2019 IL App (2d) 161014-U
No. 2-16-1014
Order filed July 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RENE ROJO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-1183 Honorable Robert A. Miller, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of criminal drug conspiracy: although the relationship between defendant and his buyer had certain features of an ordinary buyer-seller relationship, certain others, particularly the sheer amounts of drugs involved, suggested the necessary mutual understanding that the buyer would further distribute them.

¶ 2 Following a bench trial in the circuit court of Du Page County, defendant, Rene Rojo, was found guilty of criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)) and was sentenced to a 16-year prison term. Defendant argues that the State failed to prove his guilt beyond a reasonable doubt. Defendant alternatively argues that the judgment should be modified

so as to correctly identify the offense he was found guilty of committing. We affirm defendant's conviction but modify the judgment.

¶ 3 I. BACKGROUND

¶ 4 Roque Chavarria testified that he met defendant in the winter of 2009 at a truck yard. Defendant was processing heroin. Chavarria did not know defendant's name; he called him "Chapparito." Chavarria had met James Wallace a year earlier and had provided drugs to him. Early in 2010, Chavarria met with Wallace, who wanted to buy heroin. Chavarria called defendant to ask if he had anything available. Defendant showed up with an acquaintance who gave heroin to Wallace. Wallace gave money to Chavarria. Chavarria testified that, at some point that day, defendant "was telling the other guy, if he ride with him, what to do."

¶ 5 A few days later, Wallace called Chavarria and told him that the heroin was bad. Wallace wanted to return it and get something else. Defendant, Chavarria, and Wallace met again, and Wallace returned the heroin to defendant. Chavarria testified that defendant tried to give him and Wallace better heroin.

¶ 6 In June 2010, a traffic stop resulted in the discovery of two kilograms of heroin in Chavarria's car. Another kilogram of heroin was discovered when Chavarria's home was searched. At that point, a Department of Homeland Security task force enlisted Chavarria's cooperation with drug trafficking investigations. Chavarria's cooperation included secretly recording various telephone and in-person conversations with defendant. In addition, members of the task force conducted surveillance of various meetings among defendant, Chavarria, and Wallace.

¶ 7 Chavarria testified that, on July 16, 2010, defendant and another individual visited his home. Defendant asked Chavarria to stay in contact with Wallace so that they could arrange

more drug deals in the future. Defendant indicated that Wallace would have to be careful because the police could be watching.

¶ 8 On November 17, 2010, defendant and Chavarria met at a McDonald's, where they discussed potential drug deals. Defendant told Chavarria to be careful because the police were watching them. On January 12, 2011, defendant and an acquaintance met with Chavarria at a McDonald's. Defendant indicated that, when they conducted drug deals, he wanted Chavarria to exchange the drugs with the buyers. Defendant was concerned that "those customers who bring the drugs connected with the buyer might exchange numbers and leave [defendant and Chavarria] out of the business." During a meeting on May 5, 2011, defendant told Chavarria that he wanted him to be present during drug deals with Wallace. The next day, defendant and Chavarria met at a truck yard. Defendant told Chavarria to call Wallace. Wallace came to the truck yard and an acquaintance of defendant gave Wallace a sample of heroin. Defendant's acquaintance also gave two grams of heroin to Chavarria. The next day, Wallace called Chavarria to say that he wanted to buy half a kilogram of heroin. Chavarria called defendant, who indicated that he would sell Wallace either a full kilogram or 1½ kilograms.

¶ 9 On May 12, 2011, Chavarria went to a Burger King. He called Wallace, who joined him there. Chavarria called defendant, who told them to go to a restaurant called Marisco's. After they arrived at Marisco's, one of defendant's acquaintances showed up. Defendant arrived about 10 or 15 minutes later. Chavarria went outside and counted Wallace's money, which came to about $31,000. Chavarria went back into the restaurant, and defendant took the money. Chavarria testified, "the guy working with him, grab [sic] the money, went outside, took it to Mr. Wallace, and then came back inside of the restaurant. And then he took the money to the car, and

that's when they went on their way." Chavarria met with Wallace on May 14, 2011. Wallace gave Chavarria $400 because Chavarria had not made any money from the May 12 deal.

