FIFTH DIVISION
June 12, 2015

No. 1-13-1228

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).

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 19666
	)	
TIMOTHY WILSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The State presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of possession of a controlled substance with intent to deliver despite his claim the sole surveillance officer's testimony was incredible and unreliable.

¶ 2 After a bench trial, defendant Timothy Wilson was convicted of possession of a controlled substance (PCP) with intent to deliver and sentenced to seven years in prison. On appeal, defendant contends that: (1) the State failed to prove beyond a reasonable doubt that he was guilty of possession of a controlled substance with intent to deliver, specifically arguing that

the State's sole witness to the transactions' testimony was so "cursory[,] vague" and "uncorroborated" that it was unreliable; and (2) his mittimus should be amended to reflect the actual crime of which he was convicted.

¶ 3 At trial, Officer John Sandoval testified that around 10 a.m. on September 28, 2012, he was conducting surveillance of a vacant residential lot located at 1542 South Sawyer Avenue in Chicago. While performing surveillance, Sandoval witnessed, on two separate occasions, two different men approach defendant and engage in a brief conversation on the sidewalk in the middle of the vacant lot. Both men gave defendant some amount of money. Sandoval further explained that after each conversation, defendant went to a wooden fence along the southern portion of the lot, bent down, removed a small item from an opening in the fence and returned to the men. At that point, defendant tendered the unknown item to each of the men.

¶ 4 Sandoval stated that he watched defendant for about 15 minutes and stood approximately 75 feet away from him during the transactions. However, when defendant walked toward the wooden fence, defendant came closer to Sandoval's location than he was during the conversations with the two men. Sandoval also stated that during the course of the transactions, he maintained an unobstructed view of defendant. On cross-examination, Sandoval stated he was neither across the street from the address of the vacant lot nor on the same side of the street of the address. He also stated that he was on foot, at times was at street level and also utilized binoculars. When pressed for his exact location, Sandoval declined to give specifics for fear of "officer[] safety." During a sidebar in regard to the questioning of Sandoval's exact location, defense counsel stated "[a]t this time I will withdraw the question. If it comes up again, I will bring it up."

¶ 5 After witnessing the second transaction, Sandoval radioed enforcement officers, Officers Honda, Bocanegra and Alonzo, to detain defendant. After the officers had detained defendant, Sandoval broke surveillance and positively identified defendant as the individual selling the unknown items during the two transactions. Sandoval directed Bocanegra to the wooden fence where Sandoval saw defendant obtain the unknown items.

¶ 6 Bocanegra went to the wooden fence and saw an opening in the fence when he looked down. There, he observed a clear plastic bag containing multiple tin foil packets. He picked up the bag, and maintained it in his care and custody until he arrived back at the police station at which time he inventoried the items.

¶ 7 The parties stipulated that, if called, Nancy McDonogh, a forensic chemist at the Illinois State Police crime lab, would testify that the contents of 27 of the inventoried tin foil packets tested positive for PCP, weighed 10.3 grams and the additional 15 inventoried tin foil packets were not tested.

¶ 8 All of the officers agreed that no narcotics were found on defendant's person. On cross-examination, Sandoval stated that he could not remember if money was found on defendant. Bocanegra stated he did not recall recovering any money, but if money had been recovered, it would have been returned to defendant. Honda stated that he thought money was found, but that it was not inventoried due to a Chicago Police Department policy of not "inventory[ing] anything over [*sic*] $500."[1] He further stated there is no policy to document money returned to a suspect.

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[1] Although the transcript states "over," the parties and trial court apparently agree that the officer meant to say "under."

¶ 9 Finally, Alonzo testified that at the police station he gave defendant the *Miranda* warnings. Afterward, Alonzo stated that defendant made two statements. First, defendant asked if he could do six years. Second, defendant stated he knew a judge and would not be convicted.

