2013 IL App (4th) 110276-U

NO. 4-11-0276

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 26, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MALAQUIAS VILCHIZ,	)	No. 10CF521
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Any error in the trial court's consolidation of defendants' trials was harmless beyond a reasonable doubt.

¶ 2 In January 2011, a jury found defendant, Malaquias Vilchiz, guilty of controlled substance trafficking, unlawful possession of a controlled substance with intent to deliver (cocaine), unlawful possession of a controlled substance (cocaine), unlawful possession of a controlled substance with intent to deliver (heroin), and unlawful possession of a controlled substance (heroin). In March 2011, the trial court sentenced him to concurrent prison terms of 35 years for controlled substance trafficking and 20 years for unlawful possession of a controlled substance with intent to deliver (heroin). The court treated the other counts as merged. Defendant filed a motion to reconsider his sentence, which the court denied in March 2011.

¶ 3 On appeal, defendant argues the trial court erred in granting the State's motion to

consolidate, thereby depriving defendant of a fair trial based on his codefendant's statements and defense strategy. Because we find any error in the trial court's consolidation of defendants' trials harmless beyond a reasonable doubt, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2010, a grand jury indicted defendant by information with controlled substance trafficking (720 ILCS 570/401.1(a) (West 2008)), alleging defendant knowingly brought into the State of Illinois with the intent to deliver 900 grams or more of a substance containing cocaine; unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2008)), alleging defendant knowingly possessed with the intent to deliver 900 grams or more of a substance containing cocaine; unlawful possession of a controlled substance (900 grams or more of a substance containing cocaine) (720 ILCS 570/402(a)(2)(D) (West 2008)); unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(D) (West 2008)), alleging defendant knowingly possessed with the intent to deliver 900 grams or more of a substance containing heroin; and unlawful possession of a controlled substance (900 grams or more of a substance containing heroin) (720 ILCS 570/402(a)(1)(D) (West 2008)). The State also charged codefendant, Moises Torrez, with the same offenses in case No. 10-CF-520.

¶ 6 In August 2010, the State moved to consolidate the trials of the two defendants stating, in part:

> "In addition, witnesses for the State, and presumably for the defense, will be exactly the same for both offenses [*sic*]. Each defendant has pleaded not guilty. The issue in this case is squarely

on the knowledge of each defendant. It is anticipated that each defendant will claim no knowledge of the events leading to the charged offenses. Therefore, it is anticipated that no antagonistic defense will be presented by either defendant."

¶ 7 In October 2010, codefendant filed a response in opposition to consolidation stating "consolidation of these two cases is inappropriate because at trial, the defense of Mr. Torrez will be inconsistent with, and antagonistic to, that of Mr. Vilchiz." Codefendant stated on May 31, 2010, he drove a semitruck owned by H.C.A. River Transport (HCA). Defendant rode with codefendant as a "trainer." Illinois State Trooper Timothy Sweeney stopped the semitruck to conduct a motor carrier safety inspection. During the inspection, Sweeney found approximately eight kilograms of cocaine and one kilogram of heroin among pallets of yogurt. Both codefendant and defendant were arrested and charged as stated above.

¶ 8 Codefendant further stated in his response in opposition to consolidation that his defense "will expressly implicate Mr. Vilchiz's sole involvement in the events leading to the charged offenses." According to codefendant, he would offer the following as testimony at a joint trial. Codefendant denied having knowledge of the drugs in the trailer. During a custodial interrogation, codefendant reported that defendant trained and supervised codefendant. On the date codefendant and defendant began transporting a shipment of yogurt from California to Illinois, codefendant and defendant drove to a location in California to pick up 22 pallets of yogurt. Codefendant then instructed defendant to drive back to the HCA terminal in Riverside, California, to fix a tire. Codefendant did not think there was anything wrong with the tire but followed defendant's orders. Upon arriving at the terminal, defendant instructed codefendant to

get something to eat from a nearby restaurant and return in 30 minutes. Codefendant observed defendant speak with three Hispanic men at the HCA terminal. Upon codefendant's return, he recorded "fix tire" in the logbook. Codefendant stated defendant became angry over the logbook entry. Codefendant advised law enforcement officials that the return to the HCA terminal "didn't feel right" but he followed defendant's orders. He reported traveling with defendant on three other occasions. On one occasion, defendant told codefendant to "get lost" while he met with "some people."

