2015 IL App (1st) 131952-U

SECOND DIVISION
June 30, 2015

No. 1-13-1952

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 14826
	)	
JARLON GARRETT,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to convict defendant of delivery of a controlled substance where the State proved he sold heroin to an undercover police officer; we correct the mittimus to properly reflect his conviction for delivery of a controlled substance; judgment affirmed as modified.

¶ 2 Following simultaneous but separate bench trials, defendant Jarlon Garrett and codefendant Telly Watkins[1] were convicted of delivery of a controlled substance. Defendant was sentenced as a Class X offender to six years' imprisonment. On appeal, defendant contends that

[1] Telly Watkins has a separate appeal (1-13-2052).

the State failed to prove him guilty beyond a reasonable doubt where the two police witnesses were impeached with their own reports, and where their account was unconvincing and uncorroborated by any supporting evidence. Alternatively, defendant requests that his mittimus be corrected to properly reflect his conviction for delivery of a controlled substance. We affirm as modified.

¶ 3 The record shows that defendant and Watkins were charged with delivery of less than one gram of heroin within 1,000 feet of a school (Count 1) and delivery of less than one gram of heroin (Count 2). The charges stemmed from an incident on July 15, 2012, where an undercover officer bought heroin from a man standing near the corner of Leamington and West End Avenues in Chicago.

¶ 4 At trial, Officer Charon Bady testified that at about 11 a.m. on July 15, 2012, she was working as an undercover narcotics officer on a team that included nine other officers. Bady went to 155 North Leamington Avenue in a covert vehicle and parked. Watkins nodded his head, approached Bady's vehicle, and Bady asked him for two "blows," which was a street term for heroin. Watkins left and went into the house at the aforementioned address. About two minutes later, Watkins returned with defendant who went around the corner and out of sight. Defendant was wearing black shorts, but no shirt. Watkins remained on the sidewalk and told Bady to wait 10 minutes for defendant to return. After about 10 minutes, Bady was about to leave when Watkins told her to wait because defendant was approaching them. Bady drove to a nearby corner to meet with defendant, who asked her "how many," and Bady responded that she wanted two. Defendant opened a sandwich bag containing several Ziploc bags of suspect heroin, removed two Ziploc bags, and tendered them to Bady while she remained in her car. In return, Bady gave defendant $20 of pre-recorded funds, left the area, and notified her team members of

a positive purchase of heroin, providing her team a physical and clothing description of the two offenders. A short time later, both offenders were arrested. Bady did not see the arrest, and the $20 she provided to defendant was never recovered. On cross-examination, Bady testified that she mistakenly indicated in her police report that Watkins was the person who handed her two bags.

¶ 5 Officer Joseph Meloscia testified similarly to Officer Bady. He also testified that he was a surveillance officer at the scene and saw defendant engage in a transaction with Bady while she was inside of her vehicle. Following the transaction, Bady left the scene and both offenders returned to the residence at 155 North Leamington Avenue. About three to five minutes later, the offenders exited the residence and walked to the corner of West End and Leamington Avenues where they were arrested. No pre-recorded funds or drugs were recovered from the offenders. On cross-examination, Meloscia testified that his report indicated that after the transaction between defendant and Bady, only defendant returned to the residence.

¶ 6 The parties stipulated that the suspect heroin tested positive for 0.4 gram of heroin.

¶ 7 Following closing arguments, the trial court found both offenders not guilty of Count 1, but guilty of Count 2, *i.e.*, delivery of a controlled substance. In doing so, the court found the officers credible and any inconsistencies in their testimony minor and insignificant.

¶ 8 On appeal, defendant contends there was insufficient evidence to support his conviction for delivery of a controlled substance. Specifically, defendant maintains that the two police officers were impeached with their own reports, and their testimony was unconvincing and uncorroborated by pre-recorded funds or any other evidence.

¶ 9 In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have

found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When an appellate court reviews a case where the defendant questions the sufficiency of the evidence, it does not retry the defendant. *People v. Cox*, 195 Ill. 2d 378, 387 (2001). Rather, it is the responsibility of the trier of fact to assess witness credibility, weigh the evidence and draw reasonable inferences therefrom, and resolve any conflicts in the testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A defendant's criminal conviction will not be reversed on appeal unless the reviewing court finds that the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 10 To sustain a conviction of unlawful delivery of a controlled substance, the State must prove that the defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2012); *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009). Delivery means "the actual, constructive or attempted transfer of possession of a controlled substance with or without consideration, whether or not there is an agency relationship." *Brown*, 388 Ill. App. 3d at 108, quoting 720 ILCS 570/102(h) (West 2012) .

