2013 IL App (1st) 120383-U

SECOND DIVISION
March 12, 2013

No. 1-12-0383

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 00024
	)	
KEVIN WALLACE,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction and sentence are affirmed where the evidence was sufficient to prove defendant guilty of delivery of a controlled substance under an accountability theory, and imposition of a Class-X term of mandatory supervised release was proper.

¶ 2 Following a bench trial, defendant Kevin Wallace was convicted of delivery of a controlled substance. Based on his criminal history, defendant was sentenced to a Class X term of six years in prison. On appeal, defendant contends that the evidence at trial did not support a conviction under an accountability theory. He further contends that his term of mandatory

supervised release (MSR) is void and should be the two years that attaches to a Class 2 felony, rather than the three years that attaches to a Class X felony.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of November 23, 2010. In brief, on that date, an undercover Des Plaines police officer and a confidential informant made arrangements over the phone to buy crack cocaine from a man named Jason Brown. Defendant drove Brown from the west side of Chicago to Des Plaines, where the sale was to take place. While defendant waited in his vehicle, Brown completed the sale. According to Brown's trial testimony, defendant knew nothing about his plans, only that he wanted a ride to Des Plaines "to pick up some money from a girl."

¶ 5 At trial, Des Plaines police officer Ruzicka testified that on the date in question, he met with a confidential informant at the police station. The informant told him that a man, later identified as Jason Brown, would be willing to deliver crack cocaine. The informant then called Brown in Officer Ruzicka's presence and arranged for Brown to drive from the west side of Chicago to Des Plaines, meet him at a particular gas station, and sell him an amount of crack cocaine for $500. The informant gave Brown detailed driving directions, said the delivery was for a "buddy," and agreed to meet Brown in 30 minutes.

¶ 6 Officer Ruzicka obtained $500 in prerecorded funds and a covert vehicle to drive himself and the informant to the gas station. Five other officers were also involved in the operation. They stayed in communication via radio and cell phone. About 2:20 p.m., the informant received a phone call from Brown. Officer Ruzicka could hear the informant give Brown driving directions, and could hear Brown repeating the directions to the driver of their vehicle. Officer Ruzicka did not see the vehicle arrive in the area.

¶ 7 Shortly after the phone call, Brown got into Officer Ruzicka's vehicle and gave Officer Ruzicka a bag of suspect crack cocaine in exchange for the $500 in prerecorded funds. Once the delivery was complete, Officer Ruzicka gave an arrest signal to his fellow officers, who placed Brown into custody. Officer Ruzicka did not see defendant near the gas station; he only saw defendant at the police station following his arrest.

¶ 8 Des Plaines police officer Matthew Bowler testified that he was an assist officer on the surveillance team on the day in question. About 2:50 p.m., he saw a vehicle occupied by two people pull into the parking lot adjacent to the gas station at issue. After the vehicle parked, Officer Bowler saw Brown get out of the passenger side and walk over to the gas station parking lot. The driver, later identified as defendant, stayed in the vehicle. Officer Bowler watched defendant. The undercover officer's car was not in his view. After a short amount of time, Officer Bowler learned from Officer Ruzicka that a drug transaction had taken place and someone had been taken into custody.

¶ 9 At that point, Officer Bowler, who was in uniform, approached the driver's side of the vehicle, where defendant was sitting. As Officer Bowler approached, he "observed the defendant make a furtive movement toward -- with his hands toward underneath his seat, the driver's seat." Defendant made no attempt to flee. Officer Bowler asked defendant to get out of the vehicle, and defendant complied. Officer Bowler then recovered a digital scale and plastic baggies "from where [defendant] was reaching." He testified that the scale was the type commonly used for weighing drugs, and that the baggies were the type commonly used to package drugs. According to Officer Bowler, the scale and baggies were not inside another bag.

¶ 10 The parties stipulated as to the chain of custody, as well as to the forensic testing of the substance recovered by Officer Ruzicka, which tested positive for cocaine and weighed 5.1 grams.

¶ 11 Defendant called Jason Brown to testify on his behalf. Brown stated that he had pleaded guilty in the instant case and received a sentence of seven years in prison. He also acknowledged that he had prior convictions for possession of a controlled substance, burglary, and possession of a controlled substance with intent to deliver.

¶ 12 Brown testified that on the day in question, he made arrangements over the phone to deliver cocaine to a buyer in Des Plaines, but that defendant was not with him when he arranged the transaction. After setting up the sale, he called defendant and asked for a ride from the area of Lawndale and Ogden to Des Plaines so that he could pick up some money from a girl. According to Brown, he had asked defendant to drive him places many times before, including some times just to visit friends. Defendant picked Brown up in his van. Brown brought with him the cocaine for the sale, as well as a black bag that contained a scale and some baggies that he would use to package cocaine. To Brown's knowledge, defendant was not aware that he sold drugs.

¶ 13 Defendant told Brown he was running low on gas, so Brown said he would put some gas in the van. The men stopped at a gas station at Washington and Pulaski, where Brown bought $25 worth of gas. They then followed defendant's GPS to a gas station on Touhy in Des Plaines. Brown denied that his buyer called during the drive to give him directions. He stated that the only phone conversation that occurred during the drive was when he called his girlfriend to tell her he "was going to handle some business." According to Brown, defendant never asked any questions about the trip.

