to the State, the evidence was sufficient to prove defendant guilty of unlawful possession with intent to deliver heroin.

¶ 2 Defendant, Kema L. Fair, appeals his convictions for unlawful possession of a controlled substance with intent to deliver (cocaine) and unlawful possession of a controlled substance with intent to deliver (heroin). Defendant argues that his prior convictions for drug offenses were improperly admitted at his trial as other-crimes evidence to show intent, knowledge, or lack of

mistake. Defendant also argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of unlawful possession with intent to deliver heroin. We affirm.

¶ 3 Defendant was charged with unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS 570/401(a)(2)(B) (West 2010)), unlawful possession with intent to deliver a controlled substance (heroin) (*id.* § 401(d)(i)), unlawful possession of a controlled substance (cocaine) (*id.* § 402(a)(2)(B)), and unlawful possession of a controlled substance (heroin) (*id.* § 402(c)).

¶ 4 Prior to trial, the State filed a notice of intent to use defendant's prior convictions to show intent knowledge, and lack of mistake. The convictions in question were for the offenses of unlawful possession with intent to deliver cocaine in 2000, unlawful delivery of cocaine in 2001, unlawful possession of heroin in 2006, and unlawful possession of cocaine in 2009. Defendant argued that the convictions should not be admitted because they were more prejudicial than probative. Defendant also argued that just reading the names of the convictions to the jury without going into the specific facts of the prior convictions would be improper.

¶ 5 The court entered a written order granting the State's request to admit the prior convictions. The order stated that the court had considered the pleadings, argument, and authority submitted by the parties. The court reasoned: "All of the defendant's prior criminal cases are either unlawful possession with intent to deliver (2 cases of cocaine possession) or unlawful possession (1 case for cocaine and 1 case for heroin) cases. Thus they are similar or identical to the instant charge." The court found that the prior offenses were not so remote in time as to be irrelevant. The court also noted that all of the prior offenses resulted in convictions, which assured that there was sufficient evidence to support a jury finding defendant had committed the offenses. The court reasoned that the prior convictions went directly to the

question of intent and that their probative value was not substantially outweighed by their prejudicial impact.

¶ 6 A jury trial was held. When the court recited defendant's prior convictions at the trial, the court erroneously informed the jury that defendant's two convictions for simple possession were for possession with intent to deliver. The jury found defendant guilty of possession with intent to deliver cocaine and heroin.

¶ 7 On appeal, we reversed defendant's convictions and remanded for a new trial. *People v. Fair*, 2014 IL App (3d) 120371-U, ¶ 34. We reasoned that the court committed structural error when it erroneously told the jury that two of defendant's prior convictions were for possession of a controlled substance with intent to deliver when the convictions were actually for simple possession. *Id.* ¶¶ 31-32. We declined to address a second issue that defendant raised on appeal, namely, whether the court erred in admitting the other-crimes evidence at all. *Id.* ¶¶ 4, 32.

¶ 8 On remand, a second trial was held before a different judge. Police Officer Richard Linthicum testified that on April 19, 2011, he executed a search warrant on a house on Louisa Street and defendant's person. At approximately 5 a.m., Linthicum began surveillance on the residence. At approximately 5:55 a.m., Linthicum observed defendant and Marcus McCline leave the residence in a vehicle. Defendant was driving. Another officer conducted a traffic stop on defendant's vehicle, and defendant was taken into custody.

¶ 9 Linthicum entered the Louisa Street residence and spoke with defendant's girlfriend, Erica Miller. Erica's children were also present in the residence at that time.

¶ 10 Linthicum was dispatched to the police department to interview defendant. Officer Brett Lawrence was also present during the interview. Defendant told the officers that he moved into the Louisa Street residence in May or June 2010. Sometimes Erica or McCline would stay there,

but they did not live there. Defendant said that there was a dog present at the home that belonged to him. Defendant said he was the only one who fed the dog. The officers told defendant that a bag of dog food containing illegal narcotics was found in one of the cabinets. Defendant initially denied that the narcotics found in the dog food bag were his. Defendant said that the bag in the cabinet had been there since he moved in over a year ago, and he did not know what was inside the bag. Defendant said that he fed the dog from a different bag of dog food.

¶ 11 The officers told defendant that heroin had been discovered in a jacket inside the residence. Defendant admitted that the jacket and the heroin belonged to him. Defendant said that he was a heroin addict, and he sometimes sold heroin "to basically keep the lights on." The officers told defendant about a grinder that was discovered in the kitchen, and defendant said that it belonged to him but he had not used it in awhile. Defendant told the officers that all the drugs in the residence were his. Defendant said Erica and McCline had nothing to do with the drugs. Defendant stated that he would obtain narcotics in Chicago and return to Peoria to sell them. Defendant said that he "sold a few bags, four to five bags *** within the past couple days."

