2018 IL App (4th) 150938-U

NO. 4-15-0938

FILED
May 14, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ERIC D. MAHONE,	)	No. 15CF465
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence proved defendant guilty beyond a reasonable doubt and the trial court lacked authority to impose a drug-treatment assessment in the amount of $3000; the amount authorized by statute was $2000.

¶ 2 In October 2015, the trial court found defendant, Eric D. Mahone, guilty of unlawful delivery of a controlled substance within 1000 feet of the real property comprising a public park and unlawful delivery of a controlled substance. In November 2015, the court sentenced him to seven years in prison and ordered him to pay various fines, fees, and assessments.

¶ 3 On appeal, defendant argues (1) the State's evidence failed to prove him guilty beyond a reasonable doubt, and (2) the trial court imposed a drug-treatment assessment in an amount greater than statutory law allowed. We affirm in part as modified and remand the cause with directions.

¶ 4 I. BACKGROUND

¶ 5 In April 2015, a grand jury indicted defendant on single counts of unlawful delivery of a controlled substance (cocaine) within 1000 feet of the real property comprising a public park (count I) (720 ILCS 570/407(b)(2) (West 2014)) and unlawful delivery of a controlled substance (cocaine) (count II) (720 ILCS 570/401(d)(i) (West 2014)). The indictments alleged the offenses occurred during the course of a controlled buy conducted on April 1, 2015.

¶ 6 In September 2015, defendant's bench trial commenced. Chris Anderson (also referred to as "Sonny") testified he was a confidential source for the Bloomington police department. He stated on April 1, 2015, he called defendant to arrange the purchase of cocaine. Defendant had provided Anderson his cellular phone (cell phone) number on a night defendant "served" Anderson's cousin. Detective Jared Bierbaum gave Anderson $200 to purchase the drugs. Anderson spoke with defendant by cell phone as he drove to "the corner of Monroe and Oak." As Anderson approached the corner, he saw defendant (while simultaneously speaking to defendant by cell phone) and an individual later identified as Gerald Brown. Anderson continued speaking with defendant by cell phone. Defendant directed Anderson to a new location. Anderson drove his van to the new location. Anderson observed defendant as the two men continued talking on their cell phones. Defendant told Anderson "here comes my guy." Anderson hung up when Brown appeared at his driver-side window and "served" Anderson. Brown gave Anderson "a bag that had other bags inside of it." Anderson gave Brown $160 "because he had said that he didn't have $200 worth." Brown told Anderson "if I needed anything else later, just give him a call back." As Anderson pulled away, he saw defendant and Brown "hooked back up with each other and they turned in this alley ***." Anderson met with

Bierbaum to hand over the drugs and the money Anderson did not use to purchase the drugs. On cross-examination, Anderson testified defendant gave him his cell phone number approximately one week before he met defendant to buy cocaine. Anderson stated the police paid him for his drug buys.

¶ 7 Bloomington police detective Jared Bierbaum testified Anderson agreed to work as a confidential source. Anderson was paid $220 for this case and approximately $9000 for his work over 10 years in other investigations. Prior to the transaction with defendant, Anderson called defendant. Anderson placed his cell phone on speaker so Bierbaum could hear the conversation between Anderson and defendant. Bierbaum gave Anderson $200 after searching him and finding no contraband. Bierbaum followed Anderson as he drove to meet defendant, parking his vehicle nearby. Bierbaum lost sight of defendant for approximately two minutes. Bierbaum and Anderson met immediately after Anderson purchased the cocaine. Anderson transferred the cocaine and remaining money to Bierbaum.

¶ 8 After defendant was arrested, Detective Bierbaum read him his rights and spoke with him. Defendant told Bierbaum he "gets crack cocaine from a guy named Big Homey, and that he gets a little bit of cash for moving the crack cocaine for Big Homey." The video recording of the conversation between Bierbaum and defendant was played for the trial court. A transcript of the contents of the recording was admitted into evidence.

