2014 IL App (2d) 121218-U
No. 2-12-1218
Order filed March 13, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARCO ARENAS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-3001 Honorable Marmarie J. Kostelny, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved beyond a reasonable doubt that defendant's possession of cannabis was with intent to deliver: in addition to a significant amount of cannabis, defendant possessed scales with sandwich bags nearby, a large amount of cash, weapons, security cameras, and a picture of a fictional crime family, and did not possess drug paraphernalia related to personal use, leading an expert to opine that defendant had such intent; (2) as defendant's convictions of possession of cannabis and possession with intent to deliver the same cannabis violated the one-act, one-crime rule, we vacated the former.

¶ 2 Defendant, Marco Arenas, appeals from the judgment of the circuit court of Kane County finding him guilty, after a bench trial, of one count of unlawful possession of cannabis with the intent to deliver (720 ILCS 550/5(d) (West 2010)) and one count of unlawful possession of

cannabis (720 ILCS 550/4(d) (West 2010)). Because the evidence was sufficient to prove him guilty of possession of cannabis with the intent to deliver, we affirm that conviction. However, we vacate his conviction for possession of cannabis, because it violated the one-act, one-crime rule.

¶ 3 I. BACKGROUND

¶ 4 The following evidence is from defendant's bench trial. On December 9, 2010, several officers from the Aurora police department's special operations group executed a search warrant at defendant's home in Aurora. As one of the officers entered the basement, he smelled unburned cannabis. The officers found a plastic bag, within another plastic bag, which contained 82.9 grams of cannabis. The cannabis was located between the floor joists of the unfinished basement ceiling.

¶ 5 There was a chest freezer in the basement. Next to the freezer was a small dresser with a black tool case sitting on top. On top of the tool case was a digital scale and an open box of plastic sandwich bags, both of which were approximately 8 to 10 feet from the cannabis. Although the officers found no food near the sandwich bags and scale, or anywhere in the basement, they did not look inside the freezer.

¶ 6 There was a second digital scale on top of the duct work above the freezer. It was in a box, and the officer who found it had to "stand on something" to see it.

¶ 7 The officers found $3,400 cash rolled up in a pair of socks in a dresser in the second-floor bedroom of defendant and his wife. One of the officers testified that the money consisted of multiple denominations, although he could not recall the specific bills. There was also a purse in that bedroom, containing about $700 cash and coins.

¶ 8 The officers found four guns in the home, including a .357-caliber handgun in a coat in a closet near the front door. Because defendant's wife possessed a valid firearm owner's identification card and claimed the guns as hers, they were not seized.

¶ 9 There were five security cameras located on the outside of the house. Although it was not in a "high-crime" area, the house had been broken into twice, and a shooting had occurred in the driveway.

¶ 10 When defendant arrived at the house, he admitted that the cannabis was his. He told the officers that his wife did not smoke cannabis. He denied selling cannabis, but said that he "smoke[d] a lot of weed."

¶ 11 Officer Cottrell Webster of the Aurora police department testified as an expert on narcotics packaging and distribution. He opined that defendant possessed the cannabis for the purpose of selling it. He based that opinion on the amount of cannabis and the way it was packaged, the two scales, the box of sandwich bags, the large amount of cash hidden in the socks, the weapons, the surveillance cameras, the absence of any paraphernalia typically associated with the personal use of cannabis, such as a grinder or a smoking pipe, and a picture of the fictional crime family the Sopranos.

¶ 12 He elaborated that there was enough cannabis to "break down into smaller amounts to be sold" and that people usually buy cannabis in 1/8-ounce increments. He admitted that a "heavy smoker" of cannabis possibly could use as much as 20 grams per day. Based on that, the 89.2 grams would be a four-to-five-day supply for a heavy smoker. However, in his experience, most heavy users of cannabis do not buy large amounts at one time.

¶ 13 In his opinion, the presence of security cameras at a house in a neighborhood like defendant's usually indicates illegal activity in the house. He added that defendant had been the

subject of a prior police investigation and that someone like that would use security cameras to observe a possible police entry into his home. He did not believe that the cameras were being used to monitor illegal activity outside the house, although he admitted that he did not know that the house had been the location of prior break-ins and a shooting.

¶ 14 Officer Webster explained that the picture of the Sopranos contributed to his opinion that defendant was dealing cannabis. In his experience, similar pictures are found along with weapons and drugs in "over half the [searches]" the police perform.

¶ 15 He considered the location of the handgun in a closet near the front door to be important. According to Officer Webster, that is a common location for drug dealers to place weapons to prevent competitors from entering to rob them.

