

No. 1-12-0038

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 3371
	)	
CORY HICKS,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE CONNORS delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Defendant's conviction for delivery of cocaine was affirmed; evidence was sufficient to establish defendant's identity as the person who sold the drug to an undercover police officer, and the trial court did not abuse its discretion in allowing evidence of two previous similar transactions involving same officer.

¶ 2 Following a bench trial, defendant Cory Hicks was convicted of the delivery of between 1 and 15 grams of cocaine and was sentenced to six years in prison. On appeal, defendant

contends the State did not prove beyond a reasonable doubt that he was the man who sold the drug to an undercover police officer. Defendant also asserts the trial court erred when it allowed into evidence two prior drug sales involving the same undercover officer because those incidents did not establish his identity as the offender in the charged case. We affirm.

¶ 3 On January 29, 2010, defendant was arrested and charged with delivery of a controlled substance in connection with three separate transactions. The State proceeded to trial on the charge involving a sale of cocaine on October 1, 2009, to Chicago police officer Kevin Drumgoole, who was part of an undercover narcotics investigation.

¶ 4 Before trial, the State filed a motion *in limine* to allow evidence of two prior narcotics transactions between defendant and Officer Drumgoole. The motion stated that at about 12:25 p.m. on August 28, 2009, the officer and a surveillance team planned a controlled drug purchase in the 6200 block of South Justine in Chicago. The officer stopped his vehicle and spoke to a black male, and defendant pulled alongside the officer's vehicle in a silver Chevrolet.

¶ 5 Defendant got out of his vehicle and approached the officer asking, "What are you looking for?" The undercover officer responded "rocks" and said he wanted 11 for \$100. Defendant ran to a nearby vacant lot and returned, handing the officer a small knotted plastic bag containing 11 smaller clear knotted plastic bags, each of which contained suspect crack cocaine. Defendant accepted \$100 in pre-recorded currency from the officer, and the two men had a brief conversation during which defendant provided a cell phone number to the officer.

¶ 6 The motion described a similar transaction that took place about a month later, on September 23, 2009. On that date, Officer Drumgoole called the phone number defendant had provided and told defendant he wanted to buy rocks. The men agreed to meet at 59th and Racine. The officer arrived at 11:02 a.m. and parked in a restaurant parking lot. Defendant

called the officer and said he was pulling into a nearby Marathon gas station. The officer observed a silver Chevrolet vehicle with the same license plate number as he had seen on August 28. The officer got out of his car and stood near it, and defendant approached the officer and displayed 12 small bags of suspect crack cocaine. The officer asked if he could purchase the bags for \$100 and defendant said that if the officer made future buys, he would get a "better deal." Defendant handed the officer the 12 bags and accepted \$120.

¶ 7 The motion also described a third transaction on October 1, 2009, for which defendant was convicted and which is the basis of this appeal. On that date, Officer Drumgoole contacted defendant at the phone number that defendant provided in August and at which the officer reached defendant for the September transaction. The officer told defendant he was interested in buying rocks. Defendant asked what he wanted to spend, and the officer replied, "\$120." Defendant agreed to meet the officer at the Marathon gas station at 59th and Racine.

¶ 8 At 1:54 p.m., the officer arrived at the gas station and stood near his vehicle. A silver Chevrolet bearing a temporary license plate arrived, and the officer approached the window on the driver's side, where defendant was seated. Defendant removed a clear plastic bag from his mouth that contained 1.5 grams of suspect crack cocaine, handed the bag to the officer and accepted \$120 in cash in exchange.

¶ 9 The motion *in limine* indicated that the State intended to call Officer Drumgoole at trial, who would testify as to the events of August 28 and September 23 as evidence of other crimes committed by defendant in addition to the transaction on October 1, 2009. The motion asserted the prior cocaine sales were relevant to demonstrate defendant's knowledge and intent, among other factors, and to show the series of events involving defendant and Officer Drumgoole. The motion contended the probative value of that evidence outweighed its prejudicial effect and that

defendant's acquittal of the charges in the August 28 incident did not bar its admissibility as a prior crime.<sup>1</sup>

¶ 10 The trial court held a hearing on the motion *in limine*, at which defense counsel stated he did not have "any real serious problem with [] linking" the September and October transactions. However, defense counsel challenged the introduction of the August 28 drug sale to establish defendant's identity in the October sale. The trial court ruled that the August and September transactions were admissible to show identification and intent.

¶ 11 At trial, Officer Drumgoole described the August 28, 2009, transaction consistent with the contents of the motion *in limine* and identified defendant in court as the person who sold him cocaine. After that transaction, the officer was shown a photo array and identified defendant. The officer next described the September 23 transaction and said when he called the phone number that defendant gave him in August, he spoke to a person who had a voice similar to defendant. The officer was within an arm's reach of defendant during that transaction.

