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2012 IL App (3d) 100082-UB

Order filed August 29, 2011
Modified Upon Denial of Rehearing January 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
Plaintiff-Appellee,) Peoria County, Illinois,
)
v.) Appeal No. 3–10–0082
) Circuit No. 09–CF–454
)
MICHAEL E. MILLER,) Honorable
) James E. Shadid,
Defendant-Appellant.) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held:* It was an abuse of discretion for the trial court to permit the cannabis at issue to remain in the courtroom during the vast majority of the trial which resulted in a denial of defendant's right to a fair trial. However, the trial court did not err when it denied defendant's motion for a directed verdict, because the State's evidence was sufficient to prove the elements of the offense beyond a reasonable doubt.

¶ 2 A jury convicted defendant, Michael E. Miller, of cannabis trafficking (720 ILCS

550/5.1(a) (West 2008)), unlawful possession with intent to deliver cannabis (720 ILCS 550/5(g) (West 2008)), and unlawful possession of cannabis (720 ILCS 550/4(g) (West 2008)). The trial court sentenced him to a 26-year term of imprisonment. Defendant appeals, contending that the trial court: (1) abused its discretion by permitting the courtroom to be filled with the odor of the cannabis at issue; and (2) erred when it denied his motion for a directed verdict. We hold that the court erred by permitting the cannabis odor in the courtroom, but that it properly denied the motion for a directed verdict.

¶3

FACTS

¶4 The State charged defendant with trafficking more than 5,000 grams of cannabis into Illinois, unlawful possession with intent to deliver more than 5,000 grams of cannabis, and unlawful possession of more than 5,000 grams of cannabis. The charges stemmed from the April 21, 2009, execution of a search warrant at 1512 West Margaret Street (subject residence) in Peoria, Illinois, where Peoria police officers found and seized approximately 147 pounds of cannabis.

¶5 The cause proceeded to trial on September 1, 2009. After *voir dire*, defense counsel objected to the presence of the cannabis in the courtroom during opening statements because the exhibits had a strong aroma. The court overruled defense counsel's objection and stated that "[i]f it becomes too overbearing, we'll address that[.]" Defense counsel then stated that "the smell [was] quite offensive," to which the court responded that it "d[i]dn't know how [they were] going to avoid that" because the instant case was "a case about cannabis[.]" and that if the smell "start[ed] to wear on [them, they would] work through it." The record indicates that after that exchange, the bailiff brought the jury into the courtroom at approximately 3:35 p.m. After the

parties offered opening statements and during the State's case-in-chief, the State presented the testimony of 18 witnesses and offered over 20 exhibits, 11 of which consisted of portions of the large quantity of the cannabis at issue. The defense did not object to the admission of any of the cannabis as exhibits during the State's case-in-chief.

¶6 During the first day of trial, the State presented the testimony of three witnesses, and the cause concluded for the day at 5:55 p.m. The second day of jury trial began at 8:51 a.m. and concluded at 4:49 p.m. The cannabis was present in the courtroom. The jury left the courtroom on four occasions during periodic breaks in the proceedings, which occurred from approximately 9:35 to 9:45 a.m., 11 to 11:11 a.m., 11:22 a.m. to 1:21 p.m., and 2:38 to 2:46 p.m.

¶7 The third day of the trial began at 8:50 a.m., and the cannabis was present in the courtroom. The jurors took their first break by leaving the courtroom from 9:42 until 9:54 a.m. While the jury was on this break, the prosecutor indicated to the court that she had one or two redirect questions for the witness who was on the stand at the time of the recess.

¶8 After the jury returned to the courtroom at 9:54 a.m., a juror advised the judge that the smell of the marijuana was affecting the juror's asthma. The court responded that after "one minute," the jury would be excused for another break. The court then asked "[h]ow [it was] back there[.]" to which a juror indicated that it was "okay." After the State's two-question redirect examination, the State rested its case, and the jury was allowed to leave the courtroom for approximately a half-hour break.

