2015 IL App (1st) 130889-U

SIXTH DIVISION
DATE FILED: January 23, 2015

No. 1-13-0889

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. 12 CR 778
	)	
COLBY WALKER,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's conviction for delivery of a controlled substance affirmed over challenge to the sufficiency of the evidence, where there was sufficient evidence to show defendant's knowledge of the presence of narcotics inside a box he handed to an associate during an undercover heroin transaction.

¶ 2 Following a bench trial, defendant, Colby Walker, was found guilty of delivery of a controlled substance, then sentenced to five years' imprisonment. On appeal, defendant challenges the sufficiency of the evidence to sustain that conviction.

¶ 3 The evidence adduced at trial showed that about 1 p.m. on December 15, 2011, a team of Chicago police officers were conducting an undercover narcotics buy operation. Officer Melvin Ector testified that he was dressed in plain clothes and driving a covert vehicle in the area of 40th and Ellis in Chicago. Ector telephoned Devon Williams and asked if he was "up," which he described as street terminology for selling narcotics. Williams asked Ector what he needed, and the officer requested two "blows," meaning heroin. Williams told Ector that he would call him "right back," and, when he did so, he instructed him to come to 47th and Wabash. He and Williams described their respective vehicles to each other, and, when Ector reached 45th and Wabash, he saw a minivan matching Williams's description flash its headlights twice. Ector made a U-turn, parked his covert vehicle behind the minivan, and exited.

¶ 4 Ector walked up to the passenger side of the minivan, and saw two occupants: Williams sitting in the drivers' seat and defendant in the passenger seat. He then saw defendant open the passenger door and reach underneath the minivan to retrieve a small black box that was secured to the undercarriage of the vehicle. Defendant handed the black box to Williams, and Ector walked over to the driver's side window. Williams opened the box, removed two clear plastic bags containing a white powdery substance, handed them to Ector and told him to give him $20. Ector gave Williams two $10 bills which were "pre-recorded 1505 Chicago Police Department funds." Williams closed the box, and handed it back to defendant. Ector started to walk back to his covert vehicle, while continuing to observe the minivan in case it pulled away. He then saw defendant open the passenger-side door, and replace the black box underneath the vehicle.

¶ 5 Ector got into his vehicle and observed as the minivan went northbound on Wabash, then eastbound on 47th Street. He radioed to his team members that there had been a positive

narcotics transaction, and, after the team members stopped the minivan, Ector drove by, and identified Williams and defendant as the offenders.

¶ 6 On cross-examination, Ector acknowledged that he had spoken only to Williams, not defendant, on the telephone, and that defendant did not open the box before handing it to Williams. Ector testified that defendant told him to go to the driver's side, but that defendant did not personally hand him any drugs. He also did not see Williams hand defendant the prerecorded funds from the transaction, and when defendant and Williams were arrested, the two $10 bills were found on Williams. Officer Ector testified that they did not discuss drugs at the time of the transaction, and that the discussions had taken place during the earlier telephone call.

¶ 7 Chicago police officer Troutman testified that he and Sergeant Cato pulled over the minivan, and advised the two occupants, Williams and defendant, to exit the vehicle. They were placed under arrest, and the officers conducted a search, during which they recovered the 1505 funds from Williams's person. Troutman then retrieved a black magnetic key case containing six Ziploc bags of heroin, from underneath the front passenger side of the vehicle.

¶ 8 The parties stipulated that Lenetta Watson, a forensic scientist at the Illinois State Police Forensic Science Laboratories, would testify that she tested the six bags recovered from the black box, and one of the two bags obtained in the transaction, and concluded that they contained, respectively, 1.3 grams and 0.3 grams of heroin.

¶ 9 In closing, defense counsel observed that defendant never opened the box or touched the drugs, and argued that there was no evidence to show that he was present during the phone call or knew what was inside the black box. The trial court, however, disagreed, noting:

> "It would seem very odd to reach outside the vehicle. It would be one thing if he said, hey, hand me that little box out of the glove compartment box and he does so, but to reach outside the vehicle and hand someone a box seems to be a bit much to be asking

> someone, even if it was just your best friend or somebody who you picked up for lunch who happened to be in the vehicle. Someone asking them to reach outside the vehicle and grab a box underneath the vehicle would make them pause.
>
> But even if it didn't, to then receive that box back after the person that has retrieved illegal narcotics, made a sale in your presence and then now wants to tender it back to you, that seems to be where I draw the line, at least at my friendship."

The court found defendant guilty of delivery of a controlled substance, and defendant now appeals the propriety of that judgment, contending that the evidence was insufficient to support his conviction.

¶ 10 When reviewing a challenge to the sufficiency of the evidence, " 'the relevant question 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.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court may not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses (*People v. Young*, 128 Ill. 2d 1, 51 (1989)), and will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of a defendant's guilt (*Collins*, 106 Ill. 2d at 261).