¶ 12 As to the October 1, 2009, transaction, the officer met defendant in the Marathon gas station parking lot. The officer testified defendant was the person from whom he previously purchased cocaine. Defendant remained in his vehicle while the officer approached and accepted the bag. Defendant wore a white hat and a green shirt or jacket. The officer testified the entire transaction was "very brief" and lasted 30 or 40 seconds.

¶ 13 The officer returned to his undercover vehicle and watched defendant drive away. The transactions were being observed by additional undercover officers. The officer reported to his

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<sup>1</sup> The parties do not expound on the representation in the State's motion *in limine* that defendant was acquitted in the August incident; however, the record is devoid of any documentation as to that fact. The motion *in limine* indicates that the October 1, 2009, transaction is the "elected charge" against defendant.

team members that he had made a purchase and described defendant to the other officers. The officer said defendant was not arrested after any of the three transactions because the narcotics investigation was ongoing. Defendant was taken into custody on January 29, 2010.

¶ 14 On cross-examination, Officer Drumgoole stated he was not sure if the phone number he called was registered to defendant or defendant's girlfriend and that the narcotics unit did not investigate that information. When asked if anyone checked to see who the license plate on the silver vehicle was registered to, the officer replied, "I believe one of my team members did check that." However, the officer did not recall who the registered owner of the vehicle was found to be. The officer stated that defendant was the only person present during any of the transactions who gave him a phone number. Even though the bag in the October 1 transaction was taken from defendant's mouth, the bag was not tested for DNA.

¶ 15 Officer Drumgoole observed defendant in a police station holding cell after his arrest. When asked if he noticed a tattoo on defendant's neck, the officer stated that defendant had a tattoo on the right side of defendant's neck that said "Simiko." The officer did not recall seeing the tattoo during any of the three drug transactions. On redirect examination, Officer Drumgoole was asked if there was "any doubt" in his mind that the person he saw and whose voice he heard on October 1, 2009, was defendant, and the officer replied, "No doubt whatsoever."

¶ 16 The State's next witness was Chicago police officer Roumbos, who testified he and two other officers were part of the narcotics unit involved in Officer Drumgoole's undercover purchase on October 1, 2009. Officer Roumbos was assigned to surveillance and was parked across the street from the Marathon gas station, where he observed Officer Drumgoole drive into the gas station parking lot and get out of his car. A silver Chevrolet parked near Officer

Drumgoole, and Officer Roumbos had a clear view of that vehicle. Officer Roumbos testified that Officer Drumgoole approached the Chevrolet and had a short conversation with the driver, who handed him an object in exchange for money. Officer Roumbos testified the transaction lasted 45 to 60 seconds. Shortly thereafter, Officer Drumgoole radioed other team members that he had completed a narcotics transaction. The officers met and Officer Roumbos received the plastic bag from Officer Drumgoole.

¶ 17 On cross-examination, Officer Roumbos said he did not see defendant remove the plastic bag from his mouth. Officer Drumgoole approached defendant as defendant sat in the driver's seat of the Chevrolet. Officer Roumbos did not record the Chevrolet's license plate but he thought someone on his team did.

¶ 18 Officer Roumbos stated that defendant was not detained on October 1, 2009, to verify his identity because Officer Drumgoole told the narcotics team that "the offender of that date was in fact the same person he has dealt with in the past who he knows to be Cory Hicks." Officer Roumbos could not recall if he was present at the August 28, 2009, transaction but testified he saw defendant on the street near the September 23, 2009, transaction, though he was a mobile surveillance officer that day. In contrast, Officer Roumbos was a fixed surveillance officer for the October 1, 2009, transaction, and thus remained in one location. The officer stated that defendant wore a green jacket on that date.

¶ 19 The parties stipulated that the bag purchased on October 1, 2009, contained 1.1 grams of cocaine and that a proper chain of custody was maintained. The defense presented no testimony. Defense counsel argued to the trial court that the State did not prove defendant spoke to Officer Drumgoole on the phone or owned the vehicle that Officer Drumgoole described, and that no evidence established that defendant was the individual who delivered the drugs. Defendant was

convicted of delivery of a controlled substance, specifically between 1 and 15 grams of cocaine, in violation of section 401(c)(2) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(2) (West 2008)).

¶ 20 On appeal, defendant first contends the State failed to prove beyond a reasonable doubt that he was the man who sold cocaine to Officer Drumgoole. Defendant asserts the officer observed the seller for an insufficient amount of time during the October 2009 transaction while the seller sat in a vehicle and wore a hat. Defendant also contends the officer's prior identification of defendant was inconsistent with his trial testimony. Defendant further argues the State presented no evidence to corroborate Officer Drumgoole's identification and contends the four-month time span between the October 2009 transaction and defendant's arrest in January 2010 undermined the reliability of that identification.

