

Third Division
February 6, 2013

No. 1-11-0024

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

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.	)	09 CR 3972
	)	
VALENTIN MEHEDINTI,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

¶1 *Held:* When neither party asks a chemist about testing procedures in detail, this court cannot infer that the chemist commingled pills from separate bags before testing them. Defense counsel provides ineffective assistance when counsel fails to offer an instruction on a defense theory supported by evidence and argument.

¶2 A jury found the defendant, Valentin Mehedinti, guilty of distributing more than 600 tablets of ecstasy. On appeal, Mehedinti contests the sufficiency of the evidence, and he claims he did not receive effective assistance of counsel. We find the evidence sufficient to support the conviction.

However, we find that defense counsel provided ineffective assistance when he failed to offer an instruction on a theory, argued at trial and supported by Mehedinti's testimony, that Mehedinti did not know he sold real, rather than fake, ecstasy. We reverse the conviction and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 On December 9, 2008, Officer Marco DiFranco of the Chicago Police Department, working undercover, arranged to meet Mehedinti at a restaurant in Chicago. DiFranco asked Mehedinti to sell him 100 pills, and Mehedinti agreed to sell that amount for \$7 per pill. DiFranco rode as a passenger in Mehedinti's car as Mehedinti drove to an alley on the north side of Chicago, where Mehedinti retrieved a package from behind a dumpster. Mehedinti returned to the car and handed DiFranco a bag of 100 blue and orange pills. DiFranco gave Mehedinti \$700 for the bag. Mehedinti then drove DiFranco back to his car.

¶ 5 On January 13, 2009, DiFranco arranged to meet Mehedinti at a location on the south side of Chicago. Mehedinti drove a different car to the second meeting. Again, DiFranco got into Mehedinti's car. As they drove, Mehedinti retrieved a package of pills from a compartment hidden in the car's roof. Mehedinti said the package held 272 pills. Mehedinti sold the package to DiFranco for \$1,900. DiFranco said he wanted to purchase 1000 pills in their next transaction. Mehedinti said he would need to go to Michigan to get that quantity of pills.

¶ 6 DiFranco again met Mehedinti on January 28, 2009. Mehedinti drove DiFranco to a different location, where they both got into another car. Mehedinti drove around for a while before taking 10 small bags out of a compartment in the roof of the car. DiFranco gave Mehedinti \$7,000 for the 10

bags of pills. When DiFranco gave a prearranged signal, police surrounded the car and arrested Mehedinti.

¶ 7 Prosecutors charged Mehedinti with delivering more than 600 tablets of ecstasy, which contains the controlled substance methylenedioxymethamphetamine (MDMA). See 720 ILCS 570/401(a)(7.5)(C) (West 2008). The State filed a motion to permit it to introduce evidence of the transactions on December 9, 2008, and January 13, 2009, as relevant evidence of other crimes. At the hearing on the motion, the prosecutor explained that the pills DiFranco received on December 9, 2008, tested positive for benzylpiperazine (BZP), a cat tranquilizer that Illinois had not listed as a controlled substance despite its similarity in effect to ecstasy. According to the prosecutor, the pills Mehedinti sold DiFranco on January 13, 2009, also included BZP and not MDMA. The two transactions constituted crimes of selling look-alike substances. See 720 ILCS 570/404(b) (West 2008). In 2010, after the transactions at issue here, Illinois made BZP a controlled substance. The prosecutor told the court that some of the pills sold on January 28, 2009, had MDMA. The court granted the State's motion, permitting it to use at trial evidence of the first two transactions.

¶ 8 After the court selected the jurors, prosecutors informed the court that they did not intend to use the evidence of the first two transactions. Defense counsel sought leave to introduce the evidence of those two transactions as part of the defense case. The court granted the defense motion.