¶ 12 Officer Lawrence testified that he participated in the search of the Louisa Street residence. During the search, the officers located a grinder containing a white powder residue, foils, and a plate containing powder residue the officers suspected to be cocaine. The officers located a Crown Royal bag inside a dog food bag in a kitchen cabinet. The Crown Royal bag contained several baggies of a substance the officers suspected to be cocaine. The officers located "[f]oil bindles" inside a jacket. The officers also located mail addressed to defendant, including an electric bill. Lawrence video recorded the items found in the residence, and the video was played for the jury.

¶ 13 Lawrence later interviewed defendant at the police department with Officer Linthicum. The officers seized $351 from defendant's pockets while he was in the interview room. During the interview, defendant said that the cocaine the officers found was not his, but the heroin was his. Defendant said that he both used and sold heroin. Lawrence could not recall defendant ever saying that the cocaine was his or that all the drugs in the house were his. Lawrence testified that he did not take notes or write a report based on the interview, and he did not remember the specifics of the interview.

¶ 14 Forensic scientist Michelle Dierker testified that she tested white powder submitted by the police in connection with the instant case. The powder contained cocaine and weighed 107.6 grams. The police also submitted several foil packets in connection with the instant case. Dierker determined that the substance inside one of the foil packets contained heroin. The substance weighed less than a tenth of a gram. She did not test the remaining packets.

¶ 15 During a break in the trial, the State informed the court outside the presence of the jury that it intended to introduce certified copies of conviction for defendant's four prior convictions. The State said that these convictions had "been allowed to be introduced as evidence of other crimes and bad acts to prove intent." Defendant objected to admission of his prior convictions on the basis that they were prejudicial because they showed propensity rather than intent. The court stated that it had not reviewed the transcript of the former judge's prior ruling on the issue. The court ruled that it would permit the State to use defendant's prior convictions to show intent or lack of mistake. The court stated: "I had noted the Appellate Court decision and ruling and that this was not something they chose to rule upon and familiar with the background of the State's ability to show that substantive evidence prior to convictions to show intent or design or lack of mistake." Defense counsel stated:

> "For the record, [Y]our Honor, we haven't had a motion *in limine*, but, for the record, there's been no factual situation showing that, in these prior cases, that some of the case at hand to show this intent on my client's part that he's a cocaine dealer, I guess, is what they're trying to say. So, you know, and to do it without presenting evidence, I mean, I would argue is inappropriate. It's going to require him almost to take the stand to rebut it because it's being allowed against him in their case in chief."

The court said it stood by its ruling. The jury was called back into the courtroom.

¶ 16 Court reporter Kathy Lerner testified that she prepared a transcript of defendant's testimony from the first trial. The court admitted the transcript into evidence, and Lerner read it for the jury. In the transcript, defendant testified that in April 2011, he lived in a house on North Street. Erica lived at a residence on Perry Street. Defendant went to the Louisa Street residence to spend time with Erica because it was a "neutral zone." Neither defendant nor Erica lived at the Louisa Street residence, but defendant "would have possessions down there for taking showers, changing clothes, stuff like that." Defendant testified that McCline lived at the Louisa Street residence, and Richard Braxton stayed there occasionally. Defendant denied that the cocaine found in the residence was his. Defendant said he did not know that the cocaine was there. Defendant admitted that the heroin found in the jacket was his. Defendant said that he was a heroin addict. Defendant said that he sold heroin on occasion, but the heroin the police found at the Louisa Street residence was for consumption.

¶ 17 Police Officer Corey Miller was qualified as an expert in the field of trafficking, manufacturing, pricing, packaging, and method of use of narcotics. Miller testified that he was involved in the search of the Louisa Street residence. Miller testified that the officers located a

bag of suspected cocaine inside a Crown Royal bag contained inside a dog food bag located in a kitchen cabinet. Miller testified that the 107.6 grams of cocaine found in the residence was not a user amount.

¶ 18 Miller testified that if someone was using heroin at a residence, he would look for paraphernalia including syringes, spoons that are burnt on the bottom, small cotton balls used as filters, and toot straws. Miller was unaware of any user paraphernalia found at the Louisa Street residence. This indicated to Miller that the individuals living at the residence were not using heroin.

