2019 IL App (1st) 163418-U

No. 1-16-3418

Order filed April 18, 2019

Fourth 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. 15 CR 7997
	)	
TERRANCE FOWLER,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for possession of a controlled substance with intent to deliver and delivery of a controlled substance are affirmed over his challenge to the sufficiency of the evidence and chain of custody.

¶ 2 Following a jury trial, defendant Terrance Fowler was convicted of possession of a controlled substance with intent to deliver and delivery of a controlled substance, and sentenced as a Class X offender to concurrent terms of six years' imprisonment. On appeal, defendant contends that the State failed to establish a sufficient chain of custody of the narcotics, and did

not prove him guilty beyond a reasonable doubt because it relied on inconsistent and contradictory testimony. We affirm.

¶ 3 Defendant was charged by indictment with one count of possession of a controlled substance with intent to deliver 15 grams or more, but less than 100 grams of a substance containing heroin (720 ILCS 570/401(a)(1)(A) (West 2014)), and one count of delivery of a controlled substance, namely heroin (720 ILCS 570/401(d) (West 2014)).

¶ 4 At trial, Chicago police officer Arthur Rosa testified that, at approximately 4:44 p.m. on April 19, 2015, when the sun was out, he was on patrol with Officer Christina Gonzalez near Augusta Boulevard and North Central Park Avenue, in Chicago. The officers were in uniform and in a marked vehicle. While driving east on Augusta, an area known for a high volume of narcotics sales, Rosa saw a "young juvenile" give an adult male a small item in exchange for U.S. currency. The juvenile then walked towards a wrought iron fence, opened it, and entered. Within seconds, Rosa exited the vehicle and headed towards the fence, which was located approximately 50 feet from where the police vehicle had stopped. Rosa pushed through the gate, revealing a yard and a staircase attached to a building with an exposed porch. As Rosa walked through the yard, he observed the juvenile and defendant, whom he identified in court, within arm's distance of each other, standing on the second floor of the porch. Rosa could not see the entire porch from the ground due to the difference in elevation, but saw defendant hand a "piece of plastic containing small items" to the juvenile. Rosa was on the stairs and 20 feet from defendant and the juvenile when the transaction occurred.

¶ 5 Rosa stated that he could see the entire porch once he "got three quarters up the stairs." While Rosa climbed the stairs, the juvenile dropped the items that defendant had given him, and

they landed on the "ground." Rosa also saw defendant drop a bundle of narcotics wrapped in a white napkin, along with a different bundle wrapped in black plastic. After noticing that no one else was on the porch, Rosa handcuffed both individuals. Within 30 to 60 seconds, Gonzalez arrived and retrieved the dropped items. Rosa testified that People's Exhibit No. 1 was a sealed Chicago Police Department envelope, containing multiple ziplock bags that held a white powdery substance "consistent with" heroin. According to Rosa, "[t]hese specific items" were given by defendant to the juvenile, who dropped them, and were recovered by Gonzalez. These items were in substantially the same condition as they were on the day they were recovered, with the exception of markings made during a drug analysis. Without objection, People's Exhibit No. 1 was admitted into evidence.

¶ 6 On cross examination, Rosa stated that he initially saw the juvenile and defendant's hands move as he was walking through the yard and approaching the flight of stairs. Once Rosa was at the bottom of the stairs, he saw defendant give the juvenile the items. As he began walking, he could "kind of" identify the items as narcotics.

¶ 7 Gonzalez testified that on April 19, 2015, she and Rosa were driving near the 3600 block of West Augusta. After witnessing a hand-to-hand transaction between a man and a juvenile, Gonzalez saw the juvenile approach a fence and open it. Rosa exited the vehicle while Gonzalez parked. Gonzalez subsequently followed Rosa through the fence and up a flight of stairs leading to an exposed porch, and saw him place the juvenile and defendant in handcuffs. As Gonzalez climbed the stairs, and was eye level with the porch, she noticed a plastic bundle directly in front of her. Gonzalez recovered the plastic bundle, which she identified as People' Exhibit No. 1, and described it as a "clear plastic [b]aggie with clear plastic Ziploked [b]aggies containing narcotics

in it." Gonzalez also discovered two separate "grouping[s]" of narcotics, approximately five to seven feet to the left of the first bundle. The first grouping, which she identified as People's Exhibit No. 2, was a "tissue with several black-tinted Ziploked [*sic*] [b]aggies with white powder substances inside of them." The second item, which she identified as People's Exhibit No. 3, was a "bundle with bright orange tape with tinfoil." Gonzalez stated that all three exhibits were in the same or substantially the same condition as they were when she discovered them. Without objection, People's Exhibits Nos. 2 and 3 were admitted into evidence.

