

2013 IL App (2d) 120199-U  
No. 2-12-0199  
Order filed August 21, 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 Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-2210
	)	
PETER E. AUST,	)	Honorable
	)	George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly refused to instruct the jury as to the lesser included offense of possession of drugs because the evidence overwhelmingly established that the defendant possessed the drugs with the intent to deliver.

¶ 2 Following a jury trial, the defendant, Peter Aust, was convicted of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2010)) and was sentenced to 14 years' imprisonment. On appeal, the defendant argues that the trial court erred in denying his request that the jury be instructed as to the lesser included offense of possession of a controlled substance.

We affirm.

¶ 3

### BACKGROUND

¶ 4 On October 5, 2010, the defendant was charged by indictment with one count of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2010)). The indictment alleged that, on September 15, 2010, the defendant possessed and intended to deliver more than 100 grams of cocaine. On December 6 and 7, 2011, the trial court conducted a jury trial on the charge against the defendant.

¶ 5 Officer Steve Mandat of the Elmhurst police department testified he worked on an undercover narcotics task force that investigated narcotics dealing and trafficking. In September 2010, he contacted the defendant because the defendant was selling large amounts of cocaine. On September 14, 2010, he called the defendant after learning the defendant's phone number through public records. When he called the defendant, the defendant identified himself by his first name, Peter. The defendant also referred to himself as "Baby G." Officer Mandat indicated that he wanted to purchase four and a half ounces of cocaine from the defendant. The defendant indicated that he had some cocaine that was of poor quality, but he would pick up nine ounces later in the day. Officer Mandat replied that, depending on the quality of the cocaine that the defendant was able to get, he would consider purchasing it.

¶ 6 After the defendant obtained more cocaine, the defendant and Officer Mandat exchanged text messages. Officer Mandat agreed to pay \$3,600 for four and a half ounces of cocaine. Later, Officer Mandat called the defendant's phone number and recognized the defendant's voice. Officer Mandat and the defendant agreed to meet at the Jewel parking lot in Westmont on Ogden Avenue. The defendant told Officer Mandat to erase all of his other contacts for purchasing cocaine because he would be able to supply him.

¶ 7 Officer Mandat talked to the defendant again between 5:10 p.m. and 6 p.m. The defendant indicated that he was on his way to the deal but would not be able to make the meeting because he was having car trouble. At 6:30 p.m., Officer Mandat and the defendant talked again. Officer Mandat told the defendant that they would have to meet the next day. However, the defendant kept sending him text messages, trying to set up a meeting later that night.

¶ 8 After the conversations with the defendant, Officer Mandat obtained a court authorized overhear for recording phone conversations. The overhear was set to go into effect on September 15, 2010.

¶ 9 Between 11:45 p.m. and 12:41 a.m., the defendant and Officer Mandat again exchanged text messages. The defendant and Officer Mandat agreed to meet at 2 p.m. on September 15.

¶ 10 At 12:34 p.m. on September 15, Officer Mandat called the defendant and recorded the call. They discussed the meeting location and Officer Mandat's purchasing of the cocaine. The defendant told Officer Mandat that, for the last 10 years, he had purchased 9 ounces of cocaine every 10 to 12 days. He also stated that he did not "party," which Officer Mandat understood to mean that the defendant did not use drugs himself. The defendant also told Officer Mandat that his source for cocaine was upset that the transaction had not gone through the previous night and was giving him a hard time.

¶ 11 Officer Mandat recorded another phone call between 1:45 and 1:50 p.m. During that phone call, Officer Mandat informed the defendant that he was at their meeting place and had parked his black Dodge Dakota truck next to a nearby Pizza Hut. He directed the defendant to park next to his truck and said that he would meet him there. Officer Mandat then observed a tan pickup truck pull

up next to his truck. He then radioed other surveillance officers who were at the scene about the arrival of the tan truck.

¶ 12 Officer Don Cummings testified that he was part of the surveillance team at the scene. Officer Cummings saw a tan pickup truck driven by Jeremy Lutrell and with the defendant in the passenger seat pull into the parking lot and park 50 to 75 yards east of the Pizza Hut. Officer Cummings later learned that the truck belonged to Lutrell. He watched as the defendant and Lutrell got out of the truck, and the defendant used his cell phone for a short time. After the defendant finished the phone call, the defendant and Lutrell went back to Lutrell's truck and pulled up next to Officer Mandat's truck. Officer Cummings and the other surveillance officers then approached the defendant and Lutrell and placed them under arrest.

¶ 13 After the defendant and Lutrell were taken into custody, Officer Cummings stood outside of Lutrell's truck and noticed an open small sandwich bag in the middle, but closer to the passenger's side, of the front bench seat. The bag was knocked on its side and inside it was a white powdery substance. The substance tested positive for cocaine and weighed 126 grams.

¶ 14 On cross-examination, Officer Cummings testified that Lutrell consented to the search of his home. Officer Cummings and other officers subsequently found 15 grams of cocaine and 150 grams of cannabis. The cocaine was found in a locked safe along with a digital scale.

¶ 15 Officer Chris Banasynski testified that, following the defendant's arrest, he interviewed the defendant at the police station. The defendant told him that he was at the Pizza Hut to meet with Officer Mandat and to sell him drugs. He had been dealing with Officer Mandat for a long time and was trying to get him four and half ounces of cocaine. He was selling cocaine to make money. He had tried to do a deal with Officer Mandat the previous night, but he was not able to get the cocaine

at that time. The defendant indicated that Lutrell was the source of the cocaine. Lutrell drove the defendant to the Pizza Hut and decided that the defendant should sell the cocaine for \$3,600. The defendant indicated that he would make \$400 from the deal and pay Lutrell \$3,200.