¶9 After the court excused the jury, the judge requested that "maintenance [come to the courtroom] to circulate some kind of air." By the agreement of the parties, all of the cannabis was removed from the courtroom at that time. The record does not indicate whether the cannabis

exhibits were returned to the courtroom during closing arguments, which took place on the third day of trial from approximately 4:45 to 6:15 p.m. that day.

¶10 During the three day trial, the testimony from the State's witnesses and its exhibits revealed that based on a tip from a confidential informant, Peoria police officers began conducting surveillance of the subject residence at approximately 4:45 p.m. on April 21, 2009. Sometime before 5 p.m., officers saw a Trail Blazer pull into the driveway of the subject residence, and at approximately 5:05 p.m., a Cadillac pulled into the driveway.

¶11 The Cadillac left the subject residence around 7:15 p.m. Officer Rory Pointer testified that he executed a traffic stop on the Cadillac shortly thereafter. Pursuant to this stop, Pointer discovered 5½ pounds of cannabis, packaged in five one-gallon zip-lock bags weighing approximately one pound each, in a black garbage bag in the trunk. The Trail Blazer left the subject residence at approximately 7:48 p.m., and Peoria police sergeant Loren Marion made a traffic stop of it. Pursuant to a search, Marion found three five-pound "blocks" of cannabis wrapped in cellophane and placed in a black garbage bag with red ties.

¶12 Based on these traffic stops, police obtained a warrant to search the subject residence. Prior to the execution of the search warrant, however, a police officer conducting surveillance on the subject residence saw someone leave around 10:30 p.m. Another officer stopped the individual, identified as defendant, and found that he possessed, among other things, his passport and \$320 in cash.

¶13 Peoria police officers executed the search warrant around 11 p.m. on April 21, 2009. The officers located 12 black garbage bags with red ties containing plant material suspected to be cannabis in the backyard along the fence line shared with 1514 West Margaret Street. Although

the bags were placed across the fence from the subject residence, the owner of the home at 1514 West Margaret Street testified that they were not his and were not in the yard when he looked outside that morning. These bags contained: (1) one loose bundle of cannabis; (2) 11 zip-lock bags of cannabis weighing approximately one pound each; (3) 27 blocks of cannabis wrapped in cellophane weighing approximately five pounds each; and (4) some packaging material with cannabis residue in it.

¶14 Police officers searched the garage and discovered empty, marked cardboard boxes and "Mylar" bags. Marion opined that the markings on the boxes were like those used by upper-level drug dealers to keep track of the contents of the box, and who was to receive the box. Marion and Peoria police sergeant Jerry Bainter further explained that Mylar was a heavy-duty, aluminum material, like a potato chip bag, and that drug dealers used it to package drugs because it acted as an odor and moisture barrier. According to Marion, Mylar could conceal the presence of drugs from dogs and during an x-ray scan, so it was an effective way to transport drugs. The Mylar bags found in defendant's garage had cannabis residue in them and markings consistent with those used by upper-level drug dealers.

¶15 Once inside the subject residence, police discovered three additional Mylar bags, an empty safe, a box of black garbage bags with red ties, a currency counter, a coin counter, and a scale used to weigh objects. Police also found an Illinois identification card and credit cards belonging to defendant, utility bills for the subject residence in defendant's name, and photographs of defendant with other people. The search also revealed a Western Union receipt indicating defendant had sent money to someone in California, the main distribution state for cannabis, and "Drug notes[.]" *i.e.*, notes in shorthand consisting of a set of initials with an

amount of money next to it.

¶16 Inside the subject residence, police further found approximately \$130,000 of assets, including one vehicle, three big screen televisions, an entertainment system, a sound system, and "a lot of jewelry" that itself was valued at \$60,000 to \$65,000. Police also discovered almost \$10,000 in cash and coins. Marion opined that the numerous \$20 bills police recovered were indicative of drug dealing, as purchasers typically paid in \$10 and \$20 denominations. Police also discovered bank accounts belonging to defendant. Specifically, defendant had one bank account with a balance of \$12,110.78, another with a balance of \$9,845, and a safe deposit box containing \$25,000.

