

No. 1-09-0401

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SIXTH DIVISION
January 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 16313
)	
DONTE WADE,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.

Justices Cahill and McBride concurred in the judgment.

O R D E R

HELD: Where defendant, represented by counsel, tendered a written jury waiver in open court, and responded appropriately to the trial court's inquiries regarding the waiver, the trial court did not err in accepting defendant's jury waiver. Where a police officer credibly testified that defendant held a controlled substance in his mouth and spit it out onto the sidewalk as the police approached, the State did not fail to prove defendant guilty beyond a reasonable doubt. The judgment of the circuit court is affirmed.

Donte Wade was charged with possession of a controlled substance with intent to deliver and, following a bench trial, convicted of the lesser-included offense of possession of a controlled substance. The trial court sentenced defendant to two years' incarceration. On appeal, defendant contends that the trial court failed to ensure that his jury waiver was knowing and voluntary and the State failed to prove him guilty beyond a reasonable doubt. We affirm.

Prior to trial, the trial court was tendered a written jury waiver. The court inquired whether defendant wished to waive his right to a jury trial, and whether he signed the waiver. The court also asked, "Do you understand that I will then listen to the evidence and decide whether or not the State can prove you guilty beyond a reasonable doubt?" and defendant replied "Yes, sir." After some additional inquiry the trial court accepted defendant's jury waiver.

At trial, Chicago police officer Paul Heyden testified that on July 30, 2008, he was assigned to a narcotics surveillance team in the area of 5002 West Huron in Chicago. When Heyden arrived, he observed two men yelling "rocks" and "blows" to people passing by. Heyden believe that this was an attempt to solicit the illegal sale of narcotics. Heyden moved to an elevated location and continued to observe. Two unknown individuals approached defendant on separate occasions and each

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tendered an unknown amount of cash. In exchange, defendant took a small object from his mouth and gave it to the individual. A fourth man engaged in similar exchanges with other unknown individuals. Defendant and the three other men congregated near 5002 West Huron, but conducted the transactions in front of the building next door, 5010 West Huron.

Heyden radioed the other police officers assigned to his team, and they approached defendant. As they did, Heyden saw defendant spit an unknown object from his mouth. Officer Paolino detained defendant and officer Wyroba bent down and picked up some items approximately two feet from where defendant spit.

On cross-examination, Heyden admitted that at a preliminary hearing he testified that he was not elevated when he made his observations. He also admitted testifying that he could only see the back of defendant's head, and could not see him spit.

Chicago police officer Paolino testified that he went to 5002 West Huron to arrest defendant after receiving a radio call from Officer Heyden. As he approached defendant, he saw defendant spit out objects. He saw the objects hit the ground and saw Officer Wyroba recover them. Paolino then determined that the objects were three tin foil packets

On cross-examination, Paolino testified that defendant was facing west when he spit.

Chicago police officer Albert Wyroba testified that he responded to Heyden's radio call and followed Paolino to 5002 West Huron in a second car. Wyroba was approximately 15 feet from defendant when he saw a "spitting motion." He did not see the objects leave defendant's mouth, but subsequently recovered three tin foil packets containing suspect heroin. The packets were wet and within the area of some saliva Wyroba saw on the ground.

On cross-examination, Wyroba testified that defendant was facing east when he spit.

The parties stipulated that the items recovered tested positive for 0.3 gram of heroin and that a proper chain of custody was maintained at all times.

The State rested, defendant moved for a finding of not guilty, and the trial court denied the motion.

Margaret Wade, defendant's mother, testified that she lives at 5015 West Huron. On July 30, 2008, she was sitting on her front porch. Defendant was there when she arrived, then he walked across the street to the area of 5002 West Huron, where he began playing a dice game with some other young men. She saw the police approach defendant, but never saw him spit anything out of his mouth.

Jasmine Tooley, defendant's sister, testified consistently with Margaret Wade.

Defendant rested without testifying on his own behalf, and the trial court found him guilty of possession of a controlled substance. When making its finding of guilt, the trial court found that Heyden's testimony was sufficiently impeached that it "discounted" his testimony regarding the intent to deliver. However, the trial court found that Paolino and Wyroba testified credibly. The court further found "Paolino detained the defendant while Wyroba went to the location of the spitting and found in a pile of saliva or some saliva three items of suspect narcotics." The trial court subsequently sentenced defendant to two years' incarceration. Defendant timely appealed.

Defendant first contends that the trial court failed to ensure that his jury waiver was knowing and intelligent. The State responds that defendant has forfeited the issue, and that, if not procedurally barred, he was adequately admonished of his jury trial right. In his reply brief, defendant concedes that he failed to preserve the issue, but argues that we should consider it as plain error.

