SECOND DIVISION
February 14, 2017

No. 1-14-2725

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 505
	)	
ISAIAH BARNEY,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his conviction for possession of a controlled substance with the intent to deliver; defendant is not entitled to plain-error relief from the forfeiture of his claim that the trial court failed to ensure he knowingly and intelligently waived his right to a jury trial.

¶ 2 Following a bench trial, defendant Isaiah Barney was found guilty of the Class 1 felony of possession of more than three grams of heroin with the intent to deliver and sentenced to four years' imprisonment with two years of mandatory supervised release. On appeal, Barney first challenges the sufficiency of the evidence to prove beyond a reasonable doubt both his

possession of, and intent to deliver, the recovered heroin. Barney argues that the testimony of two arresting officers was contradictory and implausible, and that the quantity and packaging of the heroin was consistent with personal use, and not intent to deliver. Barney also contends that he is entitled to a new trial because the trial court failed to ensure that he knowingly and intelligently waived his right to a jury trial. We affirm.

¶ 3 Following his arrest, Barney was charged with one count of possession with intent to deliver more than one gram but less than 15 grams of a controlled substance, *i.e.*, more than three grams of heroin. 720 ILCS 570/401(c)(1) (West 2012).

¶ 4 At a status date on July 10, 2013, defense counsel stated, "We request a bench trial," and the court set the case for a bench trial on August 28, 2013. The trial date was continued several times and although Barney was in court when reference was made to the upcoming trial as a bench trial on six occasions, he did not object. On four of those occasions, it was defense counsel who indicated that the trial would be a bench trial.

¶ 5 Before trial on July 10, 2014, the following exchange occurred regarding the jury waiver:

"THE COURT: Mr. Barney, is before the court for trial, is that right?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Barney, you have the right to have a jury trial. Do you know what kind of trial that is?

DEFENSE COUNSEL: Yes, ma'am.

THE COURT: Are you waiving your right to have that kind of trial?

THE DEFENDANT: Yes, ma'am.

THE COURT: The Court accepts both your oral and your written waivers of your right to have a jury trial."

¶ 6 The written waiver is signed by Barney and states, "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing."

¶ 7 On December 1, 2012, Chicago police detective J.M. Malkowski was on patrol with his two partners, Sergeant Jack Axium and Officer A. Travlos, in the area of 128 South Whipple Street in Chicago, Illinois. Officer Malkowski[1] was dressed in plain clothes and seated in the front passenger seat of an unmarked police vehicle. Shortly after 3:00 p.m., Officer Malkowski noticed Barney standing in an alley near the back of an abandoned building. Barney was facing away from the police vehicle toward the front of the building, where about five other individuals were standing approximately 60 or 70 feet away from him. Officer Malkowski's passenger side window was rolled down when he "heard and observed [Barney] yelling blows" several times towards the individuals in front of the building. Based on over 19 years of experience, Officer Malkowski understood that the term "blows" was a street term used in the sale of heroin.

¶ 8 Sergeant Axium, who knew Barney from "a couple" of prior encounters and who was sitting in the rear passenger seat with his window up, did not hear Barney yell "blows." When asked if anyone was near where Barney was standing, Axium stated, "I don't recall." He also denied seeing any cars driving by that Barney appeared to be soliciting. The officers did not observe Barney engage in any hand-to-hand transactions, nor did they see anything in his hands.

[1] On December 1, 2012, J.M. Malkowski was an officer, not a detective. We therefore refer to him as Officer Malkowski.

¶ 9 As the officers approached Barney in the police vehicle, he looked in their direction and then started running down an alley. The officers pursued Barney in the vehicle, driven by Officer Travlos. After about one and a half blocks, Sergeant Axium exited the vehicle and pursued Barney on foot while Officers Malkowski and Travlos left the alley and drove out onto the street. After losing sight of Barney for about 20 or 30 seconds, Officer Malkowski observed Barney again as he exited a "T-alley," which intersected with Jackson Boulevard. Barney bent down by a garbage can about 30 or 40 feet away from them. Officer Malkowski had an unobstructed view of Barney as he extended his arm and dropped an item in between garbage cans that were alongside the building.

¶ 10 Sergeant Axium, who had been pursuing Barney on foot, lost sight of him briefly as Barney turned down another alley. When Axium turned the corner, he also saw Barney, who was about 30 to 40 feet ahead of him, throw an item in between the garbage cans. Although Officer Malkowski testified that, after he discarded the item, Barney also took off a hoodie he was wearing before he walked in the direction of the police vehicle, Sergeant Axium did not recall whether Barney was wearing a hoodie and denied seeing him take off his hoodie at any time that day.

