

No. 1-14-0048

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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 22406
)	
JASON BURTON,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Defendant's conviction for possession of controlled substance with intent to deliver affirmed. Evidence showed that defendant accepted money in exchange for items taken from tissue containing bags of heroin.
- ¶ 2 Following a bench trial, defendant Jason Burton was convicted of possession of heroin with intent to deliver and sentenced to seven years' imprisonment. On appeal, defendant urges us

to reduce his conviction to simple possession because the State failed to prove beyond a reasonable doubt that he intended to deliver the drugs. We affirm.

¶ 3 At trial, Officer John Frano testified that he and three other officers went to an apartment building at 1120 South California in Chicago at approximately 8:40 p.m. on November 10, 2012. Acting on a tip, Frano recovered a large plastic bag containing a softball-sized bag of white powder from beneath the rear porch. Ultimately, the State discovered that this softball-sized bag did not contain narcotics.

¶ 4 But Frano stayed underneath the porch and observed defendant in the alley, 50 to 60 feet away. He testified that, although it was dark, he could see defendant "adequately" in the artificial lighting of the alley. On two occasions, defendant accepted money from unknown individuals and then walked to the stairs behind 1120 South California Avenue, stopping three to four feet from Frano. Both times, defendant reached behind a piece of plywood, retrieved a white tissue, removed a small item from the tissue, and returned the tissue to its original location. Afterwards, defendant walked back and tendered the item to the individual who had given him money.

¶ 5 Following the second transaction, Frano recovered the tissue and found nine Ziploc bags of suspect heroin, each bearing a red decal with the words "stay high, stay high." Defendant was arrested and, while in custody, told Frano that the bag of powder from beneath the porch belonged to residents of another building who left it there earlier in the day. The following colloquy then occurred:

"Q [Assistant State's Attorney]: And did he say anything further?"

A [Officer Frano]: He then said the only drugs that were his were the narcotics that he was selling.

Q: And was he specific about those narcotics?

A: Yes.

Q: What did he say?

A: He said the narcotics that I recovered from the white tissue was [*sic*] the narcotics he was selling.

Q: Did he specifically say the drugs recovered from the base of the plywood?

[ASSISTANT PUBLIC DEFENDER]: Objection. Leading.

THE COURT: Is there something refresh [*sic*] your memory as to what he exactly said as opposed to summarizing what he might have said?"

Frano refreshed his memory with his case report and the following colloquy then occurred:

"Q [Assistant State's Attorney]: Okay. And did the defendant state anything more specifically about the drugs that he was admitting to owning?

A [Officer Frano]: Yes. He said that the heroin that was his was the heroin that I recovered from the base of the plywood."

¶ 6 On cross-examination, Frano testified that he did not use binoculars to view defendant in the alley.

¶ 7 Officer Bonnstetter testified that he searched defendant and recovered \$95.

¶ 8 The parties stipulated to the chain of custody for the suspected heroin. They also stipulated that the nine bags weighed 3.2 grams and that six of those bags contained heroin.

¶ 9 At the close of trial, the following colloquy occurred:

"THE COURT: Refresh my memory as to what the officer testified about what the defendant said concerning the 9 bags.

* * *

ASSISTANT STATE'S ATTORNEY: He said that the only heroin that was his was the heroin recovered from the base—that the officers recovered from the base of the plywood that he was selling.

THE COURT: That he was selling, okay, that's what I thought, okay."

¶ 10 The court found defendant guilty of possession of heroin with intent to deliver. In its findings, the court noted that "the officer indicated he was hiding in a certain location, where he was at, he could see what he said he saw, which is basically corroborated by the defendant's own statement" that "the 9 bags, were mine, I was just selling those bags." After denying defendant's motion for a new trial, the court sentenced defendant to seven years' imprisonment.

¶ 11 On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he intended to deliver the heroin. Defendant argues that the quantity of heroin he possessed (3.2 grams) is consistent with personal use, and that the State presented no additional circumstantial evidence of his intent to deliver, such as weapons, technology associated with drug trafficking, purity of the drugs, or the denominations of the \$95 found on his person. He also argues that it was unreasonable to believe that Officer Frano observed two drug transactions in an alley at night from a distance of 50 to 60 feet without the use of binoculars while under a porch.

