2015 IL App (1st) 133754-U

THIRD DIVISION
November 18, 2015

No. 1-13-3754

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 1213
	)	
LESLIE HUGHES,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant forfeited his contention that the trial court failed to ensure that his jury waiver was knowingly and intelligently made. Defendant's conviction for delivery of a controlled substance is affirmed because the evidence at trial established that defendant gave a police officer four plastic baggies in exchange for $40 and the contents of those bags tested positive for the presence of heroin.

¶ 2 Following a bench trial, defendant Leslie Hughes was found guilty of the delivery of a controlled substance and sentenced to four years in prison. On appeal, he contends that the trial court failed to ensure that his jury waiver was knowingly and intelligently made. Defendant

further contends that he was not proven guilty beyond a reasonable doubt because, *inter alia*, only one of the officers involved in the alleged transaction testified at trial and this testimony was unsupported by any documentary or video evidence. We affirm.

¶ 3 At a January 2013 court date, the public defender was appointed to represent defendant and the trial court explained that defendant had a right to a trial, *i.e.*, a "trial by jury." After asking if defendant understood the charges against him and hearing defendant's affirmative answer, the court then asked defendant if he knew what a "trial by jury" was, and defendant answered "Yes, sir." At another court date, the court again told defendant that he had the right to a trial by jury and asked if defendant knew what a jury trial was. Defendant answered "Yes."

¶ 4 At an August 2013 court date, the following exchange took place:

> "THE COURT: All right. [Defendant] your attorney has handed me a document purportedly signed by you asking this trial by be my, [*sic*] as opposed to a jury, did you sign this jury waiver?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did anybody make any promises or threats to get you to waive your right to a jury trial?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you understand on this felony, if you are found guilty, it's between three and seven, but apparently there is something in your background that will make it X mandatory, six to thirty, do you understand?
>
> THE DEFENDANT: Yes."

The trial court accepted defendant's jury waiver. However, the cause was continued because the State elected to proceed on a different case.

¶ 5 At the next date, the trial court asked if defendant wanted a trial "with the judge or trial with the jury." Defendant replied "judge." The following exchange then took place:

"THE COURT: Have you signed the jury waiver?

THE DEFENDANT: Yes, sir.

THE COURT: Is this your signature on the document entitled jury waiver?

THE DEFENDANT: Yes.

THE COURT: Anybody make any promises or threats to get to you [to] waive your right to trial by jury?

THE DEFENDANT: No, sir.

THE COURT: Did you make that decision of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Jury waiver is accepted."

The record contains defendant's signed jury waiver. The matter proceeded to a bench trial.

¶ 6 Officer Pearson testified that he was working as an undercover buy officer in the vicinity of 6426 South Ellis on August 1, 2012, when he spoke to defendant. As a result of that conversation, Pearson recovered information regarding "a narcotic" and a phone number. On August 3, 2012, he returned to the same area and met with a detective. On August 10, 2012, Pearson again returned to the vicinity of 6426 South Ellis. Prior to arriving, he called the phone number he received from defendant and spoke to a man.

¶ 7 When he arrived at the location, he purchased heroin from defendant. Specifically, Pearson walked into an alley and saw defendant standing next to a shopping cart. He walked up, and defendant asked him "how many" he wanted. Pearson explained that he interpreted defendant's question to indicate that defendant had heroin. Pearson gave defendant $40 in

exchange for four clear bags. He explained that the bags were packaged in a clear Ziploc bag and imprinted with "dice logos." Pearson then went to his car. He indentified defendant to his team via radio. He later identified defendant from a photographic array. Defendant was taken into custody on December 19, 2012. During cross-examination, Pearson testified that he was accompanied by Officer Harris during the transaction. Pearson did not make either an audio or video record of his interaction with defendant.

¶ 8 The items Pearson received from defendant were later inventoried. The parties stipulated that the contents of the four baggies had an estimated weight of .6 gram and tested positive for the presence of heroin.

¶ 9 In finding defendant guilty of the delivery of a controlled substance, the trial court stated that the question was not "so much a question of what could have been done but the evaluation of the evidence is whether or not the evidence is proving this defendant guilty beyond a reasonable doubt." The court then stated that it was "mystery" why the office of the State's Attorney did not "encourage" the police to utilize "the readily available and cheap surveillance tools that exist even on someone's common phone." However, given the closeness between the meetings with defendant and the actual buy, the court found that defendant had been proven guilty beyond a reasonable doubt. Defendant was sentenced to four years in prison.