¶ 11 As Barney approached, Officer Malkowski observed Sergeant Axium recover something from in between the garbage cans where Barney threw the item. Sergeant Axium said, "I got it" and brought the item to Officer Malkowski. Barney was then detained. The recovered item was a plastic bag that contained 13 smaller plastic bags with a spade logo, each containing suspect heroin. The plastic bags remained in Officer Malkowski's custody until he inventoried them at the police station. Neither Officer Malkowski nor Sergeant Axium saw anything in Barney's

hand prior to observing him discard the item between the garbage cans. No money was recovered from Barney.

¶ 12 The parties stipulated to the chain of custody and to the results of forensic testing of nine of the bags, which revealed the presence of heroin weighing 3.1 grams. The remaining bags were not tested.

¶ 13 Prior to ruling, the court noted that although no money was recovered from Barney's person, "no one knows how long the defendant had been out there" before he was heard yelling, "blows, blows, a street term for heroin." The court incorrectly recalled that both officers ("they") heard Barney yell "blows." The court further noted that Barney fled when the officers approached him and he was seen discarding an item that contained 13 small packages of a powdery substance that tested positive for heroin. The court found that the presence of other individuals while Barney yelled, "blows," coupled with Barney's possession of 13 packages, was sufficient to establish his intent to distribute and thus found Barney guilty of possession with intent to deliver.

¶ 14 Following the denial of Barney's motion for a new trial, the trial court imposed the minimum sentence: four years in the Illinois Department of Corrections and two years of mandatory supervised release.

¶ 15 On appeal, Barney first challenges the sufficiency of the evidence to prove him guilty of possession of a controlled substance with the intent to deliver beyond a reasonable doubt. Barney argues that the State failed to prove both possession and intent to deliver the heroin because the testimony from Officer Malkowski and Sergeant Axium was contradictory and too implausible to believe.

¶ 16 Where, as here, a defendant challenges the sufficiency of the evidence to sustain a guilty verdict, the relevant inquiry 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 offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). A reviewing court may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that a reasonable doubt regarding defendant's guilt exists. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007); *People v. Smith*, 2015 IL App (1st) 132176, ¶ 24.

¶ 17 To sustain Barney's conviction for possession of a controlled substance with the intent to deliver, the State was required to prove beyond a reasonable doubt that he: (1) had knowledge of the presence of the narcotics; (2) had immediate possession or control of the narcotics; (3) and intended to deliver the narcotics. 720 ILCS 570/401(c)(1) (West 2012); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). "The trier of fact may rely on reasonable inferences to determine knowledge and possession." *People v. Branch*, 2014 IL App (1st) 120932, ¶ 10 (citing *People v. Smith*, 191 Ill. 2d 408, 413 (2000)). Knowledge may be proved if a defendant knew narcotics existed in the place where they were recovered. *People v. Harden*, 2011 IL App (1st) 092309, ¶ 27. Possession can be actual or constructive and constructive possession is established if a defendant was aware of, and exercised control over, the narcotics. *Id*.

¶ 18 Direct evidence of intent to deliver is rare. *People v. Bush*, 214 Ill. 2d 318, 324 (2005); *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 16. Thus, intent to deliver is frequently proven by circumstantial evidence. *Id*.; *Branch*, 2014 IL App (1st) 120932, ¶ 10.

¶ 19 In this case, Officer Malkowski testified that he observed and heard Barney yelling, "blows" towards nearby pedestrians and that the term "blows" is a street term used in the sale of

heroin. Both Officer Malkowski and Sergeant Axium testified that Barney looked in their direction and fled as they approached, and that they observed Barney discard an item, which was found to be a clear plastic bag containing 13 packages of a powdery substance, nine of which were later stipulated to contain heroin. Drawing reasonable inferences from this testimony in a light most favorable to the State, we find that any trier of fact could conclude that Barney knowingly possessed, and intended to deliver, the 13 packages when he advertised them to nearby pedestrians as "blows," and Barney's control over the heroin was demonstrated by his conduct in discarding the narcotics in the alley. Accordingly, the evidence was sufficient to prove beyond a reasonable doubt that Barney possessed 3.1 grams of heroin with the intent to deliver.

¶ 20 Barney raises a number of factual inconsistencies between Officer Malkowski's and Sergeant Axium's testimony, which he claims undermines the credibility of that testimony and renders it insufficient to support his conviction. But it is well-settled that the trial court determines the credibility of the witnesses, weighs the evidence, draws reasonable inferences, and resolves any conflicts in the evidence. *People v. Valaderes*, 2013 IL App (1st) 112010, ¶ 112; *People v.Irvine,* 379 Ill. App. 3d 116, 122-23 (2008).

