2019 IL App (1st) 170991-U

No. 1-17-0991

Order filed August 2, 2019

Fifth 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. 16 CR 5906
	)	
KEVIN SILER,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance is affirmed over his contentions that the State failed to prove the elements of the crime beyond a reasonable doubt. We remand so that defendant may raise the alleged errors in his mittimus and in the imposition of fines, fees, and costs pursuant to Illinois Supreme Court Rule 472(e) (eff. May 17, 2019).

¶ 2 Following a bench trial, defendant Kevin Siler was convicted of delivery of a controlled substance (720 ILCS 570/401(d) (West 2016)). He was sentenced as a Class X offender to eight years' imprisonment. Defendant was also assessed a total of $3749 in fines fees and costs and

given credit for 384 days of presentence custody. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt, the mittimus should be corrected to reflect the proper offense of which he was convicted, and that his fines, fees, and costs order be adjusted because he was entitled to a $5-per-day presentence custody credit against his controlled substance fine. We affirm and remand as to the fines, fees, and costs and the mittimus issues.[1]

¶ 3 Defendant, along with codefendant Kishaun Mobley, was charged with one count of delivery of a controlled substance within 1000 feet of a school (720 ILCS 570/407 (b)(2) / 401(d) (West 2016)) and one count of delivery of a controlled substance (720 ILCS 570/401(d) (West 2016))[2]. Defendant waived his right to a jury trial and the case proceeded to a bench trial. Prior to trial, the State *nolle prossed* the delivery of a controlled substance within 1000 feet of a school charge.

¶ 4 At trial, Chicago police officer Shayon Harris testified that he works in the narcotics unit of the Chicago Police Department. On March 16, 2016, Officer Harris was part of a surveillance team conducting a narcotics investigation in the vicinity of the 1100 block of North Pulaski Road. Officer Harris was acting as a buy officer for the team. Officer Harris' narcotics team consisted of Officer Shane Jones, the surveillance officer, and Officer Arthur Carlson and Officer Mielcarz, who were the enforcement officers. Officer Harris was working in plain clothes and driving a covert vehicle. During the investigation, he remained in radio communications with his team. At approximately 1:27 p.m., Officer Harris approached co-defendant. Officer Harris told co-defendant that he wanted to purchase crack cocaine and co-

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

[2] Co-defendant is not a party to this appeal.

defendant directed him to a Boost Mobile Store. Officer Harris walked to Division Street then proceeded west to the store. Co-defendant called someone on his cell phone while Officer Harris waited outside the store. Officer Harris waited about "two minutes" until a man arrived. Officer Harris noted that the man was wearing a "gray hooded sweatshirt, dark pants and white gym shoes." He identified defendant in court as the individual. Officer Harris asked defendant for "two for $19" and defendant gave him two clear Ziploc bags each containing a white substance that Officer Harris believed to be crack cocaine. The officer then tendered $19 of "pre-marked currency" to defendant.

¶ 5 After the transaction, Officer Harris walked west on Division and observed Officer Jones who was parked in a covert vehicle. Officer Harris gave Officer Jones, who was approximately ten feet away, a "thumbs up" indicating a positive narcotics purchase. Officer Harris used Officer Jones' radio and contacted his team members to inform them that a positive buy had taken place. He also gave his team a description of defendant and co-defendant. Officer Harris drove his car to Pulaski Road and Grand Avenue and monitored his radio. About 30 minutes after the transaction, Officer Harris saw defendant walking east on Division. Defendant was wearing a black hooded sweatshirt, dark pants, and white gym shoes. Officer Harris radioed his team members and gave defendant's location. Officer Harris lost sight of defendant when defendant turned the corner on Pulaski and began walking south bound. Officer Harris relocated to the 1100 block of North Pulaski and observed defendant and co-defendant standing in front of a convenience store. Officer Harris observed as Officer Carlson and Officer Mielcarz arrived. Defendant and co-defendant entered the store followed by the officers. A short time later, Officer Carlson emerged with defendant and co-defendant. Officer Harris radioed to his team that they

were the individuals involved in the narcotics transaction and later observed defendant in custody in an alley between Crystal Street and Division. Officer Harris inventoried the two items he received from defendant at the police station.

¶ 6 On cross-examination, Officer Harris testified the first time he saw defendant was on the 4000 block of West Division near the Boost Mobile store. Officer Jones was in his vehicle just west of the Boost Mobile store. When Officer Harris first saw defendant he was wearing a gray hooded sweatshirt. When Officer Harris saw defendant 30 minutes later, he "popped out" of the vacant lot where they first did the transaction wearing a black hooded sweatshirt. Officer Harris testified that neither defendant nor co-defendant were carrying any packages when they came out of the convenience store.

