

No. 1-13-1324

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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 15283
)	
ANDREW WHIRLEY,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 **Held:** Judgment entered on defendant's conviction for delivery of a controlled substance affirmed over his claim that the evidence was insufficient to prove him guilty of that offense beyond a reasonable doubt.
- ¶ 2 Following a bench trial, defendant Andrew Whirley was found guilty of delivery of a controlled substance, then sentenced to seven years' imprisonment. On appeal, defendant contests the sufficiency of the evidence to prove him guilty of that offense beyond a reasonable doubt where the testimony of the police officers was inconsistent, incredible, and contrary to human experience.

¶ 3 At trial, Chicago police officer Martin Howard testified that at 8 a.m. on June 9, 2012, he was conducting narcotics surveillance near Jackson Boulevard and California Avenue in Chicago, Illinois. He was sitting in a parked, unmarked police car wearing plain clothes and had his star with him. Officer Howard testified that he observed defendant, whom he identified in court, engage passers-by in conversation, and, after each conversation, saw defendant walk across the street to a vacant lot where he picked up a small tin box. After observing four or five of these encounters, Officer Howard believed, based on his experience, that defendant was engaged in the sale of narcotics.

¶ 4 Officer Howard then radioed his undercover officer, Chicago police officer Lazaro Altamirano, who arrived at the street corner five minutes later and engaged defendant in conversation. Officer Howard watched as defendant walked across the street to the same vacant lot, picked up the same tin box, and removed something from it. Defendant then returned to where Officer Altamirano was standing, handed him an item, and Officer Altamirano handed defendant money.

¶ 5 Officer Howard further testified that it was light outside, there was nothing obstructing his view of defendant, and he never lost sight of defendant during the initial transactions or during the transaction with Officer Altamirano. He did not observe anyone else in the vicinity of the tin box, and there were no other items around the tin box in the vacant lot. After Officer Altamirano left the area, Officer Howard radioed his enforcement officers to detain defendant. Officer Howard stayed in the area until an enforcement officer arrived and watched as he conversed with defendant.

¶ 6 On cross-examination, Officer Howard stated that he was 10 to 15 yards away from defendant during the surveillance, and acknowledged that he could not hear any of the

conversations between defendant and the passers-by or Officer Altamirano. In his radio call, he described defendant as a black male wearing a baseball cap and blue jeans, but did not include his age, height, or weight.

¶ 7 Officer Altamirano identified defendant in court and testified that about 8 a.m. on June 9, 2012, he went to the area of Jackson Boulevard and California Avenue after receiving a radio call from a surveillance officer that defendant was involved in narcotics transactions. When he arrived, there were no other civilians in the area, and he walked up to defendant and asked for two "blows," which is a street term for packaged heroin. Defendant told Officer Altamirano to wait there, then walked across the street to a vacant lot, bent down, and removed items from a small tin box. Defendant walked back to Officer Altamirano and handed him two Ziploc bags with Batman logos on them containing suspect heroin. In exchange, Officer Altamirano handed defendant two \$10 bills of pre-recorded 1505 funds.

¶ 8 After the transaction, Officer Altamirano returned to his vehicle and informed his team that there had been a positive narcotics transaction. Officer Altamirano further testified that the serial numbers of the 1505 funds that he handed to defendant were pre-recorded on a 1505 funds sheet. He also testified that he kept the Ziploc bags containing the suspect heroin in his custody until he returned to the police station where they were inventoried, and he identified defendant there in a photo spread.

¶ 9 On cross-examination, Officer Altamirano stated that when defendant returned from the vacant lot, he handed him the items he had removed from the tin box, and Officer Altamirano handed him \$20 in a "hand-to-hand" transaction. He further stated that, to his knowledge, the 1505 funds were never recovered, and in his radio message after the transaction he described defendant as wearing a gray shirt, dark pants, and white shoes.

¶ 10 Chicago Police Officer Daniel Villa identified defendant in court and testified that he received a description of defendant from Officer Altamirano before arriving on the scene. When he encountered defendant, he noticed that defendant was carrying the pre-recorded 1505 funds because the serial numbers on the bills matched the ones given to him on the 1505 funds sheet. Officer Villa further testified that defendant was not arrested or taken into custody that day.

¶ 11 On cross-examination, Officer Villa stated that he did not recall Officer Altamirano's description of defendant, and that there were five other people on the street corner. He also stated that he had the serial numbers for the 1505 funds written on a pre-printed contact card so that when he conducted the street stop, he would be able to reference the numbers on the card, but defendant would not be able to see them. Officer Villa stated that he filled out the contact card for defendant so that he could match the serial numbers on the card with the serial numbers on the bills in defendant's hand, but he did not inventory the card.