¶17 Joni Little, a forensic scientist, testified that she tested samples of the plant material recovered from the subject residence. She specifically testified regarding three exhibits of plant material that weighed 2,198 grams, 6,628 grams, and 6,530 grams, and each tested positive for cannabis. Peoria police officer Scott Bowers testified that he performed fingerprint analysis on the packaging material. According to Bowers, his tests revealed two of defendant's fingerprints on one zip-lock bag, and one fingerprint on a cellophane-wrapped block. Bowers stated that once he identified those fingerprints as defendant's, he did not continue to test the bags for fingerprints of any other individuals. Also, during the State's case-in-chief, defendant stipulated that he had five prior misdemeanor and two prior felony convictions for unlawful possession of cannabis.

¶18 The State also presented the testimony of Marion as an expert witness in narcotic packaging, trafficking, and distribution. The record indicates that Marion: (1) worked as a police officer for 15 years, including assignments with the Peoria police vice and narcotics unit and the

Federal Drug Enforcement Agency (DEA), and made numerous drug related arrests during this time; (2) participated in specialized drug training courses, including a course on the concealment, packaging, and transportation of drugs, and in yearly conferences on narcotics; and (3) frequently spoke with DEA agents in other states about methods used to package and conceal drugs.

¶19 Marion testified that he believed that the instant cannabis originated in Mexico. Marion explained that the cannabis was harvested, dried, and compressed, which was indicative of cannabis grown in Mexico. Marion further stated that the instant cannabis was not grown indoors or in water, because it looked different from cannabis of that sort and police did not recover cannabis or growing equipment inside the subject residence. Marion also explained that harvesting season for cannabis was in April in Mexico, and September through November in Illinois, and that cannabis became moldy if it sat idle for too long after its harvest. He further stated that it would take a dozen cannabis plants to produce one pound of cannabis, and thus it would take a large field to produce 147 pounds of cannabis. Marion also believed that the instant cannabis was intended for distribution because it was packaged in one and five pound bundles, which were easy to sell.

¶20 Marion opined that the instant cannabis was from outside of Illinois due to its appearance, the Mylar packaging, and the numbering on the boxes recovered from the subject residence. On cross-examination, Marion acknowledged that Mexican drug cartels were beginning to grow cannabis in the United States because of problems shipping it over the border, and that he did not have personal knowledge that the instant cannabis was from Mexico.

¶21 After Marion's testimony, the State rested. Defendant moved for a directed verdict,

which the court denied. Defendant and three witnesses testified on his behalf, and the State presented rebuttal evidence. Defendant did not renew his motion for a directed verdict at the close of the evidence.

¶22 Prior to jury deliberations, defendant objected to the jury taking the cannabis into the jury room during deliberations because the cannabis "smell[ed]." The court stated that it "work[ed] both ways[.]" and that the instant "case [was] about cannabis." The court permitted the jury to take 22.2 pounds of the cannabis into the jury room, as well as some packaging material. The court informed the jury that if they desired to examine more of the instant cannabis during deliberations, the court would send the exhibit into the jury room. The court also advised the jury that if they would like to have any of the cannabis removed from the jury room, the court would do so.

¶23 The jury began deliberating at 9:45 a.m. on the fourth day of trial, and at 10:50 a.m., the jury asked the bailiff to remove all exhibits, including the cannabis. At 11:36 a.m., the court informed the parties that the jury had reached their verdicts. The jury convicted defendant on all counts. The court subsequently sentenced him to a 26-year term of imprisonment. Defendant appeals.

¶24 ANALYSIS

¶25 I. Odor of Cannabis

¶26 Defendant first contends that the trial court abused its discretion when it permitted the courtroom to be filled with the odor of the cannabis at issue, thus prejudicing defendant. The State argues that the trial court properly exercised its discretion by permitting the cannabis to remain in the courtroom during the State's case-in-chief and that the odor of the cannabis was not

at issue in this case.

¶27 A court of review grants great deference to the evidentiary rulings of the trial court (*People v. Sullivan*, 366 Ill. App. 3d 770 (2006)), and we will reverse a trial court's evidentiary ruling only if the court abuses its discretion (*People v. Lisle*, 376 Ill. App. 3d 67 (2007)). A trial court abuses its discretion when its ruling is arbitrary or fanciful, or where no reasonable person would adopt the view of the trial court. *Illgen*, 145 Ill. 2d 353.