¶ 11 Viewed in the light most favorable to the State, the evidence established that defendant knowingly delivered heroin to Officer Bady. When Bady arrived at 155 North Leamington Avenue in a covert vehicle and parked, Watkins nodded his head and approached her vehicle. After Bady asked Watkins for two "blows," he went into a house and returned two minutes later with defendant. While defendant walked away, Watkins remained on the sidewalk and told Bady to wait for defendant to return. About 10 minutes later, defendant began approaching them, and Bady drove to a nearby corner to meet with him. Defendant asked her "how many," and Bady

responded that she wanted two. Defendant opened a bag containing several smaller bags of suspect heroin, removed two of them, and tendered them to Bady. In return, Bady gave defendant $20 of pre-recorded funds. Following the transaction, Officer Meloscia saw defendant and Watkins return to the residence at 155 North Leamington Avenue, and, shortly thereafter, they exited the residence together and were arrested.

¶ 12 Nevertheless, defendant argues on appeal that the police officers' testimony was unreliable where it was impeached with their own reports, uncorroborated by any other evidence, and their identifications of defendant were vague. Specifically, defendant maintains that Officer Bady's testimony at trial that he handed her heroin was impeached by her police report indicating that Watkins was the individual who gave her the drugs. Furthermore, defendant maintains that Officer Meloscia's trial testimony that both offenders returned to the house at 155 North Leamington Avenue before emerging a few minutes later and being arrested by enforcement officers was impeached by his police report stating that only defendant re-entered the house. According to defendant, the officers' reports pointed affirmatively to his non-involvement in the crime where Bady's report stated that Watkins gave her two bags of heroin in exchange for two pre-recorded $10 bills, and Meloscia's report stated that Watkins remained on the sidewalk while defendant went inside. Defendant asserts that if those two reports were accurate, Watkins was the seller and the drugs and pre-recorded funds should have been recovered on Watkins.

¶ 13 The problem with defendant's argument is that the trial court did not find all the information in the police reports accurate. Instead, the court found the officers' testimony credible, and found any inconsistencies between their testimony and the police reports to be "minor." Bady and Meloscia's credibility was an issue for the trier of fact (*Campbell*, 146 Ill. 2d at 375), and we will not substitute our judgment for that of the trier of fact, particularly where the

officers' testimony was not so improbable as to create a reasonable doubt of defendant's guilt (*Givens*, 237 Ill. 2d at 334).

¶ 14 In so finding, we do not agree with defendant that the police testimony here "taxes the gullibility of the credulous." Defendant points to the supreme court decision in *People v. Coulson*, 13 Ill. 2d 290 (1958), to support his position. However, we find *Coulson* distinguishable from the case at bar. In *Coulson*, 13 Ill. 2d at 293, the alleged victim of an armed robbery testified that the supposed offenders forced him into their car at gunpoint, took his wallet, and threatened to shoot him. The victim told the offenders he had more money at home, and that if they drove him there he would get it for them and not inform the police. *Id*. After being driven to his aunt's house, the victim went inside, and called the police who arrested the offenders shortly thereafter. *Coulson*, 13 Ill. 2d at 293. No money or weapons were found on them or the vehicle, and the defendants testified that the victim asked them for a ride home and told them to wait in the car while he went inside of his aunt's house. *Coulson*, 13 Ill. 2d at 293-95. The defendants were convicted, but the supreme court reversed, reasoning that the purported victim's version of events would require the court to believe that the defendants drove him home and waited for him while he went inside trusting that he would not call police. The court concluded that such testimony "taxe[d] the gullibility of the credulous." *Coulson*, 13 Ill. 2d at 296; see also *People v. Marion*, 2015 IL App (1st) 131011, ¶ 28 (reversing the defendant's convictions where the police officer's testimony made the defendant's behavior improbable, incomprehensible, and contrary to human nature). The record here, however, shows that the trial court found that the officers credibly testified to the controlled drug transaction and, despite defendant's contentions to the contrary, we do not believe the finding was improbable, incomprehensible or contrary to human nature. *Marion*, 2015 IL App (1st) 131011, at ¶ 28.