¶ 16 He added that it is common for drug dealers to use digital scales to measure their drugs for sale. Many times they keep a second scale, in the event the first scale fails to function.

¶ 17 Defendant's wife, Damaris Arenas, testified that there was a cabinet in the unfinished basement where she kept "storage stuff, foil and Saran wrap," because there was limited storage in the kitchen. She explained that the open box of sandwich bags was sitting next to the scale because her daughter must have failed to put it back in the cabinet. Although she kept the sandwich bags in the basement, she used them in the kitchen to make lunches. Therefore, she or her daughter would have to retrieve the bags from the basement and return them when done.

¶ 18 According to her, she operated a home business in which she sold various items on Ebay. As part of that business, she used the two scales to weigh items so that she could calculate shipping prices. One scale was for heavier items and the other for lighter objects. She ordinarily kept the scales in the storage cabinet, but sometimes one of the scales ended up above the freezer. Either she would put it there or her daughter would misplace it there. She would use a

step ladder or would stand on the freezer to reach the scale above the freezer. She did not know how the scale ended up there on the day of the search. She denied ever seeing defendant use either scale to weigh cannabis.

¶ 19 She said that the cameras were installed on the house because they "don't live in the best of neighborhoods," there had been a shooting in their driveway, and their house had been broken into twice. The cameras were strictly for home security.

¶ 20 According to her, the $3,400 consisted entirely of $100 bills that she and defendant were saving to buy a vehicle. The money in the purse was a Christmas fund.

¶ 21 Although she was aware that defendant smoked cannabis, she did not approve. She did not know that the cannabis was in the house.

¶ 22 The trial court found defendant guilty both of possession of cannabis and of possession of cannabis with the intent to deliver. As to the latter offense, the court found that the quantity of cannabis was "substantial and not indicative of personal use." The court noted the absence of any "user paraphernalia" and the presence of "dealer paraphernalia." In that latter regard, the court pointed to the two scales, one of which was hidden above the freezer, the open box of sandwich bags, and the fact that the scales and sandwich bags were found near each other. The court also relied on the large amount of cash, the four weapons, and the security cameras. Further, it considered the expert opinion that defendant possessed the cannabis to sell. After referring to the various explanations offered by defendant's wife, the court stated that it had carefully observed her demeanor, considered the logic of her explanations, and found her not to be credible.

¶ 23 The court denied defendant's motion for a new trial and sentenced him to concurrent two-year prison terms. Defendant then filed this timely appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant concedes that the State proved him guilty of possession of cannabis, but contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of having the intent to deliver. In that regard, he argues that the amount of cannabis, combined with the insufficiency of the evidence of drug dealing, merely showed that he possessed the cannabis for personal use. Alternatively, he contends that, if we affirm his conviction of possession with the intent to deliver, we should vacate his conviction of possession, because it violated the one-act, one-crime rule.

¶ 26 Evidence is sufficient to sustain a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Perez*, 189 Ill. 2d 254, 265-66 (2000). In assessing the sufficiency of the evidence, we do not retry the case. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, we defer to the trial court's assessment of witness credibility, the weight it gave the evidence, and the reasonable inferences it drew from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991).

¶ 27 To establish possession of a controlled substance with the intent to deliver, the State must prove beyond a reasonable doubt that: (1) the defendant knew that the controlled substance was present; (2) the defendant was in immediate possession or control of the drugs; and (3) the defendant intended to deliver the drugs. *People v. Jennings*, 364 Ill. App. 3d 473, 478 (2005). Here, defendant challenges the sufficiency of the evidence only as to the element of intent to deliver.

¶ 28 Direct evidence of intent to deliver is rare. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). Therefore, circumstantial evidence is commonly used to prove intent. *Robinson*, 167 Ill.

2d at 408. There are various factors from which one may infer intent. *Robinson*, 167 Ill. 2d at 408. Those include: (1) the quantity of the controlled substance when it is too large to be viewed as being for personal consumption; (2) the high degree of purity of the drugs; (3) the possession of weapons; (4) the possession of large amounts of cash; (5) the possession of police scanners, beepers, or cellular telephones; (6) the possession of drug paraphernalia; and (7) the manner in which the drugs are packaged. *Robinson*, 167 Ill. 2d at 408. We are not limited to those factors, however, as they are merely examples of the many factors that a court may consider as indicative of intent. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). Further, the issue is resolved on a case-by-case basis, and the fact that evidence in one case is not as strong as that in other cases is not controlling. *People v. Blan*, 392 Ill. App. 3d 453, 457 (2009).

