

FOURTH DIVISION  
June 4, 2015

No. 1-13-1485

**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. 12 CR 8990
	)	
ANDRE MABRY,	)	Honorable
	)	Thomas Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE COBBS delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**O R D E R**

¶ 1 **Held:** The judgment of the trial court is affirmed where police officers made positive out-of-court and credible in-court identifications of defendant sufficient to establish his identity as the seller of a controlled substance beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Andre Mabry was found guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) and sentenced to seven years' imprisonment as a Class X offender. On appeal, defendant contends the evidence of identity was insufficient to prove him guilty beyond a reasonable doubt.

¶ 3 According to the State's theory of the case, on March 27, 2012, between approximately 6:15 and 6:20 p.m., defendant sold .5 gram of heroin to undercover Chicago police officers David Torres and John Gonzales (the "buy" officers) near 900 North Homan Avenue. Officer Emerico Gonzales (the "surveillance" officer) was watching the transaction through binoculars from approximately one block away. Defendant was not arrested at the time of the transaction due to an ongoing narcotics investigation in the area, but was ultimately taken into custody when stopped for an unrelated vehicle code violation three weeks later.

¶ 4 Prior to trial, defendant filed a motion to suppress identification testimony arguing the photo arrays used by police officers to identify him were unnecessarily suggestive. During a hearing on the motion, the parties stipulated that undercover police officers participated in a narcotics transaction with an individual known as "Colby." The trial court denied defendant's motion finding that other than some participants smiling while others were not, the photos were all of black males of approximately the same age and hairstyle, wearing similar clothing, and not overly suggestive to make defendant immediately identifiable.

¶ 5 At trial, Officer Torres testified that he was an undercover officer on assignment as part of a narcotics investigation. He was the front passenger in a covert vehicle driven by his partner, Officer J. Gonzales. Officer Torres observed several black males standing on the corner near the

900 block of Homan Avenue. He yelled "blows" (a "street" term for heroin) at the males from his vehicle and his partner parked the car. A black man wearing a baseball cap (the "seller") approached the passenger side window and asked Officer Torres, "How many?" to which he responded "four." The seller then directed the officers to drive around to the east alley of Homan and ran out of sight.

¶ 6 The officers drove around to the alley and waited for a short period of time before the seller reappeared from an empty lot and signaled the officers to drive the vehicle to where he was standing. When the vehicle approached, the seller exchanged four bags of a white substance (which the parties stipulated was heroin) for \$40 in prerecorded bills from the buy officers. Officer Torres asked for the seller's contact information and was given the name "Cass" and a phone number. He then relayed this information via radio to the surveillance officer and the buy officers drove away without making an arrest.

¶ 7 Immediately thereafter, the officers returned to the police station and Officer Torres identified defendant as the seller from a photo array. The officers did not attempt to drive by again to identify "Cass" on scene. Officer Torres testified he was face-to-face with the seller during both encounters, first in the street and then the alley, and his view of the seller's face was not obstructed. He also stated it was not dark outside. Officer Torres made a positive in-court identification of defendant as the seller.

¶ 8 Officer J. Gonzales testified that he was driving the covert vehicle during the narcotics transaction. He stated that while he and his partner were in the alley, the seller walked up to his side of the vehicle and handed him four bags of heroin. He explained the purpose for obtaining

the seller's name and phone number was to conduct future heroin transactions. Officer J. Gonzales handed the bags of heroin to Officer Torres and they proceeded back to the station where he was presented with a photo array created by the surveillance officer. The parties stipulated that a proper chain of custody over the heroin was maintained at all times. Officer J. Gonzales identified defendant from the photo array at 7:10 p.m., approximately 55 minutes after the transaction occurred. He also made a positive in-court identification.

¶ 9 Officer Emerico Gonzales testified that he was the surveillance officer during the undercover narcotics investigation that occurred between defendant and the buy officers around 6:20 p.m. He was watching the transaction from approximately one block away through binoculars and was in constant contact with his team via radio. He could not see the seller's face clearly when the seller first approached the police vehicle, but was able to see his face once the seller ran to meet the buy officers in the alley. Officer E. Gonzales explained that the seller was not arrested immediately following the transaction because they were conducting an ongoing narcotics investigation in the area. He also testified it was not dark outside during the transaction.

¶ 10 Based upon identifying information relayed to him by the buy officers, Officer E. Gonzales used the Chicago police I-Clear database to retrieve a photograph of defendant which he placed in a photo array to present to the buy officers. He input defendant's demographics including age, height, weight, and possibly the nickname "Cass," and the geographic area of the transaction into I-Clear which generated defendant's photograph. He was not sure whether he actually input the nickname "Cass" into the database. The parties stipulated that "Cass" was not on defendant's "rap sheet." Officer E. Gonzales corroborated the testimony that a positive

identification of defendant was made by both buy officers from the presented photo array. He also made a positive in-court identification.

