FOURTH DIVISION
June 18, 2015

No. 1-13-2808

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. 13 CR 5945
	)	
NEVEL MYLES,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis 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 where a police officer credibly testified to witnessing two suspect narcotics transactions, defendant was found wearing two pairs of pants and in the inner pair, two bags containing heroin were recovered.

¶ 2 After a bench trial, defendant Nevel Myles was convicted of possession of a controlled substance (heroin) with intent to deliver and sentenced, based on his criminal background, to a Class X sentence of eight 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 evidence was insufficient to demonstrate his intent to deliver; (2) his mittimus should be amended to reflect the actual crime of which he was convicted and his actual time in presentence custody; and (3) the trial court erred in imposing defendant's fines and fees order, specifically with regard to the amount of his Controlled Substance fine.

¶ 3 At trial, Officer Wayne Frano testified that at approximately 8 p.m. on February 25, 2013, he was conducting narcotics surveillance along with his partner Officer Vincent Celio. Frano was on foot dressed in civilian clothes in a vacant lot on West Chicago Avenue, between North Homan Avenue and North Christiana Avenue. Despite being nighttime, Frano stated the area "was pretty well lit" due to various street and store lights.

¶ 4 From the vacant lot, Frano, at times using binoculars, saw defendant walking on North Homan with his "pit bull" from approximately 150 to 200 feet away. Defendant wore a yellow coat, dark jeans and tan boots. Frano observed defendant walking his dog in the area for about 25 minutes. Then, when defendant was just west of North Christiana on West Chicago, a man wearing all black walked up to defendant. After the two had a brief conversation, the man gave defendant an unknown amount of money. Defendant reached into his pants, but not his pocket, retrieved an unknown item and tendered it to the man. The man subsequently left the scene.

¶ 5 About five minutes later, Frano observed two men approach defendant around the same location. One wore a gray hoodie and black pants, and the other wore a black coat and blue jeans. After a brief conversation, the two men gave defendant an unknown amount of money. Defendant reached into his pants, but again not his pocket, retrieved an unknown item and tendered it to the men. Both men subsequently left the scene.

¶ 6 After the second exchange, defendant began to walk westbound on West Chicago toward North Homan. Frano radioed Celio to pick him up in their vehicle. However, after being picked up, Frano lost sight of defendant for approximately one to two minutes. The two officers drove to where Frano last saw defendant, which was in front of a Family Dollar on West Chicago just west of North Homan. There, they saw defendant and pulled up alongside him. Celio told defendant to tie up his dog, and defendant complied by tying his dog to a nearby tree. Celio and Frano exited their vehicle and detained defendant. Celio searched defendant and recovered two small plastic bags containing a white powder, which Frano believed was suspect heroin. Defendant was arrested and transported to the police station where he was searched again. Frano recovered $50 from defendant.

¶ 7 On cross-examination, Frano admitted that he could not see the actual objects exchanged between defendant and the various men nor could he hear their conversations. He also could not tell how much money was exchanged and only assumed it was money based on the items' "size and shape." Frano acknowledged that he did not attempt or have his partner attempt to detain the alleged buyers.

¶ 8 Officer Vincent Celio testified that he was working as an enforcement officer at approximately 8 p.m. on February 25, 2013. He dropped Frano off in an alley and then drove their vehicle to the 3300 block of West Iowa Street and waited.

¶ 9 About 20 to 25 minutes later, Frano radioed Celio and told him that he observed a suspect narcotics transaction. Five minutes later, Frano told Celio that he observed a second suspect narcotics transaction. Celio then drove the vehicle to the alley where he originally dropped Frano off and picked him up. Frano then directed Celio to defendant's last known whereabouts. As they

were driving west on West Chicago approaching North Homan, they saw defendant. Celio pulled the vehicle alongside defendant and told him to tie up his dog.

¶ 10 Celio then performed a protective pat down of defendant and observed that defendant was wearing two pairs of pants: jeans and then underneath, a pair of cargo pants. Celio stated that from his experience, narcotics are often concealed by individuals in a second pair of pants. Celio searched both and recovered two clear bags containing suspect heroin from the cargo pants. Defendant was arrested and transported to the police station where he was searched again. Celio found $56 inside defendant's cargo pants.

¶ 11 The parties stipulated that, if called, a forensic chemist at the Illinois State Police crime lab would have testified that the contents of the two plastic bags tested positive for heroin and weighed a combined 0.5 gram.

¶ 12 Defendant made a motion for a directed finding, which the trial court denied. Defendant testified in his own defense. At approximately 8 p.m. on February 25, 2013, he was walking on West Chicago on his way to buy lottery tickets. While walking, he saw three individuals from his neighborhood, "Slick," Timothy Montgomery and "Boosty." After a brief conversation with them, he continued walking on West Chicago toward North Homan along with Slick. Then, defendant ran into another individual named Darryl, a high school friend he had not seen in 25 years. Defendant could not remember Darryl's last name. They briefly caught up, and defendant bought two bags of drugs from Darryl.