¶ 8 After collecting the three bundles, Gonzalez placed them on her person "for the safety and integrity" of the investigation, and inventoried the items at the Chicago Police Department. Gonzalez assigned a specific inventory number to People's Exhibit No. 1 (inventory number 13422097), People's Exhibit No. 2 (inventory number 13422105), and People's Exhibit No. 3 (inventory number 13422107). The following colloquy then ensued between the assistant state's attorney and Gonzalez:

> "Q. Now, once you assigned these numbers to these items, please continue sharing with us what exactly you do?
>
> A. Once the numbers are assigned, we have to have it approved by our desk sergeant. We take it for approval. He looks over everything and makes sure all of our documents are correct. They sign off on it. We seal the bag, and then we put it into a vault to be sent to our forensic department for testing and analysis.
>
> Q. Did you follow all those steps pursuant to Chicago Police procedures for each one of the three items that I presented to you in court here today?
>
> A. Yes."

¶ 9 Debra Bracey, a forensic scientist with the Illinois State Police Forensic Science Center at Chicago, testified that she received the three items contained in the People's Exhibits Nos. 1, 2, and 3 from the Chicago Police Department, and marked them with her initials and the date, April 28, 2015. The following colloquy then occurred between the assistant state's attorney and Bracey:

"Q. With regard to People's Exhibit Number 1, upon receiving that, what's the first thing that you do?

A. The first thing I do is that I look at the inventory number on the bag against the inventory sheet to make sure that the items match.

Q. Now, for expediency purposes, you have People's Exhibit Number 2 and Number 3 next to you on the witness stand; is that correct.

A. Yes, I do.

***

Q. Now, did you receive all three of these items to perform analysis at the same time?

A. Yes, I did."

¶ 10 Next, Bracey checked to see that each item was in a heat-sealed bag. Bracey opened the bags, weighed the substances inside them, and performed color and gas chromatography mass spectrometry tests. The substance in the first inventory bag, People's Exhibit No. 1, tested positive for 0.2 grams of heroin; the substance in the second inventory bag, People's Exhibit No. 2, tested positive for 3.3 grams of heroin; and the substance in the third inventory bag, People's Exhibit No. 3, tested positive for 14.1 grams of heroin. After testing was complete, Bracey

placed the substances and ziplock bags back into their inventory bags and "heat seal[ed]" them. Bracey stated that all three exhibits were in the same or substantially the same condition as they were on the day she tested them.

¶ 11 The State rested and defendant presented a motion for a directed finding, arguing that the chain of custody of the narcotics had not been established because there was no testimony describing how the narcotics were transported from the police department to the lab. In denying defendant's motion, the trial court found that sufficient evidence had been presented to establish the chain of custody and that any problems would go "to the weight, not to the admissibility" of the evidence.

¶ 12 Defendant, who acknowledged that he had been convicted twice for possession of a controlled substance, testified that, on April 19, 2015, he was visiting a friend on West Augusta, when he decided to go to the store. While defendant was on his way down the outside stairs of the building, he noticed "a young man standing in the back." Then, an officer "grabbed" defendant and took him back up the stairs and onto a porch, where he was searched and handcuffed. As he was being searched, defendant noticed the same young man on the porch. Five minutes later, a female officer arrived and found drugs in a windowsill behind a board. Defendant denied knowing the young man, handing him anything, or possessing the drugs.

¶ 13 In rebuttal, the State called Gonzalez. She denied seeing or searching for drugs inside a windowsill or behind boards.

¶ 14 Following closing arguments, the jury found defendant guilty of possession of a controlled substance with intent to deliver 15 grams or more, but less than 100 grams of a substance containing heroin, and delivery of a controlled substance.