¶ 29 We begin our analysis with the amount of cannabis possessed by defendant in this case. We do so because the quantity of a controlled substance alone can be sufficient to prove intent to deliver. See *Robinson*, 167 Ill. 2d at 410-11. That is the case, however, only where the amount of the drugs could not reasonably be viewed as being only for personal consumption. *Robinson*, 167 Ill. 2d at 411. As the quantity of the controlled substance decreases, the need for additional circumstantial evidence of intent to deliver increases. *Robinson*, 167 Ill. 2d at 413.

¶ 30 In this case, there were 82.9 grams of cannabis. We cannot say, however, that that amount, although significant, precluded the trial court from finding that it was only for defendant's consumption. Thus, the amount of cannabis was not sufficient alone to prove intent to deliver. *Cf. People v. Birge*, 137 Ill. App. 3d 781, 791 (1985) (51 pounds of cannabis was sufficient alone to prove intent).

¶ 31 Having said that, the question then is whether there was sufficient circumstantial evidence, combined with the amount of cannabis, to prove that defendant possessed it with the intent to deliver. We believe that there was.

¶ 32 The evidence consisted of two digital scales, one of which appeared to have been hidden, within 10 feet of the cannabis. There was an open box of sandwich bags, an item commonly used to package cannabis, next to one of the scales. Additionally, there was $3,400 cash hidden in a pair of socks. There were weapons in the house, including a handgun near the front door, and security cameras outside the house. There was a picture of a fictional crime family displayed in the house. Officer Webster testified that such pictures were present with weapons and drugs in over half of the searches he had performed.[1] There was also an absence of any drug paraphernalia related to the personal use of the cannabis, such as a grinder or smoking pipe. See *People v. Williams*, 358 Ill. App. 3d 1098, 1103 (2005) (lack of drug paraphernalia associated with personal use is relevant to show intent to deliver). Moreover, Webster opined that, based on the evidence, defendant possessed the cannabis for the purpose of selling it.[2]

¶ 33 Defendant attempted to counter much of the evidence via his wife's testimony. The trial court, however, found her not to be credible. We are in no position to question that finding. See *Steidl*, 142 Ill. 2d at 226. Additionally, we agree with the court that many of defendant's wife's explanations, such as those related to the open box of sandwich bags, the use of the two scales, and the location of one of the scales above the freezer, were implausible.

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[1] Although defendant objected to the admission of the picture at trial, he has not challenged on appeal Officer Webster's testimony about, or reliance on, the picture.

[2] Although defendant objected, without argument, to the trial court's qualifying Webster as an expert, he has not challenged on appeal Webster's expert status.

¶ 34 Defendant points to his admission to the officers that he smoked "a lot of weed" as evidence that the cannabis was purely for his personal use. That argument, however, was countered by Officer Webster's testimony that heavy users typically buy cannabis in much smaller amounts. Although defendant clings to Officer Webster's testimony that a "heavy smoker" would likely consume 89.2 grams of cannabis in four or five days, there was no evidence as to the rate by which defendant smoked cannabis or what he meant exactly when he said that he smoked "a lot of weed." Moreover, as noted earlier, there was no evidence of any items typically associated with personal cannabis use to substantiate defendant's self-serving statement about his purpose for possessing the cannabis.

¶ 35 There are certainly innocuous reasons why someone might possess such things as a digital scale, sandwich bags, cash, security cameras, a picture of the Sopranos, and even weapons in his home. However, when considered in their totality, in addition to the presence of a significant amount of cannabis, and viewed in a light most favorable to the State, those facts were more than sufficient to prove that defendant possessed the cannabis with the intent to deliver. Thus, we affirm defendant's conviction of that offense.

¶ 36 We turn next to the contention that, if we affirm defendant's conviction of possession of cannabis with the intent to deliver, we must vacate the conviction of simple possession because, being based on the same cannabis, it violated the one-act, one-crime rule. The State concedes that we should vacate the possession conviction on that basis.

¶ 37 Although defendant did not raise the one-act, one-crime violation in the trial court, such a violation adversely affects the integrity of the judicial process and is reversible as plain error. See *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009). We agree that it was plain error to enter a conviction on the possession count when it was based on possession of the same cannabis as the

intent-to-deliver conviction (see *People v. Bolar*, 229 Ill. App. 3d 563, 568 (1992)), and therefore we vacate defendant's conviction of possession of cannabis.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the circuit court of Kane County finding defendant guilty of possession of cannabis with the intent to deliver but vacate his conviction of possession of cannabis.

¶ 40 Affirmed in part and vacated in part.