¶ 9 Codefendant stated his planned defense, and defendant's claim of lack of knowledge of the drugs in the trailer, presented antagonistic defenses supporting severance.

¶ 10 In November 2010, the State filed a memorandum in support of its motion to consolidate arguing "the facts highlighted by Torres's motion only point towards a shared defense of ignorance and possibly suspicious circumstances."

¶ 11 In November 2010, the trial court conducted a hearing on the motion to consolidate. Defendant adopted codefendant's response in opposition to consolidation. The State argued, in part:

> "[I]n this case, we have two people that have made no direct statements of knowledge. The defenses are, 'It wasn't me. I don't know anything.' That is not directly antagonistic. And only because these two individuals will sit at the same table at a trial and say, 'It wasn't me,' and, therefore, in argument, they'll say, 'It must be the other person,' does not make these cases antagonistic to the point that they preclude joinder as a constitutional issue."

¶ 12 Codefendant distinguished this case from those cited by the State, arguing he provided specific details in his response "about how this is going to be finger-pointing, how the prejudice is going to result to both Mr. Vilchiz and [] Mr. Torrez." Codefendant's counsel admitted "there's no evidence that either one of them had any knowledge of the narcotics in the truck." Further, codefendant argued "a limiting instruction is not even going to come close to the amount of prejudice that is going to result from them sitting in the same courtroom with [codefendant] pointing the finger at [defendant]."

¶ 13 Defendant's counsel hypothesized that during closing argument, codefendant might try to pin the blame on defendant. Defendant planned to dispute the drugs belonged to him.

¶ 14 Following argument, the trial court took the matter under advisement and thereafter entered an order granting the motion to consolidate, stating:

> "Though the defenses in these matters might be characterized as inconsistent, they are not truly antagonistic defenses at all, in that neither defendant specifically implicates the other in the offense. At the very least, the defenses are not so antagonistic that the defendants could not receive a fair trial."

¶ 15 In January 2011, the consolidated jury trial commenced. Forensic scientist Aaron Roemer testified that People's exhibit No. 1A was 997 grams of a substance containing heroin and People's exhibit No. 2 was 4,000 grams of a substance containing cocaine.

¶ 16 Manuel Zendejas testified he loaded trucks at Sun Valley Dairy, a yogurt factory in California. Zendejas testified that his job was to drive the forklift with pallets of yogurt into

the trailer, and then another man helped position the pallets within the trailer. Zendejas remembered defendant because he dressed nicer than most drivers. Some drivers helped fix the load, but defendant did not. Zendejas testified that, after they loaded the trailer, the cargo was "smooth across the top" and he would have noticed if one pallet was not shrink wrapped. Zendejas did not seal the trailer after it was loaded.

¶ 17 On cross-examination, Zendejas admitted that he did not look inside the trailer or inspect it after it was loaded.

¶ 18 Maria del Carmen Sandoval testified she was employed by HCA, an over-the-road trucking business based in California that employed defendant and codefendant. Defendant was hired in 2005 as a driver but, after his license was suspended, he remained an employee. Sandoval testified that the trucking company was owned by a friend who lived in Texas and she owned the only truck used by the company, although it was in her father's name. HCA contracted with Sun Valley Dairy to take a load of yogurt to Bolingbrook, Illinois. Codefendant was supposed to drive the truck, since he was the only employee who had a valid license, and defendant went with him to train codefendant to drive out of state. Codefendant had previously driven out of state to Arizona and Nevada, picking up and dropping off loads by himself.

¶ 19 Sandoval testified that she authorized defendant to pick up the load on May 28, 2010, even though he was not licensed. Her company did not seal the trailers after they were loaded, as their policy was to use locks. Sandoval testified that the driver kept the key to the locks.