¶28 In general, evidence must be relevant to be admissible. *People v. Maldonado*, 402 Ill. App. 3d 411 (2010). Even when relevant, the trial court may exclude evidence if the probative value of the evidence is substantially outweighed by unfair prejudice to the defendant's right to a fair trial. *People v. Illgen*, 145 Ill. 2d 353 (1991).

¶29 Our review of Illinois case law reveals that this issue has not been considered by our supreme court. However, courts in other jurisdictions have considered similar concerns surrounding the odor of cannabis in the courtroom. These courts have considered whether: (1) the cannabis was present for the State's case-in-chief, the defendant's case-in-chief, or both (*McKenzie v. State*, 208 S.W.3d 173 (Ark. 2005)); (2) the cannabis was present in the courtroom for an extended period of time (*McKenzie*, 208 S.W.3d 173); (3) the government acted in bad faith seeking to admit the cannabis (*United States v. Ramos Rodriguez*, 926 F.2d 418 (5th Cir. 1991)); (4) the substance or weight of the substance was an element of the offense (*Kalinosky v. State*, 414 So.2d 234 (Fla. Dist. Ct. App. 1982)); and (5) the court properly admitted the cannabis into evidence (*McKenzie*, 208 S.W.3d 173; see also *United States v. Dunn*, 961 F.Supp. 249 (D. Kan. 1997)). A court has also stated that the prosecution acted improperly by allowing open containers of marijuana to remain present in the courtroom and emit an odor during that

defendant's case-in-chief. *United States v. Garcia*, 986 F.2d 1135 (7th Cir. 1993).

¶30 We find these considerations helpful when deciding the issue in the case at bar. In this case, we conclude that the court abused its discretion when it admitted the cannabis at issue and allowed its odor to permeate the courtroom. Here, the State charged defendant with the knowing possession, distribution, and trafficking of more than 5,000 grams of cannabis. Thus, we acknowledge that both the nature and quantity of the illegal substance seized during the search warrant were relevant to establishing the elements of each offense charged. See 720 ILCS 550/4(g), 5(g), 5.1(a) (West 2008). As such, the record does not indicate that the State necessarily acted in bad faith when it placed the cannabis in the courtroom.

¶31 However, we believe that the State could have established the nature and weight of the substance in other, less offensive, manners. Specifically, the State could have sought to admit pictures of the cannabis, along with testimony regarding its nature and weight. The State could have also brought the cannabis into the courtroom for the limited purpose of establishing its nature and weight, and removed it immediately. Proceeding in one of these manners would have permitted the case to proceed in a less inflammatory fashion.

¶32 Furthermore, while we acknowledge that the cannabis at issue was not present in the courtroom during defendant's case-in-chief, it was present in the courtroom during opening statements and for the State's case-in-chief and again during closing arguments and jury instructions. Thus, the cannabis was present in the courtroom for an extended period of time. *Cf. McKenzie*, 208 S.W.3d at 178 (although the jury did not complain of the odor of cannabis when the court inquired whether "any of the jurors [were] having trouble with the smell[.]" the court ordered removal of cannabis that had been in the courtroom for 2 hours and 45 minutes).

We also note that by the third day of trial, a juror's medical condition became aggravated by the odor of the cannabis.

¶33 Overall, we do not believe it was essential to the State's case that the cannabis at issue remain in the courtroom for three days of the trial. We believe that permitting the cannabis to remain in the courtroom for this length of time caused substantial prejudice to defendant. Thus, admission of this evidence in this particular instance was more prejudicial than probative, and the trial court abused its discretion in doing so.