¶ 9 Detective Bierbaum also testified regarding a "phone to phone conversation" between defendant and Holly Vorhees on April 4, 2015, at the McLean County detention center. All of the "phone to phone conversations" at the detention center are recorded. Bierbaum retrieved the call between defendant and Vorhees. Defendant and Vorhees discussed the identity of the confidential source. Based on conversations defendant had with other inmates, he

believed the confidential source was a white male named "Sonny." Vorhees insisted "Sonny" was an African American male. The recording was played for the trial court and a transcript of the contents of the recording was admitted into evidence.

¶ 10 On cross-examination, Detective Bierbaum testified he "had a conversation where I heard [defendant's] voice and then I spoke directly to him while looking at him and I realized that the person I was speaking to *** was the person on the phone."

¶ 11 Bloomington police detective Stephen Brown testified he provided surveillance of the April 1 transaction. He observed two individuals walk toward the intersection of Oak and Monroe. One individual wore a multicolored jacket with a white pattern and the other individual had "two poofs" on the top of the head. Approximately one minute after the two individuals arrived at the intersection, Detective Brown observed Anderson's van approach the intersection. As Anderson's van approached, one of the individuals made a "waving motion" toward the van. Anderson continued driving through the intersection. Detective Brown then moved his vehicle near the intersection of Market Street and Mason Street. He observed "the informant's vehicle driving north on Mason Street and I could see those same two subjects, that same pattern coat and the same person with the hair with the two poofs on top, they were walking [together] into an alleyway angling to go westbound in that alley off of Mason."

¶ 12 On cross-examination, Detective Brown acknowledged he did not see the exchange of money for drugs between Anderson and the two individuals Detective Brown observed.

¶ 13 Bloomington police detective Kevin Raisbeck testified he provided surveillance of the April 1 transaction. Raisbeck observed two individuals walk toward the driver-side door of Anderson's van. "They started on the south side of Monroe Street, crossed the street and were

walking together directly towards the driver's side of the confidential source's vehicle." One of the individuals wore a multicolored jacket. As Raisbeck continued driving west, he observed the two individuals "within ten feet" of Anderson's van. Raisbeck drove around the block and south on Mason Street. He observed the same two individuals walking west through an alley between Market and Monroe streets.

¶ 14 On cross-examination, Detective Raisbeck acknowledged he did not see the exchange of money for drugs between the confidential source and the two individuals he observed approaching the driver-side window of Anderson's van.

¶ 15 Bloomington police officer Tyler Klein testified he participated in the arrest of defendant and Gerald Brown. Officer Klein located the individuals in an alley between Monroe and Market streets and placed them under arrest. He identified defendant as one of the individuals he arrested. Bloomington police officer Aaron Veerman testified he participated in the arrest of Gerald Brown. Gerald Brown had cash in his left hand which Officer Veerman gave to Detective Hernandez.

¶ 16 Bloomington police detective Manuel Hernandez testified he provided surveillance of the April 1 transaction. He observed two males walking down an alley in the area of Oak and Monroe streets. Officers Klein and Veerman were also present in the alley. Officer Veerman gave Hernandez cash in the amount of $160. Hernandez searched defendant and Gerald Brown following their arrest. Hernandez did not find anything on Gerald Brown. Hernandez stated he found a phone on defendant. Hernandez testified the $160 taken from Gerald Brown matched the "pre-recorded buy money" used in the controlled drug buy.

¶ 17 Hernandez took the phone found in defendant's right front jeans pocket to the police department. He secured the phone number used to set up the controlled drug buy from

Detective Bierbaum. He dialed the phone number using his work phone and the phone found in defendant's right front jeans pocket rang, displaying Hernandez' work phone number.

¶ 18 Gerald Brown testified he used defendant's cell phone to call "someone that wanted to buy drugs." Brown placed the call from the kitchen of an apartment he shared with defendant. Defendant was not present in the kitchen when Brown placed the call. Brown asked defendant to walk with him to a gas station for cigarettes. On the way to the gas station, Brown broke away from defendant. Brown saw "who I was looking for and I made the drug buy." Defendant walked one-half block ahead of Brown, "almost to the store." Brown testified, "[a]fter the transaction, I went back *** we walked back to the house. We was walkin' towards back to the house [*sic*] and the police pulled up." According to Brown, defendant did not know a drug transaction had occurred and was not involved in the crime.