¶ 21 The State responds that the evidence was sufficient to prove defendant's identity as the man who delivered the cocaine to Officer Drumgoole. The State points out that the officer completed two prior transactions with defendant, who arrived at the October 2009 transaction in the same vehicle that the officer previously observed after the officer contacted him using the phone number provided. The State also asserts Officer Drumgoole viewed defendant under circumstances permitting a positive identification during each of the three transactions.

¶ 22 When a defendant challenges the sufficiency of the evidence to sustain his conviction, it is the task of the reviewing court to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). It is not the function of the appellate court to retry to the defendant. *People v. Sutherland*, 223 Ill. 2d 187,

242 (2006). Rather, in a bench trial, it is for the trial judge, as the trier of fact, to determine the credibility of the witnesses, weigh the evidence and draw reasonable inferences therefrom, and resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A criminal conviction will be reversed only if the evidence is so unreasonable, improbable or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 23 To sustain a conviction for delivery of a controlled substance, the State must establish that the defendant had: (1) knowledge of the presence of a controlled substance, (2) the controlled substance within his or her immediate control and (3) the intent to deliver it. *People v. Rivas*, 302 Ill. App. 3d 421, 429-30 (1998). Here, none of those elements are challenged; defendant only challenges the proof that he was the person involved in the drug transactions.

¶ 24 The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. 720 ILCS 5/3-1 (West 2008); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Although vague or doubtful identification testimony is insufficient to sustain a criminal conviction, the identification testimony of a single eyewitness is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *Id.*

¶ 25 In assessing the identification testimony of a witness, five factors are relevant: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions provided; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the

identification. *Slim*, 127 Ill. 2d at 307-08 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)); *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 37. These are known as the *Biggers* factors and are viewed in the light most favorable to the prosecution. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007). No single factor is dispositive, and the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87.

¶ 26 As to the first two factors, Officer Drumgoole's opportunity to view the drug seller and his degree of attention, we find those weigh in favor of the State. Regarding the opportunity to view the offender at the time of the offense, courts consider "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." *Tomei*, 2013 IL App (1st) 112632, ¶ 40. Officer Drumgoole testified that on October 1, 2009, he engaged in a hand-to-hand transaction with defendant during daylight hours. The trial court also allowed into evidence the officer's August and September transactions, in which the seller and the officer were in close proximity, which favors a positive identification. Although defendant concedes the officer's degree of attention "may have been high because he set up the drug sale," defendant maintains the duration of each transaction was short, lasting as little as 30 seconds. However, the officer had three separate opportunities to view defendant and to compare defendant's visage to the seller in the previous transaction.

¶ 27 As to the third and fourth factors, the accuracy of any prior descriptions of defendant and the level of certainty demonstrated by the identification, the State notes that Officer Drumgoole was able to identify defendant in a police photo array immediately after the August 2009 transaction. The officer also identified defendant in January 2010 after defendant was arrested

and identified defendant in court. In addition, the officer's previous identifications of defendant were unequivocal.

¶ 28 The last *Biggers* factor is the length of time which elapsed between the crime and the identifications. Here, the transaction at issue took place on October 1, 2009, and defendant was arrested in late January 2010. A four-month time span is not categorically long enough to render unreliable the officer's identification of defendant while defendant was in custody. See *Biggers*, 409 U.S. at 201 (a lapse of seven months weighs against the State); but see *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (period of 16 months between offense and witness's initial identification of the offender did not render identification unreliable). Even were we to find that this single *Biggers* factor weighed against the prosecution, we consider whether the identification was reliable under the totality of the circumstances (*Biggers*, 409 U.S. at 199), and we have found the previous four factors to be in the State's favor.

¶ 29 Defendant contends Officer Drumgoole's identification is unreliable because although the officer claimed to have viewed him closely, the officer acknowledged during his trial testimony that he failed to notice a tattoo on defendant's neck until he saw defendant in the lockup after his arrest. Issues of witness reliability are for the finder of fact to determine, and the trier of fact is entitled to believe one part of a witness's testimony without lending credence to all of it. See *People v. Borges*, 127 Ill. App. 3d 597, 605 (1984). The evidence established that during the October 1 transaction, defendant was seated in the driver's side of his vehicle when the officer approached. Because the officer stood to the left of defendant, who remained in his car, it is reasonable that the officer may not have viewed a tattoo on the right side of defendant's neck.