¶ 21 Barney asserts that it was unlikely that Sergeant Axium did not hear Barney yelling "blows," because he was seated behind Officer Malkowski. However, Sergeant Axium testified that his window was rolled up, while Malkowski's was down, and Barney's argument regarding Axium's ability to hear is based on speculation, which the trial court was not required to accept. See *id.* ¶ 78. Barney also points out that although Officer Malkowski testified that cars drove past and several pedestrians were present when Barney was yelling "blows," Sergeant Axium testified

that he could not recall whether there was "anyone near where [Barney] was standing," and no other vehicles were in the area at the time. But these obvious discrepancies in the officer's testimony were brought to the trial court's attention, which underscores the credibility determination that the trial judge was required to make and which we may not second-guess.

¶ 22 Moreover, if the officers had been intent on fabricating a story, it would stand to reason that they would have testified consistently regarding (i) hearing Barney yell "blows" and (ii) the presence of pedestrians, particularly given that both these facts were included in Barney's arrest report. The fact that their testimony varied on these topics undercuts Barney's attack on the sufficiency of the evidence.

¶ 23 Barney further argues that inconsistencies in the testimony regarding the position of the garbage cans in the alley, and the fact that both officers briefly lost sight of him, render it unlikely that both Officer Malkowski and Sergeant Axium had an unobstructed view of Barney as he discarded the item. Again, inconsistencies and discrepancies in the testimony are matters within the province of the trier of fact, and were resolved here against Barney. See *People v. Reed*, 80 Ill. App. 3d 771, 781-82 (1980).

¶ 24 Barney also contends that it is contrary to human experience to believe that he discarded the narcotics while in full view of police officers. Thus, he maintains that the more plausible explanation is that both police officers falsely testified that they observed him discard the narcotics. However, when weighing the evidence, the trial court was not required to consider every possible explanation consistent with innocence (*People v. Bull*, 185 Ill. 2d 179, 205 (1998); *people v. Moore*, 2014 IL App (1st) 112592-B, ¶ 33) and when reviewing a challenge to the sufficiency of the evidence, we may not substitute our judgment for the judgment of the

finder of fact (*People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009); *People v. Steele*, 2014 IL App (1st) 121452, ¶ 52). We believe it is just as likely that Barney, knowing one officer was chasing him on foot and seeing the police vehicle approaching, decided it would be better to attempt to discard the narcotics rather than to be found with them on his person. We therefore reject Barney's argument that both officers lied about what they observed as that is a finding that the trial court was uniquely qualified to make and we likewise reject Barney's contention that this case involves conduct "contrary to human experience and unworthy of belief." *People v. Cunningham*, 333 Ill. App. 3d 1045, 1050 (2002), reversed *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004) (internal quotes omitted) (although there were unanswered questions about arresting officer's testimony, disagreeing that the "whole scenario described by [the arresting officer] was unworthy of belief").

¶ 25 Barney also maintains that the State did not prove, beyond a reasonable doubt, that he intended to deliver the heroin. A trial court may consider a non-exclusive list of factors probative of intent to deliver a controlled substance including, among others, whether the quantity of controlled substance is too large to be consistent with personal consumption, and the manner in which the substance is packaged. *Robinson*, 167 Ill. 2d at 408; *Bush*, 214 Ill. 2d at 327. Moreover, "'[i]n light of the numerous types of controlled substances and the infinite number of potential factual scenarios in these cases, there is no hard and fast rule to be applied in every case.'" *Bush*, 214 Ill. 2d at 325 (quoting *Robinson*, 167 Ill. 2d at 414).

¶ 26 Citing *People v. Hendricks*, 325 Ill. App. 3d 1097, 1113 (2001), Barney maintains the State failed to show that the 3.1 grams of heroin was inconsistent with personal use. Thus, he argues that evidence of the quantity of heroin alone cannot sustain his conviction for possession

with intent to deliver. However, in this case, the quantity of heroin was not the sole factor considered by the trial court in finding intent to deliver. Rather, the quantity of heroin combined with its packaging and Officer Malkowski's testimony that Barney yelled "blows" while facing nearby pedestrians formed the evidentiary basis for the trial court's finding.

¶ 27 Barney also cites *People v. Ellison*, 2013 IL App (1st) 101261, and several other Illinois cases in support of his argument. In *Ellison*, 17 items of suspect cocaine weighing 3.112 grams were recovered, eight of which weighed 1.1 grams and tested positive for cocaine. *Ellison*, 2013 IL App (1st) 101261, ¶¶ 6, 8. Three additional items weighing less than 0.4 grams of a substance containing heroin were recovered. *Id.* ¶ 8. In finding that the State did not prove intent to deliver, the reviewing court noted that the amount of heroin and cocaine was consistent with personal use and none of the other evidence showed intent. *Id.* ¶ 27. Here, unlike *Ellison*, the majority of the 13 packets recovered tested positive for heroin, and the additional evidence of Barney's conduct supported a finding of intent.