¶34 "The constitutional right to a jury trial guarantees to a criminal defendant a fair trial by an impartial jury, and the failure to provide a criminal defendant a fair trial violates the minimal standards of due process." *People v. Stremmel*, 258 Ill. App. 3d 93, 112-13 (1994). Thus, a trial before a biased or prejudiced jury requires remedying in order to preserve the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶35 In this case, we conclude that the trial court abused its discretion by permitting the cannabis at issue, and its corresponding odor, to remain in the courtroom during defendant's trial. The record indicates that the jury viewed, and smelled, the instant cannabis over the course of three days of defendant's trial. As we have previously noted, the State could have proven their case in other, less invasive, manners. We cannot confidently conclude that the jury did not become prejudiced by the sight and smell of the instant cannabis for this length of time. Because the record does not unequivocally indicate that defendant was tried before an impartial and unbiased jury, we find that the judge's ruling was an abuse of discretion.

¶36 II. Directed Verdict

¶37 Defendant next contends that the trial court erred when it denied his motion for a directed

verdict. Defendant specifically argues that when the evidence is viewed in the light most favorable to the State, it failed to prove that defendant brought cannabis into Illinois, or caused cannabis to be brought into Illinois; thus, his conviction for cannabis trafficking must be overturned.

¶38 In a case tried before a jury, a motion for a directed verdict requires the trial court to consider only whether a reasonable mind could fairly conclude the guilt of that defendant beyond a reasonable doubt, considering the evidence presented during the State's case-in-chief in the light most favorable to it. *People v. Connolly*, 322 Ill. App. 3d 905 (2001). The ultimate question of whether a defendant is guilty involves weighing the evidence and determining the credibility of witnesses, functions reserved for the finder of fact. *Connolly*, 322 Ill. App. 3d 905. A motion for a directed verdict presents a question of law that an appellate court reviews *de novo*. *Connolly*, 322 Ill. App. 3d 905.

¶39 To sustain a conviction for cannabis trafficking, the State must show that defendant knowingly brought, or caused to be brought, more than 5,000 grams of cannabis into Illinois from another state or country. 720 ILCS 550/5.1(a) (West 2008). It is well settled that circumstantial evidence is sufficient to support a criminal conviction, and that a defendant can be convicted based solely on circumstantial evidence. *People v. Saxon*, 374 Ill. App. 3d 409 (2007). "Circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of other facts that tend to establish guilt or innocence of the defendant." *Saxon*, 374 Ill. App. 3d at 417. "The trier of fact need not *** be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194

Ill. 2d 305, 330 (2000).

¶40 When viewed in the light most favorable to the State, the evidence showed that defendant resided in the subject residence. Around 11 p.m. on April 21, 2009, Peoria police officers executed a search warrant of the subject residence. Pursuant to this search, police found approximately 147 pounds of cannabis next to defendant's fence. Subsequent fingerprint testing revealed defendant's fingerprints on a zip-lock bag and cellophane that had packaged the cannabis. Marion, an expert in the transportation, packaging, and sale of cannabis, opined that the cannabis at issue was grown in Mexico, and that boxes and Mylar bags found in defendant's garage bore markings consistent with the organization system of an upper-level drug trafficker.

¶41 We conclude that the State's evidence was sufficient to sustain defendant's conviction for cannabis trafficking beyond a reasonable doubt and that the trial court did not err when it denied defendant's motion for a directed verdict. Thus, we decline to grant defendant an acquittal on this conviction.

¶42 Lastly, we note that it is well settled that a defendant who presents evidence after the trial court denies a motion for directed verdict waives any error in the court's ruling unless the defendant renews the motion at the close of all evidence. *People v. Barrow*, 133 Ill. 2d 226 (1989). Here, defendant chose to present evidence on his own behalf and then failed to renew his motion for a directed verdict at the close of all evidence or to take issue with the court's ruling in his motion for a new trial. However, the State did not assert that defendant waived this argument for purposes of appellate review (*People v. Williams*, 193 Ill. 2d 306 (2000)), and since waiver is a limitation on the parties and not on the court (*People v. Rush*, 401 Ill. App. 3d 1 (2010)), we chose to address the foregoing issue in the interest of justice and in order to provide

a complete review.

¶43

CONCLUSION

¶44 For the foregoing reasons, the judgment of the trial court of Peoria County is reversed, and the cause is remanded for a new trial.

¶45 Reversed and remanded.