¶ 14 In Des Plaines, defendant pulled into a parking lot next to the gas station. Brown testified that he put the black bag on the floor in the middle of the front seat, told defendant he would be right back, and got out of the van. He then walked through the gas station and got into another

car, where he exchanged cocaine for money. When he got out of the car, "police came from everywhere" and he was arrested. He did not see what happened to defendant.

¶ 15 Following closing arguments, the trial court found defendant guilty of delivery of a controlled substance on a theory of accountability. The court explained its finding as follows:

> "I believe [defendant] knew exactly what was going on. They had already stopped at one gas station where he put 25 -- where Brown put $25 in the car. Now they get off the highway and stop in another one, and there's a scale and baggies and [defendant] is there. Mr. Brown goes from the west side to the [gas] station in Des Plaines? I genuinely believe [defendant] knew what was going on."

The trial court subsequently sentenced defendant, based on his criminal history, to a Class X term of six years in prison.

¶ 16 On appeal, defendant contends that the evidence did not support a conviction under an accountability theory because the State did not show he intended to facilitate the manufacture or delivery of cocaine beyond a reasonable doubt. Defendant argues that the State's evidence -- that defendant dropped Brown off in a parking lot not visible from the location where the drug deal occurred, and then, when a uniformed officer approached him, he moved toward a scale and some plastic baggies -- failed to show that he knew a drug deal had occurred, let alone that he had intentionally aided Brown in the delivery. He asserts that his mere presence in the general vicinity of the sale raises a suspicion of complicity, but nothing more; that the absence of an attempt to flee supports a conclusion that he was unaware of Brown's arrangements; and that his acceptance of $25 for gas cannot be considered acceptance of illegal proceeds.

¶ 17 When reviewing the sufficiency of the evidence, the relevant inquiry is 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 18 In order to prove defendant accountable for Brown's actions, the State was required to show that either before or during the commission of the crime, and with the intent to promote or facilitate such commission, he solicited, aided, abetted, agreed, or attempted to aid Brown in the planning or commission of the crime. 720 ILCS 5/5-2(c) (West 2010). A defendant's intent to promote or facilitate a crime may be inferred from the character of his acts and from the circumstances surrounding the commission of the crime. *People v. Perez*, 189 Ill. 2d 254, 266 (2000). A defendant will be found to have the intent to promote or facilitate a crime if he either (1) shared the criminal intent of the principal or (2) there was a common criminal design. *Perez*, 189 Ill. 2d at 266.

¶ 19 In the instant case, the evidence, viewed in the light most favorable to the prosecution, was sufficient to establish a common criminal design. Under the common design rule, where two or more persons engage in a common criminal design or agreement, any acts committed by one party in furtherance of that common design are considered to be the acts of all parties to the design or agreement, and all parties are responsible for the consequences of the further acts. *Perez*, 189 Ill. 2d at 267. Accountability may be proven through a defendant's knowledge of and

participation in the criminal scheme; neither words of agreement nor direct participation in the criminal act itself are required. *Perez*, 189 Ill. 2d at 267. Factors to consider when determining whether a defendant is accountable include the defendant's presence during the planning of the offense, his presence during its commission, his failure to report the crime, and his continued affiliation with the other offender or offenders after the commission of the crime. *Perez*, 189 Ill. 2d at 267; *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009). In addition, "evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, also supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *Perez*, 189 Ill. 2d at 267.

¶ 20 Here, there is no dispute that defendant drove Brown to the location where the drug transaction occurred, or that defendant was present in the general vicinity during the commission of the sale. In addition to these factors, when Officer Bowler approached defendant, he "observed the defendant make a furtive movement toward -- with his hands toward underneath his seat, the driver's seat." The officer then recovered a scale and baggies from that location. According to Officer Bowler, the scale and baggies were not inside another bag. Thus, they would have been in defendant's plain view, and it may reasonably be inferred that defendant knew about the presence of the items. Defendant's attempt to hide the drug paraphernalia from Officer Bowler further indicates that he understood the illicit purpose of the items. Combined, defendant's action of driving Brown to Des Plaines, his presence during the offense, and his awareness of and attempt to hide the scale and baggies support a finding that he intended to facilitate Brown's delivery of cocaine. The evidence, viewed in the light most favorable to the prosecution, was sufficient to prove defendant guilty of delivery of a controlled substance under an accountability theory.

¶ 21 Defendant next challenges the length of his term of MSR. He contends that the proper MSR term for defendants who receive Class X sentences based on criminal history is the term for the underlying felony, not the term applicable to Class X offenses. This court has clearly and repeatedly held that a defendant sentenced as a Class X offender receives the Class X MSR term of three years. *E.g.*, *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 60-62, *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. McKinney*, 399 Ill. App. 3d 77, 80-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). We decline defendant's invitation to abandon these well-reasoned cases, which specifically addressed the MSR statute, in favor of *People v. Pullen*, 192 Ill. 2d 36 (2000), which addressed the consecutive sentencing statute. Defendant's contention fails.

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

¶ 23 Affirmed.