¶ 11 In finding defendant guilty of Class 2 unlawful delivery of a controlled substance, the trial court determined the buy officers' out-of-court identifications and the surveillance officer's corroboration testimony were credible and sufficient to prove defendant's guilt beyond a reasonable doubt. The trial court found their testimony credible because the buy officers engaged in "hand-to-hand delivery," their testimony was corroborated by the surveillance officer, and the positive out-of-court identification occurred "immediately afterwards." The trial court also believed the ongoing narcotics investigation was a viable excuse for postponing defendant's arrest. Due to his criminal background, the trial court sentenced defendant as a Class X offender to seven years' incarceration.

¶ 12 Defendant challenges the sufficiency of the evidence establishing his identity as the seller and contends that the photo array and the police officers' testimony were unreliable and created a substantial likelihood of misidentification.

¶ 13 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 14 The offense of unlawful delivery of a controlled substance requires knowing delivery of a prohibited narcotic. 720 ILCS 570/401(d)(i) (West 2012). The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The testimony of a single witness is sufficient to convict a defendant if the witness is credible and the accused is viewed under circumstances which would permit a positive identification. *People v. Smith*, 185 Ill. 2d 532, 541 (1999); *People v. Johnson*, 94 Ill. App. 3d 200, 206 (1980). In a bench trial, the trial court is responsible for determining the credibility of witnesses, the weight to be given their testimony and the reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978).

¶ 15 Defendant argues that due to "sloppy" police work, the original photo array used by police officers to identify defendant was unreliable because the nickname "Cass" was used to generate defendant's photograph and it was stipulated during the pretrial motion to suppress the identification testimony that the officers conducted a transaction with "Colby;" there was no foundation provided for the I-Clear testimony; and the officers did not investigate if the phone number given by the seller was linked to the nickname "Cass" in the I-Clear database. Defendant further argues the in-court identification testimony undermines the officers' credibility because the sun set around 6:11 p.m. that day and the officers testified it was light outside, and the use of prerecorded funds to conduct the narcotics transaction is contrary to human experience when the officers did not intend to make an arrest.

¶ 16 As the State notes in its brief, defendant does not expressly challenge the admissibility of the photo array on appeal. However, defendant's sufficiency arguments with regard to the procedures used to create the array appear to attack its admissibility indirectly. To the extent this argument is made, we have examined the array and agree with the trial court's judgment that there was nothing unduly suggestive about the array itself which would give rise to a substantial likelihood of misidentification. See *People v. Curtis*, 262 Ill. App. 3d 876, 882 (1994). As such, the array was properly admitted, and once admissible, any shortcomings in the procedures or the testimony goes to the weight of the evidence, which is the province of the trier of fact. *Manson v. Braithwaite*, 432 U.S. 98, 116 (1977); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Therefore, the trial court was called upon to make a credibility determination and decide the weight to be accorded the out-of-court identification in light of the procedures used, and we will not disturb this determination where the deficiencies in the identification process were presented to the trial court for consideration. See *People v. Young*, 128 Ill. 2d 1, 131 (1989) (it is not the practice of the reviewing court to reweigh the evidence presented at trial).

¶ 17 Consequently, this court is unconcerned with the manner in which the photo array was created or how the officers retrieved defendant's photograph from the database. We do find it compelling, however, that each officer was able to positively pick defendant as the seller from the photo array less than an hour after the transaction, and we find nothing in the record to support defendant's argument that the investigation conducted up to this point was the result of "sloppy" police work.

¶ 18 We also reject defendant's argument that the officers' alleged inconsistent testimony that it was light outside, or regarding their use of prerecorded funds, undermines their credible identification of defendant. In light of the positive out-of-court identification, if any defect existed in the in-court identification, the defect goes to the weight of the evidence and not to the substance, and the trial court clearly made this determination in favor of the State. *Manson*, 432 U.S. at 117.

¶ 19 Defendant apparently requests we take judicial notice that the sun set at 6:11 p.m. on the date of the offense, arguing this proves the officers' testimony was unreliable because the transaction occurred after the sun set, and the officers testified it was not dark outside. Even if we were to take judicial notice of this fact, it does not prove it was dark outside at the time of the offense; only that the sun had set. Regardless, the trial court knew the time of the offense and heard the officers' testimony that it was not dark outside and was required to make a credibility determination based upon such testimony, which it did in favor of the State.

¶ 20 Furthermore, defendant's argument that the police officers' use of prerecorded funds was contrary to human experience is senseless. We find it exceptionally plausible that undercover officers would use prerecorded funds to purchase drugs in an area subject to an ongoing narcotics investigation, and defendant does not provide any suggestion for a viable alternative. Moreover, this was also a credibility determination to be made by the trial court.

¶ 21 In conclusion, we cannot find any indication of "sloppy" police work in the record. Neither can we find that no rational trier of fact could have found the positive out-of-court identifications and the reliable in-court identification testimony established defendant's identity



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as the seller beyond a reasonable doubt sufficient to prove his guilt of unlawful delivery of a controlled substance.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.