¶ 15 Defendant filed a motion for a new trial and a motion to reconsider, challenging, *inter alia*, the chain of custody of the narcotics, which were denied. Following a hearing, defendant was sentenced as a Class X offender to concurrent terms of six years' imprisonment.

¶ 16 On appeal, defendant first argues that the State failed to establish a chain of custody of the narcotics. Defendant acknowledges that he failed to preserve this issue because he did not object to the admission of the People's Exhibits Nos. 1, 2, and 3. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (generally, to preserve an error for appeal, a defendant must both object at trial and raise the specific issue again in a posttrial motion). A challenge to the chain of custody "is considered an attack on the admissibility of the evidence," not a challenge to the sufficiency of the evidence, and therefore, it is subject to the rules of forfeiture. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). This rule is appropriate because a defendant's failure to object to a foundation at trial deprives the State of the opportunity to cure any deficiency in the foundation. *Woods*, 214 Ill. 2d at 470.

¶ 17 Nevertheless, defendant requests that we review his claim under the plain error doctrine. A defendant may raise a forfeited chain-of-custody issue on appeal only if the alleged error rises to the level of plain error, such as "in those rare instances" where there is a complete breakdown of the chain of custody. *Id.* at 471. "The plain-error doctrine allows a reviewing court to address defects affecting substantial rights if the evidence is closely balanced or if fundamental fairness requires rather than finding the claims waived." *People v. Donoho*, 204 Ill. 2d 159, 187 (2003). Since there can be no plain error without error, we must determine whether an error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 18 Defendant maintains that the State failed to establish a proper chain of custody for the narcotics because Gonzalez never testified "to what the protocol is in sealing the bags" and "never specifically testified that the bags at issue in this case were in fact properly sealed." Defendant claims that there was no testimony regarding the transportation of the narcotics from the vault to the lab, the identification of the individual who accepted the exhibits at the lab, and the dates that the exhibits were transported and received. Defendant also contends that there was no testimony by personnel from the Illinois State Crime Lab comparing the inventory numbers assigned at the police department with the inventory numbers on the People's exhibits. Furthermore, defendant argues that Bracey testified in a general manner as to "the protocol" for unsealing, testing, and resealing the narcotics, and never discussed the exhibits in any detail. The State maintains that a proper chain of custody was established.

¶ 19 "The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion." *People v. Pikes*, 2013 IL 115171, ¶ 12. An abuse of discretion occurs "when the ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view." *People v. Ward*, 2011 IL 108690, ¶ 21.

¶ 20 Before the results of chemical testing on a purported controlled substance can be introduced, the rules of evidence require that the State "provide a foundation for its admission by showing the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist." *Alsup*, 241 Ill. 2d at 274-75. The trial court determines whether the State has met its " 'burden to establish a custody chain that is sufficiently complete to make it improbable that the evidence has been subject to

tampering or accidental substitution.' " *Id.* (quoting *Woods*, 214 Ill. 2d at 467). After the State has made a *prima facie* showing, the burden shifts to the defendant to "show actual evidence of tampering, alteration or substitution." *Alsup*, 241 Ill. 2d at 275. "Unless the defendant produces evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination." *Woods*, 214 Ill. 2d at 467. Nevertheless, the State must show that "reasonable measures were employed to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered." *Id.* Additionally, "[t]he court may properly admit evidence, despite a lack of testimony from every person participating in the chain of custody, if the State can show that the condition of the evidence did not change while it was in the hands of the nontestifying custodian." *People v. Johnson*, 361 Ill. App. 3d 430, 440 (2005).

¶ 21 Here, the testimony at trial established that the condition of the evidence did not change after it was recovered by the officers and transported from the police department to the lab. Rosa testified that he saw the juvenile drop the items defendant had given him, and stated that he saw defendant drop a bundle of narcotics, which Gonzalez retrieved. Gonzalez testified that she retrieved the three bundled items, inventoried them at the Chicago Police Department, and assigned them inventory numbers. She explained that the inventory process involves receiving approval from her desk sergeant regarding the inventory numbers assigned, sealing and placing the inventoried bags in a vault, and sending them to the forensic department for testing. Gonzalez stated that she followed each step with respect to the items in People's Exhibits Nos. 1, 2, and 3. Although Gonzalez did not testify that she personally sealed the items, and did not specify who

transported them from the vault to the lab, "a sufficiently complete chain of custody does not require that every person in the chain testify," absent actual evidence of tampering. Here, defendant identifies no evidence of actual tampering. See *People v. Phillips*, 215 Ill. 2d 554, 574 (2005) ("mere possibilities or speculation are insufficient to raise reasonable doubt").