¶ 15 In addition, we find the officers' credibility was not undermined by defendant's arguments that police should have obtained a search warrant to search the residence at 155 North Leamington Avenue, no evidence corroborating the officers' testimony was admitted at trial, and the officers' testimony regarding the identification of defendant as the seller was weak. Defendant's claim that the officers should have obtained a search warrant to retrieve the unsold heroin and pre-recorded funds supposedly deposited in the house to establish his guilt is unpersuasive because the recovery of those items was not necessary for the State to establish the elements of delivery of a controlled substance. We thus decline to adopt defendant's position that the State's alleged failure to produce this evidence should be viewed in a light favorable to the defense. We also find that no corroborating evidence was needed in this case because two police officers, found credible by the trial court, testified on behalf of the State regarding the events in question. See *People v. Williams*, 252 Ill. App. 3d 1050, 1060 (1993) ("[t]he testimony of one witness if credible and positive is sufficient to convict, even if contradicted by the accused"). The fact that no pre-recorded funds were admitted as corroborating evidence was explained by defendant in his brief when he stated, "[a]corrding to the officers' trial story, there was only one place the drugs and bills could have been: inside 155 N. Leamington."

¶ 16 Moreover, the officers' testimony regarding the identification of defendant was not weak. The evidence showed that police had ample opportunity to view the offenders during the incident, and both made unequivocal identifications of them at trial. Therefore, the absence of any post-arrest identification of the offenders by Officers Bady and Meloscia was immaterial. See *People v. Jennings*, 142 Ill. App. 3d 1014, 1031 (1986) (finding that even if the post-arrest identification of the defendant was deemed improper, his conviction would still stand where the victim identified the defendant in open court, the in-court identification was supported by the

evidence, and the circumstances surrounding the defendant's arrest substantiated the victim's identification).

¶ 17 Although defendant argues otherwise, the record does show Bady testified that she described defendant's physical characteristics to enforcement officers. She specifically testified that she gave a "physical and clothing description of the two offenders." Defendant argues extensively that the officers' meager description underscored their failure to testify to defendant's most distinguishing physical feature, *i.e.*, a 14-inch scar on his torso, as described in the arrest report contained in the common law record and the Illinois Department of Corrections website. However, defendant's scar was not raised during the examination of either officer, no photographs of the defendant's abdomen were admitted by either party at trial, nor did the court have an opportunity to view defendant's abdomen to determine whether such a scar existed. Instead, the scar is mentioned for the first time in defendant's brief on appeal. As the State correctly points out, although a description of the scar is part of the common law record, the arrest report was never admitted at trial for any purpose. It is well established that a reviewing court must determine the issues before it on appeal solely on the basis of the record made at trial. *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994). Evidence which is not part of the record on appeal is not to be considered by a reviewing court. *Heaton*, 266 Ill. App. 3d at 476. Furthermore, "[j]udicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court." *Heaton*, 266 Ill. App. 3d at 477-78.

¶ 18 Notably, defendant improperly attempts to rely on certain studies and articles regarding police credibility and heroin dealing in Chicago. Such sources do not qualify as relevant authority on appeal and will not be considered. See, *e.g.*, *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983); *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30

(2007); *Heaton*, 266 Ill. App. 3d at 476-78; *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

¶ 19 Next, defendant contends, and the State concedes, that his mittimus must be corrected to properly reflect the offense of which he was convicted. The record shows that defendant was charged with one count of the Class 1 offense of delivery of a controlled substance within 1,000 feet of a school, and one count of the Class 2 offense of delivery of a controlled substance. According to the report of proceedings, defendant was convicted of the latter offense. The mittimus, however, incorrectly cites section 407(b)(2) instead of section 401(d) of the Illinois Controlled Substances Act (720 ILCS 570/407(b)(2), 401(d) (West 2012)), misidentifies the offense as "AMT NARC SCHED I/II/SCH/HS/PK," and mislabels the class of the offense as Class 1.

¶ 20 It is well settled that where the common law record conflicts with the report of proceedings, the report of proceedings controls. *People v. Roberson*, 401 Ill. App.3d 758, 774 (2010). Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), a reviewing court can correct the mittimus to accurately reflect defendant's conviction of the Class 2 offense of delivery of a controlled substance. *People v. Gorosteata*, 374 Ill. App. 3d 203, 230 (2007).

¶ 21 For the foregoing reasons, we direct the clerk of the circuit court to correct defendant's mittimus to accurately reflect that he was convicted of delivery of a controlled substance and affirm his conviction in all other respects.

¶ 22 Affirmed as modified.