THIRD DIVISION
January 20, 2016

No. 1-14-0771

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 17225
	)	
REGINALD WASHINGTON,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in admitting other-crimes evidence during defendant's trial for delivery of a controlled substance.

¶ 2 Following a bench trial, defendant Reginald Washington was found guilty of delivery of less than one gram of a controlled substance (heroin) and was sentenced as a mandatory Class X offender to nine years in prison. On appeal, defendant contends the trial court erroneously admitted evidence of an earlier delivery of a controlled substance by defendant for the improper purposes of showing defendant's intent and his propensity to commit crime, that the probative

value of the evidence was substantially outweighed by prejudicial impact, and that the error was not harmless. We affirm.

¶ 3 The State charged defendant in separate indictments with two incidents of delivery of a controlled substance (0.1 gram or less of heroin) that occurred on two consecutive days, on March 20 and 21, 2012. The State elected to proceed to trial on the second delivery, on March 21, and, prior to trial, moved successfully to introduce evidence at trial of the March 20 delivery.

¶ 4 The State's main witness, Kevin Sellers, testified at trial to the following. On March 20, 2012, he was an officer in the Chicago Police Department's Narcotics Division and was working as an undercover purchasing officer. Between 1 and 2 p.m. on that date, he drove to the 4300 block of West Monroe and saw defendant on the north side of the street. Sellers had never seen defendant before that time. He asked defendant for "two blows," which was street jargon for heroin. Defendant told Sellers to park his car, approached the car, introduced himself as "Low," and asked Sellers if he was the police. Sellers replied that he was not. Defendant walked down the street to where another man was standing and received items from him. Defendant walked back toward Sellers' car and motioned Sellers to drive toward him. Defendant handed Sellers two tinfoil packets and Sellers gave him $20 in pre-recorded funds. Sellers drove away out of the vicinity and radioed to other team members that a positive purchase had taken place.

¶ 5 Within five minutes, two other members of Sellers' team, Officers Davila and Eldridge, approached defendant and briefly detained him, ostensibly to make a contact card on him. Sellers drove by and radioed his team that the man they had detained was the person who sold narcotics to Sellers. His team also detained the second man who had handed items to defendant, and Sellers notified his team that that man was also involved in the drug transaction.

¶ 6 On the following day, March 21, at about 2 p.m., Sellers returned to the same location on West Monroe and observed defendant standing across the street and just westbound of where he had stood the previous day. Sellers asked defendant for "six blows." Defendant instructed him to park his car and Sellers complied. Through his rear-view mirror, Sellers observed defendant walk to a blue van parked at 4301 West Monroe, about half a block from where Sellers was parked. Defendant had a conversation with someone in the blue van and reached into the passenger side window. Then defendant walked to the passenger side window of Sellers' car and showed him five tinfoil packets. Defendant said the girl in the van had only five packets and they were waiting to get more. Sellers gave defendant $50 in pre-recorded funds and defendant gave him the five packets. Sellers drove off and radioed his team that he had made a positive purchase from the same offender as on the previous day.

¶ 7 On one of the two dates, Sellers asked defendant for his phone number. Defendant replied that he would give Sellers his phone number "the next time [Sellers] came through." Sellers was not positive on which of the two dates that conversation had taken place, but he believed it was on the 20th. Defendant was not immediately arrested after the second delivery on March 21 because the investigation was on-going. Ultimately a warrant was issued for his arrest.

¶ 8 On each of the two occasions after purchasing packets from defendant, Sellers inventoried the packets at the police station. The parties stipulated that the five packets defendant delivered to Sellers on March 21 were sent to the Illinois State Police crime lab; a forensic chemist tested one of the five packets, and it contained less than 0.1 gram of heroin. Sellers and his team never recovered any of the prerecorded funds.

¶ 9 After the State rested, the defense called Officer Gerold Lee, a narcotics officer and a member of Sellers' team on March 21, working as a surveillance officer. He testified that on that date, he observed the hand-to-hand transaction between defendant and Sellers, and that the transaction occurred on the driver's side of Sellers' car, not on the passenger side.