¶ 10 On appeal, defendant first contends that the trial court failed to ensure that his jury wavier was knowingly and intelligently made because the court failed to conduct any inquiry into his understanding of the right to a jury trial or the ramifications of waiving that right. Defendant admits that he did not challenge the validity of his jury waiver before the trial court, but argues that this issue should be reviewed pursuant to the plain error doctrine.

¶ 11 Pursuant to the plain error doctrine, a reviewing court may consider an issue that was not preserved when the evidence was closely balanced such that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or the error was so serious it affected the fairness of the proceedings and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Whether a defendant's fundamental right to a jury trial has been violated may be considered under the second plain error prong. *People v. Campbell*, 2015 IL App (3d) 130614, ¶ 22. The first step to determine whether the plain error doctrine applies is to determine whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). Absent reversible error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 12 The validity of a jury waiver does not rest on any precise formula; rather it depends on the facts and circumstances of a particular case. *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001). Although the trial court must ensure that a defendant's jury waiver is understandingly made, no set admonition is required before an effective waiver may be made (*id*.), and the court is not required to explain the ramifications of a jury waiver unless there is an indication that the defendant did not understand the right to a jury trial (*People v. Steiger*, 208 Ill. App. 3d 979, 981 (1991)).

¶ 13 Here, defendant was represented by counsel, presented a written jury waiver to the court, and acknowledged that it was his signature on the waiver. At two different court dates the trial court asked defendant if he knew what a jury trial was, and defendant answered yes. Additionally, on two separate occasions, the trial court asked defendant if he wanted a trial with the judge or the jury, and defendant answered judge each time. Defendant also indicated, twice, that no one made any promises or threats to get him to give up right to a jury trial and that he

made the decision of his own free will. The record reveals that defendant told the trial court that he understood what a jury trial was and that he wanted to proceed with the "judge" as opposed to a jury. See *People v. Bannister*, 232 Ill. 2d 52, 69 (2008) (the "pivotal knowledge that the defendant must understand" is that the facts of the case will be determined by a judge rather than a jury). Although defendant is correct that the trial court did not explain the difference between a jury trial and a bench trial, the record reveals that each time the trial court asked defendant if he knew what a "trial by jury was," defendant answered in the affirmative. Absent any indication that defendant did not understand what jury trial was, the court was not required to explain the ramifications of a jury waiver. See *Steiger*, 208 Ill. App. 3d at 981.

¶ 14 Defendant, however, contends that his case is similar to *People v. Sebag*, 110 Ill. App. 3d 821 (1982). In that case, the defendant was *pro se*, and the court told him he was entitled to have his case tried before a jury or judge. The defendant chose the judge, and trial court found that the defendant waived his right to a jury trial. On appeal, the court observed that the defendant was not advised of the meaning of a trial by jury nor did it appear that he was familiar with criminal proceedings, and that the trial court's discussion in the record related to the offense of battery, but the defendant was later found guilty of public indecency. *Sebag*, 110 Ill. App. 3d at 829. The court found that the record did not adequately establish a waiver of the defendant's right to a jury trial on the public indecency charge, reversed his conviction and remanded for a new trial. *Sebag*, 110 Ill. App. 3d at 829.

¶ 15 *Sebag* is inapposite to the case at bar because defendant was represented by counsel, the court specifically stated the defendant could be tried by a judge or a jury, and defendant indicated his understanding of trial by jury and that he wanted a trial by judge.

¶ 16 Here, the record indicates that the court explained to defendant that his case could be decided by a judge or a jury, and defendant indicated his understanding of what a jury trial was. Accordingly, we reject defendant's contention that he did not knowingly waive his right to a jury trial because the record shows that the court fulfilled its duty to see that defendant's jury waiver was made "knowingly and understandingly." See *In re R.A.B.*, 197 Ill 2d at 364. As the trial court did not err, there can be no plain error and we must honor defendant's procedural default. See *Williams*, 193 Ill. 2d at 349.

