

NOTICE  
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2012 IL App (4th) 100744-U

Filed 5/4/12

NO. 4-10-0744

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DEMARCO J. FORD,	)	No. 09CF1019
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

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JUSTICE McCULLOUGH delivered the judgment of the court.  
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)) and (2) the \$200 DNA analysis fee imposed by the trial court is vacated due to defendant's prior felony conviction which subjected him to DNA sampling.

¶ 2 Defendant, Demarco J. Ford, appeals his conviction for unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)), challenging the sufficiency of the State's evidence against him. Additionally, he contends the \$200 deoxyribonucleic acid (DNA) analysis fee imposed by the trial court should be vacated because he was previously convicted of a felony and subjected to DNA sampling. We affirm in part, vacate in part, and remand with directions.

¶ 3 On November 10, 2009, a grand jury indicted defendant on a single count of

unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)). Defendant's charge was based upon allegations that, on September 3, 2009, he delivered less than one gram of a substance containing cocaine to confidential police source Jackie Bynum.

¶ 4 On February 17, 2010, defendant's bench trial was conducted. Evidence showed Bynum agreed to act as a confidential police source after her arrest, on September 3, 2009, for a drug-related offense. That same day, she agreed to participate in a controlled purchase of crack cocaine from a dealer she knew as "Chocolate" and whom she identified as defendant. Detectives with the Bloomington police department's vice unit, Mike Gray, Stephen Brown, and Kevin Raisbeck, were responsible for conducting surveillance and attempting to observe and record the controlled purchase, set to take place at a truck stop with an attached Wendy's restaurant in Bloomington, Illinois.

¶ 5 Brown testified Bynum made a telephone call to set up the purchase and both Bynum and her car were searched. Brown then gave Bynum \$50 for the transaction and followed her to the truck stop. Gray and Raisbeck observed Bynum arrive at truck-stop parking lot. Gray testified Bynum exited her vehicle, spoke on her cell phone, and approached the Wendy's drive-up window on foot when no cars were present. Gray stated Bynum was at the drive-up window for "just a brief moment" before she "walked away with some french fries." Thereafter, defendant arrived on the scene and met with Bynum before entering the truck stop. A short time later, defendant come out of the truck stop and Gray and Raisbeck observed him briefly enter Bynum's vehicle on the front passenger side. After defendant exited the vehicle, Bynum drove across the parking lot to meet Brown and handed him a small baggie of a substance containing crack cocaine.

¶ 6 The State also presented Bynum's testimony. She was reluctant to testify and provided nonresponsive answers to several of the State's questions. As a result, the trial court allowed the State to treat her as a hostile witness. Bynum testified she met defendant at the truck stop and gave him some money. In turn, defendant gave her something that he left in the car and was retrieved by police. Upon further questioning, the following colloquy occurred between the State and Bynum:

"Q. You got the drugs from that man right there that you pointed out, right?

A. He's — I got them off my seat.

Q. He put them on the seat that [*sic*] you got them?

A. More than likely."

On cross-examination, Bynum stated she worked with the police "to save [her] ass." She testified she remembered "bits and pieces" of what occurred on September 3, 2009, but she had "been up for three days."

¶ 7 The State submitted video recordings taken at the scene by Gray and Raisbeck. The videos depict two different vantage points and show defendant entering the passenger side of Bynum's vehicle for several seconds before exiting. Each video also shows a couple of occasions, prior to defendant's arrival, when Bynum left the area of her vehicle and was off camera for short periods of time as she approached the Wendy's restaurant or the truck stop.

¶ 8 Finally, the State submitted the testimony of Bloomington police detective Todd McClusky. On November 18, 2009, McClusky interviewed defendant and defendant acknowledged selling small amounts of cocaine in Bloomington.

¶ 9 The trial court found defendant guilty of the charged offense. It rejected defendant's theory that Bynum, in an attempt to save herself from prosecution for unrelated drug offenses, set defendant up by blaming him for selling her drugs that she had actually obtained elsewhere. The court acknowledged that police surveillance videos contained "blind spots" representing times when "the confidential source could have secured the evidence" at issue. However, it found such possibility of a "set up" was not a reasonable possibility and did not constitute reasonable doubt.

¶ 10 The trial court first found Bynum was telling the truth during her testimony, albeit reluctantly. It states as follows:

"[Bynum] indicated that \*\*\* defendant got into her car. I believe she was asked if he handed her the drugs, and she corrected the questioner \*\*\* and said, [']no, he placed it on the seat.['] That's an innocuous detail, the correctness of which would not be of significance except for the fact that she's owning the reality of the circumstances and pointing it out."

The court further noted that the video showed "it took no more than five seconds" for defendant to get in and out of Bynum's vehicle, a circumstance that was "entirely consistent with him getting in for the purpose of placing drugs on the seat and then getting out again."