¶ 11 In this case, defendant contends that there was no evidence to show that he was aware of the contents of the black box when he handed it to Williams, or that he knew of Williams's plan to sell heroin. He therefore maintains that the evidence was insufficient to prove his guilt beyond a reasonable doubt.

¶ 12 The State responds that the evidence adduced at trial established defendant's possession under an "accountability theory." Defendant replies that the State did not argue "an accountability-based theory of the case" at trial, and the "theory upon which a case is tried to the

lower court cannot be changed on review[.]" *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). We determine, however, that we need not reach this issue, because we find the evidence sufficient to support defendant's guilt of the charged offense as a principal.

¶ 13 To sustain a conviction for delivery of a controlled substance, the State was required to prove that defendant knowingly delivered the heroin. 720 ILCS 570/401(d) (West 2010); *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009). Defendant does not contest the finding that his actions constituted "delivery" of the narcotics, but instead challenges the finding that he did so "knowingly."

¶ 14 A defendant is deemed to have acted knowingly if he is proven to be aware of the existence of facts that make his conduct unlawful. *People v. Hodogbey*, 306 Ill. App. 3d 555, 559 (1999). The element of knowledge is rarely susceptible to direct proof and can be established by circumstantial evidence of acts, statements or conduct of the defendant, as well as the surrounding circumstances. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008). The determination of whether the defendant had knowledge is a question of fact for the court, which will not be disturbed on review unless the evidence is so unbelievable and improbable that it creates a reasonable doubt of defendant's guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007).

¶ 15 Defendant asserts that the evidence is insufficient because the contents of the box were only revealed once Williams opened it. He further maintains that his acceptance and replacement of the box after the transaction do not prove that he "knew the contents when he initially handed it to Williams." We disagree and find the surrounding circumstances sufficient to show that he possessed such knowledge.

¶ 16 The evidence at trial showed Officer Ector arranged a heroin transaction with Williams over the telephone, then drove to meet him. When Ector arrived, he saw a minivan with

defendant seated in the front passenger seat, and Williams in the driver's seat. Defendant opened the passenger door, reached outside and under the vehicle, and retrieved a black box, which he then handed to Williams. Defendant told Ector to go to the drivers' side, and Williams opened the box, retrieved two bags of heroin, and gave them to Ector through the driver's side window in exchange for two prerecorded $10 bills. Williams then closed the box and handed it back to defendant, who opened the passenger door and replaced the box under the vehicle. Although defendant claimed to lack knowledge of the contents of the box, this issue was presented to, and resolved by, the trial court, which is in the best position to resolve any conflicting inferences produced by the evidence. *People v. McDonald*, 168 Ill. 2d 420, 447 (1995). Viewed in the light most favorable to the prosecution, the trial court could reasonably conclude that defendant knowingly delivered heroin where he retrieved it from a secret place under the vehicle, observed the drug transaction, then replaced it under the vehicle. Defendant's willingness to replace the box in the same secret location where it was retrieved, after observing a drug transaction, is ample evidence from which the trial court could infer defendant's knowledge of its illicit contents at the relevant time period.

¶ 17 In so finding, we conclude that *People v. Hodogbey*, 306 Ill. App. 3d 555 (1999), upon which defendant relies, is distinguishable from the case at bar. In *Hodogbey*, authorities intercepted a package of heroin which had been mailed to the defendant, then executed a controlled delivery of the package. *Hodogbey*, 306 Ill. App. 3d at 556-57. After the defendant accepted the package, he walked “from the apartment building to the sidewalk where he looked both ways down the street before returning inside." *Hodogbey*, 306 Ill. App. 3d at 557. The defendant was arrested after leaving his apartment with a friend, and the authorities recovered the still unopened package in the apartment. *Hodogbey*, 306 Ill. App. 3d at 557.

¶ 18 In that case, this court found the evidence showing that the "suspicious behavior" of defendant leaving his apartment, looking up and down his street, then returning to the apartment, was insufficient to prove beyond a reasonable doubt that he knew the package contained heroin. *Hodogbey*, 306 Ill. App. 3d at 562. Unlike *Hodogbey*, however, defendant here did not simply receive a package delivered unannounced to his home address. Rather, defendant was inside a vehicle with Williams, with whom Ector had arranged a narcotics transaction, and defendant affirmatively reached outside and under the vehicle to recover the hidden black box which contained heroin. Moreover, after the transaction was completed in defendant's presence, he accepted the box, and returned it to the place where it was previously hidden. In delivering judgment, the court found those actions "very odd" and incompatible with defendant's claimed lack of knowledge. Given the above circumstances, we find sufficient evidence to support that determination.

¶ 19 After reviewing the evidence in the light most favorable to the State, we cannot say that the trial court's determination was so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *Collins*, 106 Ill. 2d at 261. We therefore affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.