¶ 19 The State asked Miller if there was any significance as to the way the foils of heroin found in defendant's jacket were packaged. Miller replied that it was "a common method of packaging to use the heroin." The State asked Miller if there was any significance as to the number of heroin packages the police found in the residence. Miller replied:

> "Five, I would say it's not uncommon for a guy who has five bags of heroin *** that could be personal use, but it also could be that he's low on his amount he *** has sold more and this is just the last part of his bindle or bundle of heroin that he has received from a source."

Miller testified: "If I had to make an educated guess, since I didn't find any user paraphernalia, the majority of the time I would say that the person, I could come to an educated conclusion that the person is selling the heroin." Miller testified that the fact that flat, clean pieces of foil were found at the residence indicated that packaging was occurring at the residence.

¶ 20 The State asked Miller whether he had been able to establish an opinion as to the possession of heroin located at the residence. Miller replied:

> "I will say again that it's not uncommon that a user would have five bags of heroin. That size. It's also not uncommon for me to come in contact with a heroin distributor and he only has five bags left out of whatever amount he started with during the day as well. So it's my opinion that it could go either way."

The State asked Miller if the lack of user paraphernalia and presence of the uncut foils swayed his opinion. Miller replied:

> "It does sway it a little bit. There's no evidence of any use of heroin. No needles were located. We didn't locate a toot straw that is commonly used to help assist snorting the heroin up through the nostrils. So, it is fair to say that heroin sells could possibly be taking place with the five bags of heroin."

Miller stated: "There's no way I can tell one hundred percent if he was gonna use it or sell it."

¶ 21 The State asked Miller whether he was aware that $351 was found on defendant's person when he was arrested. Miller said he knew that money was found, but he did not know the amount. Miller said that $351 was "a significant amount of money for somebody who said he only made $8.25 in an interview." Miller said that the amount of money found on defendant indicated that he was making additional money on the side.

¶ 22 The court admitted certified copies of defendant's prior convictions into evidence and addressed the jury as follows:

> "Ladies and gentlemen of the jury, the State has submitted 8, 9, 10 and 11 describing the defendant's prior offenses. The evidence would be received on the issue of the defendant's intent, knowledge and absence of mistake and may be considered by you only for that limited purpose. It is for you to determine what

> weight you, should be given to this evidence on the issue of the defendant's intent, knowledge and absence of mistake."

The court then correctly read the names of defendant's prior convictions and the dates on which they were committed. The State rested.

¶ 23 Defendant presented two witnesses who testified that he lived at the North Street house at the time of the incident.

¶ 24 Defendant testified that on April 19, 2011, Erica was living at the Louisa Street residence. She had been living there since approximately November 2010. Defendant was living on North Street with Erica's mother and children. Erica had been arrested for possession of heroin, and the Department of Children and Family Services took custody of Erica's children. Erica's mother went to live with the children at the North Street residence. Erica went to live with her oldest daughter on Perry Street. Their apartment was very small, so defendant asked Wallace Braxton to allow Erica to stay at the Louisa Street residence. Defendant said that he also knew Wallace Braxton by the name Richard Braxton. Braxton stayed at the Louisa Street residence occasionally, and McCline lived there. After Erica moved into the Louisa Street residence, defendant began going there almost every day and stayed overnight a couple nights each week.

¶ 25 Defendant testified that he had been using heroin periodically since 2006. He used heroin before leaving for work on the morning of April 19, 2011, so that he would not feel ill. Defendant stated that the heroin found in the jacket at the Louisa Street residence was his "personal stash." He had no intent to sell it; he planned to use it over the next two to three days.

¶ 26 Defendant testified that he had $351 on his person when he was stopped by the police because he had recently cashed his paycheck. Defendant typically earned $300 to $350 per

week. The officers took defendant into custody and placed him in an interview room at the police station. Defendant told the officers that he sometimes stayed at the Louisa Street residence, but he did not live there. Defendant told the officers that the dog belonged to Erica and that it was his dog as well. Defendant said that sometimes he fed the dog, and sometimes McCline, Erica, or Erica's children fed the dog. Defendant knew that there was a bag of dog food in a kitchen cabinet at the Louisa Street residence, but he never opened it. He fed the dog from a different bag of dog food. Defendant never told the officers that all the drugs in the Louisa Street residence were his. Defendant told the officers he knew nothing about the cocaine found in the residence. Defendant testified that he had used the grinder found in the residence for cooking and mixing up his heroin. Defendant said he allowed Braxton to use his name for the Ameren bill because Braxton could not obtain service in his own name.

¶ 27 The jury found defendant guilty of unlawful possession with intent to deliver cocaine and unlawful possession with intent to deliver heroin. The court sentenced defendant to concurrent sentences of 18 years' imprisonment for unlawful possession with intent to deliver cocaine and 11 years' imprisonment for unlawful possession with intent to deliver heroin.