¶ 10 In closing argument, defense counsel argued that it defied credibility that defendant would have sold heroin to Sellers on March 21; that defendant would have deduced Sellers was an undercover police officer because, on the previous day, defendant had been detained briefly by two police officers just minutes after his sale of heroin.

¶ 11 At the close of the evidence, the trial court found defendant guilty of delivery of a controlled substance. The court found that the evidence of the transaction on March 20 was "admissible for identification purposes and also as to intent on Reginald Washington's part." The court also rejected the defense argument that defendant would not have made a second sale of heroin to Sellers after being detained by police officers the previous day. The court found that "[t]here's no reason in the world [defendant] would assume or speculate that the guy he sold drugs to five minutes ago must have been a cop." Defendant filed a motion for a new trial, alleging, in relevant part: "The Court erred in granting the State's Motion to Allow Proof of Other Crimes." The trial court denied defendant's motion. The court sentenced defendant to nine years in prison. Defendant's motion to reconsider sentence was denied.

¶ 12 On appeal, defendant first contends that the trial court admitted the evidence of the March 20 drug transaction for the improper purpose of showing that defendant had a propensity to deal in drugs.

¶ 13 Evidence of other crimes is admissible only if relevant for any purpose other than to show a defendant's propensity to commit crimes. *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010). Such purposes include but are not limited to motive, intent, identity, and accident or absence of mistake. *Id.* Here, in introducing its motion to allow evidence of other crimes, the State advised the court that the purpose was "primarily for identification, the prior delivery, the first time, identified the defendant. We believe that identification will be an issue in this case as the arrest date is so long after the incident."

¶ 14 Defendant contends that the trial court erred in admitting evidence of the March 20 drug transaction and that the court improperly considered that evidence as proof that defendant sold drugs on March 21 because the March 20 transaction showed he had a propensity to sell drugs. In support of his claim, defendant's opening brief has highlighted a portion of an excerpt from the court's findings at the end of trial:

> "But as far as the evidence is concerned in this case, *there's no question in my mind of a delivery on March 21st, based on the fact he sold the stuff to the guy the day before*. The guy came back to get more the next day. He got less than what he wanted. He got five [packets of heroin] instead of six. And Washington was the one who sold him the drugs on March 21st."

¶ 15 Defendant submits that the words he has highlighted indicate that the court used the March 20 drug transaction as propensity evidence. We reject his conclusion. The last sentence of the above excerpt shows that the court was addressing the issue of identification. The court had stated a moment earlier: "Sellers said this was a man who sold him drugs on the 20th and 21st. That is admissible for identification purposes and also as to intent on Reginald Washington's

part." The obvious meaning of the words highlight above was that "he"--defendant--was the same person who had "sold the stuff to the [undercover agent] the day before."

¶ 16 Defendant next contends that even if the trial court did not improperly use the other-crimes evidence for propensity, the facts of the March 20 crime were unnecessary to bolster Officer Sellers' identification of defendant. All that needed to be said about the March 20 transaction, defendant claims, is that Sellers had seen him the day before on the same block and in similar circumstances, and that defendant was detained by Officer Davila. We disagree. In the context of unlawful narcotics transactions, evidence of the defendant's prior transactions is admissible to prove, *inter alia*, his identity. *People v. Vasquez*, 180 Ill. App. 3d 270, 278 (1989); *People v. Sanderson*, 48 Ill. App. 3d 472, 474 (1977). Moreover, to prove identity, the State must present "a strong and persuasive showing of similarity between the charged crime and the other-crimes evidence." *People v. Allen*, 335 Ill. App. 3d 773, 780 (2002), citing *People v. Robinson*, 167 Ill. 2d 53, 65 (1995). In *People v. Borawski*, 61 Ill. App. 3d 774 (1978), we held that the other-crimes evidence strengthened the agent's identification of the defendant by his extensive opportunities to observe the defendant. Here, the narcotics transactions took place on March 20 and 21. Details of the March 20 transaction were relevant to how Sellers was able to recognize defendant as the individual who delivered the heroin to him on March 21. Sellers did more than merely "see" defendant on March 20. Sellers' identification of defendant on March 20 was heightened by the fact that he observed defendant at close quarters while the men were exchanging money for heroin. Sellers had never seen defendant prior to March 20 and, as defendant was not arrested until some months after the March 20 and 21 transactions, it was

relevant for Sellers to explain under what conditions he observed defendant so as to be able to make an identification of him at a much later date.

