SIXTH DIVISION
July 26, 2013

No. 1-11-3792

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. 11 CR 6035
	)	
DAVID DIXON,	)	The Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's guilt of delivery of a controlled substance was established beyond a reasonable doubt. There was no clear abuse of discretion by the trial court or manifest prejudice to defendant in restricting cross-examination, but if the trial court erred in sustaining the State's objection to defense counsel's questions on cross-examination designed to elicit evidence that the owner of the vehicle the heroin buyer was driving was a different person from the driver/heroin buyer, the error was harmless.

¶ 2 Following a bench trial, defendant David Dixon was found guilty of delivery of a controlled substance (less than one gram of heroin) and, based on his criminal background, was sentenced to a 10-year Class X prison term. On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt because the State failed to call the only witness who completely observed the transaction, namely, the alleged purchaser of the drugs who, according to defendant, was in prison after having entered a guilty plea to a narcotics offense in connection with this incident. Defendant also contends that he was not proved guilty beyond a reasonable doubt because the surveillance officer's testimony was not credible. Defendant alternatively contends that the trial court should have overruled the State's objections to defense counsel's questions concerning the identity of the owner of the car because the questions were designed to establish that the driver was not the owner and thereby cast more doubt on defendant's guilt.

¶ 3 At approximately 12:50 p.m. on March 20, 2011, Chicago police officers conducted a narcotics surveillance of 923 East 130th Place in Altgeld Gardens, a public housing project. Officer Turner was the undercover surveillance officer, and Officers Soraghan, Byrne, and Skarupinski were the enforcement officers. Shortly before 12:50 p.m., Turner observed a small maroon vehicle pull into the parking lot, probably 30 feet away from Turner. Turner then observed defendant, whom he identified in court, walk up to the vehicle and exchange a plastic Baggie with a man inside the vehicle.[1] Turner saw defendant hand a plastic bag to the driver of the vehicle, Tio, and Tio tendered an unknown amount of cash to defendant. Turner could not

[1] The record elsewhere discloses that the buyer was Christopher Tio, and that he entered a guilty plea in connection with this case.

state what was in the plastic bag. Nothing obstructed Turner's view of the transaction. Turner had walked closer to the scene and was approximately 20 feet away from the vehicle and probably on a 15 degree angle away from the vehicle, and he was observing the driver's side. After Turner observed defendant give the plastic Baggie to Tio, Turner signaled to the other officers because he had seen other narcotics transactions conducted in that particular area before and speculated that a narcotics transaction was taking place.

¶ 4 When Turner radioed the other officers, Officer Soraghan parked his vehicle right behind Tio's automobile. Officers Byrne and Skarupinski rode in behind him and they placed both defendant and Tio in custody. Turner then walked to the scene. Suspected narcotics had been recovered from inside of the vehicle, but Turner had not observed it being recovered. Turner searched defendant at the station and recovered $707 in cash, but did not discover any additional drugs on him. It was Turner's understanding that the drugs were discovered inside the vehicle, not on Tio. The individuals whom the enforcement officers detained were the same two individuals whom Turner had seen participate in the transaction. Turner did not lose sight of defendant or Tio during the transaction and while waiting for the other officers to arrive. Defendant and Tio had not moved from the scene from the time Turner observed the transaction until the time the other officers arrived.

¶ 5 Officer Skarupinski searched the vehicle and recovered a clear knotted Baggie containing multiple smaller Baggies of a white powder-like substance suspected to be heroin, from the "driver's seat floor of the vehicle." The floor was the area where the driver's feet would be if he were seated in the vehicle. Skarupinski maintained custody of that Baggie until it was turned

over to other officers to be inventoried. Skarupinski did not remember the size of the Baggie and did not recall if it was larger than a fist, but it could fit in someone's hand. He did not see how the item got into the vehicle. When he recovered the bag, it was on the driver's seat floor on "the middle of the floor just in the open."

¶ 6 The parties stipulated to the laboratory evidence and the safekeeping, control, and inventory procedures for the contraband, which proved positive for less than one gram of heroin.

¶ 7 The defense did not present any witnesses.

¶ 8 The court denied defendant's post-trial motion. The court stated that it would not concede that there were inconsistencies in the testimony of Officers Turner and Skarupinski and observed that any inconsistencies in their testimony were minor.