¶ 30 In conclusion on this point, the evidence relating to the five *Biggers* factors, viewed in the light most favorable to the State, supports defendant's conviction beyond a reasonable doubt.

Moreover, even though the identification of a single witness is sufficient to support a conviction where viewed under circumstances permitting a positive identification (see *People v. Herron*, 2012 IL (1st) 090663, ¶¶ 16-17), additional testimony was offered at defendant's trial that supported his conviction. Officer Roumbos described the transaction between defendant and Officer Drumgoole consistently with the latter's testimony.

¶ 31 Defendant's second main contention on appeal is that the trial court erred in allowing evidence of the August and September 2009 transactions because those prior offenses did not prove he was the person who sold narcotics to the officer on October 1, 2009. He points out that he was acquitted in connection to the August 2009 transaction, and he argues the prejudicial effect of the evidence of the two transactions outweighed its probative value. The State responds that defense counsel conceded to the admission of the September transaction, and the State contends the evidence of both transactions was necessary to establish intent and prove defendant's identity as the offender.

¶ 32 Here, the record establishes that the prior drug transactions involving Officer Drumgoole were the subject of a motion *in limine*. Because rulings on evidentiary motions, such as motions *in limine*, are subject to the trial court's discretion, we will not reverse the court's ruling absent an abuse of that discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the trial court's position. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 33 Evidence of a defendant's other crimes is inadmissible to show "the defendant's disposition or propensity to commit crime." *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). "However, evidence of other crimes, wrongs, or acts committed by a defendant is admissible to

prove *modus operandi*, intent, identity, motive, absence of mistake, or any other relevant purpose[]" aside from a defendant's propensity to commit crimes. *People v. Johnson*, 262 Ill. App. 3d 565, 570 (1994). Where such evidence is offered, the trial court must weigh the probative value of the evidence versus its prejudicial effect. *People v. Robinson*, 167 Ill. 2d 53, 63 (1995).

¶ 34 Evidence of prior narcotics transactions is admissible as relevant to show the identity of the seller. *People v. Palmer*, 47 Ill. 2d 289, 296-97 (1970); *People v. Vazquez*, 180 Ill. App. 3d 270, 278 (1989), citing *People v. Cole*, 29 Ill. 2d 501, 503 (1963) (evidence of prior drug purchases strengthened the identification of the defendant as the person with whom the undercover officer had previously dealt). When other-crimes evidence is presented to establish the identity of the offender, "the two offenses must be so similar that evidence of one offense tends to prove the defendant guilty of the offense charged." *People v. McKibbins*, 96 Ill 2d 176, 185 (1983).

¶ 35 The record reflects that in arguing the motion *in limine* to the trial judge, defense counsel acknowledged the probative value of the September transaction but pointed out that defendant was acquitted in connection with the August incident. The trial court ruled that both the August and September transactions were admissible to show defendant's identity as the seller in the instant case. Defendant renews that argument on appeal, asserting he was acquitted of the August charge and that the evidence of the series of transactions likely biased the trial court in favor of finding that defendant was involved in the October drug sale.

¶ 36 A defendant's acquittal of a prior offense "does not necessarily render evidence thereof incompetent." *People v. Osborn*, 53 Ill. App. 3d 312, 322 (1977). To admit into evidence a crime other than the charged offense, the State need not show beyond a reasonable doubt that

defendant committed the crime, but the State must provide "more than a mere suspicion."

*People v. Gwinn*, 366 Ill. App. 3d 501, 515 (2006). "[I]f another crime has a tendency to make the existence of a fact of consequence to the determination of the case more probable than it would be without that evidence, then it is relevant and admissible regardless of whether the other crime occurred before or after the crime charged." *People v. Kimbrough*, 138 Ill. App. 3d 481, 489 (1985).

¶ 37 Prior to this bench trial, the trial court was informed that defendant had been acquitted of the August transaction; however, the court ruled that transaction was admissible along with the September exchange. The three transactions were similar in nature. In the August transaction, defendant asked the undercover officer what he was looking for, and delivered a small bag containing smaller individual plastic bags of cocaine. The September and October exchanges bore greater similarities, in that the officer contacted defendant by a cell phone number defendant had provided, and the transactions took place at the same location, a Marathon gas station near 59th and Racine. In both of those transactions, defendant arrived in a silver Chevrolet, although at the October meeting, that vehicle bore a temporary license plate. In each exchange, the undercover officer received more cocaine than he received before, in accordance with defendant's assurance that his repeat business would result in a "better deal." The trial court's ruling that the August and September transactions were admissible was not so unreasonable as to constitute an abuse of discretion.

¶ 38 Accordingly, for all of the reasons set forth above, the judgment of the trial court is affirmed.

¶ 39 Affirmed.