¶ 13 Defendant, along with Slick, continued to walk down West Chicago. When they crossed North Homan, defendant saw the police drive up alongside of him and Slick. The police pointed their weapons at defendant and told Slick to leave. The police told defendant they would shoot

him and his dog if he did not tie his dog up. He admitted that he was looking to buy drugs that night, but testified that he did not sell drugs to anyone or receive any money from anyone.

¶ 14 The trial court stated that it observed the witnesses who testified and considered all of the evidence presented. In particular, the court found the officer's "testimony credible" and defendant's testimony "not credible." Accordingly, the court found defendant guilty of possession of a controlled substance (heroin) with intent to deliver and sentenced him based on his criminal background to a Class X sentence of eight years in prison.

¶ 15 Defendant first contends the State did not prove beyond a reasonable doubt that he intended to sell the heroin found in his possession, arguing that the State failed to present any evidence that the 0.5 gram of heroin was inconsistent with personal use, no paraphernalia associated with selling drugs was found and the arresting officer only assumed defendant was tendered money. The State responds, arguing that the indisputably credible and clear officer's testimony concerning two transactions by defendant and the fact defendant wore two pairs of pants demonstrate his intent to distribute the heroin found in his possession.

¶ 16 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.

¶ 17 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).

¶ 18 Defendant concedes that the State established the first and second elements beyond a reasonable doubt. Defendant's sole argument is that the State failed to prove the third element, that he intended to deliver the heroin found in his possession. Accordingly, defendant requests that we reduce his conviction to the Class 4 felony of simple possession.

¶ 19 In order to establish that a defendant had intent to deliver a controlled substance, Illinois courts look at a variety of circumstantial evidence as direct evidence of intent is often difficult to find. *People v. Bush*, 214 Ill. 2d 318, 324 (2005). Factors relevant in this inquiry include: (1) the quantity of the controlled substance found in the possession of the defendant; (2) the purity of the controlled substance; (3) possession of any weapons; (4) possession of large amounts of cash; (5) possession of police scanners, beepers or cell phones; (6) possession of drug paraphernalia (or its lack thereof); and (7) the manner in which the controlled substance was packaged. *Robinson*, 167 Ill. 2d at 408 (citing cases). The *Robinson* factors are just illustrative and not exclusive. *Bush*,

214 Ill. 2d at 325. When the amount of narcotics seized is consistent with personal use, more circumstantial evidence of intent is needed. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 16 citing *Robinson*, 167 Ill. 2d at 411. Furthermore, this court has stated "the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver." *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007). However, there are no "hard and fast" rules to be applied in every case. *Robinson*, 167 Ill. 2d at 414.

¶ 20 We find *People v. Little*, 322 Ill. App. 3d 607 (2001), instructive in analyzing defendant's claim. In *Little*, an individual found guilty of possession of cocaine with intent to deliver challenged the sufficiency of the evidence to convict him of the intent-to-deliver element. *Id.* at 614. The defendant only possessed 1.5 grams of cocaine and $10. *Id.* at 615. The court agreed with the defendant that "a great majority of the factors indicative of intent" were not present. *Id.* Nevertheless, the court found sufficient evidence to find him guilty beyond a reasonable doubt of intent to deliver. *Id.* at 620. The court reasoned that the testimony at trial revealed that on two separate occasions, the defendant was approached by individuals who gave the defendant money and in exchange, he tendered the individuals an object from his pants. *Id.* at 616. Police recovered six individual bags of cocaine from the defendant. *Id.* Because of the drugs recovered on the defendant coupled with an experienced narcotics officer's "specific observations," of the transactions, the court found sufficient evidence that the defendant intended to deliver the narcotics. *Id.*

¶ 21 In the case at bar, we agree with defendant that none of the most common *Robinson* factors are present. See *Robinson*, 167 Ill. 2d at 408. First, there was no testimony that the 0.5

gram of heroin found on defendant was inconsistent with personal use. Additionally, there was no evidence as to the purity of the heroin, defendant did not possess any weapons, he did not have large amounts of cash, he did not have any scanners, beepers or cell phones on his person, and he did not possess any drug paraphernalia associated with selling drugs. Finally, while defendant did have two plastic bags containing heroin on him, there was no evidence that the packaging of these drugs was any more indicative of selling heroin as opposed to buying heroin.

