FIRST DIVISION
May 6, 2013

No. 1-11-3467

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(e)(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.	)	No. 10 CR 20400
	)	
FONTAINE OLIVER,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence was sufficient to convict defendant of possession of a controlled substance with intent to deliver, and the trial court only relied on facts presented at trial in finding defendant guilty; we affirm the judgment of the circuit court.

¶ 2 Following a bench trial, defendant Fontaine Oliver was found guilty of possession of 15 grams or more but less than 100 grams of a controlled substance, *i.e.*, cocaine, with intent to deliver and was sentenced to 8 ½ years' imprisonment. On appeal, defendant contends that his conviction for possession of a controlled substance with intent to deliver should be reduced to

simple possession because the State failed to prove the requisite intent to deliver. Defendant also maintains that the trial court misapprehended the facts of this case when it allegedly relied on the State's false assertion that police had testified they recovered a scale indicating an intent to deliver. We affirm.

¶ 3 Defendant was charged with being an armed habitual criminal, possession of a controlled substance (cocaine) with intent to deliver, four counts of unlawful use of weapons by a felon, and possession of cannabis with intent to deliver. These charges arose after police executed a search warrant at 4103 West Carroll Avenue in Chicago on October 8, 2010, and found contraband in a basement bedroom.

¶ 4 At trial, Officer Daniel Conway testified that at about 1 p.m. on October 8, 2010, he and other police officers executed a search warrant at 4103 West Carroll Avenue. After the two-floor building was cleared, Conway went into the basement, which was unlocked. The basement contained a family room, kitchen, two bedrooms, and a storage area. Conway searched the first bedroom in the basement and recovered a loaded handgun, three small plastic bags of suspect cannabis, the title to a vehicle registered to defendant at 4103 Carroll, and a letter from an attorney's office addressed to defendant at 4103 Carroll. Conway also recovered 143 baggies of suspect cocaine, $754, and defendant's birth certificate from an unlocked Sentry brand safe located underneath the bed in the first bedroom. The lock on the safe had a marking that read "3C2."

¶ 5 Conway further testified he first saw defendant when he was already in police custody. A set of keys, one of which was stamped with the word "Sentry" and had a marking of "3C2," was recovered from defendant. The set of keys was used to open the gates to the front door of the residence. Conway acknowledged that women's clothing was on the floor of the basement,

defendant was not the individual paying the utility bills at 4103 Carroll, and the Secretary of State did not have 4103 Carroll listed as defendant's address.

¶ 6 Officer Michael Kaczynski testified that he located defendant at 3431 West Madison Street when the search warrant was being executed at 4103 Carroll. According to Kaczynski, defendant told him that he lived at 4103 Carroll, but Kaczynski acknowledged this statement was not in the police report. Defendant was then detained and searched. Kaczynski recovered a wallet and a set of keys from defendant, relocated to the 4100 block of Carroll, and turned the keys over to the officers at the subject address.

¶ 7 Carrie Appleton testified that defendant was her boyfriend. On October 8, 2010, Appleton owned a car, but defendant was the titleholder. In order to get the title in his name, defendant used his driver's license as identification, and the title was sent to 4103 Carroll where Appleton, defendant's brother, and his brother's girlfriend resided. According to Appleton, defendant did not reside at 4103 Carroll, but instead at 2829 West Wilcox Street. Appleton also testified that on the day in question, defendant had Appleton's car parked at his residence. Defendant picked her up to drive her to school the morning of October 8, dropped her off, and told her he was going to Madison Street to be with friends. The key ring defendant possessed belonged to Appleton, and contained keys that opened several doors at 4103 Carroll and the safe.

¶ 8 The parties stipulated that Penny Evans, a forensic scientist, would testify that she performed tests on the contents of 95 of the 143 small zip-top plastic bags, and that the contents weighed 15.4 grams and contained cocaine.

¶ 9 Following closing argument, the trial court acquitted defendant of all the gun and cannabis charges, stating that other people were "in and out of the place," and it could not say for sure that defendant was the only person who could have possessed those items. However, the court did find defendant guilty of possession of cocaine with intent to deliver. In doing so, the

court found Appleton's testimony incredible, and recounted the evidence establishing defendant's connections to the Carroll address, including defendant's possession of keys to the residence and keys to the safe. The court also noted that the cocaine in defendant's safe was found in 143 packages, and believed defendant to be a "dope dealer."