The plain error doctrine allows the review of unpreserved errors in two circumstances: (1) where the evidence is so closely balanced that the guilty verdict may have resulted from the error and not the evidence; and (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Courts

have almost universally agreed that the waiver of the right to a jury concerns such a fundamental right, that application of the second prong of the plain error analysis is appropriate. See *In re R.A.B.*, 197 Ill. 2d 358, 362 (2001). We review the issue *de novo*. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004).

Turning to the merits of defendant's claim, we find no error here. The question of whether a jury waiver is valid is not susceptible to application of a precise formula; rather, each case turns on its unique facts and circumstances. *Bracey*, 213 Ill. 2d at 269, citing *In re R.A.B.*, 197 Ill. 2d at 364. Defendant relies heavily on *People v. Sebag*, 110 Ill. App. 3d 821 (1982), for the proposition that the trial court must ensure that a jury waiver is made understandingly. See *Sebag*, 110 Ill. App. 3d at 828.

Defendant clearly misapprehends a significant circumstance of the *Sebag* case--the defendant there was proceeding *pro se*. Where, as here, the defendant is represented by counsel no admonition of the defendant at all is required, and counsel may waive a jury trial on his client's behalf if the defendant is present and fails to object. See *Bracey*, 213 Ill. 2d at 270. In this case, however, we have far more than a simple waiver by counsel. Defendant, who was represented by counsel, was admonished in person that he would be waiving a jury trial, and was asked directly whether he understood what a jury trial was.

In the absence of unusual circumstances, we can assign no error to the trial court for accepting defendant's affirmative statement at its face value. Accordingly, we find that the court did not err when it accepted defendant's jury waiver.

Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt. Defendant argues that the police officers' testimony was inconsistent and incredible and that the trial court misstated the evidence in rendering its finding of guilt.

A reviewing court will not overturn a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010), citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not our function to retry the defendant. *Givens*, 237 Ill. 2d at 334. "Instead, the relevant inquiry 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.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this standard, we must allow all reasonable inferences from the record in favor of the prosecution. *Givens*, 237 Ill. 2d at 334.

To determine whether the State proved a defendant guilty beyond a reasonable doubt of possession of a controlled substance

the deciding question is whether the defendant had knowledge and possession of the drugs. *Givens*, 237 Ill. 2d at 334-35, citing 720 ILCS 570/402 (West 2004). Possession may be actual or constructive. Actual possession is the exercise by the defendant of the present personal dominion over the controlled substance and exists when a person exercises immediate and exclusive dominion over the controlled substance. *Givens*, 237 Ill. 2d at 335, citing *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000).

Here, there can be little doubt that if the State's theory of the case, *i.e.*, that defendant was holding the drugs in his mouth, was supported by the evidence that defendant was proven guilty of possession of a controlled substance. The relevant question is whether the State proved that defendant actually spit the recovered narcotics from his mouth. Defendant makes several arguments intended to cast doubt on this proposition.

First, defendant argues that it would be highly improbable that he could spit the recovered narcotics the distance of one or more house lengths. Defendant's argument on this point manipulates the testimony of the witnesses to make it appear that this implausible long distance spitting occurred. However, the testimony of Officer Heyden clearly established that defendant spit the narcotics no more than two feet. Despite defendant's attempt to muddy the waters, this clear testimony is neither incredible nor contrary to human experience.

Defendant also notes that the officers contradicted one another about whether defendant was facing east or west when he spit out the narcotics. Defendant further argues that the police officers' testimony was directly contradicted by the testimony of defendant's relatives who said they never saw him spit out any drugs. Resolving this sort of minor discrepancy and determining whether to accept the testimony of one set of witnesses over another is precisely the sort of task the trial judge, who could observe the witnesses, is in the best position to perform. See *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). Accordingly, we must give deference to the trial court's findings regarding the witnesses' credibility. Therefore, we cannot conclude that these discrepancies in the testimony are so significant that the State's evidence should be found unsatisfactory.

Finally, defendant argues that the trial court misstated the evidence when it stated that the tinfoil packets were found in a pile of saliva, when, in fact, the testimony was that the packets were merely in the vicinity of a pool of saliva. This argument has no merit. First, the court actually stated that the packets were in "some saliva," a statement that is consistent with the testimony that the packets were wet when recovered. Moreover, even if the court had misstated this evidence this was the sort of minor misstatement that does not cast doubt on the overall

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reliability of the trial court's factual findings. See *People v. Burnette*, 325 Ill. App. 3d 792, 803 (2001).

Therefore, viewing, as we must, the evidence in the light most favorable to the State, we cannot conclude that no rational trier of fact would have found defendant guilty of possession of a controlled substance.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.