¶ 22 However, similar to *Little*, we find sufficient evidence to prove defendant intended to sell the heroin based on additional factors besides the heroin being packaged for sale. See *Blakney*, 375 Ill. App. 3d at 559. First and most importantly, defendant had two brief encounters with men in which items of unknown substance were exchanged, which according to Officer Frano was consistent with narcotics transactions. Second, defendant was wearing two pairs of pants when he was arrested, which according to Officer Celio was common for individuals attempting to conceal narcotics. While it was certainly cold in February 2013, as defendant argues, that fact does not preclude a finding that the second layer of pants were worn for the purpose of narcotics concealment. Finally, after defendant's first alleged transaction, he stayed in the same area for five minutes until his second alleged transaction. Therefore, even though the typical *Robinson* factors were not present in this case, there were other factors establishing defendant's intent to deliver heroin.

¶ 23 Defendant further argues that while Frano was a credible witness, his belief that defendant engaged in two narcotics transactions was based upon an assumption that the men tendered defendant money, and in return, defendant tendered those men heroin. Defendant

supports his argument by stating Frano was approximately 150 to 200 feet away and the alleged buyers were never detained.

¶ 24 First, with regard to the alleged buyers, defendant points to no case law requiring buyers to be arrested under the circumstances presented here. In fact, our supreme court has held just the opposite. See *Bush*, 214 Ill. 2d at 328-29 (State not required to prove items sold to buyers contained same controlled substance for which defendant was charged). Second, the trial court found the testimony of Frano, who based on his experience as a narcotics officer believed he witnessed two narcotics transactions, to be truthful. Moreover, it is reasonable to infer that defendant was selling heroin when he exchanged small unknown items with multiple men for objects that appeared to be money and was later found with heroin. See *Little*, 322 Ill. App. 3d at 616; see also *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13 (stating it is for the trier of fact to make "reasonable inferences from basic facts to ultimate facts").

¶ 25 As such, when the evidence is viewed in the light most favorable to the State, with all reasonable inference therefrom in favor of the State, we cannot say that no rational trier of fact could conclude beyond a reasonable doubt that defendant possessed heroin with intent to deliver.

¶ 26 Defendant next contends that his mittimus contains two errors. He first argues that the mittimus incorrectly reflects his presentence custody credit and second, that his mittimus incorrectly reflects the offense of which he was convicted.

¶ 27 Defendant first argues, the State concedes, and we agree, that his mittimus must be corrected to accurately reflect his presentence custody credit from 159 days to 169 days.

¶ 28 A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Williams*, 2013 IL App (2d) 120094, ¶ 37; see 730 ILCS 5/5–4.5–100(b) (West 2012).

¶ 29 Defendant was arrested on February 25, 2013, and sentenced on August 13, 2013, which totals 169 days in custody prior to his date of sentencing. His mittimus reflects credit for only 159 days in custody prior to his date of sentencing. Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we order the clerk of the circuit court to correct defendant's mittimus to reflect 169 days of presentence custody credit.

¶ 30 Defendant next argues that his mittimus, which states his offense as "Other Amt Narcotic Sched I&II," does not accurately reflect the offense of which he was convicted. The State responds that the mittimus is technically correct and that at most, it may be changed to "possession of a controlled substance with intent to deliver." Because this description more accurately reflects defendant's conviction, we order the clerk of the circuit court to correct defendant's mittimus to reflect his conviction for possession of a controlled substance with intent to deliver.

¶ 31 Finally, defendant contends, the State concedes, and we agree, that his fines and fees order should be corrected because he was erroneously assessed a $2,000 Controlled Substance fine and did not receive the $5 per day credit for the 169 days he was in custody.

¶ 32 Defendant was charged pursuant to section 401(d) of the Illinois Controlled Substances Act (720 ILCS 570/401(d) (West 2012)), which is a Class 2 felony. Defendants convicted under the Illinois Controlled Substances Act "shall be assessed for each offense a sum fixed at ***

$1,000 for a Class 2 felony." 720 ILCS 570/411.2(a)(3) (West 2012). Therefore, the court erroneously assessed defendant a $2,000 fine rather than the proper $1,000 fine.

¶ 33 Additionally, the trial court originally gave defendant only 159 days of presentence custody credit. However, as we explained above, defendant should have received presentence custody credit for 169 days. Defendants are entitled to a $5 credit per day for the time spent in custody prior to sentencing. See 725 ILCS 5/110-14(a) (West 2012). Therefore, defendant was entitled to an $845 credit toward his fines.

¶ 34 Accordingly, we order the clerk of the circuit court to correct defendant's fines and fees order to reflect a reduction in fines and fees from $2,384 to $1,384 and to give defendant credit for 169 days in presentence custody ($845) toward his $1,000 Controlled Substance fine and other fines. Defendant now owes a total of $539.

¶ 35 For the reasons stated above, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 36 Affirmed; mittimus, and fines and fees order corrected.