¶ 17 Defendant next contends that he was not proven guilty beyond a reasonable doubt. He argues that the State presented the testimony of only one witness which was unsupported by "any documentary, video, or other evidence," and that he was not arrested until four months after the alleged narcotics transaction.

¶ 18 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The trier of fact is responsible for evaluating the credibility of the witnesses, weighing witness testimony, and determining what inferences to draw from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A reviewing court will not retry the defendant (*People v. Lloyd*, 2013 IL 113510, ¶ 42), or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses (*Brown*, 2013 IL 114196, ¶ 48). This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 19 Here, viewing the evidence at trial in the light most favorable to the State, as we must (*id.*), there was sufficient evidence to find defendant guilty beyond a reasonable doubt based

upon Officer Pearson's testimony that he gave defendant $40 in exchange for four clear bags that were later determined to contain heroin. The trial court found Officer Pearson's testimony credible, as evidenced by its verdict. It was for the trial court, as the trier of fact, to determine witness credibility; we will not substitute our judgment for that of the trial court on this issue. *Id*.

¶ 20 Defendant, however, contends that the evidence was insufficient because the State presented the uncorroborated testimony of only one witness. He further argues that the State's decision not to present the testimony of either Officer Harris, who was also present at the transaction, or the arresting officer suggests that their testimony might have been unfavorable to the State. He also argues that the failure of the police to arrest him immediately and to record the transaction in some manner "erodes" police credibility.

¶ 21 Initially, we reject defendant's conclusion he was not proven guilty beyond a reasonable doubt because the State only presented the testimony of Officer Pearson at trial. Defendant sets forth no authority for the proposition that Pearson's testimony had to be corroborated to sustain a conviction. In fact, the law is precisely the opposite. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant.").

¶ 22 We disagree with defendant's conclusion that the State's failure to produce Officer Harris and the arresting officer suggests that the officers' testimony would have been unfavorable to the State. While it is true that caselaw recognizes the propriety of drawing such an inference under certain circumstances, it is also true that the State has no obligation to call every possible witness. See *People v. Smith*, 3 Ill. App. 3d 64, 67 (1971). The State "may accept the risk of [the] unexplained absence of a witness so long as the offense is otherwise proved." *People v.*

Gonzales, 125 Ill. App. 2d 225, 235 (1970). Defendant was, of course, free to comment on the fact that the State did not call the other officers (*id.*), and counsel cross-examined Pearson regarding whether he was alone at the time of the transaction. The decision whether to draw the inference and what effect, if any, that inference may have had on the weight to which the court afforded Pearson's testimony was a matter for the trial court to determine as the trier of fact. See *Ross*, 229 Ill. 2d at 272 (the trier of fact is responsible for evaluating the credibility of the witnesses, weighing their testimony, and determining what inferences to draw from the evidence presented).

¶ 23 Finally, defendant argues the failure of the police to arrest him until four months after the instant transaction and to utilize video or audio recordings in order to memorialize the events surrounding the transaction "erodes the credibility of the police and of our State." However, as stated above, the testimony of a single witness if positive and credible is sufficient to sustain a defendant's conviction (*Siguenza-Brito*, 235 Ill. 2d at 228). In the case at bar, the trial court specifically noted the transaction was not recorded, but still found the evidence sufficient to find defendant guilty. The court had the opportunity to observe Pearson testify and found him credible after weighing all the testimony presented at trial including the fact that Pearson did not record the transaction. The trier of fact is not required to disregard the interferences that normally flow from the evidence or to seek out all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt. See *In re Jonathan C.B.*, 2011 IL 107750, ¶ 60.

¶ 24 Ultimately, this court cannot say that no rational trier of fact could have found defendant guilty when Pearson testified that he gave defendant $40 in exchange for four bags, the contents of which tested positive for the presence of heroin. *Brown*, 2013 IL 114196, ¶ 48. This court reverses a defendant's conviction only where the evidence is so unreasonable or unsatisfactory

that a reasonable doubt of his guilt remains (*id.*); this is not one of those cases. Therefore, we affirm defendant's conviction for delivery of a controlled substance.

¶ 25 Accordingly, we affirm the judgment of the circuit court of Cook County in all respects.

¶ 26 Affirmed.