2014 IL App (2d) 130082-U
No. 2-13-0082
Order filed October 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-974
VICTOR M. JACOBO,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel was not ineffective: defendant was not prejudiced by counsel's presentation of a baseless defense, as defendant's testimony undermined any claim of innocence, or by counsel's failure to seek an instruction on a lesser included offense, as given the evidence the jury could not have convicted him of only that offense; (2) the trial court did not abuse its discretion in sentencing defendant to 12 years' imprisonment (on a 9-to-40 range) for possession of cocaine with intent to deliver: despite the mitigating factors, which the court considered, the sentence was justified by defendant's criminal history, and any reliance on an improper factor was insignificant.

¶ 2 Following a jury trial, defendant, Victor M. Jacobo, was convicted of unlawful possession of a controlled substance with intent to deliver and sentenced to 12 years in prison.

He raises two arguments on appeal. The first is that he was denied the effective assistance of counsel, where defense counsel conceded defendant's knowledge of the presence of cocaine, presented a non-viable defense theory, and failed to seek a jury instruction on the lesser included offense of possession. The second is that his sentence is excessive. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful possession of 100 to 400 grams of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2012)). The following relevant evidence was presented at his jury trial.

¶ 5 On May 16, 2012, Stefan Bjes, a detective with the Addison police department, was travelling in an unmarked car when he saw defendant riding in the front passenger seat of a taxi. Bjes knew that there was an outstanding warrant for defendant's arrest, and, as he followed the taxi, he called for a marked squad car to effectuate a traffic stop.

¶ 6 Addison police officers Thomas Hostetler and Cristobal Soto were each in their respective squad cars when the call regarding defendant came in, and together they effectuated a traffic stop of the taxi. Hostetler approached the driver of the taxi, Jose Luna-Aguilera, and Soto approached the passenger seat where defendant was sitting. As defendant gave Soto his identification, Soto saw a black backpack on the floor between defendant's legs. According to Soto, defendant kept covering the bag with his legs. When Soto asked defendant to step out of the taxi, defendant grabbed the backpack and placed it in the back seat behind where he had been sitting.

¶ 7 Addison police officer Dan Slattery arrived on the scene after Hostetler and Soto had asked Luna-Aguilera and defendant to exit the taxi. Soto told Slattery to look in the backpack in

the back seat. Slattery found three clear baggies containing a white powdery substance, which he believed to be cocaine. Slattery asked defendant if the substance was cocaine, and defendant responded that it was. Hostetler and Soto both saw Slattery remove the baggies from the backpack. Hostetler asked defendant if the backpack was his, and defendant responded that it was. Defendant and Luna-Aguilera were arrested and transported to the police station. Slattery placed the baggies back into the backpack and transported the backpack to the police station, where he gave it to Bjes.

¶ 8 At the police station, Jose Gonzalez, an investigator with the Addison police department, assisted Bjes with interviewing defendant. Gonzalez read defendant his *Miranda* rights, and defendant initialed and signed the *Miranda* form. Thereafter, Bjes conducted the interview.

¶ 9 Bjes asked defendant if he knew why he was in custody and if he knew of the cocaine that had been recovered from the taxi. According to Bjes, defendant initially denied any knowledge, but as the interview proceeded defendant admitted that he was aware of the cocaine that was in the backpack. Bjes testified that defendant told him that he was travelling with Luna-Aguilera, that they had conducted two cocaine transactions, and that defendant had remained in the taxi. Defendant told Bjes that he was "Luna-Aguilera's muscle during his cocaine deals," which meant "[t]hat he was more or less the lookout to make sure that Luna-Aguilera did not get ripped off during the cocaine deals." Bjes asked defendant to prepare a written statement, and defendant did so. Defendant's written statement was admitted into evidence as People's Exhibit No. 4. The jury was shown an enlarged copy of the statement (People's Exhibit No. 5). The statement read:

> "The cocaine belongs to Jose luna he had the bag when he picked me up we went 2 this guys house he got out the car n i stayed out side i go with him sumtimes when he goes makes deals sumtimes he pays me when i go with him cus im his muscle [*sic*]."

Bjes was asked to read what defendant wrote, and he read the statement as follows:

> "The cocaine belongs to Jose Luna, he had the bag when he picked me up. Went to two guys house, he got out of the car, and I stayed—stayed outside. I go with him sometimes when he goes and makes deals. Sometimes he pays me when I go with him because I'm his muscle."

