

2013 IL App (2d) 120181-U  
No. 2-12-0181  
Order filed July 30, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 11-CF-25
	)	11-CF-26
	)	
DAMON L. BIFFLE,	)	Honorable
	)	Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Presiding Justice Burke and Justice Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The evidence was sufficient to sustain defendant's conviction for possession with intent to deliver more than 1 gram, but less than 15 grams, of a controlled substance within 1,000 feet of a senior citizen activity center. Affirmed.

¶ 2 Following a January 2012 bench trial, defendant, Damon L. Biffle, was convicted of: (1) delivery, on December 22, 2010, of more than 1 gram, but less than 15 grams, of a controlled substance within 1,000 feet of a senior citizen activity center (count I) (720 ILCS 570/401(c)(1), 407(b)(1) (West 2010)); (2) delivery, on January 5, 2011, of more than 1 gram, but less than 15

grams, of a controlled substance within 1,000 feet of a senior citizen activity center (count II) (720 ILCS 570/401(c)(1), 407(b)(1) (West 2010)); and (3) possession with intent to deliver, on January 26, 2011, more than 1 gram, but less than 15 grams, of a controlled substance within 1,000 feet of a senior citizen activity center (count IV) (720 ILCS 570/401(c)(1), 407(b)(1) (West 2010)). The trial court sentenced defendant to three, concurrent 10-year terms of imprisonment.

¶ 3 On appeal, defendant contends that his conviction on count IV should be reduced to simple possession (720 ILCS 570/402(c) (West 2010)) due to lack of proof that he intended to deliver two baggies of heroin. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On December 20, 2010, Officer Shane Woody of the Belvidere police department received a telephone call from Michael Mancuso, age 28, offering to purchase heroin as a cooperating witness. Mancuso had previously purchased heroin from defendant, whom he knew as “Dude.” In exchange for serving as a cooperating witness, Mancuso received a promise from the State to “assist” on domestic battery and felony DUI charges pending against him.

¶ 6 A. Count I: December 22, 2010

¶ 7 On December 22, 2010, Woody and detective Leon Berry instructed Mancuso to telephone defendant to order heroin. Mancuso called defendant in the presence of Woody and Berry and ordered \$200 worth of heroin, plus \$30 for gas, and arranged for defendant to drive to Belvidere for the delivery. Later, in the same call and at Mancuso’s request, defendant agreed to provide “a couple more bags.” The heroin was to be delivered in “dubs,” which are baggies containing two tenths of a gram of heroin worth \$20. Thus, the \$200 was sufficient to purchase 10 baggies containing a total of two grams of heroin.

¶8 In the late afternoon on December 22, 2010, Woody searched Mancuso for drugs, contraband, and cash. Woody provided Mancuso with \$230 in official, advanced funds and a recording device. Woody and Berry drove Mancuso, in an unmarked vehicle, to the Sonic restaurant on East State Street in Belvidere, where Mancuso and defendant had agreed to meet. At approximately 4:50 p.m., police watched as a white, four-door Honda (license plate K455494) carrying two occupants arrived in the parking lot. Defendant sat in the front passenger seat. Mancuso entered the back passenger seat, and the vehicle pulled out of the parking lot, heading north on Van Epps Boulevard. The vehicle traveled north on Van Epps until West Hills Boulevard, where it made a U-turn and returned south on Van Epps toward the Sonic restaurant. Mancuso testified that he and defendant exchanged the \$230 for the heroin at the point the Honda made the U-turn.

¶9 Once the Honda returned to the Sonic parking lot, Mancuso exited and proceeded back to the unmarked police vehicle. Mancuso turned over 11 plastic baggies,<sup>1</sup> each containing an off-white powdered substance. The contents of nine of the baggies were later examined at the State police laboratory and found to consist of 1.2 grams of a substance containing heroin. Assuming each baggie contained equal amounts of heroin, defendant delivered about 0.6 grams less than the amount for which Mancuso had paid.

¶10 B. Count II: January 5, 2011

¶11 On January 5, 2011, at 5:40 p.m. Mancuso returned to the police station to meet Woody and Berry. He called defendant and placed an order for 15 baggies of heroin for \$300, plus \$20 for gas,

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<sup>1</sup>Eleven baggies is one more baggie than expected, but one less baggie than Mancuso requested when he asked for \$200 in “dubs” (*i.e.*, 10 baggies) plus “a couple more bags.”

and arranged for defendant to deliver at the Sonic restaurant that day. The \$300 was sufficient cash to purchase 15 baggies containing a total of three grams of heroin.