¶ 7 Officer Jones testified that on March 16, 2016, he was the primary surveillance officer and Officer Harris was the buy officer. Officer Jones was working in plain clothes and driving a covert vehicle. He drove to the area of Division and Pulaski and parked his vehicle at the 1100 block of North Pulaski. During the surveillance, Officer Jones used his rearview mirror and also looked out his rear window. He saw Officer Harris engage in a conversation with co-defendant and then watched as Officer Harris walked north on Pulaski and west on Division. Officer Jones relocated to the 4000 block of west Division and parked his car on the same side of the street as Officer Harris. Through his rearview mirror, Officer Jones saw Officer Harris talking to a man wearing a gray hooded sweatshirt, black jeans and white gym shoes. Officer Jones identified defendant in court as the person he saw talking with Officer Harris. Officer Jones was approximately 15 to 20 feet away from Officer Harris and defendant. Officer Jones was able to see both sides of defendant's face as well as the front of his face. He saw Officer Harris speaking

to defendant but could not hear what they were saying. Officer Jones saw Officer Harris give defendant an unknown amount of currency and watched as defendant gave Officer Harris several unknown items. After the transaction, Officer Harris walked west bound on Division while defendant went north bound through a vacant lot. Officer Harris walked past Officer Jones and gave a "thumbs up" sign and kept walking. Officer Jones lost sight of defendant for about 30 minutes.

¶ 8 Officer Jones returned to the 4000 block of West Division and saw defendant re-emerge from the same vacant lot. He was about 75 feet away from defendant and "literally across the street" from him. Defendant was wearing a black hooded sweatshirt, black jeans and white gym shoes. Defendant exited the vacant lot and walked east bound on Division before crossing the street and walking south on Pulaski to 1151 North Pulaski. Officer Jones relocated to 1131 North Pulaski and saw defendant standing in front of a convenience store with co-defendant. Officer Jones alerted his enforcement officers and gave them defendant's location. He saw Officer Carlson and Officer Mielcarz arrive at the convenience store. Defendant and co-defendant were inside the store. Officer Jones and Officer Mielcarz exited the store after a few minutes with defendant and co-defendant. As Officer Jones and Officer Mielcarz were patting co-defendant down, he started struggling with the officers. Officer Jones drove his vehicle to the front of Officer Jones's vehicle and "broke his covert surveillance" to engage co-defendant. As he did so, defendant "took off running." Officer Jones got back into his vehicle and followed defendant north on Pulaski and then west onto Division.

¶ 9 Officer Jones testified that during the pursuit defendant was walking in a "jay walking fashion." Officer Jones exited his vehicle and began following defendant on foot. He followed

defendant into a basement apartment located on the 4000 block of West Crystal which is one block north of Division. He noticed the basement was under construction and it was dark. There, he saw an elderly man in a wheel chair and defendant, who was "bare chested." Defendant was placed under arrest and escorted from the basement. Officer Jones went back into the basement and, near a bedroom, saw several articles of clothing, including a gray and a black hooded sweatshirt. An officer took the black sweatshirt and gave it to defendant to wear. Officer Jones estimated that about two minutes elapsed from the time he saw defendant in front of the convenience store to the time he was detained in the basement.

¶ 10 On cross-examination, Officer Jones testified he did not hear the conversation between Officer Harris and defendant and could not see what objects defendant gave to Officer Harris. Officer Jones estimated the distance from the Boost Mobile store to the convenience store to be "roughly" one quarter block east and one quarter block south. Defendant was not involved in the altercation co-defendant had with Officer Jones and Officer Mielcarz. Although Officer Jones observed an elderly man in a wheelchair in the basement apartment, he did not include that fact in his report. Officer Jones did not photograph or inventory the gray and the black sweatshirts. In response to the court's inquiry, Officer Jones testified he did not know which officer took the black sweatshirt from the basement floor.

¶ 11 The State and defendant stipulated that if Fella Johnson, a forensic chemist for the Illinois State Police, was called as a witness, she would testify that she tested the contents of the two Ziploc bags recovered and that the contents weighed .1 gram and tested positive for the presence of cocaine. The State rested.