¶ 28 Drawing all reasonable inferences in the light most favorable to the State, we find no error in the trial court's determination that the evidence regarding Barney's possession of the narcotics was consistent with the intent to deliver, and not personal consumption. See *Bush*, 214 Ill. 2d at 327-29. We therefore affirm the judgment of the circuit court of Cook County finding Barney guilty of possession of more than three grams of heroin with the intent to deliver.

¶ 29 Barney's second contention is that he is entitled to a new trial because the trial court failed to ensure that his jury waiver was knowingly and intelligently made. Barney concedes that he did not preserve his contention of error because he did not object in the trial court or raise the issue in a posttrial motion. Barney invokes plain error as a means to bypass this procedural

default. But without error, there can be no plain error; therefore, the first step in the plain-error analysis is to determine whether an error occurred. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 6.

¶ 30 A criminal defendant's right to a trial by a jury is guaranteed by our federal and state constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13; *Bannister*, 232 Ill. 2d at 65. A defendant's waiver of his right to a jury trial is valid when it is made knowingly and understandingly in open court. 725 ILCS 5/103-6 (West 2012); *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand - with its attendant consequences - is that the facts of the case will be determined by a judge and not a jury." *Bannister*, 232 Ill. 2d at 69. Where, as here, the relevant facts are undisputed, we review the validity of defendant's jury waiver *de novo*. *Id*. at 66.

¶ 31 The validity of a jury waiver is evaluated based on the totality of the circumstances of each case and cannot be reduced to a precise formula. *Bracey*, 213 Ill. 2d at 269; *People v. Hollahan*, 2015 IL App (3d) 130525, ¶ 16. Although a written waiver cannot, standing alone, demonstrate a valid jury waiver, the existence of a signed jury waiver supports the waiver's validity. *Reed*, 2016 IL App (1st) 140498, ¶ 7. Similarly, because a defendant typically speaks through counsel, a defendant's presence in court and failure to object when his attorney communicates the jury trial waiver weighs in favor of validity. *People v. Frey*, 103 Ill. 2d 327, 332 (1984) (collecting cases); *Reed*, 2016 IL App (1st) 140498, ¶ 7.

¶ 32 Here, Barney was represented by counsel throughout the proceedings in the trial court. When the trial court asked whether Barney understood what a jury trial is, defense counsel

responded in the affirmative and Barney did not object. While it would have been preferable for counsel to allow his client to answer the court's question himself, we can infer from Barney's silence that he did, in fact, understand. The trial court also directly asked Barney whether he was waiving his right to "that kind of trial," and he responded, "Yes, ma'am." The trial court then accepted Barney's verbal and written jury trial waiver, which acknowledged that the case would be submitted to "the Court for hearing." Moreover, Barney was present in court on multiple occasions before trial when his attorney stated that the matter would proceed to a bench trial and he raised no question or objection. See *Reed*, 2016 IL App (1st) 140498, ¶8.These circumstances all support a finding that Barney's jury waiver was knowing and voluntary.

¶ 33 *People v. Sebag*, 110 Ill. App. 3d 821, 829 (1982), is inapposite given that in *Sebag*, the defendant was not represented by counsel and had no familiarity with criminal proceedings. Here, Barney, represented by counsel throughout, also had a prior conviction for a Class 2 felony, which resulted in the unsatisfactory termination of probation and a five-year term of imprisonment. Thus, *Sebag* does not support a finding that Barney's waiver of a jury trial was invalid.

¶ 33 We find *People v. Clay* (363 Ill. App. 3d 780 (2006)) more analogous to this case. In *Clay*, the reviewing court found the jury trial waiver was valid where the defendant was represented by counsel, the same trial judge who presided over this case asked the defendant whether she understood what a jury trial was, the defendant responded affirmatively and signed a written jury waiver. *Clay*, 363 Ill. App. 3d at 791. The facts here are nearly identical and, as in *Clay*, we find that Barney knowingly and understandingly waived his right to a jury trial. *Id*.; see

also *People v. Bowman*, 227 Ill. App. 3d 607, 612 (1992). Therefore, there being no error, Barney's effort to invoke plain error review of his jury waiver fails. *Bannister*, 232 Ill. 2d at 65.

¶ 34 We affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.