¶ 28 I

¶ 29 Other-Crimes Evidence

¶ 30 Defendant argues that the court erred in admitting his prior convictions as substantive evidence of intent, knowledge, or lack of mistake. We find that the court did not abuse its discretion in admitting the other-crimes evidence. See *People v. Wilson*, 214 Ill. 2d 127, 136 (2005) ("The admissibility of other-crimes evidence rests within the sound discretion of the trial court, and its decision on the matter will not be disturbed absent a clear abuse of discretion.").

¶ 31 Initially, we reject defendant's argument that we should apply a *de novo* standard of review because no facts are in dispute. Specifically, defendant argues that the State did not present any facts regarding the proffered other crimes when it sought to introduce defendant's prior convictions during the second trial, and the court did not conduct a hearing. Though the proceedings on the admissibility of the other-crimes evidence during the second trial were minimal, we believe the court exercised appropriate discretion in admitting defendant's prior convictions. We also note that prior to the first trial, the court entered a written order showing that it considered the similarity and time of the prior convictions and explicitly found that the prejudicial impact of the prior convictions did not outweigh their probative value.

¶ 32 We now proceed to review the court's substantive decision in admitting the other-crimes evidence. Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***. Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"Even if other-crimes evidence falls under one of these exceptions, the court still can exclude it if the prejudicial effect of the evidence substantially outweighs its probative value." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). "Where such other-crimes evidence is offered, it is admissible so long as it bears some threshold similarity to the crime charged." *Wilson*, 214 Ill. 2d at 136.

¶ 33 We find that the circuit court's admission of the prior convictions was not an abuse of discretion. Defendant's prior drug transactions were relevant to show his intent to sell the heroin found in his coat, which was at issue in the trial. See *People v. Watkins*, 2015 IL App (3d)

120882, ¶ 46 ("Illinois courts have routinely allowed evidence of a defendant's prior or subsequent drug transactions to be admitted into evidence at trial to establish a defendant's intent to deliver the drug for which the defendant is currently charged or for any other relevant and permissible purpose."). Defendant's prior convictions were also relevant to establish knowledge regarding the cocaine found in the kitchen at the Louisa Street residence, which was also at issue during the trial.

¶ 34 Furthermore, the probative value of the prior convictions was significant. The evidence of defendant's intent to deliver the substances in this case was circumstantial, and defendant denied knowledge of the cocaine. The prejudicial impact of defendant's prior convictions was reduced because other-crimes evidence was succinctly presented and the court gave the jury a limiting instruction regarding the other-crimes evidence. Although two of the convictions were approximately 10 years old, they were not so old as to prejudice defendant. See *People v. Illgen*, 145 Ill. 2d 353, 370 (1991) ("[T]he admissibility of other-crimes evidence should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged.").

¶ 35 We reject defendant's argument that there was insufficient evidence for the court to determine that the other crimes were sufficiently similar to the crimes charged because only the titles of the convictions were presented to the court rather than the specific facts of the convictions. See *Watkins*, 2015 IL App (3d) 120882, ¶ 47. In *Watkins*, the defendant was charged with unlawful possession of a controlled substance with intent to deliver, and the State sought to introduce several prior convictions for drug offenses as evidence "of defendant's intent to deliver the substance in the present case and for any other issue for which the evidence might become relevant during the trial." *Id.* ¶ 3. The State presented the court with only the names of

the prior convictions and not the specific facts behind them. *Id.* ¶ 47. The court admitted a conviction for possession with intent to deliver to show intent, but refused to admit the remaining convictions, which were for simple possession. *Id.* ¶ 6. We held that "[t]he information that was provided, albeit the bare minimum, was sufficient for the trial court to determine, in its discretion, that a general threshold similarity existed between the facts of the prior offense and the facts of the current offense." *Id.* ¶ 47. We also held that "the fact that a different drug was involved in the prior offense did not make the prior offense and the current offense dissimilar." *Id.*

¶ 36 Like *Watkins*, we find that the court was presented with sufficient information to determine whether a threshold similarity existed between the prior and current offenses, "albeit the bare minimum." *Id.* Similarly, we find that the fact that defendant's prior convictions for offenses concerning delivery of controlled substances involved cocaine did not make them too dissimilar to be relevant to show intent to deliver the heroin in the instant case.

¶ 37 Defendant attempts to distinguish *Watkins* because the circuit court there found that the defendant's simple possession convictions were not admissible on the issue of intent. Here, intent was not the only purpose for which the prior convictions were introduced in this case. Defendant's prior convictions were also offered to show knowledge, as defendant's knowledge and control over the cocaine found in the Louisa Street residence was at issue. While simple possession convictions may be irrelevant to show intent to deliver, in this case they were relevant to show knowledge.