¶ 16 The defendant further stated that he had four or five other customers. He would not sell less than an ounce at a time, because if he did, he would not make a profit. The defendant indicated that he was a drug addict and had been for over a year.

¶ 17 After the State rested its case and the defense did not present any evidence, the trial court conducted a jury-instructions conference. Defense counsel requested that the trial court allow a lesser-included-offense instruction for possession of a controlled substance. Defense counsel argued that because the drugs were found in the front seat of Lutrell's truck and there was evidence that Lutrell was a drug dealer and the source of the drugs, the jury could find the defendant guilty of only constructively possessing the drugs. The State argued that there was nothing in the evidence to warrant a lesser-included-offense instruction. The trial court refused to give the instruction.

¶ 18 At the close of the trial, the jury found the defendant guilty of possession of a controlled substance with intent to deliver. The defendant filed a motion for a new trial, arguing that the trial court erred in denying his request for a lesser-included-offense instruction. The trial court denied the motion. The trial court found that it "probably" should have given the instruction, but explained that at most its failure to give the instruction was "harmless error" because the evidence in the case "was not closely balanced on the delivery aspect." The trial court thereafter sentenced the defendant to 14 years' imprisonment. The defendant subsequently filed a timely notice of appeal.

¶ 19

#### ANALYSIS

¶ 20 On appeal, the defendant argues that the trial court committed reversible error when it refused to instruct the jury on the lesser included offense of unlawful possession of a controlled substance. The defendant argues that because there was some evidence that supported giving the jury instruction, the trial court was obligated to give the instruction.

¶ 21 The instruction of the jury is a matter resting within the sound discretion of the trial court. *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). The identification of a lesser included offense does not automatically give rise to a correlative right to have the jury instructed on the lesser offense. *People v. Blan*, 392 Ill. App. 3d 453, 458 (2009). However, the instruction on a lesser offense must be given upon a defendant's request if (1) the charging instrument describes the lesser offense; and (2) the evidence at trial would permit a rational jury to convict the defendant of the lesser offense, and acquit him of the greater offense. *People v. Ceja*, 204 Ill. 2d 332, 359-60 (2003). In determining whether the evidence was sufficient for a jury to rationally convict on the lesser offense and acquit on the greater offense, that requirement is satisfied by "some," "slight," "very slight," or "any" evidence in the trial record. *People v. Novak*, 163 Ill. 2d 93, 108 (1994), abrogated on other grounds by *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). Accordingly, where some evidence supports the instruction, the trial court's failure to give the instruction constitutes an abuse of discretion. *Castillo*, 188 Ill. 2d at 540.

¶ 22 Here, the trial court did not abuse its discretion in refusing to give an instruction as to illegal possession. The defendant points out that there was some slight evidence that he believes warranted the instruction: (1) the cocaine was found between him and Lutrell, thus it could have been Lutrell's; (2) no delivery of the drugs actually ever occurred; (3) a large amount of cocaine was found at Lutrell's home, which suggested that Lutrell was the one selling drugs; and (4) it is unlikely that a

person trying to sell drugs would have identified himself by name when talking with Officer Mandat; thus, it was possible that Lutrell was impersonating the defendant and was the person Officer Mandat was really talking to in trying to set up the drug deal. We disagree with the defendant's assertion that this evidence was enough in itself to merit the lesser-included-offense jury instruction. As set forth above, such a jury instruction is required where the evidence is at a level that a jury could rationally conclude that the defendant committed the lesser offense but not the greater offense. See *Ceja*, 204 Ill. 2d at 359-60. In this case, for the jury to conclude that the defendant did not intend to deliver drugs, it would require them to discount Officer Mandat's testimony that the defendant was trying to sell him drugs. Most importantly, the jury would have to overlook the defendant's own statements that he intended to deliver drugs to Officer Mandat. The jury would also have to disregard the defendant's statement that he was selling drugs to four or five other people. As we cannot say that a rational jury would have convicted the defendant of only possession of drugs in light of the overwhelming evidence that the defendant intended to deliver drugs, the trial court did not abuse its discretion in refusing to give the lesser-included-offense instruction. *Castillo*, 188 Ill. 2d at 540.

¶ 23 In so ruling, we note that on the hearing for the posttrial motion, the trial court determined that it "probably" should have given the requested instruction. The trial court nonetheless found that the defendant was not entitled to any relief because its error, if any, was harmless. The defendant insists that once the trial court found that it should have given the instruction, it was obligated to award him a new trial. See *Blan*, 392 Ill. App. 3d at 459 (failure to give a lesser-included-offense instruction is not subject to harmless error analysis).

¶ 24 We believe that the trial court's acknowledgment of possible error at a hearing on a posttrial motion is equivalent to the State's confession of error as to an issue pending before this court. It is

not something that we are obligated to accept. See *People v. Kelly*, 66 Ill. App. 2d 204, 209 (1965). This court's judicial obligations compel us to examine independently whether any errors have occurred. *Id.* As explained above, the trial court properly refused to give an instruction as to the lesser-included-offense of illegal possession. Thus, the defendant is not entitled to any relief.

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 27 Affirmed.