¶ 12 When a defendant challenges the sufficiency of the evidence, the reviewing court must consider all the evidence in the light most favorable to the State and determine whether 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 reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving the credibility of witnesses or the weight of the evidence. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Moreover, the trier of fact is not required to disregard inferences that flow normally from the evidence or to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Rather, a conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 13 To sustain a conviction for possession of a controlled substance with intent to deliver, the State must prove the defendant had knowledge of the presence of the drugs, the drugs were in the immediate control or possession of the defendant, and the defendant intended to deliver the drugs. 720 ILCS 570/401 (West 2010); *People v. Alexander*, 2014 IL App (2d) 120810, ¶ 36. On appeal, defendant only contests the element of intent to deliver.

¶ 14 Because direct evidence of intent to deliver is rare, intent must usually be proven by circumstantial evidence. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). When only a small amount of drugs is found, the minimum evidence needed to establish intent to deliver is that the drugs were packaged for sale and at least one additional factor tending to show intent. *People v.*

Blakney, 375 Ill. App. 3d 554, 559 (2007). These factors include, but are not limited to, the purity of the drugs and the possession of drug paraphernalia, weapons, large amounts of cash, or police scanners. *Robinson*, 167 Ill. 2d at 408. The absence of these particular factors is not dispositive, as other circumstantial evidence may be equally probative of intent. *People v. Bush*, 214 Ill. 2d 318, 328 (2005); *People v. Branch*, 2014 IL App (1st) 120932, ¶¶ 11-13. Whether the evidence was sufficient to prove intent to deliver is determined on a case-by-case basis, considering all relevant facts and circumstances. *Robinson*, 167 Ill. 2d at 411-13.

¶ 15 In this case, the evidence at trial was sufficient to establish that defendant intended to deliver the heroin which he admitted possessing. Officer Frano testified he twice saw defendant exchange money for items from a tissue hidden behind a piece of plywood. That tissue contained 3.2 grams of heroin packaged in nine Ziploc bags, each bearing a red decal with the words "stay high, stay high." Viewing this evidence in the light most favorable to the State, it is reasonable to infer that defendant dealt heroin to those two individuals, and that he further intended to deliver the remainder of the narcotics in that tissue.

¶ 16 Our supreme court's decision in *People v. Bush*, 214 Ill. 2d 318 (2005), is instructive. In *Bush*, a police officer twice observed an individual approach defendant while the defendant was standing near an apartment building around 2 a.m. After speaking to the individual, the defendant accepted money from the individual, went to a nearby fence, retrieved small items from a brown paper bag, and gave the items to the individual. *Id.* at 321. The officer recovered the bag and found cocaine inside of it. *Id.* The supreme court found that the State had sufficiently proved the defendant's intent to deliver, finding that this series of events "support[ed] the

inference that [the] defendant intended to engage in further transactions." *Id.* at 329. And the court rejected the notion that the State's failure to prove that the defendant had, in fact, given narcotics to the individual who approached her meant that it failed to prove the defendant's intent to deliver. *Id.* at 324, 326. The two hand-to-hand transactions that Officer Frano observed in this case are very similar to the transactions at issue in *Bush*.

¶ 17 Defendant argues that *Bush* is distinguishable because, in this case, Frano observed defendant's transactions in a dark alley from 50 to 60 feet away, while Frano was hidden under a porch. But we note that the officer in *Bush*, like Frano, observed the transactions at night. *Id.* at 321. And, in this case, it was not unreasonable to conclude that Frano could see the transaction from his vantage point, given his testimony that the alley was illuminated. Moreover, defendant retrieved the items from the tissue just three to four feet from Frano. Frano was thus able to observe the critical piece of the transaction—the retrieval of the items that were ultimately delivered—from a short distance. Even if Frano had not seen money change hands, the absence of money does not erase defendant's intent to deliver heroin. See 720 ILCS 570/102 (West 2012) ("deliver," for purposes of possession with intent to deliver, 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" (emphasis added)).

¶ 18 We would add that defendant's claim of personal use is somewhat hard to credit in light of the particular circumstances of this case. While the amount of narcotics recovered was not particularly high, and the presence of individual packages could be consistent with personal use in certain factual settings, we do not that believe that this is such a factual setting. Defendant's

narcotics were not recovered in his home, or his school locker, or in a backpack. Defendant was essentially loitering in an alley at night, with the narcotics stashed under a piece of plywood, and waiting for others to approach him. Defendant is hard-pressed to explain why he would keep his "personal" stash of narcotics in any alley, nor can he credibly claim that he had just purchased those drugs from someone and was on his way home. The trial court was more than justified in finding intent to deliver under these facts.