¶ 12 Shameika Siler, defendant's older sister, testified that on March 16, 2016, at approximately 1:30 p.m., she was with defendant in the 4000 block of Division, between Pulaski and Keystone Avenue. Ms. Siler was sitting in a car waiting for defendant, who was looking for their brother. Ms. Siler saw defendant talking to a person he knew. About "two minutes" later, she saw defendant running and two police officers chasing him. Ms. Siler did not see anyone hand anything to defendant and she did not see defendant hand anything to anyone. Ms. Siler watched defendant run through a vacant lot with the police officers following him. She exited the car and went to the lot where she saw defendant and the police officers next to their "old home" where Ms. Siler and defendant "grew up."

¶ 13 On cross-examination, Ms. Siler testified that on March 16, 2016, defendant spent the day with her before going out to look for their brother. Ms. Siler did not hear the conversation defendant was having but knew he was talking to a "boy named James." She could not recall what defendant was wearing on that day. Ms. Siler testified she was not home when an investigator from the State's Attorney's Office came to her house but she acknowledged that he left a business card. Ms. Siler called the number on the card the next day but refused to speak to the investigator about the case.

¶ 14 On re-direct examination, Ms. Siler testified she never lost sight of defendant when he got out of the car to look for their brother. In response to questions posed by the court, Ms. Siler testified defendant was dressed when the police brought him out of the basement apartment but did not remember what defendant was wearing.

¶ 15 Defendant testified that on March 16, 2016, about 1:30 p.m., he arrived near the area of Keystone and Division to look for his brother. He got out of the car, approached someone and

asked if they had seen his brother. The police grabbed him by the store and he watched as the police started wrestling with another guy. Defendant ran to a basement apartment. He acknowledged that he was convicted of a 2007 and a 2012 "gun case" and had two drug convictions from 2009 and 2010.

¶ 16 On cross-examination, defendant testified he was wearing a black sweater with a hood and not a sweatshirt when he was arrested. The elderly man in the wheelchair that was in the basement apartment was his cousin "Junior Clemons," who lived there.

¶ 17 Officer Jones testified in rebuttal that on March 16, 2016, he was in plain clothes and driving in an unmarked police car. He heard Officer Harris over the police radio and relocated to the 1100 block of North Pulaski. There, he observed both defendant and co-defendant, who matched the description given. The pair were in a convenience store standing by the counter. Officer Jones asked defendant and co-defendant to step outside so he could speak to them. Co-defendant was detained after he attempted to flee. Defendant, who was wearing a black hoodie and black pants, ran north bound on Pulaski. The next time Officer Jones saw defendant he was in custody.

¶ 18 In finding defendant guilty of delivery of a controlled substance the court noted that the police officers testified clearly and convincingly, and were not impeached or contradicted. The court stated that it had to juxtapose the officers' testimony against the testimony of defendant "a four-time convicted felon," and his sister, "a person, obviously, who is of interest to the defendant." The court pointed out that there were "issues with the case," including that defendant was not arrested until 30 minutes after the transaction and that no cell phone or pre-recorded funds were recovered. In resolving these issues in favor of the State, the court noted that these

matters were not "all that significant," given that "there was ample opportunity either in the store or during the chase or in the apartment for that to be secreted." The court also noted that it would have been better police work had police officers recovered the gray sweatshirt, but ultimately found the officers to be more credible than defendant and his sister.

¶ 19 Defendant's motion for new trial was denied. After hearing arguments in aggravation and mitigation, the court sentenced defendant as a Class X offender to eight years' imprisonment.

¶ 20 On appeal, we first address defendant's challenge to the sufficiency of the evidence to sustain his delivery of a controlled substance conviction, and in particular his argument that the State failed to prove that he was the offender. Defendant argues that the testimony of the police officers was unconvincing given that no additional drugs, phone or any pre-recorded funds were recovered from him when he was arrested. Defendant also argues that the officers lost sight of him for 30 minutes and he was wearing a different shirt.

¶ 21 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). This standard is applicable in all criminal cases regardless whether the evidence is direct or circumstantial. *People v. Herring,* 324 Ill.App.3d 458, 460 (2001); *People v. Campbell,* 146 Ill. 2d 363, 374-75 (1992). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Hutchinson,* 2013 IL App (1st) 102332 ¶ 27; *People v. Ortiz,* 196 Ill. 2d 236, 259 (2001). When considering the sufficiency of the evidence, it is not the reviewing court's duty to retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011);

People v. Collins, 106 Ill. 2d 237, 261 (1985). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 224 (2009). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Beauchamp,* 241 Ill. 2d at 8; *People v. Collins,* 214 Ill. 2d 206, 217 (2005).

¶ 22 In order to sustain a finding of guilt for delivery of a controlled substance, the State was required to prove that defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2014); *People v. Brown,* 388 Ill. App. 3d 104, 107-108 (2009). 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).