¶ 9 On appeal, defendant contends first that he was not proved guilty beyond a reasonable doubt because the State failed to call Tio, the alleged buyer of the heroin and driver of the vehicle, as a witness. Defendant argues that Tio was the only eyewitness to the entire transaction and the only one who could have confirmed whether he obtained narcotics from defendant. According to defendant, Tio's absence allows an inference that his testimony would have been adverse to the State, particularly given that no narcotics were found on defendant's person. Defendant observes that on June 27, 2011, prior to the August 29, 2011, trial in this case, Tio pleaded guilty to a narcotics offense stemming from this incident, so there was no valid self-incrimination impediment to his testimony.

¶ 10 Defendant also contends that he was not proved guilty beyond a reasonable doubt because Turner's testimony was not credible. Defendant observes that Turner saw the transaction from a

15 degree angle and that his testimony consequently was inconsistent, improbable, and contrary to human experience. Defendant maintains that his back would have obstructed the surveillance officer's 15 degree angle view of the transaction. Defendant argues that Turner testified both that he was 20 feet away, and 30 feet away. Defendant argues that Turner's testimony that his view of the transaction at the driver's side window was unobstructed was inconsistent with his testimony that he could not see Skarupinski recover the drugs from the floor of the driver's seat. He suggests that either Skarupinski was not credible because he did not recover the drugs from the driver's side of the car, or Turner was not credible because he could not really see the driver's side of the car. He also observes that if the bag was small enough to fit inside defendant's hand, as Skarupinski testified, then it is improbable that Turner could have seen it from 20 to 30 feet away, especially given that Turner did not testify he used a visual aid.

¶ 11 A criminal conviction will not be reversed on appeal unless the evidence, viewed in the light most favorable for the State, was so improbable as to create a reasonable doubt of guilt. See *People v. Slim*, 127 Ill. 2d 302, 307 (1989); *People v. Smith*, 299 Ill. App. 3d 1056, 1061 (1998). The question on appeal is whether, after viewing the evidence in the light most favorable for the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. See *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004); *People v. Killingsworth*, 314 Ill. App. 3d 506, 510 (2000); *Smith*, 299 Ill. App. 3d at 1061.

¶ 12 The credibility of the witnesses, the weight of the evidence, and the resolution of any conflicts in the evidence, are matters for the trial court to decide. *Slim*, 127 Ill. 2d at 307. When assessing evidence that can produce conflicting inferences, the fact finder is not required to look

for all possible explanations consistent with innocence and elevate them to the level of reasonable doubt. *People v. Digirolamo*, 179 Ill. 2d 24, 45 (1997); see also *People v. Slinkard*, 362 Ill. App. 3d 855, 858 (2006) (State's evidence need not exclude every possible doubt). A court of review must not retry the defendant. *Cunningham*, 212 Ill. 2d at 279. "[A] reviewing court should bear in mind that the fact finder had the benefit of watching the witness' demeanor." *Cunningham*, 212 Ill. 2d at 284. Slight discrepancies in the testimony do not destroy the credibility of a witness; they affect the weight of that testimony (*People v. Garcia*, 103 Ill. App. 3d 779, 782 (1981)) and merely "go to the question of credibility," which is for the trier of fact (*People v. Voda*, 70 Ill. App. 3d 430, 435-36 (1979)).

¶ 13 In this case, the resolution of defendant's guilt depended on the credibility of the witnesses and the weight accorded to their testimony. These determinations were within the province of the trial judge, who observed the witnesses, watched their demeanor, listened to their testimony, and found that they were credible witnesses. Although defendant argues that there were various weaknesses in the testimony of the officers, defendant's arguments fall within the realm of witness credibility. The trial court was entitled to find that the basic facts presented by the State were consistent and established that defendant delivered heroin to Tio by handing a bag containing multiple smaller bags of heroin to him in exchange for cash.