¶ 10 On May 16, 2011, Chavarria met with defendant and another individual at a McDonald's. Defendant reiterated that Chavarria had to be present at drug deals so that they would not be cut out of future deals. On June 1, 2011, defendant and Chavarria met at a swap market where they discussed heroin prices. Defendant indicated that he would have heroin to sell in about a week. On June 3, 2011, defendant met with Wallace at a Taco Bell. Wallace did not have money with him, so he left and returned with about $30,000. Defendant's supplier was unable to deliver the drugs, so the deal fell through. The next day, defendant told Chavarria that he had 396 grams of heroin to sell to Wallace. Chavarria replied that Wallace wanted to buy a full kilogram. Defendant asked Chavarria to find out if Wallace would be willing to purchase the smaller amount until the rest was available.

¶ 11 On June 6, 2011, defendant and Chavarria met at a McDonald's and discussed the price that defendant would charge Chavarria's customers for heroin. Chavarria recorded that conversation. According to a transcript of the recording, while discussing deals with Wallace, defendant said, "This is the fucking problem buddy, that [Wallace] only buys a fucking half every time he fucking feels like it, buying, and he works our ass off." Defendant also said, "if we give it to him, we expect he doesn't bring back shit, you understand me. You know the fucking job how we give it to him that how it comes back."

¶ 12 On June 7, 2011, Chavarria met defendant at a Subway restaurant. Chavarria got into defendant's car and they drove around. Defendant told Chavarria that he had heroin to sell. Defendant wanted Chavarria to check with Wallace to see if he had money to buy the heroin. Chavarria then met Wallace at a Home Depot. Chavarria got into Wallace's vehicle and counted

the money Wallace brought. Chavarria called defendant, who told them to meet him at a Dunkin' Donuts. Once they were assembled, defendant instructed Chavarria to exchange the money and drugs. He told Chavarria that he (Chavarria) would have to make the exchange because the individual bringing the heroin had a crippled leg. The individual with the heroin arrived in a Dodge Intrepid. Chavarria took Wallace's money and gave it to the driver of the Intrepid. He then gave the heroin to Wallace.

¶ 13 Wallace testified that, in 2010, and until June 2011, he sold heroin. Wallace first got to know Chavarria in December 2009. He first met defendant in April 2010, when he bought approximately 100 grams of heroin from Chavarria. The heroin was bad, so Wallace contacted Chavarria. Wallace met with Chavarria and defendant to either swap the drugs or get his money back. Defendant and Chavarria started speaking in Spanish. Wallace did not speak Spanish, and Chavarria told him to wait in the car. Chavarria later walked to the car and told Wallace that he was not getting his money back, but would get a reduced price for future heroin purchases. Wallace was using multiple suppliers at the time. He testified, "I was going through [Chavarria] and we was going to different people." Wallace decided to keep defendant as a supplier because defendant agreed to reduce the price for heroin.

¶ 14 On May 6, 2011, Wallace met with Chavarria at a truck yard to get a sample of defendant's heroin. Wallace was satisfied with the quality of the sample, and he "placed an order" with Chavarria. On May 12, 2011, Wallace met with Chavarria at a Burger King. Chavarria received a phone call. He spoke in Spanish. After the phone call ended, Wallace and Chavarria went to Marisco's Restaurant in separate vehicles. Chavarria got into Wallace's car and counted Wallace's money. Chavarria then entered the restaurant with Wallace's money while Wallace waited in his car. About 15 minutes later, Chavarria called Wallace and told him

"just be cool. He is on his way." Wallace did not know whom Chavarria was referring to. Five or 10 minutes later, someone drove up and handed a package of drugs to Wallace. Chavarria called Wallace that night. Wallace complained that the package was about seven grams short. A few days later, Wallace met with Chavarria, who told him that his payment for the drugs was $400 short. Wallace gave Chavarria four $100 bills.

¶ 15 Wallace and Chavarria later agreed to meet at a Taco Bell. The meeting took place on June 3, 2011. Wallace asked Chavarria if he had a sample of heroin. Chavarria told Wallace that he did not have a sample and was ready to sell heroin to Wallace. Wallace left to get money. He returned with enough to buy 500 grams of heroin. Wallace understood that he was buying the heroin from defendant. Wallace and Chavarria waited for about two hours for someone to bring the heroin, but nobody showed up and Wallace left.