¶ 22 Furthermore, contrary to defendant's claim that there was no testimony regarding the date the exhibits were received by the lab, Bracey testified that she received the inventoried items from the Chicago Police Department and marked them with her initials and the date, April 28, 2015. After confirming that the items were in heat-sealed inventory bags, she reviewed the inventory numbers on the bags and compared them to the numbers on her inventory sheet. To the extent defendant claims that Bracey merely testified "in a general way as to the protocol," we note that Bracey testified that she opened the bags, weighed the substances inside them, and performed color and gas chromatography mass spectrometry tests, and therefore, the trier of fact could conclude that she adequately described the steps she took in analyzing People's Exhibits Nos. 1, 2, and 3. Based on this, we find defendant's characterization of Bracey's testimony unavailing. Moreover, Gonzalez and Bracey testified that the exhibits were in the same or substantially the same condition as they were on the day when they first encountered them. Accordingly, we conclude that this is not one of the "rare instances" constituting a complete breakdown in the chain of custody. *Woods*, 214 Ill. 2d at 471. Because no error occurred, plain error analysis is unmerited and defendant's forfeiture of his chain-of-custody argument must be honored.

¶ 23 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver or delivery of a controlled substance.

¶ 24 The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Wheeler,* 226 Ill. 2d 92, 114 (2007). When a defendant challenges the sufficiency of the evidence presented at trial, it is not the function of a reviewing court to retry the defendant. *Id.* "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *Id.* at 114-15. Hence, a defendant's conviction will not be set aside unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 25 We first address defendant's claim that the State failed to prove him guilty of possession of a controlled substance with intent to deliver. To sustain a conviction for possession of a controlled substance with intent to deliver, the State was required to prove beyond a reasonable doubt that defendant (1) had knowledge of the presence of the narcotics, (2) had immediate possession or control of the narcotics, (3) and intended to deliver the narcotics. 720 ILCS 570/401(a)(1)(A) (West 2014).

¶ 26 "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). "The question of whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-

case basis." *Id.* at 412-13. Our supreme court has identified seven non-exhaustive factors to consider in determining whether a defendant possessed an intent to deliver a controlled substance, which include (1) whether the quantity of a controlled substance in the defendant's possession is too large to be considered for personal consumption; (2) the high purity of the confiscated substance; (3) possession of weapons; (4) possession of large amounts of cash; (5) possession of beepers, police scanners, or cellular telephones; (6) possession of drug paraphernalia; and (7) the manner in which the substance is packaged. *Id.* at 408.

¶ 27 Defendant contends that the State failed to prove the elements of intent and possession because the officers failed to discover money, drug paraphernalia, weapons, police scanners, beepers, cellular phones, fingerprints, or DNA evidence around the porch. Defendant also claims that there was no testimony regarding the purity of the heroin, or that the objects that Rosa saw him drop were the same items that Gonzalez recovered. The State maintains that the evidence at trial established that defendant controlled narcotics in packaging that indicated his intent to deliver.

¶ 28 Here, Rosa and Gonzalez testified that they witnessed a hand-to-hand transaction in "an area with a high volume of narcotics sales," when a juvenile transferred a small item to a man for U.S. currency. Rosa followed the juvenile into a yard, and observed him, within arm's distance of defendant, on top of a second-floor porch. Rosa climbed the staircase, and saw defendant hand the juvenile a "piece of plastic containing small items," approximately 20 feet away from where Rosa was standing. As Rosa reached the top of the stairs, he noticed the juvenile drop the item that defendant had handed to him. Defendant also dropped a bundle wrapped in a white napkin

and a bundle wrapped in black plastic. No one else was on the porch except Rosa, defendant, and the juvenile.