¶ 19 Defendant testified he and Gerald Brown walked to a gas station on April 1, 2015. Brown "veered off to a white van." Defendant "stayed back" and did not know what was going on. Defendant stood one-half block from Gerald Brown. Defendant "could see the store was closed" and the two men walked down an alley toward home. Defendant admitted lying during his interview with Detective Bierbaum. Defendant lied so he could go home. When defendant told Detective Bierbaum he was getting a cut of the deal, it was "all part of my lie."

¶ 20 The parties stipulated the cocaine Anderson provided to Detective Bierbaum on April 1, 2015, tested positive for .2 grams of cocaine.

¶ 21 Following closing arguments, the trial court found defendant guilty on each count. In November 2105, the court sentenced him to seven years in prison.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Sufficiency of the Evidence

¶ 25 Defendant argues there was insufficient evidence to prove him guilty beyond a reasonable doubt. " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 26 Defendant argues no evidence showed he participated in the drug transaction on April 1, 2015, and thus, he should not be held accountable. The theory of accountability holds a defendant responsible for another's conduct if "(1) defendant solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the offense; (2) this participation [took] place either before or during commission of the offense; and (3) [the act was performed] with the concurrent, specific intent to facilitate or promote the commission of the offense." *People v. Saldana*, 146 Ill. App. 3d 328, 334-35, 496 N.E.2d 757, 763 (1986). "Mere presence at the scene of a crime, even the knowledge that a crime is being committed, or

negative acquiescence is not enough to constitute a person as a principal, but one may aid and abet without actively participating in the overt act." *Saldana,* 146 Ill. App. 3d at 335.

¶ 27 Here, the evidence showed defendant as an active participant in the drug transaction, not merely Gerald Brown's tag-along companion. Although Brown testified defendant knew nothing of the transaction and only accompanied him to a gas station, the trial court was free to interpret the evidence as it saw fit. The court may consider the reasonableness of the defense offered and may reject that evidence when it finds it contradictory, unlikely, or improbable in light of other facts before it. *People v. Eliason*, 117 Ill. App. 3d 683, 695-96, 453 N.E.2d 908, 915 (1983). It is clear from our review of the record, defendant was actively involved in the transaction.

¶ 28 Defendant argues Anderson was not credible because he received payment in return for his assistance and admitted using drugs one month prior to his testimony. Defendant characterizes Anderson's testimony as inconsistent and lacking corroboration. In support of this argument, defendant relies on *People v. Anders*, 228 Ill. App. 3d 456, 464, 592 N.E.2d 652, 657 (1992), for the following proposition: "testimony by an informant who himself abuses unlawful substances and who participates in an undercover operation to minimize punishment for his own illegal activity should be closely scrutinized." However, the *Anders* court went on to state, "when this testimony is partially corroborated, the reasonable doubt threshold can be overcome." *Id*. Anderson's testimony was corroborated by the police officer's testimony and was consistent with the physical evidence. It is not necessary for law enforcement officers to see the exchange of money for narcotics between the confidential source and the defendant if the circumstances lend credence to the confidential source's testimony. See *People v. Lopez*, 187 Ill. App. 3d 999, 1005, 543 N.E.2d 997, 1001 (1989). Moreover, defendant had the opportunity to cross-examine

Anderson regarding his drug use and the trial court was well aware of this information. As the evidence is sufficient, we decline to disregard the trial court's credibility finding. As the finder of fact, the trial court was in a superior position to observe the witnesses and make credibility determinations. See *People v. Hernandez*, 319 Ill. App. 3d 520, 533, 745 N.E.2d 673, 684-85 (2001) ("Inconsistencies in the testimony of the witnesses, bias or interest affecting their credibility, and the weight to be given to the testimony of witnesses are for the trier of fact to determine.").