¶ 10 On appeal, defendant contends that his conviction for possession of a controlled substance with intent to deliver should be reduced to simple possession because the evidence was insufficient to prove he had the intent to deliver. In particular, defendant argues that the State failed to prove that the amount of cocaine was inconsistent with personal consumption or that other indicia indicated an intent to deliver.

¶ 11 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court 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. Bush*, 214 Ill. 2d 318, 326 (2005). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 12 In order to prove defendant guilty of possession of a controlled substance with intent to deliver, the State must prove the defendant had knowledge that the controlled substance was present, the controlled substance was in the defendant's immediate control or possession, and the defendant intended to deliver the controlled substance. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); 720 ILCS 570/401(a)(2)(A) (West 2010). Defendant does not challenge the possession

element, but contends that the State failed to meet its burden to prove that he intended to deliver the cocaine.

¶ 13 Intent to deliver must usually be established by circumstantial evidence because direct evidence of intent to deliver is rare. *Robinson*, 167 Ill. 2d at 408. In *Robinson*, the Illinois Supreme Court listed several factors as probative of a defendant's intent to deliver. These factors include the quantity, purity, and packaging of the controlled substance, as well as the defendant's possession of weapons, police scanners, beepers, drug paraphernalia and large amounts of cash. *Robinson*, 167 Ill. 2d at 408. The *Robinson* factors are not exclusive. *Bush*, 214 Ill. 2d at 327. No one rule may be applied to each case because the number of potential fact scenarios in controlled substance cases are infinite. *Bush*, 214 Ill. 2d at 327. The court must determine on a case-by-case basis whether evidence of the defendant's intent to deliver is sufficient. *Robinson*, 167 Ill. 2d at 412-13.

¶ 14 We find that the evidence was sufficient to establish the intent to deliver element. Most notably, the police recovered 143 separate bags of suspected cocaine along with $754 in cash from a safe concealed under a bed in the basement residence. Defendant does not dispute on appeal that the cocaine and cash belonged to him but, rather, argues that the number of packets tested (95 packets) and the weight of cocaine (15.4 grams) were indicative of personal consumption not for sale. Defendant's position does not withstand scrutiny because case law holds that 95 separate packets of cocaine can evince intent to deliver. Moreover, the fact that the remaining 48 packets were not tested does not favor defendant because the relevant statute for this offense bans controlled substances in a range of 15 to 100 grams (720 ILCS 570/401(a)(2)(A)(West 2010)) and, therefore, it is axiomatic that the testing of the remaining packets would not affect the level of the offense. See, *e.g.*, *Robinson*, 167 Ill. 2d at 413-14 (40 packets containing 2.8 grams of cocaine and 2.2 grams of PCP was sufficient to sustain the

defendant's conviction of possession of controlled substance with intent to deliver); *People v. Ballard*, 346 Ill. App. 3d 532, 541-42 (2004) (18 tested packets with a weight of 5.1 grams was sufficient to sustain the defendant's conviction of possession with intent to deliver cocaine); see also *People v. Sherrod*, 394 Ill. App. 3d 863, 868 (2009) (stating in *dicta* that "[p]erhaps 100 individual baggies containing an illegal substance would be sufficient evidence to demonstrate intent to deliver").

¶ 15 In addition, the large amount of cash ($754) discovered in the safe with the cocaine is a factor indicative of intent to deliver. Defendant's argument that the money could be unconnected to drug sales because it was contained in the safe and not carried by defendant is unpersuasive to overcome the intent to deliver element here. This case was premised not on monitored transactions of contraband for money but, rather, on unobserved and future transactions in light of the numerous packets and large amount of money recovered from the safe. A defendant can always attempt to claim that recovered money was not drug related whether the money is found on the defendant's person or elsewhere.