¶ 16 Chavarria and Wallace agreed to meet again on June 7, 2011, at a Home Depot. Chavarria intended to buy 500 grams of heroin. When Wallace arrived, Chavarria got into his car and made a phone call during which he spoke in Spanish. They then drove separately to a Dunkin' Donuts. They both went inside and Chavarria made another phone call. They returned to their cars and Wallace gave money to Chavarria. About 15 minutes later, defendant walked into the Dunkin' Donuts and Chavarria followed him inside. Wallace testified that "he" called Wallace and told him that the driver with the heroin would be there any minute. (Wallace did not specify whether "he" was Chavarria or defendant.) The driver arrived and pulled up next to Chavarria's vehicle. Chavarria took Wallace's money to the driver. The driver gave drugs to Chavarria and Chavarria gave the drugs, which were wrapped in green cellophane, to Wallace. After Wallace left the Dunkin' Donuts, agents from the Department of Homeland Security stopped his vehicle and arrested him. The State presented evidence that a green cellophane

package was found in Wallace's vehicle. The package contained just under 500 grams of a substance containing heroin.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that the evidence was insufficient to sustain his conviction of criminal drug conspiracy. A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " '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)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 19 Defendant was careful to avoid personally handling the drugs, and a prosecution based on possession would have been difficult. There can be no doubt, however, that defendant was involved in the drug trade. The question here is whether the law of conspiracy was an appropriate mechanism to criminally punish defendant's conduct. Section 405.1(a) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/405.1(a) (West 2010)) provides that "[a] person commits criminal drug conspiracy when, with the intent that an offense set forth in Section 401, Section 402, or Section 407 of this Act be committed, he agrees with another to the commission of that offense." A conviction also requires an allegation and proof that the defendant or a coconspirator committed an act in furtherance of the agreement. *Id.*

¶ 20 Before proceeding, we note that it is not clear whether a dealer's agreement to sell drugs and a purchaser's agreement to buy them can constitute a conspiracy in Illinois. In *People v. Stroud*, 392 Ill. App. 3d 776, 801 (2009), it was observed that "the federal courts have consistently held that evidence establishing a mere buyer-seller relationship is not enough to prove a conspiracy to distribute drugs and that the government must prove that the defendant agreed to commit a crime other than the sale itself, such as the subsequent distribution of drugs by the buyer." Those holdings represent an application of "Wharton's Rule." See *People v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993). Wharton's Rule "prohibits prosecution of a conspiracy to commit a particular crime when the commission of that crime requires the participation of more than one person." *People v. Laws*, 155 Ill. 2d 208, 211 (1993). However, Wharton's Rule "currently has vitality only as a judicial presumption to be applied in the absence of legislative intent to the contrary." *People v. Caballero*, 237 Ill. App. 3d 797, 806 (1992). The *Caballero* court noted that the committee comments accompanying the general conspiracy statute reflected a legislative intent to abolish Wharton's Rule. *Id.* at 806-07 (citing Ill. Ann. Stat., ch. 38, ¶ 8-2, Committee Comments-1963, at 474 (Smith-Hurd 1989)). In *Caballero*, the defendant was charged under the general conspiracy statute. The charging instrument alleged that the defendant agreed with another individual to deliver a controlled substance. It also alleged that, in furtherance of the conspiracy, the defendant exchanged money for the controlled substance. *Id.* at 799. The *Caballero* court upheld the defendant's conspiracy conviction based on proof of that charge.

¶ 21 The defendant in *Caballero* was not charged under the criminal drug conspiracy statute; it had not yet been enacted. We note, however, that the legislative history of the criminal drug conspiracy statute bears no indication of a legislative intent to revive Wharton's Rule. See 86 Ill.

Gen. Assem., House Proceedings, May 12, 1989, at 48-53. Thus, defendant arguably could have been charged with criminal drug conspiracy based on a simple buyer-seller relationship with Wallace. However, that is not how defendant was charged. The indictment alleged that defendant and Wallace committed the offense of criminal drug conspiracy in that "defendant, with the intent that the offense of Unlawful Possession of a Controlled Substance with the Intent to Deliver *** be committed, agreed with another and/or each other to the commission of that offense in that the defendant arranged to deliver or supply 400 grams or more but less than 900 grams or more of heroin *** to another *with the intention that* [*the*] *heroin be distributed to another*." (Emphasis added.) We read this as an allegation of a conspiracy meeting the strictures of Wharton's Rule; *i.e.* that defendant and Wallace conspired for the delivery of heroin to Wallace with the intent that Wallace would further distribute the heroin.