¶ 20 On cross-examination by codefendant's counsel, Sandoval testified she had a previous conviction for smuggling cannabis. Defendant did not have the tire fixed before loading

the trailer because the tire shop did not open early. She explained defendant did not set the route for the trip, since they always used the same route.

¶ 21 On cross-examination by defendant's counsel, Sandoval testified that she spoke to both drivers while they were on the road.

¶ 22 Sweeney testified he stopped the tractor trailer driven by codefendant on May 31, 2010, to perform a motor carrier inspection. When Sweeney noticed that defendant had signed the bills of lading, he asked codefendant if defendant picked up the load; codefendant told him that defendant only signed for the load. On redirect, Sweeney testified that codefendant told him that the lock on the trailer belonged to him.

¶ 23 Michael Ross, a master sergeant with the Illinois State Police, testified he was asked by Sweeney to retrieve the key to the locked trailer. Defendant told Ross that the key was on the key ring in the ignition. Ross testified that defendant told him "he did not know there was contraband or drugs in the trailer."

¶ 24 Earl Candler testified he was a narcotics investigator with the Illinois State Police at the time of the stop. He was called to the scene to track the drugs to their destination. Codefendant told Candler that he and defendant picked up the empty tractor trailer and drove to Sun Valley to get a load of yogurt, then returned to the yard to fix a bad tire. Codefendant did not think that the tire was bad, but he followed defendant's orders. Once at the truck yard, codefendant was instructed to leave and eat while defendant had mechanics fix the tire. While codefendant was leaving, he saw defendant meet with three Hispanic men he did not know. Codefendant told Candler that when he entered "fix a tire" in the logbook, defendant yelled at him. When Candler interviewed defendant, he denied any knowledge of the drugs and stated that

he was only there to train codefendant.

¶ 25 Candler testified he traveled to California to investigate the trucking company, tire shop, and dairy. The personnel at the dairy were cooperative. The trucking company only had one vehicle, and operated out of a residence. Sandoval met with Candler and was cooperative. Candler went to the tire shop and confirmed that defendant did have a tire fixed there. The actual trucking yard, which was next to the tire shop, was "just a junk yard, very run down, very unprofessional."

¶ 26 On cross-examination by codefendant's counsel, Candler testified that codefendant told Candler he rode with defendant to pick up the load of yogurt. During his investigation, Candler learned codefendant did not accompany defendant to pick up the load of yogurt. Codefendant told Candler about the stop to fix the tire, which codefendant did not believe needed to be fixed, and that the stop "didn't really feel right." Codefendant told Candler that defendant was the one who communicated with Sandoval. Candler testified that he learned through his investigation that Sandoval was a convicted drug smuggler. Candler admitted that, although an unidentified fingerprint was found on the drug packaging, he never compared the prints of Zendejas or Koritko, the men who loaded the trailer, or Sandoval.

¶ 27 On cross-examination by defendant's counsel, Candler testified that defendant told him he was only the trainer to the driver and had no knowledge of the drugs.

¶ 28 Defendant testified on his own behalf. Defendant testified he was hired to teach codefendant to keep a logbook and follow the commercial driving rules. The night before they were due to pick up a load at Sun Valley Dairy, Sandoval could not reach codefendant, so defendant took the truck and picked up the load. Defendant testified that he waited in the truck

while the yogurt was loaded, then counted the pallets and signed for the load. Defendant put the load locks on, closed the door, and waited in front of Sun Valley Dairy for 60 to 90 minutes for codefendant to arrive. Once codefendant arrived, codefendant drove the truck back to the yard so a tire could be replaced. At the yard, defendant called his wife to pick him up so he could get his clothing for the trip. He invited codefendant to come to his house and wait, but codefendant stayed at the yard. Defendant denied meeting anyone at the truck yard. About 60 to 90 minutes later, Sandoval called defendant and told him the truck was ready for the trip. Defendant's wife drove him back to the yard, where he found codefendant asleep in the truck, which was locked. Defendant knocked on the window so codefendant would let him in, then he and codefendant left for Illinois.