¶ 12 The parties then stipulated to the chain of custody and testing of the narcotics recovered from defendant. The parties agreed that Officer Altamirano inventoried the narcotics and sent them to the Illinois State Police Crime Lab in a sealed condition where they were tested by Melissa McCann, a forensic chemist at the Illinois State Police Crime Lab, who would testify that the contents of the inventory tested positive for the presence of heroin with an actual weight of .5 gram.

¶ 13 Defendant testified on his own behalf that he did not remember where he was on June 9, 2012, because he had three surgeries in April and May of that year. He further testified that he did not sell anyone drugs on that date, and that he could not even walk at that time. On cross-examination, defendant stated that he was not on the corner of Jackson Boulevard and California Avenue on June 9, 2012, but acknowledged that this is a block-and-a-half away from his house.

He also stated that he had never seen the three officers before they testified in court, and that he left the hospital on May 29, 2012.

¶ 14 On redirect examination, defendant testified that he was never on the corner of Jackson Boulevard and California Avenue during the summer of 2012, and repeated that account on re-cross-examination. The trial court reminded defendant that he was arrested at the end of the block on August 7, 2012, but defendant again asserted that he did not walk off his block during that summer.

¶ 15 Following closing arguments, the court found defendant guilty of delivery of a controlled substance. In reaching its conclusion, the court recounted the testimony of the three officers, and noted that each of them had identified defendant at least once, and that Officer Altamirano made three identifications, once on the scene, once in the photo spread, and once in court. The court acknowledged the stipulation with regard to the testing of the narcotics, and also stated that there were a lot of discrepancies in defendant's testimony because he could not remember where he was on June 9, 2012, but yet he knew he was not on the street corner, and that although he could not recall that date, he did recall May 29, 2012, as the date he was released from the hospital. The court concluded that the State had met its burden of proving defendant guilty of delivery of a controlled substance based on the photo array, the 1505 funds, and the seven identifications. After considering the relevant factors in mitigation and aggravation, the court sentenced defendant to a term of seven years' imprisonment.

¶ 16 In this appeal from that judgment, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt. He maintains that Officer Villa's testimony that he could see the serial numbers on the 1505 funds that defendant was holding was improbable

and contrary to human experience. He also claims that the descriptions of defendant given by Officer Altamirano and Officer Howard were vague and contradictory.

¶ 17 Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 270 (2006). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 18 To sustain defendant's conviction for delivery of a controlled substance in this case, the State was required to prove beyond a reasonable doubt that defendant knowingly delivered, or possessed with intent to manufacture or deliver, a controlled substance. 720 LCS 570/401(d) (West 2012). Viewed in a light most favorable to the prosecution, the evidence in this case shows that Officer Howard observed defendant standing on a street corner where he separately engaged four or five different people in conversation, then walked across the street to a vacant lot and retrieved something from a tin box on the ground and gave the item to the individuals. Based on his experience, Officer Howard believed defendant was engaged in the sale of narcotics, and radioed his undercover officer, Officer Altamirano, who approached defendant and asked for two "blows." Defendant then walked across the street to the same vacant lot, retrieved something

from the same tin box on the ground, and returned to Officer Altamirano who gave defendant two \$10 bills of pre-recorded 1505 funds in exchange for two Ziploc bags containing a substance, which was tested and shown to be heroin. After the transaction, Officer Altamirano radioed Officer Villa who testified that he encountered defendant and observed that the serial numbers on the \$10 bills that defendant held in his hand matched those on the 1505 sheet, which the officer had printed on the contact card in his possession.

¶ 19 Defendant contends, however, that Officer Villa's testimony that he could see the serial numbers on the \$10 bills in defendant's hand was incredible and contrary to human experience because Officer Villa did not testify that he took defendant into custody or that he confiscated the bills. He maintains that it is improbable that Officer Villa would be able to observe the serial numbers on the bills while the defendant held them in his hand, without taking possession of them. Defendant also maintains that the descriptions of the offender given by Officer Howard and Officer Altamirano were vague and contradictory.

¶ 20 Through these assertions, defendant essentially challenges the weight and credibility of the testimony of the officers. This is a matter within the province of the trier of fact (*Sutherland*, 223 Ill. 2d at 242), and we will not substitute our judgment for that of the fact finder unless the proof is so unsatisfactory that a reasonable doubt of guilt appears (*People v. Berland*, 74 Ill. 2d 286, 305-06 (1978)). We do not find this to be such a case.