¶ 23 In the present case, the evidence, when viewed in the light most favorable to the prosecution, established that defendant knowingly delivered .1 gram of cocaine to Officer Harris. Officer Harris testified he approached co-defendant and asked if he could buy crack cocaine. Co-defendant directed Officer Harris to a Boost Mobile Store where Officer Harris waited for defendant. After a few minutes, defendant approached and engaged Officer Harris in a conversation. Officer Harris asked defendant for "two for $19" and defendant gave him two clear Ziploc bags containing cocaine. Officer Jones also observed defendant engage in the transaction with Officer Harris. After the transaction, Officer Harris signaled to Officer Jones that a positive buy had been made. Officer Harris also radioed defendant's description and location to his team. When Officer Carlson arrived at the location, he observed defendant, who fit the relayed description, and approached him and co-defendant. As Officer Carlson did so, defendant fled

from the store. See *People v. Hart*, 214 Ill. 2d 490, 519 (2005) (flight constitutes circumstances from which the trier of fact could infer consciousness of guilt). This evidence and the reasonable inferences therefrom, were sufficient to sustain defendant's conviction for delivery of a controlled substance.

¶ 24 Defendant nevertheless argues that this court should reverse his conviction because the police officers lost sight of him for 30 minutes. He also argues that the evidence was insufficient where the cell phone, $19 pre-recorded funds, and any additional narcotics were not recovered from him upon his arrest. Defendant further points to the officer's description of his clothing as being inconsistent and therefore unreliable.

¶ 25 We initially note that the "mandate to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal, an improper task expressly inconsistent with past precedent." *Wheeler*, 226 Ill. 2d 92, 117-18 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 26 That aside, contrary to defendant's argument, the State is not required to produce the pre-recorded funds used in a narcotics transaction. *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997). Moreover, the State was not required to prove that money was exchanged during the transaction to sustain defendant's conviction. See 720 ILCS 570/401 (West 2014); 720 ILCS 570/102(h) (West 2014) ("delivery" is defined as "the actual, constructive or attempted transfer of possession of a controlled substance with or without consideration"). Additionally, the recovery of additional narcotics or cell phones after a transaction has occurred is not an element

necessary to proving defendant guilty of delivery of a controlled substance. See 720 ILCS 570/401(d) (West 2014).

¶ 27 Here, defendant's arguments are, essentially, asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991) ("A reviewing court has neither the duty nor the privilege to substitute its judgment for that of the trier of fact"). These alleged inconsistencies were fully explored at trial and expressly rejected by the court in finding defendant guilty. As mentioned, it is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences therefrom. *Brown*, 2013 IL 114196, ¶ 48. In doing so, the trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt (*Brown*, 2013 IL 114196, ¶ 71 (citing *Wheeler*, 226 Ill. 2d at 117). Based on its decision, it is clear that the trier of fact found the testimony of the officers credible. See *People v Loferski*, 235 Ill. App. 3d 675, 682 (1992) (the testimony of a single police officer, if positive and credible, is sufficient to convict). We will not reverse a conviction simply because defendant claims that a witness was not credible. *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004). Rather, as mentioned, a defendant's conviction will be overturned only if the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This is not one of those cases.

¶ 28 Next, defendant contends that his mittimus should be corrected to reflect the proper offense of which he was convicted and that his assessment order should be adjusted because he is entitled to a $5-a-day presentence incarceration credit against his controlled substance fine. It

does not appear from the record before us that defendant objected below to the offense listed in the mittimus. And defendant concedes he did not preserve the issue of his fines, fees, and cost but argues that it is reviewable under Illinois Supreme Court Rule 615 (b)(1); the second prong of the plain error doctrine (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010); Ill. S. Ct. Rule 615 (a) (eff. Jan. 1, 1967); or as a matter of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 29 On February 26, 2019, our Supreme Court adopted Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, "the imposition or calculation of fines, fees and assessments or costs," the "application of *per diem* credit against fines" and "[C]lerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court." Ill. S. Ct. R. 472(a)(1), (2), (4) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during the pendency of an appeal. (Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). Moreover, on May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 30 Here, defendant's appeal was pending as of March 1, 2019 and defendant did not raise these issues in the circuit court. Therefore, pursuant to Rule 472, we "remand to the circuit court to allow [defendant] to file a motion pursuant to this rule," raising the alleged errors regarding fines, fees, *per diem* credit and his mittimus. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 31 For the reasons stated, we affirm defendant's conviction for delivery of a controlled substance and remand defendant's alleged errors regarding fines, fees, *per diem* credit and his mittimus to the circuit court pursuant to Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 32 Affirmed and remanded.