¶ 14 Regarding the alleged weaknesses in the evidence, the distances, for example, were estimates. Moreover, Turner explained that he was around 30 feet away when the vehicle arrived and defendant approached it, and then around 20 feet away after he (Turner) walked closer to the scene. Thus, there was no inconsistency in Turner's testimony concerning his distance from the

transaction. No evidence supports defendant's claim that Turner could see only his back from the angle of observation, or that he was too far away to see what happened or to see the bag in defendant's hand. Defendant was arrested immediately after the transaction, and there consequently was no identification question. Tio apparently pleaded guilty to a narcotics offense in connection with this case. Given those circumstances, we fail to see any logic in defendant's argument that Tio's absence implied that his testimony would have been adverse to the State. We also fail to see any logic in the State's argument that defendant could have called Tio as a witness; had he done so, we fail to see how Tio's testimony would have raised a reasonable doubt regarding defendant's guilt. Thus, the alleged weaknesses, if any, in the testimony of the officers were minor and were resolved by the trial court as the trier of fact (see *Garcia*, 103 Ill. App. 3d at 782; *Voda*, 70 Ill. App. 3d at 435-36). Viewing the evidence here as a whole and as it must be in a light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant delivered heroin to Tio. We have considered, and rejected, all of defendant's arguments on appeal.

¶ 15 Next, during cross-examination of Officer Turner, the following colloquy ensued:

"Q [Defense Counsel] And did you learn pursuant to the arrest that the owner of the vehicle was not the driver of the vehicle?

[Assistant State's Attorney] Objection. Relevance.

THE COURT: How is it relevant?

[Defense Counsel] Judge, if the narcotics were found inside the vehicle the contents of that vehicle were not—there's an additional owner that calls into question who

has access to the contents of the vehicle.

THE COURT: I guess it depends on where it was found so at this point the objection will be sustained."

¶ 16 During cross-examination of Officer Skarupinski, a similar colloquy ensued:

"Q [Defense Counsel] And per your investigation did you learn that the vehicle was owned by someone other than the driver?

[Assistant State's Attorney] Objection. Relevance.

THE COURT: Sustained."

¶ 17 On appeal, defendant alternatively contends that the trial court should have allowed defense counsel's questions concerning who owned the car, because if the driver, Tio, did not own the vehicle, more doubt would have been cast on defendant's guilt. Defendant claims that the evidence was close and that the evidence defense counsel was trying to elicit would have supported the defense that the driver of the car, Tio, was not the owner of the car and that the narcotics belonged to the owner of the car, not the driver. Defendant maintains that the issue was properly preserved for review, or that it should be reviewed pursuant to principles of plain error.

¶ 18 The State responds that the issue was waived because defendant's offer of proof was not sufficiently specific regarding the evidence. The State observes that therefore the evidence might have been hearsay or otherwise inadmissible. The State also argues that the evidence was irrelevant and that therefore the trial court did not abuse its discretion in barring it.

¶ 19 Defendant replies that the offer of proof was not necessary because the court made an erroneous relevancy ruling and improperly proscribed the cross-examination. Defendant further

replies that the offer of proof sufficiently indicated that the evidence to be elicited was that someone other than the driver owned the automobile. Defendant suggests that, just because the drugs were found on the floor of the car does not mean that they were in the open or even in plain view. He suggests that the drugs could have been under the driver's feet or out of view under the brake pedal or accelerator pedal. He also postulates that if the drugs were in plain view, the driver might have accepted the car from the owner in that condition and decided not to disturb the drugs.

> "Generally, cross-examination is limited in scope to the subject matter of direct examination of the witness and to matters affecting the credibility of the witness. [Citations.] However, this limitation is construed liberally to allow inquiry into whatever subject tends to explain, discredit, or destroy the witness' direct testimony. [Citation.] Nevertheless, the trial court's determination that an area of inquiry falls outside the proper scope of cross-examination should not be disturbed unless it is a clear abuse of discretion which results in manifest prejudice to the defendant." *People v. Terrell*, 185 Ill. 2d 467, 498 (1998).

¶ 20 Here, defendant suggests that there was an insufficient nexus between the drugs, the driver, and defendant and that the cross-examination would have further weakened any nexus. However, the trial court believed the testimony of Officers Turner and Skarupinski, which established that defendant had handed a bag containing multiple bags of heroin to Tio, in exchange for cash. Defendant had $707 in cash on his person. Under these circumstances, assuming that the merits of this issue are reviewable, there was no clear abuse of discretion by

the trial court or manifest prejudice to defendant. Furthermore, any error in restricting the scope of cross-examination above was harmless.

¶ 21 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.