¶ 12 Woody and Berry searched Mancuso and provided him with a recording device and \$320 in official, advanced funds. Woody drove Mancuso, in an unmarked vehicle, to the restaurant. At approximately 8:21 p.m., the (same) Honda pulled into the parking lot. Officer Berry testified that his view of the Honda was blocked by the building for a period, but that he saw Mancuso walk toward the Honda. Berry stated that he next saw the Honda behind the building, near the entrance/exit, where he observed Mancuso exit the vehicle. Mancuso testified that the vehicle did not leave the parking lot when he and defendant exchanged the \$320 for the heroin.

¶ 13 Mancuso returned to Berry's unmarked vehicle, and he turned over 15 baggies (as ordered), each containing an off-white powdered substance. The contents of 10 baggies were later examined at the State police laboratory and found to consist of 1.2 grams of a substance containing heroin. Assuming each baggie contained equal amounts of heroin, defendant delivered about 1.2 grams less than the amount for which Mancuso had paid.

¶ 14 C. Count IV: January 26, 2011

¶ 15 On January 26, 2011, police obtained a warrant to arrest defendant. The same day, Mancuso returned to the police station and, with Berry and Woody, called defendant and placed an order for 15 baggies of heroin for \$300 (sufficient to purchase three grams), plus \$20 for gas, and arranged for defendant to deliver at the Sonic restaurant.

¶ 16 Mancuso was again searched, provided with a recording device and \$320 in official, advanced funds, and driven by Berry to the restaurant. At approximately 5:40 p.m., the Honda pulled into the parking lot, carrying three occupants. Defendant sat in the front passenger seat.

Mancuso entered the rear passenger seat. Mancuso testified that the vehicle did not leave the parking lot when he and defendant exchanged \$320 for what he believed were 15 baggies of heroin.

¶ 17 Berry testified that Mancuso returned to Berry's unmarked vehicle and turned over only 13 baggies (2 less than the 15 baggies Mancuso expected), one of which was later found to contain 0.1 grams of a substance containing heroin.

¶ 18 Upon Mancuso's return to the vehicle, Berry notified other officers that the purchase was complete. Police pursued the Honda and subsequently apprehended the occupants, one of which was defendant. During a subsequent search of the Honda, detectives found two baggies of a white powdery substance and pills. The powdery substance was later found to consist of 1.6 grams of a substance containing heroin. A search of defendant's person also revealed the \$300 in advanced funds Mancuso had used for the January 26, 2011, purchase. Officer Woody testified that police subsequently *Mirandized* defendant and interviewed him. According to Woody, police told defendant that they knew he had sold drugs in Belvidere. Defendant replied, " '[I]et me explain. I'm not the big guy out there. I'm just doing this to make some money for my kids.' "

¶ 19 The trial court found defendant guilty of count I (delivery on December 22, 2010), count II (delivery on January 5, 2011), and count IV (possession with intent to deliver on January 26, 2011). Defendant appeals.

¶ 20

## II. ANALYSIS

¶ 21 Defendant argues the evidence as to count IV was insufficient to prove he intended to deliver more than 1 gram of a controlled substance.<sup>2</sup> Specifically, defendant contends the ~~2~~ **two** baggies

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<sup>2</sup>He does not challenge the finding that the offenses occurred within 1,000 feet of a senior

discovered in the Honda cannot reasonably sustain an inference that he intended to deliver the full amount (*i.e.*, 15 baggies) promised on January 26, 2011, but simply forgot. Defendant notes that he consistently shorted Mancuso on earlier purchases, which support his argument that he intentionally did not deliver the two baggies found in the car. Defendant also argues there was a lack of circumstantial evidence typically indicative of an intent to deliver.

¶ 22 The United States Constitution provides that no person may be convicted of a crime unless the State establishes beyond a reasonable doubt every fact necessary to constitute the crime with which the person was charged. U.S. Const. amend. XIV; *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When considering a challenge to the sufficiency of the evidence, the reviewing court must decide “ ‘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.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The 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.” *Id.*

¶ 23 Here, defendant was convicted pursuant to section 401(c)(1) of the Criminal Code of 1961, which provides, in pertinent part, that “[a] person [who] knowingly \*\*\* possess[es] with intent to manufacture or deliver, a controlled substance \*\*\* is guilty of a Class 1 felony \*\*\* [if the substance contains] 1 gram or more but less than 15 grams of any substance containing heroin, or an analog thereof[.]” (720 ILCS 570/401(c)(1) (West 2010)). Thus, to sustain a conviction for possession of

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citizen activity center.