¶ 10 Prior to interviewing defendant, Bjes inventoried the contents of the backpack, which included school books, homework, and other school-related items such as pens and paper. The backpack also contained three large baggies and one small baggie of cocaine. Bjes field-tested the contents of the baggies, which testified positive for cocaine. The amount of cocaine in the backpack was not "a personal use amount." He estimated a personal use amount to be about one to two grams. The cocaine in the backpack had an approximate street value of between $5,000 and $5,500. The backpack was later released to its owner, Claudia Tiznado.

¶ 11 Du Page County forensic scientist Sara Norris testified that the total weight of the three large bags of white powdery substance, which she tested and found to be cocaine, was 111.48 grams. She did not test the contents of the smaller bag, because it would not have changed the weight for charging purposes, but it weighed 1.16 grams.

¶ 12 The State rested.

¶ 13 Against defense counsel's initial recommendation, defendant informed the court that he wanted to testify. Defendant testified that Tiznado was Luna-Aguilera's girlfriend. When defendant entered the taxi at about 3 p.m. on May 16, 2012, the backpack was on the floor on the

front passenger side of the taxi. When he entered the taxi, he did not know what was in the backpack, and he never looked in the backpack before the police arrived.

¶ 14 On cross-examination, defendant testified that he never touched the backpack. According to defendant, Soto lied when he said that defendant moved the backpack to the back seat, and Slattery lied when he said that he removed the backpack from the back seat. Defendant never told the officers that the cocaine belonged to him. Defendant was shown People's Exhibit No. 5 and the following colloquy occurred:

"Q. *** [T]his is that written statement that you wrote out to the police, isn't it?

A. Yes, it is.

Q. And that's your signature—

A. Yes, it is sir.

Q. —right there that they asked you to sign; is that right?

A. Yes.

Q. And that's where you said, I'm his muscle; is that correct?

A. Yes.

Q. And that's where you said, I go with him sometimes when he goes and makes deals and sometimes he pays me; is that right?

A. Yes.

Q. And this is exactly what you told the police what happened?

A. Yes.

Q. You told them you were riding around with Jose Luna while he was making deals; is that right?

A. Yes.

Q. And you also told them that you expected to get some money out of that; is that right?

A. Yes."

¶ 15 In closing arguments, defense counsel argued that the fact that the backpack might have been in the same compartment of the taxi as defendant did not establish that defendant knew that it contained cocaine. Counsel stated:

"The instructions you'll be getting, as the State has pointed out, talk to knowingly possess more than 100 grams, less than 400 grams. I believe we have reasonable doubt here that [defendant] knew what was in that backpack and how much there was. He may have known that there was cocaine in the backpack, but how much. Is it 100 grams or more? We don't know.

I think that is your reasonable doubt. That he did not know how much cocaine was in that backpack. We don't hold—we can't find him guilty of prior bad acts, only what he is charged in the indictment, which is on the 16th of May 2012, he possessed—committed the offence [*sic*] of unlawful possession of a controlled substance with the intent to deliver. I believe were [*sic*] his reasonable doubt—more than reasonable doubt, that [defendant] knew that there was 100 grams or more of cocaine in that backpack, and you should find him not guilty."

¶ 16 Thereafter, the jury found defendant guilty of unlawful possession of 100 to 400 grams of cocaine with the intent to deliver.

¶ 17 Defendant moved for a new trial, arguing that he was not proved guilty beyond a reasonable doubt, because there was "no evidence at trial that the Defendant knew the weight of the substance to be more than 100 grams." The State responded that there was no legal

requirement that defendant know how much cocaine was in the backpack; he had to know only that there was cocaine in the backpack. The court agreed and denied the motion.

¶ 18 Following a sentencing hearing, the trial court sentenced defendant to 12 years in prison. The trial court denied defendant's motion for reconsideration of his sentence, and defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues that he received the ineffective assistance of counsel and asks for a new trial. Where a defendant claims ineffective assistance of counsel, he must prove that: (1) defense counsel's performance fell below an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of defense counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the defendant's claim. *Id*. at 697.

¶ 21 Defendant argues that defense counsel was deficient for conceding that defendant "may have known" that there was cocaine in the backpack and arguing a defense that had no basis in law; *i.e.*, reasonable doubt based on the fact that defendant did not know the *amount* of cocaine in the backpack. According to defendant, given defendant's testimony that he did not know that there were drugs in the backpack, had counsel argued that defendant was unaware of the presence of the drugs, there is a reasonable probability that defendant would have been found not guilty. Defendant further argues that counsel was deficient for failing to request a jury instruction on the lesser included offense of possession. According to defendant, had the jury believed that defendant knew of the drugs but had not participated in any drug deals, it could have convicted him of the lesser offense.