¶ 10 Defendant testified that around 10 a.m. he woke up because his sister was yelling about her son (defendant's nephew) not going to school. Defendant stated he walked outside to look for his nephew and walked across the vacant lot. There were about five other individuals around the vacant lot when he walked through, either walking through a gangway or in the alley. As defendant walked across the vacant lot, a car pulled up near him with police officers inside. The officers told defendant to come toward them and when he did, the officers immediately exited the car and detained him. Defendant denied that he received the *Miranda* warnings or made any statements to the officers at the police station.

¶ 11 In finding defendant guilty of possession of a controlled substance with intent to deliver, the trial court stated that it "[found] the officers who testified were credible [and it] did not find [defendant's] testimony at all to be credible." The court also stated that it believed the reason there was no evidence of money being inventoried was because it was less than $500. Defendant was subsequently sentenced to seven years in prison.

¶ 12 On appeal, defendant first contends that the evidence was insufficient to prove him guilty of possession of a controlled substance with intent to deliver beyond a reasonable doubt. Specifically, defendant argues that "Sandoval's vague and cursory descriptions of his location and his observations render his testimony virtually worthless" and that his testimony is "unreliable" and "highly suspicious." Defendant notes that Sandoval – the only eyewitness to the transactions – was evasive in his testimony about his surveillance location. Defendant also notes

that Sandoval's descriptions of the supposed drug transactions were lacking in sufficient detail. And finally, defendant argues there was no physical evidence corroborating Sandoval's testimony.

¶ 13 The State responds that Sandoval's testimony regarding his location and the observations of the narcotics transactions were both clear and credible, and the lack of corroborating physical evidence is not fatal to defendant's conviction. The State argues that the evidence elicited at trial was sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 14 Due process mandates that a defendant may not be convicted of a crime unless each element constituting that crime is proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) quoting *In re Winship*, 397 U.S. 358, 364 (1970). When assessing the sufficiency of the evidence in a criminal case, the reviewing court must view the evidence in the light most favorable to the prosecution and then decide if any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences must be allowed in favor of the prosecution. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). We will not overturn a conviction unless the evidence is "so improbable or unsatisfactory that it creates" reasonable doubt of guilt. *Id.* Finally, while we must carefully examine the evidence before us, we must give the proper consideration to the trial court who saw the witnesses testify, (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 15 In order to convict a defendant of possession of a controlled substance with intent to deliver, the State must prove that defendant: (1) had knowledge of the presence of narcotics; (2) had possession or control of the narcotics; and (3) intended to deliver the narcotics. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); see 720 ILCS 570/401 (West 2012).

¶ 16 Here, defendant does not argue that the evidence, if accepted by the trier of fact as credible, is insufficient to prove defendant had possession of a controlled substance or intent to deliver. Rather, defendant argues that Sandoval's testimony was incredible and unreliable, and thus could not be used by a trier of fact to find defendant guilty beyond a reasonable doubt regardless of the acts described.

¶ 17 Defendant's argument that Sandoval's testimony is incredible is unpersuasive. He first argues that Sandoval's testimony is unreliable and highly suspicious because it lacks detail about his whereabouts during the alleged transactions, making it impossible to verify Sandoval's ability to see the transactions. While Sandoval did not divulge the exact specifics of his location for concern of "officer[] safety," that fact is not fatal to his testimony being credible. In fact, Sandoval was not evasive about his location. His answers of "no" to two of defense counsel's questions in regard to whether or not he was at a specific location along South Sawyer Avenue were not evasive; they were simply answers to defense counsel's questions. Furthermore, during a sidebar, defense counsel withdrew her question in regard to Sandoval's specific location and did not follow-up with regard to that line of questioning. The failure to answer questions that were not asked does not negatively affect credibility.