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

¶ 24 Direct evidence of intent to deliver a controlled substance is rare; therefore, circumstantial evidence is commonly used to draw an inference of intent. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). The *Robinson* court set forth various factors from which one may infer an intent to deliver: (1) the quantity of controlled substance in the defendant's possession is too large to be viewed as being for personal consumption, (2) the high purity of the drug confiscated, (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, (7) and the manner in which the substance is packaged. *Id.* A court determines if the inference of intent to deliver is sufficient on a case-by-case basis, and the evidence determined sufficient in one case does not necessarily control subsequent cases. *People v. Blan*, 392 Ill. App. 3d 453, 457 (2009).

¶ 25 Defendant argues that the evidence showed that he intended to keep, not deliver, the two baggies, containing 1.6 grams of heroin, found in the Honda. Defendant argues that he intended to distribute only 13 baggies. He asserts that his argument is supported by his prior sales, where he also shorted Mancuso on his orders. We reject this argument.

¶ 26 It is true that the baggies Mancuso received during the two prior purchases contained less heroin than Mancuso ordered. However, we do not find that the shorting of the *amount in each baggie* is similar to shorting a buyer the *amount of baggies* he expected. In the previous two transactions, defendant always delivered the minimum amount of baggies/dubs Mancuso ordered.

Therefore, the court could have found that this evidence failed to show that defendant intended to keep, not deliver, the two baggies of heroin and that this did not undermine the State's case. Furthermore, although the police lab did not weigh the entire contents of the baggies for any of the transactions, it appears that, even if all 15 baggies were delivered, defendant would have still shorted Mancuso in the January 26, 2011, transaction. Specifically, during the first two transactions, defendant shorted Mancuso by 0.8 (out of 2 grams ordered) and 1.2 grams (out of 3 grams ordered), respectively. During the final transaction, if defendant had delivered all 15 baggies, the delivered heroin would have weighed either 1.7 grams (actually weighed) or, for example, 2.9 grams (if we assume that each of the 13 baggies contained 0.1 grams of heroin). (Thus, Mancuso would still have been shorted between 1.3 and 0.1 grams out of the 3 grams ordered).

¶ 27 Defendant also contends that the fact that he kept the two baggies shows that he did not intend to deliver them. We reject this argument. “ ‘Deliver’ or ‘delivery’ means the actual, constructive or *attempted transfer of possession* of a controlled substance, with or without consideration, whether or not there is an agency relationship.” (Emphasis added.) 720 ILCS 570/102(h) (West 2010). In addition, the similarities between defendant's actions during the delivery on January 26, 2011, compared to the deliveries on December 20, 2010, and January 5, 2011, support an inference that defendant intended to deliver, but inadvertently did not do so.

¶ 28 Finally, turning to the *Robinson* factors, defendant argues that the absence of drug paraphernalia in the vehicle shows that he lacked the intent to deliver. We reject this argument. Although the presence of drug paraphernalia can support an inference of intent (*Robinson*, 167 Ill. 2d at 408), items such as scales and packaging materials are generally not present in a moving

vehicle. *Johnson*, 334 Ill. App. 3d at 678. Indeed, the absence, in a vehicle, of drug paraphernalia used in personal consumption, such as needles, syringes, pipes or other smoking devices, may support an inference that a defendant had an intent to deliver a controlled substance. *Id.* Here, since the Honda did not contain any drug paraphernalia indicative of personal consumption, an inference could reasonably be made that defendant intended to deliver the baggies. (We reject defendant's argument that heroin does not require any paraphernalia to be consumed, where no evidence was presented on this issue.) Therefore, the drug-paraphernalia factor, viewed in the light most favorable to the State, cuts against defendant, and, therefore, it does not convince us to disturb the trial court's finding.<sup>3</sup>

¶ 29 In sum, we conclude that, when considering the evidence in the light most favorable to the State, any rational fact finder could have found beyond a reasonable doubt that defendant intended to deliver the two baggies found in the vehicle.

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<sup>3</sup>Defendant generally notes that the remaining *Robinson* factors support an inference that he did not intend to deliver the two baggies. Again, the factors are considered in the context of the specific facts of each case. *Blan*, 392 Ill. App. 3d at 457. Unlike *Robinson*, which involved only a charge of possession with intent to deliver, here, defendant had made previous deliveries; further, he had agreed in the January 26, 2011, telephone conversation to deliver three grams of heroin, and the 1.6 grams of heroin in the two baggies is very close to the amount (i.e., 1.2 grams) he had delivered in the January 5, 2011, transaction (also for three grams). Accordingly, while the additional *Robinson* factors are relevant, we do not find them dispositive here because the third transaction was similar to the previous deliveries.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 32 Affirmed.