¶ 29 Defendant next argues the trial court "misremembered" the evidence presented at trial. Defendant takes issue with the trial court's statement: "The problem *** is we have at least three other officers who testified on surveillance that they all saw both men walking directly together towards the van." Defendant asserts "*no* officers saw this." The record shows Detective Brown testified he saw two individuals approach the intersection of Monroe and Oak streets, where the drug transaction was to take place. One wore a multicolored jacket and one had "two poofs on top of the head." The two individuals gestured to Anderson as he approached the intersection in his white van. Anderson then drove through the intersection and out of Detective Brown's view. Detective Raisbeck testified he observed the confidential source park his vehicle on Mason Street. Two individuals walked toward the driver's side of the confidential source's vehicle; one wore a multicolored jacket. Detective Bierbaum testified he parked on Monroe Street, losing visual contact with Anderson's van for approximately two minutes. Detective Bierbaum acknowledged he did not see anyone in the area where he parked his vehicle. We do not find the trial court's reference to "at least three other officers" significant. The record shows detectives observed the two individuals, defendant and Brown, walk toward Anderson's van. Defendant challenged each of the witness's credibility; it is the function of the trial court as the

trier of fact to determine the credibility of the witnesses and the weight to be given their testimony (*People v. Snulligan*, 204 Ill. App. 3d 110, 118, 561 N.E.2d 1125, 1131 (1990)). The court resolved that credibility argument against defendant in this case. Rather than the trial court misapprehending the evidence, it was simply summarizing it. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt.

¶ 30 B. Drug-Treatment Assessment

¶ 31 Defendant next argues the trial court imposed a drug-treatment assessment in an amount greater than statutory law allowed. We agree.

¶ 32 The trial court found defendant guilty of unlawful delivery of a controlled substance (cocaine) within 1000 feet of the real property comprising a public park (720 ILCS 570/407(b)(2) (West 2014)), a Class 1 felony. However, because of defendant's prior convictions, the trial court sentenced him as a Class X offender. See 730 ILCS 5/5-4.5-95(b) (West 2014). The court sentenced defendant to 7 years in prison and imposed a drug-treatment assessment of $3000, the amount to be assessed for a Class X felony (720 ILCS 570/411.2(a)(1) (West 2014)). According to section 411.2(a)(2) of the Act (720 ILCS 570/411.2(a)(2) (West 2014)), $2000 was the amount of the drug-treatment assessment to be imposed for a Class 1 felony.

¶ 33 Although the State asserts this argument has been forfeited because defendant failed to raise it below (see *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988)), it nevertheless concedes the proper assessment is $2000. The forfeiture rule is an admonition to the parties rather than a limitation on the reviewing court. *People v. Normand*, 215 Ill. 2d 539, 544, 831 N.E.2d 587, 590 (2005). We choose to address the merits.

¶ 34 Defendant argues in order for the trial court to possess statutory authority to impose upon him a drug-treatment assessment in the amount of $3000, he had to be actually convicted of a Class X felony (720 ILCS 570/411.2(a)(1) (West 2014)), not merely "sentenced as a Class X offender" (730 ILCS 5/5-4.5-95(b) (West 2014)). We agree. Section 411.2(a)(2) of the Illinois Controlled Substances Act provides: "Every person convicted of a violation of this Act *** shall be assessed for each offense a sum fixed at *** $2,000 for a Class 1 felony." 720 ILCS 570/411.2(a)(2) (West 2014). This language reveals the legislature's intent to impose an assessment based on the class of offense of which the defendant was convicted. An enhancement of the sentence under section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2014)) does not change the classification of the felony. See *People v. Pullen*, 192 Ill. 2d 36, 46, 733 N.E.2d 1235, 1240 (2000). Because defendant's offense remains a Class 1 felony, despite his being sentenced as a Class X offender, the amount of the drug treatment assessment should be $2000. See 720 ILCS 570/411.2(a)(2) (West 2014).

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we modify the trial court's judgment so as to impose a drug-treatment assessment of $2000, and we remand this case with directions to amend the sentencing order accordingly. Otherwise, we affirm the trial court's judgment. Because the State has successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 37 Affirmed as modified; cause remanded with directions.