¶ 38 We reject defendant's argument that reversal is required because the court failed to explicitly weigh the prejudicial effect of the evidence against its probative value during the second trial. We do not believe that the absence of an explicit finding itself constitutes reversible

error. "[W]e review the trial court's judgment, not its rationale." *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005). Absent an affirmative showing to the contrary, we presume that the court knew and applied the law correctly in making its ruling. *In re N.B.*, 191 Ill. 2d 338, 345 (2000).

¶ 39 In coming to this conclusion, we reject defendant's reliance on *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006), for the proposition that the circuit court commits error where it fails to explicitly balance the probative value of other-crimes evidence against its prejudicial impact. In reaching its holding, the *Boyd* court cited *Donoho* for the proposition that circuit courts should be " 'cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence.' " *Boyd*, 366 Ill. App. 3d at 95 (quoting *Donoho*, 204 Ill. 2d at 186). However, the *Donoho* court did not require the assessment to be explicit. To the extent that the *Boyd* court held that a circuit court errs in failing to explicitly weigh the prejudicial impact of other-crimes evidence against its probative value, we find it to be contrary to the well-established principle that the circuit court is presumed to know and apply the law correctly unless the record affirmatively shows otherwise. *N.B.*, 191 Ill. 2d at 345.

¶ 40 We also note that at the first trial, the court explicitly found that the prejudicial impact of the other-crimes evidence did not substantially outweigh its probative value during the proceedings on the State's notice of intent prior to the first trial.

¶ 41 II

¶ 42 Sufficiency of the Evidence

¶ 43 Defendant argues that the evidence at trial was insufficient to prove him guilty beyond a reasonable doubt of unlawful possession with intent to deliver heroin. Specifically, defendant contends that the State failed to prove that defendant intended to sell rather than use the heroin,

and his conviction should be reduced to simple possession. We find that, when viewed in the light most favorable to the State, the evidence is sufficient to prove that defendant intended to deliver the heroin found in his possession.

¶ 44 "When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant 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.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 45 In order to prove defendant guilty of unlawful possession of heroin with intent to deliver, the State was required to prove that defendant knowingly possessed with intent to deliver a substance containing heroin. 720 ILCS 570/401(d)(i) (West 2010). Defendant does not dispute that the evidence was sufficient to establish that he knowingly possessed heroin. Thus, the issue is whether, when viewing the evidence in the light most favorable to the State, any rational jury could have found beyond a reasonable doubt that defendant intended to deliver the heroin found in his jacket.

¶ 46 "Because direct evidence of intent to deliver is rare, such intent must usually be proven by circumstantial evidence." *People v. Robinson*, 167 Ill. 2d 397, 408 (1995).

> "Illinois courts have used several factors to show an intent to deliver. These factors include: (1) a quantity of a controlled substance that is too much for personal consumption; (2) the high purity of the drug confiscated; (3) possession of weapons; (4) possession of large amounts of cash; (5) possession of police scanners, beepers or cell phones; (6) possession of drug paraphernalia; and (7) the

manner in which the confiscated drugs are packaged." *People v. Clinton*, 397 Ill. App. 3d 215, 225 (2009).

"[W]here a small amount of drugs is recovered, the minimum evidence needed to affirm a conviction for possession with intent to deliver is that the drugs were packaged for sale and at least one additional factor tending to show an intent to deliver." *Id.*

¶ 47 We find that, when viewed in the light most favorable to the State, the evidence was sufficient to prove beyond a reasonable doubt that defendant intended to sell at least some of the heroin he possessed. The heroin in the instant case was packaged in small foils. Miller testified that it was a common method of packaging. Although Miller testified that the question of whether defendant was going to sell the heroin found in his jacket "could go either way" based on the amount of heroin that was recovered, he stated that the lack of user paraphernalia in the Louisa Street residence suggested that the heroin was intended to be sold. Miller also noted that clean, flat pieces of foil were found at the Louisa Street residence, which indicated that packaging was occurring there. Additionally, a moderately large amount of cash, $351, was found on defendant's person. Also, defendant's prior conviction for unlawful possession with intent to deliver a controlled substance could be considered as evidence of intent to deliver. Significantly, Officers Linthicum and Lawrence testified that defendant told them that he both used and sold heroin. Linthicum testified that defendant said he last sold narcotics a couple days before his arrest. Although defendant testified that he did not intend to sell the heroin found in his jacket, the jury may not have found his testimony to be credible.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Peoria County is affirmed.

¶ 50 Affirmed.