¶ 19 Defendant also claims that the trial court's finding of intent was error because the trial court misremembered the substance of defendant's statement to the police. Again, at the close of the State's rebuttal argument, this exchange occurred:

"THE COURT: Refresh my memory as to what the officer testified about what the defendant said concerning the 9 bags.

* * *

ASSISTANT STATE'S ATTORNEY: He said that the only heroin that was his was the heroin recovered from the base—that the officers recovered from the base of the plywood that he was selling.

THE COURT: That he was selling, okay, that's what I thought, okay."

¶ 20 Defendant says that this characterization of defendant's statement to the police was incorrect, that he merely admitted that those drugs recovered from the base of the plywood belonged to him, not that he was *selling* those drugs. Defendant isolates language from one portion of Officer Frano's testimony, quoted in detail above (see ¶ 5), that defendant "said that

the heroin that was his was the heroin that I recovered from the base of the plywood"—testimony that made no mention of selling those drugs.

¶ 21 But in reviewing the record as a whole, we do not think that the State or the trial court misremembered Officer Frano's account of his conversation with defendant. Officer Frano first testified that, during his interview with defendant at the police station, defendant "said the only drugs that were his were the narcotics that he was selling." When the State pressed him for more specificity, he testified that defendant "said the narcotics that I recovered from the white tissue were the narcotics that he was selling." Not once but twice, Frano attributed the word "selling" to defendant's custodial statement. The prosecutor then pressed Frano as to whether defendant had been referring to "the drugs recovered from the base of the plywood." Pinning down the precise location of the narcotics was obviously important to the State, because there was another bag of suspect narcotics recovered that night, and about which defendant was also questioned by Frano at the police station—the softball-sized bag of white powder Frano found under the porch, which tests later revealed did *not* contain narcotics. The prosecutor was clearly trying to clarify that the drugs which defendant admitted selling were the narcotics stashed under the plywood in the alley, not the bag under the porch.

¶ 22 The defense objected to the State's question because it was a leading question. The judge suggested that Frano refresh his memory, and after Frano refreshed his memory with his case report, the prosecutor asked, "And did the defendant state anything more specifically about the drugs that he was admitting to owning?" Frano's reply, the one isolated by defendant for his

argument here, was: "Yes. He said that the heroin that was his was the heroin that I recovered from the base of the plywood."

¶ 23 We do not read that exchange, as defendant posits, for the proposition that Frano corrected his testimony and disavowed any admission by defendant to selling those drugs. The point of these follow-up questions was to confirm which of the narcotics—those behind the plywood, or those under the porch—were the ones defendant admitted to selling. Viewed in this light, the fact that Frano did not use the word "selling" for the third time, but rather called it "the heroin that was his," does not transform this case from one of intent to deliver to simple possession. We do not think the court's recollection of Frano's testimony was incorrect.

¶ 24 And even if defendant were correct, and the trial court misapprehended Frano's testimony, the other evidence—defendant's two transactions, the packaging of the narcotics, and his behavior in that alley—was sufficient to prove his intent to deliver. Whether defendant admitted to selling drugs or just possessing them, the record shows that his statements were neither the only evidence supporting a finding of intent nor essential for establishing intent beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007) (reviewing courts should view evidence as a whole to determine whether conviction is supported). Thus, any mistake by the trial court, if it indeed occurred, would not create a reasonable doubt as to defendant's guilt.

¶ 25 Defendant also makes a passing claim that the trial court's incorrect recollection of Frano's testimony violated his right to due process, citing *People v. Mitchell*, 152 Ill. 2d 274 (1992). First, defendant has not raised this claim as an issue separate from his reasonable doubt

claim. And he has not explained, beyond his citation to *Mitchell*, how the trial court's alleged mistake violated his right to due process. Moreover, we have already explained that we do not believe the trial court's recollection was incorrect.

¶ 26 But leaving that aside, we would not find that the trial court's error required reversal, in any event. In *Mitchell*, our supreme court held that the trial court, acting as the trier of fact, violated the defendant's right to due process where trial court "erred in failing to recall and consider the crux of [the] defense." *Id.* at 326. But the court also concluded that this error was harmless beyond a reasonable doubt because the "other evidence of [the] defendant's guilt [was] overwhelming." *Id.* Here, the other evidence supporting defendant's intent to deliver—specifically, Frano's observing defendant engage in two hand-to-hand transactions from the same tissue that contained heroin, as well as the packaging of the heroin into small, labeled packets—overwhelmingly proved his intent to deliver. Thus, any error in the trial court's memory of Frano's testimony would be harmless.

¶ 27 We affirm defendant's conviction.

¶ 28 Affirmed.