¶ 29 On cross-examination by the State, defendant testified that the key to the lock on the back of the trailer was on the key ring that also held the ignition key. At all times during the trip, codefendant had the keys. Defendant admitted he had codefendant sign the logbook as if he had picked up the load, and he knew it was wrong.

¶ 30 On cross-examination by codefendant's counsel, defendant testified he placed the load locks inside the trailer, and also the lock on the trailer door, and then put the key to the door lock on the ignition key ring. Defendant testified he told Sandoval about the bad tire a week earlier, but she did not decide to fix it until they were ready to make their trip.

¶ 31 Codefendant exercised his constitutional right not to testify. See U.S. Const., amend. V.

¶ 32 In closing, the State argued defendants had control over the trailer's contents, and defendant did not seal the trailer "because he intended to put nine kilos of drugs in there with his

partner Torrez." The State argued codefendant and defendant loaded the drugs into the trailer together, then left for Illinois. The State used the logbook entries to dispute codefendant's claim that he went to get something to eat while the tire was being repaired.

¶ 33 In closing, codefendant's counsel admitted the logbook had been falsified. However, he argued defendant likely told codefendant to falsify the logbook. He argued the State failed to prove knowledge by either defendant or codefendant. He characterized the case as based on suspicion or a hunch. Codefendant's counsel argued law enforcement officials failed to conduct an adequate investigation when it did not pursue an unknown fingerprint. He suggested multiple individuals could be responsible for placing the drugs in the trailer including Sandoval, Sun Valley Dairy employees, and "30 temporary employees" of the warehouse where the load was to be delivered.

¶ 34 The trial court provided instructions to the jury, including Illinois Pattern Jury Instructions, Criminal, No. 3.08 (4th ed. 2000), which states "[a] statement made by one defendant may not be considered by you as against any other defendant."

¶ 35 Following closing arguments, the jury found defendant guilty on all counts. The jury found codefendant not guilty on all counts. Defendant filed a posttrial motion, which the trial court denied. In March 2011, the trial court sentenced defendant to concurrent prison terms of 35 years for controlled substance trafficking and 20 years for unlawful possession of a controlled substance with intent to deliver (heroin). The court treated the other counts as merged. Defendant filed a motion to reconsider his sentence, which the court denied. This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Defendant argues the trial court erred in granting the State's motion to consolidate, thereby depriving defendant of a fair trial based on his codefendant's statements and defense strategy. However, we need not decide whether the trial court properly granted the motion to consolidate because any arguable error was harmless beyond a reasonable doubt. See *People v. Hart*, 214 Ill. 2d 490, 517, 828 N.E.2d 260, 275 (2005) ("In any event, we need not decide whether defendant's failure to deny Beck's accusation is admissible against him, because the error, if any, is harmless beyond a reasonable doubt."); *People v. Morgan*, 197 Ill. 2d 404, 442, 758 N.E.2d 813, 835 (2001) ("We need not address whether the appellate court properly found that Harberts' question was interrogation and that Jon was in custody because we find that, even if the trial court erroneously denied Jon's motion to suppress his initial statement to Harberts, any error was, at most, harmless.").

¶ 38 Following the individual charging of the defendants, the State moved for consolidation of the two cases pursuant to sections 111-4 and 114-7 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-4, 114-7 (West 2010)), and the cases were joined. Section 114-7 permits the joinder of related prosecutions if the offenses and the defendants could have been joined in a single charge. 725 ILCS 5/114-7 (West 2010). Section 111-4 provides that two or more defendants may be charged together if they are alleged to have participated in the same act or in the same comprehensive transaction out of which the offense or offenses arose. 725 ILCS 5/111-4 (West 2010). The offenses with which the defendants in the instant case were charged clearly arose from the same comprehensive transaction.