¶ 9 At trial, Mehedinti admitted that he knew DiFranco wanted to purchase ecstasy in all three of the transactions, and Mehedinti sold him BZP pills instead. Mehedinti admitted that he intended to fool DiFranco into purchasing the cheaper and inferior, but legal, BZP as ecstasy. Mehedinti testified that on January 27, 2009, he purchased 1000 pills from a supplier in Michigan, who told

him the pills were a cat tranquilizer. The supplier charged Mehedinti 20 cents per pill, which is the amount Mehedinti had paid for BZP. Mehedinti explained that he hid the pills in a secret compartment in his car as part of his effort to convince DiFranco that the pills were high quality ecstasy. Mehedinti admitted that he never tested the pills he got in Michigan to determine whether they contained BZP or MDMA. He took his supplier's word that the pills contained a substance not controlled in Illinois that mimicked some of the effects of ecstasy.

¶ 10 A police officer testified that he inventoried the pills he took from DiFranco at the time of the arrest, and heat sealed them into a plastic bag. The police department's chemist testified that he opened the ten separate bags in the sealed evidence bag and counted all the pills. He found 997 pills, the same number recorded on the inventory. He found purple, pink, yellow and blue pills. His tests showed that the purple, pink and yellow pills all contained MDMA, but the blue pills showed signs of containing BZP and not MDMA. He counted a total of 603 purple, pink and yellow pills, leaving almost 400 blue pills. Defense counsel did not ask for further details about the testing procedure or whether the chemist tested the pills acquired in the transactions on December 9, 2008, and January 13, 2009.

¶ 11 In closing, the prosecutor argued:

"[T]he defendant knew that what he was selling was Ecstasy.

*** You don't accidentally sell the real thing. You do it knowingly."

¶ 12 Defense counsel's closing emphasized the weakness of the chain of custody of the pills, and

he suggested that the State failed to prove that no one had substituted ecstasy for the pills taken from Mehedinti. He also briefly argued that the State had to prove that Mehedinti knew the pills contained MDMA, when Mehedinti "is saying [']I didn't give him a controlled substance. I didn't know it was a controlled substance.['] " Defense counsel added that Mehedinti "never had any knowledge whether the pills [were] part Ecstasy ***. He told you he never was selling anything but BZP. That was his scheme. No knowledge."

¶ 13 The trial court instructed the jurors that they could consider the evidence of the other crimes only as it pertained to "issues of common design or plan, motive, and absence of mistake." Defense counsel did not object, and he did not offer an instruction on mistake of fact or the use of prior crimes to prove the presence of a mistake.

¶ 14 The jury found Mehedinti guilty of selling more than 600 tablets containing MDMA. The trial court denied Mehedinti's posttrial motion and sentenced him to 14 years in prison. Mehedinti now appeals.

¶ 15 ANALYSIS

¶ 16 Sufficiency of the Evidence

¶ 17 Mehedinti argues first that the State did not meet its burden of proof in two respects: the State did not show Mehedinti knew any of the pills contained MDMA, and it did not prove that Mehedinti sold more than 600 tablets containing MDMA. When a defendant challenges the sufficiency of the evidence, we review the record to determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319

(1979), *quoted in People v. Davison*, 233 Ill. 2d 30, 43 (2009).

¶ 18

Knowledge

¶ 19 To prove that a defendant committed the crime of selling narcotics, the State must prove beyond a reasonable doubt that the defendant knew that the substance he delivered included a controlled substance. 720 ILCS 570/401 (West 2008); *People v. James*, 38 Ill. App. 3d 594, 596 (1976). "Knowledge is an essential element of the offense of unlawful possession of narcotics. [Citation.] While this knowledge may frequently not be susceptible of direct proof, it may be proved by evidence from which the inference may fairly be drawn that the defendant knew the nature of the [controlled substance] found on his person." *People v. Harris*, 52 Ill. 2d 558, 560 (1972).

¶ 20 Mehedinti admitted that he knew DiFranco wanted to purchase ecstasy. DiFranco offered to buy 1000 pills of ecstasy for \$7,000. Mehedinti met with DiFranco and sold him 10 bags of pills containing almost 1000 pills, and the State's chemist found that some of the pills inventoried from that transaction contained MDMA, the chemical found in ecstasy. We find this evidence sufficient to support the inference that Mehedinti knew the pills contained MDMA.