¶ 17 Because identity was an issue at trial and because evidence of the March 20 transaction was relevant to that issue, we need not consider defendant's additional arguments regarding the relevance of the other-crimes evidence to his intent, which he contends was not at issue. Based on the evidence's relevance to the contested issue of identity, the trial court did not abuse its discretion in admitting it.

¶ 18 Further, evidence of the March 20 transaction served to show why defendant was willing to sell narcotics to Sellers on March 21 after defendant had been stopped briefly by police minutes after the March 20 sale. In *People v. Lowery*, 231 Ill. App. 3d 788 (1992), at defendant's trial for unlawful delivery of a controlled substance (cocaine) to an undercover officer, this court ruled that evidence of a prior sale of cannabis to the same officer, during which time he told the officer he could supply him with cocaine, was relevant to show the plausibility of the meeting for the later drug sale. *Id.* at 793. In *People v. Borawski*, 61 Ill. App. 3d 774 (1978), the defendant was charged with the unlawful delivery of methylphenidate (Ritalin) to an undercover agent on August 19. At trial, the State proffered evidence that the defendant discussed with the agent a possible future drug sale. The State also introduced evidence of three prior sales of Ritalin to the same agent during the previous four days. On appeal, this court found no error in admitting the evidence of the prior drug transactions, as it showed the established relationship between the defendant and the agent and explained the ease with which the agent was able to obtain the Ritalin on August 19. We also further found no error in admission of the testimony that at the

close of the August 19 transaction, the defendant discussed a possible future sale. *Id.* at 779. See also *People v. Vasquez*, 180 Ill. App. 3d 270, 278 (1989).

¶ 19 Here, the evidence of the prior sale on March 20 was relevant, therefore, to establish defendant's identity, as well as to show the plausibility of the March 21 drug sale.

¶ 20 We also reject defendant's claim that the probative value of the March 20 sale was substantially outweighed by prejudicial impact. The rule generally barring other-crimes evidence is based on the belief that such evidence may over-persuade a jury to convict a person only because the jury believes the defendant is a bad person deserving punishment. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). In a bench trial, however, it is presumed that the trial court considered the other-crimes evidence only for the limited purpose for which it was introduced. *People v. Nash*, 2013 IL App (1st) 113366, ¶ 24. Here, the trial court's decision was based on its determination that the significant and compelling evidence of defendant's guilt was his identity as the same man who, one day earlier, had sold two packets of heroin to the same undercover officer. We find nothing in the record that overcomes the presumption that the trial court considered the other-crimes evidence only for its valid and limited purposes, and that the probative value was not outweighed by prejudicial effect.

¶ 21 Finally, defendant asserts that prejudicial error occurred and asserts that the error was not harmless. We have found no error in the introduction at trial of evidence of the March 20 transaction. Even assuming *arguendo* that the trial court did err in admitting other-crimes evidence, the error was harmless beyond a reasonable doubt where the evidence was not closely balanced. *People v. Haynes*, 174 Ill. 2d 204, 246 (1996). Defendant was tried by the court, and, as we have noted earlier in this decision, it is presumed in a bench trial that the trial court

considered the other-crimes evidence only for the limited purpose for which it was introduced. Moreover, the trial court heard the testimony of Officer Gerold Lee, who was called as a defense witness to impeach Sellers on a detail of the March 21 sale. Lee testified he witnessed the March 21 narcotics transaction as a surveillance officer and saw defendant tender the heroin to Sellers through the driver's side window, rather than the passenger side window as Sellers had testified. Consequently, Sellers' testimony, identifying defendant as the individual who sold the heroin to Sellers on March 21, was corroborated by Officer Lee. We conclude that the evidence in this case was not closely balanced and any error was harmless.

¶ 22 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.