¶ 18 Defendant next argues that Sandoval's details about the alleged transactions are unreliable and highly suspicious because he could not hear the conversations during the alleged

transactions, did not know how much money was exchanged, did not describe the two purported buyers and did not have them arrested. However, the identity of the buyers and the street price of PCP are irrelevant to the elements of defendant's crime and the lack of such details does not make Sandoval's testimony incredible or unreliable. Sandoval stated he watched defendant from approximately 75 feet away, only at times using binoculars. From that distance, it is completely reasonable that Sandoval would not have heard the conversations or seen the exact denominations of money exchanged. Furthermore, with regard to the alleged buyers, defendant points to no case law requiring buyers be arrested under the circumstances presented here. In fact, our supreme court has held just the opposite. See *People v. Bush*, 214 Ill. 2d 318, 328-29 (2005) (State not required to prove items sold to buyers contained same controlled substance for which defendant charged); *Robinson*, 167 Ill. 2d at 408, 414 (listing various factors courts will consider to ascertain a defendant's intent to deliver, but stating "there is no hard and fast rule to be applied in every case"). Finally, defendant cites Justice Reid's concurrence in *People v. Jennings*, 364 Ill. App. 3d 473, 486-88 (2005) (Reid, J., concurring). However, Justice Reid's concurrence, by his own admission, is "*obiter dicta*," *id.* at 487, and cannot overcome the precedent of *Bush* and *Robinson.*

¶ 19 We likewise reject defendant's arguments based on the alleged misrepresentation about or violation of Chicago Police Department ("CPD") policies regarding money seized from arrestees. Defendant argues that Honda's testimony about CPD's policies regarding seizure and documentation of cash held by arrestees undermines his credibility. First, we will not even consider defendant's attempt to impeach a witness on appeal with matters not brought before the trial court. The specific policy was not raised at trial and thus, it is improper for us to consider

the policy on review. See *Jenkins v. Wu*, 102 Ill. 2d 468, 483 (1984) ("[M]atters not properly in the record will not be considered on review."); *People v. Wigman*, 2012 IL App (2d) 100736, ¶ 36 (stating reviewing courts will not take cognizance of arguments in parties' briefs that are not properly supported by the record). Second, as the State points out, and we agree, it was improper for defendant to append the CPD policy in his brief as again the policy was not brought before the trial court. See *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23 ("Generally, attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record."). Our review is limited to matters contained in the record and accordingly, we reject defendant's arguments based on the existence of any CPD policy.

¶ 20 Finally, defendant argues there is no physical evidence corroborating Sandoval's testimony. However, there need not be any corroborating physical evidence if the trial court accepts Sandoval's testimony to be credible and positive, which it did. See *Smith*, 185 Ill. 2d at 541 (stating that the testimony of a sole credible witness can be sufficient to convict a defendant). There is no requirement that the police recover such evidence or that the State present it.

¶ 21 Accordingly, because the evidence must be taken in the light most favorable to the prosecution with all reasonable inferences allowed in favor of the prosecution, we find that a rational trier of fact could have found Sandoval's testimony to be credible and defendant guilty of possession of a controlled substance with intent to deliver.

¶ 22 Defendant next contends, and the State concedes, that his mittimus must be corrected to reflect the actual crime for which he was convicted. Defendant's mittimus states that he was convicted of "MFG/DEL 10-30 GR PCP/ANALOG" when he was actually convicted of

possession of a controlled substance with intent to deliver more than 10 grams but less than 30 grams of PCP.

¶ 23 When the mittimus contains an error, the reviewing court should order that the mittimus be corrected to reflect the actual conviction. *People v. Gordon*, 378 Ill. App. 3d 626, 641 (2007). Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) and our ability to correct a mittimus without remand, (*People v. Rivera,* 378 Ill. App. 3d 896, 900 (2008)), we order the clerk of the circuit court to correct defendant's mittimus to reflect defendant's actual conviction of possession of a controlled substance with intent to deliver more than 10 grams but less than 30 grams of PCP. For the reasons stated above, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 24 Affirmed; mittimus corrected.