¶ 11 Importantly, the trial court also considered the time line of events on September 3, 2009, and concluded there would have been insufficient time for Bynum to concoct and then carry out a plan to set defendant up. The court stated as follows:

"And another circumstance has to do with the fact [*sic*] the

amount of time the confidential source had to contact and to arrange the frame up that the defense is depending upon was clearly insufficient for her to do that. For her to set up an alternative source of drugs that could then be pinned upon \*\*\* defendant would require some time. The confidential source did not at all come across as having the intellectual equipment to do that even if she was given more time.

As I understand it, from the evidence, she was in custody, her cooperation was sought, she agreed, made phone calls, and then the arrangements that were made were made, and the events occurred as they occurred."

¶ 12 Finally, the trial court addressed Bynum's reluctance to testify, finding it suggested "that which she was resisting was the truth, but she did, in fact, [']give it up.[']" The court acknowledged that without police controls, Bynum's testimony would be more suspect. However, it found the circumstances of the controlled buy corroborated her testimony.

¶ 13 On June 30, 2010, the trial court sentenced defendant to 10 years in prison. It also assessed a \$200 DNA analysis fee. On July 8, 2010, defendant filed a motion to reconsider his sentence, arguing it was excessive. On August 24, 2010, the court denied defendant's motion.

¶ 14 This appeal followed.

¶ 15 On appeal, defendant first argues the State failed to prove him guilty of unlawful delivery of a controlled substance beyond a reasonable doubt. He contends substantial flaws in the controls surrounding the alleged drug buy were shown and Bynum failed to give credible and

unequivocal testimony that the drugs came from defendant.

¶ 16 "When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a reasonable doubt." *People v. Gonzalez*, 239 Ill. 2d 471, 478, 942 N.E.2d 1246, 1250 (2011). A reviewing court will not retry the defendant and "due consideration must be given to the fact that it was the trial court that saw and heard the witnesses" and, as such, was in the best position to judge witness credibility. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227, 241 (2011). On review, a conviction will not be reversed " 'unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011) (quoting *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005)).

¶ 17 Here, the State charged defendant with unlawful delivery to Bynum of less than one gram of a substance containing cocaine. 720 ILCS 570/401(d)(i) (West 2008). Its evidence showed Bynum agreed to act as a confidential police source the same date she was arrested for a drug-related offense. Both Bynum and her vehicle were searched and police gave her \$50. Bynum then contacted a drug source by telephone and police conducted surveillance as she met with defendant at a truck-stop parking lot. Defendant entered the front passenger side of Bynum's vehicle for several seconds before exiting and leaving the scene. Bynum then met with police and handed over less than a gram of a substance containing cocaine.

¶ 18 Although Bynum proved to be a difficult witness, she testified she met defendant at the truck stop and gave him some money. In turn, defendant left something in her car that was

retrieved by police. Bynum further testified that she obtained the drugs she gave to police "off [her] seat" and defendant was "more than likely" the individual who put them there. Further, while defendant did not confess to committing the charged offense, he did acknowledge that he had sold drugs in Bloomington. Given this evidence, any rational trier of fact could have found the required elements of unlawful delivery of a controlled substance beyond a reasonable doubt.

¶ 19 As stated, defendant asserts police controls of the alleged buy were flawed. He points out none of the officers conducting surveillance actually observed defendant and Bynum exchange drugs or money and that the videotapes showed times when Bynum "disappeared from camera range," suggesting she could have obtained the drugs from an alternate source. Defendant also challenges Bynum's credibility, arguing she "proved to be a wholly unreliable witness." He notes she was reluctant to testify, a known drug user, and acted as a confidential police source in exchange for favorable treatment in her own criminal case.

¶ 20 In rendering its decision, the trial court addressed these precise issues while considering and rejecting the defendant's theory that he was being "set up" by Bynum. The court acknowledged flaws in the video surveillance but, nevertheless, found Bynum to be a reluctant truth teller whose testimony was supported by other evidence. Reviewing the time line of events, it also found Bynum to have had insufficient time and intellectual capacity to concoct and execute a plan to "set up" defendant.

¶ 21 Here, the trial court was in a better position to judge the credibility of witnesses, and it made a well-reasoned decision based upon the evidence presented. We agree with the trial court's view of the evidence and find the State's evidence was sufficient to support defendant's conviction for unlawful delivery of a controlled substance beyond a reasonable doubt.

¶ 22 On appeal, defendant also contends his \$200 DNA analysis fee should be vacated. He points out that, because he was previously convicted of a felony and subjected to DNA sampling, he is not required to undergo additional sampling or pay the analysis fee a second time. See *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011). The State concedes this issue and we agree. The portion of the trial court's order requiring defendant to submit an additional DNA sample and requiring him to pay the \$200 DNA analysis fee is vacated.

¶ 23 For the reasons stated, we affirm in part and vacate in part the trial court's judgment. We remand for issuance of an amended sentencing judgment reflecting vacatur of the DNA analysis fee. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed in part, vacated in part, and remanded with directions.