¶ 39 Conversely, section 114-8 of the Code (725 ILCS 5/114-8 (West 2010)) provides

for severance when a defendant or the State is prejudiced by a joinder of related prosecutions. "A defendant's motion for severance must specifically demonstrate how the defendant is going to be prejudiced by proceeding with a joint trial." *People v. Harris*, 123 Ill. 2d 113, 158, 526 N.E.2d 335, 355 (1988). "Mere apprehensions of prejudice are not enough" to require separate trials. *People v. Bean*, 109 Ill. 2d 80, 92, 485 N.E.2d 349, 355 (1985). "Separate trials are mandated only when the defenses are so antagonistic that a fair trial can be achieved only through severance." *Harris*, 123 Ill. 2d at 159, 526 N.E.2d at 355. In ruling on a motion for severance, the trial court "must make a prediction about the likelihood of prejudice at trial, taking into account the papers presented, the arguments of counsel, and any other knowledge of the case developed from the proceedings." *People v. Daugherty*, 102 Ill. 2d 533, 541, 468 N.E.2d 969, 972-73 (1984).

¶ 40 The decision to grant or deny a severance is within the sound discretion of the trial court, and will not be reversed absent an abuse of discretion. *Daugherty*, 102 Ill. 2d at 541, 468 N.E.2d at 973. An abuse of discretion is found only when a court " 'acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted.' " *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 1240, 799 N.E.2d 1037, 1041 (2003) (quoting *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 846, 756 N.E.2d 382, 388 (2001)).

¶ 41 We do not address defendant's argument that he should have been afforded a separate trial because we conclude any alleged error in consolidating the trials was harmless beyond a reasonable doubt.

¶ 42 In this constructive possession case, the State was required to prove defendants

had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found. See *People v. Love*, 404 Ill. App. 3d 784, 788, 937 N.E.2d 752, 756 (2010). Here, the evidence against defendant was strong.

¶ 43 At trial, Sandoval testified she was employed by HCA. HCA was a commercial trucking company with one truck. Defendant began driving for HCA in 2005. Although defendant lost his commercial driver's license in 2006, he continued to work for HCA. Sandoval testified she hired codefendant in April 2010. Sandoval asked defendant to train codefendant to drive out of state although codefendant had previously driven out of state to Arizona and Nevada, picking up and dropping off loads by himself. Defendant drove to pick up the load on May 28, 2010, even though he was not licensed. Zendejas testified that after they loaded the trailer, the cargo was "smooth across the top" and he would have noticed if one pallet was not shrink-wrapped.

¶ 44 Sandoval testified she met defendant in approximately 2001, through defendant's wife. The three are neighbors and have been friends for a long time. Defendant's wife helps Sandoval with the trucking company. Sandoval admitted she had a previous conviction for smuggling cannabis.

¶ 45 Sweeney testified he stopped the tractor trailer driven by codefendant on May 31, 2010, to perform a motor carrier inspection. Defendant advised Sweeney he was training codefendant and his license was suspended. Sweeney stated defendant "served absolutely no purpose in a commercial motor vehicle." Sweeney had conducted 1,000 to 1,500 inspections; he had never seen a suspended commercial driver training another driver. Although defendants were stopped in McLean County, Illinois, traveling northbound on a Monday morning, their

appointment in Bolingbrook, Illinois, was not until Tuesday. Sweeney deployed his canine partner, who alerted to the smell of narcotics.

¶ 46 Candler testified when he interviewed defendant, defendant denied any knowledge of the drugs and stated that he was only there to train codefendant.

¶ 47 Defendant testified he counted the pallets of yogurt after they were loaded. The pallets were smooth across the top. Defendant placed the load locks on the inside of the trailer and closed the trailer door. Defendant testified he and codefendant drove back to the truck yard before leaving for Illinois. Defendant admitted he entered false data into the logbook.

¶ 48 Roemer testified that People's exhibit No. 1A was 997 grams of a substance containing heroin and People's exhibit No. 2 was 4,000 grams of a substance containing cocaine.

¶ 49 We find there was strong circumstantial evidence that defendant knew of the presence of the drugs and had immediate and exclusive control over the area where the drugs were found. When the evidence is viewed as a whole, it was sufficient to prove defendant guilty beyond a reasonable doubt. We do not believe a severed trial would have affected the outcome.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 52 Affirmed.