¶ 21 Mehedinti claims that the evidence at trial contradicts the inference that he knew the 1000 pills included some MDMA. Mehedinti testified that all of the pills he sold contained only BZP. The State presented no evidence concerning tests of the pills included in the first two sales, and defense counsel did not ask the State's chemist about tests of those two sets of pills. Mehedinti admitted that he did not test any of the pills he sold, and he relied on the assertions of the person who sold the pills to him. From the evidence presented at trial, the jurors could infer that all of the sets

of pills Mehedinti sold to DiFranco included some with MDMA, and some with just BZP. No law compels the trier of fact to accept Mehedinti's testimony about his conversations with the person who sold him the pills. See *People v. Walden*, 43 Ill. App. 3d 744, 749 (1976). The jury could find incredible Mehedinti's testimony that he did not know the pills he sold to the purchaser who specifically sought ecstasy actually included ecstasy.

¶ 22 Mehedinti points out that in pretrial hearings, the prosecutors admitted that lab tests of the pills sold in the first two transactions (December 9, 2008 and January 13, 2009) showed only BZP and not MDMA. However, neither party presented to the jury any evidence of these lab tests. Notably, defense counsel never asked the prosecution's chemist about the tests of the pills Mehedinti sold to DiFranco in those transactions. Defense counsel never sought to introduce to the jury written reports of the tests of those pills.

¶ 23 The chemist admitted that almost 400 of the pills Mehedinti sold to DiFranco on January 28, 2009, contained only BZP and not MDMA. The jury could infer, from the evidence presented at trial, that the prior transactions included similar mixes of real and fake ecstasy, and that Mehedinti knew he sold those mixes. See *People v. Burks*, 343 Ill. App. 3d 765, 770-73 (2003). The evidence presented at trial, viewed in the light most favorable to the prosecution, supports Mehedinti's conviction for knowingly selling MDMA.

¶ 24 Quantity

¶ 25 To prove that Mehedinti committed the Class X felony of distributing MDMA, the State needed to prove that he sold more than 600 tablets that included MDMA. 720 ILCS

570/401(a)(7.5)(C)(ii) (West 2008). The parties agree that our supreme court established the relevant principles in *People v. Jones*, 174 Ill. 2d 427, 429 (1996):

"When a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver and there is a lesser included offense of possession of a smaller amount, then the weight of the seized drug is an essential element of the crime and must be proved beyond a reasonable doubt. [Citation.] A chemist, however, generally need not test every sample seized in order to render an opinion as to the makeup of the substance of the whole. [Citation.] Rather, random testing is permissible when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested. ***

However, when such samples are not sufficiently homogenous, a portion from each container or sample must be tested in order to determine the contents of each container or sample."

¶ 26 Here, Mehedinti sold DiFranco 10 packages of pills, which came in four different colors. Under *Jones*, the chemist needed to test the pills from each bag separately. While the chemist testified about testing the four different classes of pills based on color, he did not testify about testing

the contents of each bag separately. Neither the State nor defense counsel clarified this aspect of the chemist's procedure.

¶ 27 *People v. Fountain*, 2011 IL APP (1st) 83459B, involved a similar argument about the sufficiency of the evidence. The chemist in that case testified that she received nine packets of white powder, and the powder tested positive for heroin. The chemist never said that she tested the powder from each of the nine packets. The court held the evidence sufficient to sustain the conviction for possessing heroin with the total weight of all nine packets, as the court said, "Absent evidence in the record to the contrary, the jury could reasonably infer beyond a reasonable doubt that each foil packet was tested separately." *Fountain*, 2011 IL APP (1st) 83459B, ¶ 32.