¶ 22 To establish possession of a controlled substance with intent to deliver, the State must prove three elements beyond a reasonable doubt: that the defendant knew of the narcotics, that the narcotics were in the defendant's immediate possession or control, and that the defendant intended to deliver them. 720 ILCS 570/401 (West 2012); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Here, it is clear that defense counsel erroneously argued to the jury that, even though defendant "may have known that there was cocaine in the backpack," it could find defendant not guilty if it had a reasonable doubt as to whether defendant knew that there were more than 100 grams of cocaine in the backpack. There is no requirement that a defendant know the amount of narcotics.

¶ 23 Nevertheless, the State argues that, because defendant "unequivocally acknowledged" on cross-examination that he and Luna-Aguilera were engaging in drug deals on the day in question, he cannot establish that his counsel's conduct prejudiced him. We agree. Although defendant maintains that his testimony on cross-examination related to only his written statement, wherein he told the police that he "sumtimes" goes with Luna-Aguilera when Luna-Aguilera makes deals, we find otherwise. The first several questions by the State were specifically directed at the statement; however, the State then asked whether "this is exactly what you told the police what happened," and defendant responded "Yes." The State next asked: "You told them you were riding around with Jose Luna while he was making deals; is that right?" and defendant responded "Yes." The State next asked: "And you also told them that you expected to get some money out of that; is that right?" and defendant again responded "Yes." This exchange pertained to whether defendant told the police, outside the written statement, that he was assisting Luna-Aguilera on the day in question. Defendant's testimony that he did is consistent with Bjes' testimony that, during the interview, defendant told him that he was travelling with Luna-Aguilera, that they had

conducted two cocaine transactions, and that defendant had remained in the taxi. Bjes also testified that defendant told him that defendant was "Luna-Aguilera's muscle during his cocaine deals," which meant "[t]hat he was more or less the lookout to make sure that Luna-Aguilera did not get ripped off during the cocaine deals." Defendant further told him that he had expected to get paid.

¶ 24 Defendant's inculpatory statements distinguish the present case from *People v. Chandler*, 129 Ill. 2d 233 (1989), upon which defendant relies. In *Chandler*, the defendant and a codefendant were charged with murder, residential burglary, and aggravated arson. *Id*. at 238. The defendant's attorney conceded that the defendant had entered the victim's house, but argued that it was the codefendant who had stabbed the victim. *Id*. at 239. Counsel apparently mistakenly believed that the jury could find the defendant not guilty if it believed that he had not personally inflicted the fatal wounds. *Id*. at 247. However, the jury was instructed on both felony murder and accountability and thus "had no choice but to find [the] defendant guilty of murder." *Id*. The court held: "Defense counsel's performance left the jury with no choice but to convict defendant of the offenses charged. This constitutes ineffective assistance of counsel." *Id*. at 248. The court stated further: "By failing to comprehend the law of accountability and felony murder, counsel's strategy and actions amounted to no real defense at all. The prosecution's case, therefore, was not subject to meaningful adversarial testing, and defendant was deprived of a fair trial." *Id*. at 249. The court stated:

> "Even when presented with a difficult case, counsel must provide reasonably effective assistance to a defendant. Counsel failed to do so here. Counsel's defective performance clearly prejudiced defendant, as the jury was forced to convict defendant of the offenses

charged. We also find that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different." *Id*. at 250.

¶ 25 Subsequently, in *People v. Shatner*, 174 Ill. 2d 133, 146 (1996), the supreme court revisited its holding in *Chandler*. In *Shatner*, the defendant argued that he received the ineffective assistance of counsel, where counsel, by conceding that the defendant participated in a robbery during which the victim was killed, admitted that the defendant committed felony murder. The court rejected the defendant's argument that *Chandler* mandated a finding of ineffectiveness, emphasizing that such claims must be determined on a case-by-case basis. *Id*. at 147. The court noted that, in the case before it, "[u]ltimately, it was the defendant's own statements, both to the FBI and on the witness stand, and not the actions or strategy of his counsel, which undermined any claim of innocence that defendant may have had. If a defendant enters a not-guilty plea in the face of overwhelming evidence of his guilt, we are unwilling to find that his counsel was ineffective simply because he had failed to contrive a leak-proof theory of innocence on defendant's behalf. To do so would effectively require defense attorneys to engage in fabrication or subterfuge." *Id*. at 148.