¶ 16 In reaching this conclusion, we find *People v. Crenshaw*, 202 Ill. App. 3d 432 (1990) and *People v. McLemore*, 203 Ill. App. 3d 1052 (1990), relied on by defendant, unpersuasive. In *Crenshaw*, 202 Ill. App. 3d at 436, this court found that the defendant's possession of 22 small packets of cocaine, totaling 11.2 grams, was not sufficient in itself to establish an intent to deliver. In *McLemore*, 203 Ill. App. 3d at 1056-57, this court reversed the defendant's conviction for possession with intent to deliver, declaring that the defendant's possession of 15 packets totaling 3.3 grams of cocaine and four or five $100 bills was insufficient evidence to establish an intent to deliver. These cases are distinguishable from the case at bar where police recovered 143 individual packets and the 95 tested bags revealed more than 15 grams of cocaine. More

importantly, *Crenshaw* and *McLemore* have been questioned and probably repudiated by our supreme court decision in *Robinson*. See *People v. Beverly*, 278 Ill. App. 3d 794, 800 (1996).

¶ 17 Defendant next contends that the trial court misapprehended the facts of this case when, in finding defendant guilty, it relied on the State's alleged false assertion that the police officers had testified that they recovered a "large scale" and "some small bags and things" indicative of an intent to deliver. Defendant thus maintains that his due process right to a fair trial was violated, and requests that this court reverse and remand the cause for a new trial.

¶ 18 Although defendant acknowledges that he did not properly preserve this issue for appeal (*People v. McLaurin*, 235 Ill. 2d 478, 485 (2009)), he argues that the issue is not forfeited because the court's conduct is at issue. However, relaxation of the forfeiture rule due to the trial court's conduct being the basis of the objection on appeal is an extremely limited doctrine invoked in extraordinary circumstances which are not present here. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010).

¶ 19 Nevertheless, this unpreserved issue can be reviewed under the plain error rule. The plain error doctrine provides that courts may consider forfeited errors if either the evidence was so closely balanced that the error may have affected the outcome, or the error was so serious that it denied defendant one of his substantial rights. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Because the plain error exception under either prong applies only if an actual error occurred (*People v. Chapman*, 194 Ill. 2d 186, 225-26 (2000)), we must first determine if there was a clear or obvious error (*McLaurin*, 235 Ill. 2d at 489). "Absent reversible error, there can be no plain error." *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). Defendant carries the burden to establish plain error. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 21.

¶ 20 After the State presented its opening closing argument, the court asked, "Is there any scale or --." The State replied:

> "There was, Judge. The police testified to the recovery of a large scale from the front family room. There are some small bags and things and additional cannabis, multiple types of narcotics, which would further bolster the intent as opposed to simple possession as far as my opinion and some Illinois decisions."

The court immediately then asked "How was the cocaine packaged?" The State replied:

> "Judge, it was packaged in 143 smaller Ziploc bags. Again, I would suggest that if it was his cocaine and he was just looking at it, he would keep it in one bag."

Defendant then presented closing argument and the State argued in rebuttal.

¶ 21 From the court's exchange with the State after opening closing argument, defendant claims that the trial court misapprehended the facts in finding defendant guilty of possession of cocaine with intent to deliver because the State erroneously answered the court's question by saying that "[t]he police testified to the recovery of a large scale from the front family room."

¶ 22 A judge in a bench trial is presumed to consider only admissible evidence unless the record affirmatively rebuts that presumption. See *People v. Yancy*, 368 Ill. App. 3d 381, 386 (2005) ("[u]nlike a jury, a trial judge in a bench trial is presumed to know the law and to follow it and this presumption may only be rebutted when the record affirmatively shows otherwise" (Internal quotation marks and citations omitted)). The police inventory log lists two scales that were recovered from the residence during the execution of the search warrant, but the police did not testify about the scales at defendant's trial. The police did testify about the remaining items which the State mentioned in the referenced response to the court's two questions, including the cannabis and the 143 small bags of cocaine.

¶ 23 Defendant argues that the misrepresentation of "the recovery of a large scale from the front family room" as evidence rebuts the presumption we must afford the trial court. We disagree because the trial court actually acquitted defendant of all charges (gun and cannabis) except the cocaine-related charge for the very reason that other people were "in and out of the place." The misstatement by the State claimed that the scales were recovered in the front family room. The court found defendant guilty based on the contents of his safe which was retrieved in his bedroom under his bed. The court never mentioned scales in its findings and only referenced evidence that was presented at trial. Under the circumstances of this case, defendant has not rebutted the well-established presumptions afforded a court and defendant has not met his burden of establishing plain error.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 25 Affirmed.