¶ 46 JUSTICE WRIGHT, concurring in part and dissenting in part:

¶ 47 I agree with the majority's conclusion that the trial court did not err by denying defendant's motion for a directed verdict. I also agree with the majority's conclusion that the State's evidence in this case was sufficient to sustain defendant's conviction for cannabis trafficking beyond a reasonable doubt. However, I cannot agree with the majority's conclusion that defendant did not receive a fair trial in this case.

¶ 48 Here, the State was required to prove beyond a reasonable doubt that defendant possessed and brought a certain amount of cannabis into the State of Illinois with the intent to distribute the cannabis. See 720 ILCS 550/5.1(a) (West 2008). The State offered expert testimony explaining to the jury that the seized cannabis was packaged in a manner that was both conducive to future sales and consistent with the practices of an upper-level drug trafficker. While photographs may have sufficed, the best evidence available for the jury's consideration was the packaged cannabis itself. Allowing the jury to view the packages before making their assessment of the evidence was an important component of the State's case-in-chief.

¶ 49 In fact, defense counsel did not object to the admission of the cannabis as evidence during trial. Moreover, on appeal, defendant does not assert the trial court erred by admitting the

evidence at trial. The majority has determined the probative value of the evidence was substantially outweighed by the unfair prejudice to this defendant's right to a fair trial because the cannabis exhibit smelled like cannabis. I do not share this view.

¶ 50 Defendant has successfully persuaded the majority that he is entitled to a new trial because the smell of the cannabis rendered the jury “unable to properly deliberate.” On appeal, defendant claims that the odor from the cannabis filled the courtroom for 3 full days, or 27 hours. This contention is exaggerated.

¶ 51 I submit the record reveals that the cannabis was in the courtroom for considerably less time than defendant claims. The record shows the cannabis was in the courtroom during opening statements and the State’s case-in-chief. According to the record, at the end of the State’s case-in-chief, a single juror advised the judge that the odor of the cannabis was problematic for that particular juror. The court asked the jury if the air quality was acceptable and then immediately responded to the juror’s complaint by instructing the bailiff to remove the cannabis from the courtroom before defendant's case-in-chief. The court also immediately arranged for better ventilation in the courtroom.

¶ 52 The cannabis remained outside the courtroom until the exhibit was returned for closing arguments. After the court implemented these measures, the court did not receive any subsequent complaints from the jurors about the aroma of the cannabis during trial.

¶ 53 Criminal trials can involve unpleasant evidence for the jury to view, study, and evaluate. Some exhibits documenting criminal activities such as graphic photographs, bloody clothing, and even odorous contraband may be offensive to an individual juror’s senses. The reality is that exposure to matters beyond the normal experiences of most jurors may trigger physical

discomfort or emotional unease. I respectfully suggest that juror discomfort does not automatically render a criminal trial unfair. Significantly, a defendant must demonstrate prejudice in order to warrant a new trial. In this case, defendant has not demonstrated prejudice.

¶ 54 There is no support in this record for defendant's claim that the odor of cannabis caused this jury to become unable to deliberate. Prior to deliberations, the trial court informed the jury that in order to prevent the smell from becoming unpleasant again, the court would minimize the time the exhibit would be in the jury room by allowing the jurors to first select a foreperson before a portion of the cannabis would be sent into the jury room. The court also told the jurors that if they wanted to view more of the cannabis exhibits, they could make that request during deliberations. After deliberating for approximately one hour, the jurors requested that all the exhibits, including the cannabis, be removed from the jury room. The bailiff and clerk removed the exhibits at the jurors' request, and the jury continued to deliberate for approximately 45 more minutes before reaching a verdict.

¶ 55 I would affirm the conviction in this case because this record demonstrates defendant received a fair trial. Once the court became aware of a single juror's discomfort during the State's case-in-chief, the trial judge remedied the situation such that no other complaints were expressed by that juror, or any other jurors, during the remainder of trial or later during deliberations. In fact, in my view, the court took very reasonable precautions to insure the odor of the cannabis did not unfairly influence deliberations.

¶ 56 For these reasons, I concur in part and dissent in part.