¶ 21 The record shows that the three officers provided a consistent and reliable account of the events which encompassed the elements of the charged offense. *Berland*, 74 Ill. 2d 286 at 306. This began with Officer Howard's surveillance of defendant's activity on the street corner leading to Officer Altamirano's controlled buy of narcotics from defendant. In addition, each of the officers identified defendant as the offender, and the parties stipulated to the testing of the

narcotics by the forensic chemist. This evidence was sufficient to prove defendant guilty beyond a reasonable doubt, and, we observe, has not been directly contradicted by defendant.

¶ 22 The other evidence presented was regarding Officer Villa's encounter with defendant minutes later in which Officer Villa claimed that he observed that defendant was holding the designated pre-recorded 1505 funds in his hand. Officer Villa testified that he observed that the serial numbers on the bills which defendant held in his hand matched those prerecorded on a card which Officer Villa had in his possession. Even if the improbability of Officer Villa's testimony regarding his ability to read the serial numbers on the \$10 bills while defendant held the bills in his hand is found to be incredible, there is other evidence to which the court could look in rendering its decision. The court noted the multiple identifications of defendant by the other officers and the stipulation. We note that given the incredible testimony of Officer Villa regarding being able to read the serial numbers on two individual \$10 bills, while defendant held the bills in his hand, the veracity of the remainder of Officer Villa's testimony is also suspect. Nevertheless, even without the incredible testimony of Officer Villa, the consistent testimony provided by the other officers regarding defendant's activity on the street corner, and the stipulation detailing the narcotics recovered by Officer Altamirano, were clearly sufficient to prove the elements of the charged offense. *Berland*, 74 Ill. 2d at 306. Therefore, the incredible testimony by Officer Villa regarding his ability to see the serial numbers on the bills while the defendant held them in his hand, did not negate the other officers' testimony (*People v. Baugh*, 359 Ill. App. 3d 718, 737-38 (2005)), nor raise a reasonable doubt of defendant's guilt.

¶ 23 Defendant, however, compares this case to *People v. Johnson*, 191 Ill. App. 3d 940, 946-47 (1989), where this court held that the evidence was insufficient to prove defendant guilty of delivery of a controlled substance beyond a reasonable doubt where the testifying officer did not

explain the absence of corroborating physical evidence that he allegedly received from defendant or why there was a lapse of two weeks between when the narcotics were recovered and when they were submitted to the crime laboratory for testing. After considering defendant's testimony that the officer threatened to bring charges against him unless he became an informant, and noting that there were eleven other surveillance officers on the scene, none of whom were called at trial, this court concluded that the officer was suspect, and that his uncorroborated testimony was insufficient to prove defendant guilty beyond a reasonable doubt. *Id.* at 947.

¶ 24 In this case, each of the three officers involved testified at trial, and their testimony provided a consistent and corroborated chain of events leading to defendant's arrest. Moreover, Officer Altamirano's testimony and the stipulation provided a clear chain of custody for the narcotics that was free of any of the deficiencies found in *Johnson*. Defendant did not testify that any of the officers threatened him with charges, nor does he contend that the State failed to produce a crucial piece of corroborating evidence. The case at bar is thus readily distinguishable from *Johnson* given the sufficient corroborating evidence, the lack of any alleged misconduct, and the absence of any lapse of time between Officer Altamirano's recovery of the narcotics and their submission to the crime laboratory for testing.

¶ 25 Defendant next contends that without Officer Villa's testimony concerning the 1505 funds, the evidence of his identification is unreliable. He points out that Officer Howard described the offender as wearing "jeans," while Officer Altamirano stated that he was wearing "dark pants," which, he claims, "casts doubt on the reliability of the officers' identification."

¶ 26 In determining the reliability of an identification, this court employs the factors enumerated by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989); *People v. Rodriguez*, 312 Ill. App. 3d 920, 933 (2000). In

Biggers, the Court held that in evaluating whether an identification is reliable, the court should consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the identification confrontation, and the length of time between the crime and the identification. Defendant concedes that four of the five *Biggers* factors are met in this case, but contends that the accuracy of the witness' prior description of the offender in this case is not satisfactory. While we understand defendant's focus on Officer Villa's testimony, given its patently incredible nature, we disagree that the officer's testimony was the underpinning of defendant's conviction. The court clearly had other credible evidence to consider.

¶ 27 Further, discrepancies or omissions in a witness' description do not, in and of themselves, generate a reasonable doubt as long as a positive identification has been made. *Slim*, 127 Ill. 2d at 309. Officer Howard described defendant as wearing "jeans," but Officer Altamirano, who identified defendant that same morning, described defendant as wearing "dark pants." This minor discrepancy does not, in and of itself, create a reasonable doubt as to the reliability of the officers' identification of defendant, and given the positive in-court identifications of defendant by the officers who testified credibly and Officer Altamirano's additional identifications as recounted by the court, we find that defendant's challenge to the identification evidence fails.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.