¶ 29 Gonzalez subsequently arrived on the porch, where she noticed a plastic bundle, at eye level, directly in front of her. The plastic bundle, introduced into evidence as People's Exhibit No. 1, was a plastic bag containing clear ziplocked baggies. Within five to seven feet of that bundle, Gonzalez discovered two separate bundles, introduced into evidence as People's Exhibits Nos. 2 and 3, respectively, and described them as black-tinted ziplocked baggies, containing white powdered substances, and a bundle with orange tape and tinfoil. Bracey testified that People's Exhibits Nos. 1, 2, and 3 tested positive for heroin, and weighed 0.2 grams, 3.3 grams, and 14.1 grams, respectively.

¶ 30 Viewing this evidence in the light most favorable to the State, we find the evidence sufficient to prove beyond a reasonable doubt that defendant possessed a controlled substance with the intent to deliver. While the officers failed to discover money, drug paraphernalia, weapons, police scanners, beepers, cellular phones, fingerprints, or DNA evidence around the porch, they did discover narcotics packaged in small ziplocked bags and wrapped together into three separate bundles. Despite defendant's contentions that the objects Rosa saw him drop were not proven to be the same bundles recovered by Gonzalez, the testimony revealed that Rosa saw defendant drop "narcotics," which were retrieved soon afterwards by Gonzalez. Given the manner in which the narcotics were packaged, a trier of fact could reasonably infer that they were intended for distribution. See *id.* at 410-11 ("when a defendant is charged with possession of a controlled substance, *in appropriate circumstances*, packaging alone might be sufficient evidence of intent to deliver" (emphasis in original)).

¶ 31 Furthermore, the three bundles collectively tested positive for approximately 17.4 grams of heroin, supporting the inference that the heroin was not meant for personal consumption. See *Robinson*, 167 Ill. 2d at 411 ("the quantity of controlled substance alone can be sufficient evidence to prove an intent to deliver beyond a reasonable doubt" in cases "where the amount of controlled substance could not reasonably be viewed as designed for personal consumption"). Although defendant testified to a different version of the events, the testimony of a defendant is "entitled to no greater deference than the testimony of any other witness." *People v. Barney*, 176 Ill. 2d 69, 74 (1997). Here, two officers contradicted defendant's version of the events, including the nature of his arrest and the location where the narcotics were discovered. Based on the foregoing, we affirm defendant's conviction for possession of a controlled substance with intent to deliver.

¶ 32 Next, we consider defendant's claim that the State failed to prove him guilty of delivery of a controlled substance. Specifically, defendant argues that Rosa provided inconsistent and contradictory testimony regarding the transaction that he observed on the porch because his description of the "vantage point from where he claimed to observe the alleged transaction *** shift[ed] throughout his testimony." Defendant notes that Rosa testified that he observed the transaction as he was walking "halfway through the yard," but later indicated that he first saw the transaction when he was on the first step at the bottom of the stairs. The State maintains that the evidence at trial established that defendant delivered a controlled substance.

¶ 33 To sustain a conviction for delivery of a controlled substance, the State was required to prove beyond a reasonable doubt that defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2014). Delivery is defined as "the actual, constructive, or attempted

transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2014).

¶ 34 Viewing the evidence in the light most favorable to the State, we find the evidence sufficient to prove beyond a reasonable doubt that defendant delivered a controlled substance. Rosa testified that he first observed the juvenile and defendant on top of the porch as he was walking through the yard. After further questioning, Rosa revealed that he was on the staircase, approximately 20 feet away, when he saw defendant hand the juvenile a "piece of plastic containing small items." On cross examination, Rosa clarified that he initially started to see the juvenile and defendant's hands move as he was walking through the yard, but did not see the transaction until he was "at the bottom of the stairs." Hence, the record establishes that Rosa witnessed a transaction between defendant and another individual, and observed that they both dropped bundled items, which tested positive for heroin. The trier of fact was presented with this evidence, and, as noted, was not required to reject it in favor of defendant's account. On review, we "will not substitute [our] judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Therefore, we affirm defendant's conviction for delivery of a controlled substance.

¶ 35 Based on the foregoing, the evidence presented at trial, when viewed in the light most favorable to the State, was sufficient for any rational trier of fact to find defendant guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver and delivery of a controlled substance. Therefore, defendant's convictions are affirmed.

¶ 36 Affirmed.