¶ 22 The *Stroud* court outlined the factors that federal courts consider in determining whether individuals are engaged in a conspiracy to distribute drugs, as opposed to a mere sales transaction. Those factors include "the length of the relationship, the established method of payment, the extent to which the transactions were standardized, and the level of mutual trust." *Stroud*, 392 Ill. App. 3d at 801. In addition, courts consider the quantity of drugs involved and whether the seller was aware that the buyer planned to resell the drugs. The question for the trier of fact is whether the relevant circumstances give rise to the inference that "buyer and seller are dealing not just with disinterested eyes narrowly focused on the purchase at hand but with a mutual understanding about subsequent distribution." *United States v. Clay*, 37 F.3d 338, 341 (7th Cir. 1994). As stated in *Clay*, "a prolonged and actively pursued course of sales coupled with the seller's knowledge of and a shared stake in the buyer's illegal venture is sufficient to sustain a finding of conspiracy." *Id.* No single factor is dispositive, but "if enough are present

and point to a concrete, interlocking interest beyond individual buy-sell transactions, [a reviewing court] will not disturb the fact-finder's inference that at some point, the buyer-seller relationship developed into a cooperative venture." *United States v. Hach*, 162 F.3d 937, 943 (7th Cir. 1998).

¶ 23 *Stroud* and *United States v. Contreras*, 249 F.3d 595 (7th Cir. 2001), provide helpful examples of evidence that supports a conspiracy conviction (*Stroud*) and evidence that does not (*Contreras*). In *Stroud*, there was sufficient evidence that the defendant conspired with Sam Elem to sell drugs to Maurice Macklin, who, unbeknownst to defendant and Elem, was an undercover investigator with the Cook County State's Attorney's office. The *Stroud* court described the evidence as follows:

> "The State's evidence established an agreement between Elem and Stroud to deliver controlled substances: (1) Macklin would indicate to Elem that he wanted to purchase cocaine; (2) Elem would call Stroud and Stroud would inform Elem whether drugs were available and, if so, at what price; (3) Elem would then relay to Macklin the information Elem and Stroud discussed; (4) Elem and Macklin would meet at a prearranged location and Macklin would give Elem the amount of money Elem and Stroud predetermined; (5) Elem would drive to Stroud's house and retrieve the drugs; and (6) Elem would return to the prearranged location and deliver the drugs to Macklin. In addition, the State's evidence established that Elem and Stroud's agreement had them transacting business in a standardized manner: (1) Stroud and Elem conducted the transactions with Macklin as follows: (a) Elem received the money before giving Macklin the drugs, (b) Elem counted the money when it was given to him, and (c) Elem did not bring anyone to Stroud's house; (2) Stroud reaped financial benefits from Macklin's purchases because the police

> recovered prerecorded funds used during the controlled buys from Stroud's residence; (3) when Macklin told Elem on June 27, 1998, that he was not going to purchase drugs until the following Monday or Tuesday, Elem told Stroud what they had been talking about would happen Monday or Tuesday; and (4) when there was a shortage in the weight of the agreed-upon drugs, Elem indicated that his supplier would make up the shortage in a subsequent purchase. The State also presented numerous conversations between Stroud and other men during which they discussed the availability of drugs and the corresponding prices of the drugs, and the court could reasonably conclude that these men were engaged in drug transactions." *Stroud*, 392 Ill. App. 3d at 800.

¶ 24 In *Contreras*, the defendant sold cocaine to a confidential informant. The court considered whether the prosecution had proved a conspiracy between the defendant and an unknown Hispanic male who had dropped off a kilogram of cocaine at the defendant's residence on 10 separate occasions during a six-month period. The *Contreras* court concluded that no conspiracy had been proved, reasoning as follows:

> "[The] repeat sales suggest that as buyer and seller, Contreras and his supplier had more than a transient relationship. Contreras' multiple purchases of one-kilogram quantities reveal a certain comfort and regularity in his dealings with the unidentified supplier. Yet, the evidence reveals nothing more about the circumstances and terms of Contreras' transactions with his supplier. There is no evidence, for example, that the supplier 'fronted' the cocaine to Contreras such that his payment would derive from Contreras' resale of the drug. [Citation.] There is no evidence that the supplier gave Contreras a favorable price on the cocaine on the expectation of future purchases. [Citations.] Nor is there any evidence, aside from the bare number of sales, of prolonged cooperation

> between Contreras and his supplier. [Citation.] In short, there is no evidence whatsoever that permits one to infer that the interaction between Contreras and his unidentified supplier amounted to something more than a buyer-seller relationship, that is, 'something more than a series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise.' [Citation.] The multiple purchases by themselves, without any additional evidence of the kind we have mentioned, do not permit the inference that the unidentified supplier conspired with Contreras. [Citations.]" *Contreras*, 249 F.3d at 600.