¶ 28 The parties here similarly never clarified whether the chemist commingled pills from separate bags before testing them, and they never clarified the number of tests the chemist performed. The jurors can infer that the chemist followed proper procedures and separately tested the pills from the separate containers. *Fountain*, 2011 IL APP (1st) 83459B, ¶ 32. Following *Fountain*, we find the evidence here sufficient to sustain the conviction for the Class X felony of distributing more than 600 tablets containing MDMA.

¶ 29 Ineffective Assistance of Counsel

¶ 30 Next, Mehedinti contends that his trial counsel provided ineffective assistance in two ways: (1) counsel failed to offer to the court a jury instruction on the defense of mistake of fact, and (2) counsel did not object to the instruction limiting use of the evidence of prior crimes.

¶ 31 To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that (1)

trial counsel's representation fell below an objective standard of reasonableness, and (2) [h]e was prejudiced by the deficient performance." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). This court presumes that counsel provided reasonable professional assistance, and the defendant must overcome the presumption that counsel had sound strategic reasons for adopting his course of action. *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). Defense counsel decides what instructions to proffer as a matter of trial strategy. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). "[T]he decision not to object to an instruction may be considered a matter of professional judgment (citation) or trial strategy." *Bobo*, 375 Ill. App. 3d at 977. But "[w]here defense counsel argues a theory of the case, such as an affirmative defense, but then fails [to] ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy." *People v. Gonzalez*, 385 Ill. App. 3d 15, 21 (2008).

¶ 32 Here, defense counsel argued that the State failed to prove that Mehedinti knew that the pills he sold to DiFranco included some that contained MDMA. Mehedinti testified that he believed all of the pills contained BZP instead of MDMA. Mistake of fact constitutes a defense to any charge whenever the mistake negates the mental state required for the offense. *People v. Crane*, 145 Ill. 2d 520, 527 (1991). Since a conviction for selling a controlled substance requires knowledge that the substance sold includes a controlled substance, a mistaken belief that the substance includes no controlled substance provides a viable defense to the charges Mehedinti faced. See *Harris*, 52 Ill. 2d at 560.

¶ 33 Mehedinti points out that his attorney could have offered the pattern instruction on this

defense. The pattern instruction provides:

"A defendant's mistake as to a matter of fact is a defense if the mistake shows that the defendant did not have the knowledge necessary for the offense charged." Illinois Pattern Jury Instructions, Criminal No. 24-25.24 (4th ed. 2000).

¶ 34 We can see no strategic reason for choosing not to offer this instruction. The State needed to prove that Mehedinti knew he sold DiFranco MDMA, and some evidence suggested that Mehedinti believed he sold DiFranco only BZP.

¶ 35 The State argues that the error had no prejudicial effect because overwhelming evidence proved that Mehedinti knew he sold MDMA. We disagree. The State conceded, before trial, that Mehedinti twice sold DiFranco large quantities of pills that contained only BZP, not MDMA. For the third transaction, DiFranco again requested ecstasy, and no evidence suggests that Mehedinti knew he could not fool DiFranco into accepting BZP as MDMA in this third transaction. We note that defense counsel failed to present at trial evidence of the State's tests, which proved that two prior transactions involved only BZP, but that failure only further supports Mehedinti's claim that he received ineffective assistance of counsel. Mehedinti has established a reasonable probability that he would have achieved a better result if his counsel had proffered to the court the pattern instruction on mistake of fact, and if counsel had presented some of the available evidence that would have supported that instruction.

¶ 36 Because we find that Mehedinti received ineffective assistance of counsel for counsel's

failure to proffer the mistake of fact instruction, we need not address the argument concerning the failure to object to the misleading instruction on permissible use of the evidence of Mehedinti's other transactions.

¶ 37

CONCLUSION

¶ 38 The evidence presented at trial sufficiently supports the conviction of Mehedinti for selling more than 600 tablets containing MDMA. We reverse the conviction and remand for a new trial because Mehedinti's counsel provided ineffective assistance when he failed to offer an instruction on the defense, argued at trial, that the State failed to prove that Mehedinti knew the pills he sold included some with MDMA.

¶ 39 Reversed and remanded.