¶ 26 Here, as in *Shatner*, and unlike in *Chandler*, defendant testified on his own behalf. Because defendant's testimony undermined any claim of innocence he might have had, counsel's actions did not prejudice defendant. See also *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 77 (distinguishing *Chandler* based on the defendant's testimony and holding that "[w]e are not going to reverse a defendant's conviction based on a concession made by her attorney when she essentially made the same concessions in her own testimony."). Given that defendant conceded that he was riding around with Luna-Aguilera while he was making deals, we cannot say that,

had counsel argued defendant's lack of knowledge of the presence of cocaine, the result of the proceeding could have been different.[1]

¶ 27 Defendant also contends that counsel should have sought a jury instruction on the lesser included offense of possession of a controlled substance, because then, if the jury believed that defendant had knowledge of the cocaine in the backpack but had not participated in any drug deals, it could have convicted him of the lesser offense. This argument also fails for lack of prejudice. In *People v. Robinson*, 167 Ill. 2d 397, 410-11 (1995), the Illinois Supreme Court stated that, in cases where the amount of the controlled substance cannot reasonably be viewed as designed for personal consumption, the quantity of the controlled substance alone can be sufficient to prove intent to deliver beyond a reasonable doubt. Here, Bjes testified that the amount of cocaine in the backpack (over 100 grams) was not "a personal use amount." He estimated a personal use amount to be about one to two grams. He also estimated that the cocaine in the backpack had a street value of between $5,000 and $5,500. Given the amount of cocaine in the backpack, defendant cannot show a reasonable probability that, even if the jury had been instructed on the lesser included offense of simple possession, it would have convicted him on that offense only.

¶ 28 Finally, defendant argues that his 12-year sentence was excessive, because his involvement was minimal, he had never before been sentenced to prison, and he supported two dependents. He also contends that the trial court erred by considering an improper aggravating

[1] We note that defendant also asserts that counsel was deficient for failing to vigorously cross-examine the State's witnesses on the issue of his knowledge of the drugs on the day in question. For the same reason set out above, any such deficiency here was not prejudicial.

factor, *i.e.*, "the business of selling drugs," which defendant maintains was a factor implicit in the offense, and by also considering its personal opinion on illegal drugs. We disagree.

¶ 29 The Illinois constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id*. "The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). There is a presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court should not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *Id*. at 209-10.

¶ 30 Here, defendant faced a sentencing range of not less than 9 and not more than 40 years. See 720 ILCS 570/401(a)(2)(B) (West 2012). The trial court sentenced him to 12 years in prison. In fashioning the sentence, the court specifically noted that defendant was "not a law[-] abiding individual." The court noted that defendant had already been once deported from the United States, though it acknowledged that he returned because he wanted to support his family.

The court also commented on "the inability of our government to control the very fundamental job of securing the borders of this country." The court referenced defendant's numerous arrests, acknowledging that most of the arrests were for "relatively minor offenses" but also noting an arrest for domestic abuse. The court further noted defendant's "acknowledgement of gang connections and associations and the use of possession of weapons." The court also spoke to "the very nature of the business." The court stated:

> "[Y]ou were engaged in the business of selling drugs. And I see and hear every day the real life consequences of persons who engage in criminal activity as a result of drug addictions, drug habits. It's the sick underbelly of society that lives are ruined every day, including yours to some extent, based upon this whole business of buying, selling and distributing narcotics. It perpetuates a great deal of violence and heartache and death in this country and, frankly, across many other countries including Mexico where it appears likely that you will be deported once again."

¶ 31 It is clear that the trial court was well aware of defendant's involvement in the crime, his correctional history, and his dependents. It is also clear that there were aggravating factors for the court to consider, most notably his criminal history. Even if the court's comments regarding the "business of selling drugs" were arguably improper, remand is not required, because the record demonstrates that the court's sentence was based on proper factors and that any weight placed on the improper factor was insignificant. See *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). The present case is distinguishable from the case relied on by defendant, because in that case the court's comments at sentencing established that the weight placed on the court's personal beliefs was not insignificant. See *People v. Henry*, 254 Ill. App. 3d 899, 904-05 (1993) (the reviewing court found reversible error where the trial court stated, " 'This is really a

disgusting crime. And that's why you are given this amount of time.' "). Not so here. Looking at the court's comments as a whole, we cannot say that the sentence (three years higher than the minimum) was an abuse of discretion.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm defendant's conviction.

¶ 34 Affirmed.