¶ 25 In this case, some factors suggest that defendant and Wallace were engaged in a mere buyer-seller relationship. However, other factors suggest that they were engaged in a conspiracy to distribute the drugs that defendant sold to Wallace. In the former category is the payment arrangement: defendant did not "front" the drugs to Wallace. "Payment before delivery differs from delivery before payment, the 'fronting' transaction from which an inference of agreement may be drawn." *United States v. Torres-Ramirez*, 213 F.3d 978, 982 (7th Cir. 2000).

¶ 26 In addition, it appears that defendant discussed drug prices with Chavarria rather than Wallace and that the transactions were structured to keep defendant and Wallace at a distance, with Chavarria functioning as an intermediary. On occasion, defendant and Chavarria shut Wallace out of conversations by speaking in Spanish. That facet of defendant's relationship with Wallace is emblematic of their failure to develop a bond of trust. Instead, defendant ill-advisedly placed his trust in Chavarria, relying on him to make sure that Wallace did not develop an independent relationship with defendant's suppliers. For his own part, Wallace was wary of the quality of the drugs that defendant supplied, which suggests that Wallace did not believe that defendant had a stake in the subsequent distribution of the drugs.

¶ 27 Nonetheless, the duration of the relationship between defendant and Wallace, and the amounts of drugs involved, suggest a mutual understanding about subsequent distribution of the drugs. Defendant's relationship with Wallace began with a drug deal early in 2010 and ended with the ill-fated drug deal in June 2011. It is true that defendant and Wallace completed only a few transactions. However, even a small number of transactions can be probative of membership in a conspiracy. *United States v. Dortch*, 5 F.3d 1056, 1065 (7th Cir. 1993) (three sales within a four-to-six-month period). Furthermore, given the amount of drugs involved, there can be little doubt that defendant knew that Wallace was distributing the drugs to others.

¶ 28 In addition, the dealings between defendant and Wallace were standardized to a point. Wallace and Chavarria would meet and defendant would instruct Chavarria that he and Wallace should proceed to another location. Defendant was usually present at the new location. Chavarria would count Wallace's money, and someone else would show up with the drugs for Wallace. Chavarria testified that, at the first drug deal, defendant "was telling the other guy, if he ride with him, what to do." Although it is not entirely clear what this meant, it could have been an overture to bringing Wallace into defendant's drug business. In addition, defendant offered Wallace a favorable price for the heroin on the expectation of future purchases. Although there was friction between defendant and Wallace, defendant wanted to keep Wallace's business and was concerned that Wallace might turn to other suppliers. Wallace's success in distributing the drugs benefited defendant. In that sense, at least, defendant and Wallace had a shared stake in the distribution of the drugs that Wallace purchased.

¶ 29 In sum, the relevant factors do not uniformly show either that defendant and Wallace conspired to distribute heroin to others or that they were merely engaged in a buyer-seller relationship. Thus, the determination of defendant's guilt depends upon the weight to be given

to, and the inferences to be drawn from, these competing factors. These were matters for the trier of fact to evaluate and we may not substitute our judgment for the trier of fact's. *People v. Veasey*, 251 Ill. App. 3d 589, 591 (1993). Although the evidence here is close, it is not so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt (*Collins*, 106 Ill. 2d at 261).

¶ 30 Because we affirm defendant's conviction, we must consider his alternative argument that the judgment must be corrected. The judgment incorrectly states that defendant was convicted of calculated criminal drug conspiracy (720 ILCS 570/405(b) (West 2010)), rather than criminal drug conspiracy. The State agrees that the error should be corrected. We therefore modify the judgment to reflect that defendant was convicted of criminal drug conspiracy in violation of section 405.1 of the Act.

¶ 31 III. CONCLUSION

¶ 32 For the forgoing reasons, we affirm defendant's conviction of criminal drug conspiracy, and we correct the judgment to reflect a conviction of that offense.

¶ 33 Affirmed as modified.