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Third Division  
June 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	09 CR 7399
	)	
TIMOTHY NINKO,	)	Honorable
	)	John J. Moran,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Murphy and Steele concurred in the judgment.

**ORDER**

*HELD:* Where a defendant shared use of a room where the police found contraband hidden and in plain view, the evidence sufficiently supported a verdict holding that the defendant constructively possessed the contraband. The armed habitual criminal statute does not violate the second amendment to the United States Constitution.

Following a bench trial, the trial court found the defendant, Timothy Ninko, guilty of possessing more than 30 grams of marijuana and of violating the armed habitual criminal statute. On

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appeal, Timothy challenges the sufficiency of the evidence to prove that he possessed the marijuana and the firearm parole agents found in the apartment Timothy shared with his family. He also contests the constitutionality of the armed habitual criminal statute. We find the evidence sufficient to support an inference that Timothy constructively possessed the contraband, and we adopt an earlier opinion upholding the constitutionality of the armed habitual criminal statute. Accordingly, we affirm.

#### BACKGROUND

On March 15, 2009, Chris Piotrowski, a parole agent, went to the address Timothy gave the Department of Corrections when the Department released him from the penitentiary. Piotrowski found Timothy in the apartment, which Timothy shared with his mother, his stepfather, his sister, and his sister's four children. Piotrowski smelled marijuana once he stepped inside the apartment. Piotrowski and another parole agent searched the apartment. They found a bag containing less than one gram of marijuana in plain view in one of the bedrooms. They later found bullets, a large bag containing 104 grams of marijuana, and a contraption that looked like the firing mechanism from a .22 caliber rifle. Piotrowski found that some of the bullets fit in the chamber of the firing mechanism, and he separately tested the trigger, which also worked. The other agent administered a field drug test on Timothy. The test results indicated that Timothy had marijuana and heroin in his urine. The parole agents arrested Timothy, and prosecutors charged him with (1) possession of more than 30 grams of marijuana, (2) unlawful use of a weapon by a felon (UUWF) for possession of the bullets, and (3) violation of the armed habitual criminal statute (720 ILCS 5/24-1.7(a) (West 2008)) for possession of the firearm.

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At the bench trial, Piotrowski testified that he met Timothy when he became Timothy's parole agent in February 2009. When Piotrowski went to the apartment one month later, on March 15, 2009, Timothy answered the door, stinking of marijuana. Piotrowski asked to see Timothy's bedroom. Timothy took him to a room which he said he shared with his mother. Piotrowski testified that he saw a small bag of marijuana on a dresser in the bedroom. Piotrowski and the other agent then searched the bedroom thoroughly. In the top drawer of a second dresser, Piotrowski found the large bag of marijuana and several bullets. In the bottom drawer of that dresser, he found the firearm. The other agent found a box of bullets hidden inside a cosmetic box, which was, in turn, hidden under a pile of clothes. Timothy said nothing during the search. He made no effort to hide or run from the agents.

Neither of the agents described any of the other contents of the dresser that held the firearm, some bullets, and the large bag of marijuana. The agents testified that they did not search the second bedroom in the apartment.

Timothy and his sister testified that the agents searched both of the bedrooms. Timothy swore that the agents found the large bag of marijuana, the firearm, and the bullets in his stepfather's bedroom, not in his mother's bedroom. Timothy's stepfather testified that he, too, saw the agents searching his bedroom. He did not recognize the firearm or the bullets, and he did not recall whether the large bag of marijuana had been in his bedroom. Timothy, his stepfather, and his sister, all testified that Timothy usually slept in the living room, not in his mother's bedroom. Timothy admitted that he had two prior convictions for burglary.

The trial court found Timothy guilty of possession of more than 30 grams of marijuana,

UUWF, and a violation of the armed habitual criminal statute. The court sentenced Timothy to nine years for violating the armed habitual criminal statute, and to a concurrent term of six years for possessing marijuana. The court entered no sentence on the UUWF charge. Timothy now appeals.

## ANALYSIS

### Constructive Possession

Timothy argues first that the prosecution failed to prove that he possessed the firearm, the bullets, and the large bag of marijuana. When we review a conviction for sufficiency of the evidence, we must consider all the evidence in the light most favorable to the prosecution. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). We will not reverse the conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Evans*, 209 Ill. 2d at 209.

To prove that Timothy possessed the firearm, the bullets and the marijuana, the prosecution could prove either actual physical possession or constructive possession. *People v. Rangel*, 163 Ill. App. 3d 730, 739 (1987). The prosecution elected to prove only constructive possession. To show constructive possession of the contraband, the prosecution needed to show that Timothy exercised immediate and exclusive control over the area where the agents found the contraband, and Timothy knew of the presence of the contraband. *Rangel*, 163 Ill. App. 3d at 739; *People v. Stack*, 244 Ill. App. 3d 393, 398 (1993). Two persons may jointly have exclusive control over an area. See *People v. Embry*, 20 Ill. 2d 331, 335 (1960). “Because of the difficulty of proving knowledge of the presence of drugs, evidence showing that the defendant had control over the premises where the drugs were found gives rise to an inference of knowledge and possession of the drugs. [Citation.] Such an inference ‘ “may be sufficient to sustain a conviction for unlawful possession of narcotics *absent*

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*other facts and circumstances which might leave in the mind of [the trier of fact] a reasonable doubt as to his guilt.” ‘ ’* (Emphasis in original) *People v. Jones*, 105 Ill. App. 3d 1143, 1148 (1982), quoting *People v. Faulkner*, 83 Ill. App. 2d 54, 57 (1967), quoting *People v. Nettles*, 23 Ill. 2d 306, 309 (1961).

Here, the parole agents testified that they found the firearm, the large bag of marijuana and some bullets in the drawers of one of the dressers in the bedroom Timothy shared with his mother. They found more bullets in a cosmetic box hidden under a pile of clothes in the same room. On top of the other dresser, the agents found the small bag with less than one gram of marijuana. The evidence supports the inference that Timothy and his mother jointly controlled the area in which the agents found the contraband.

The evidence of marijuana in Timothy’s urine supports the inference that he knew about the marijuana in his bedroom. Police testified that they found the marijuana on one dresser and in the top drawer of the other dresser. Police also found several bullets in the drawer with the large bag of marijuana, and the firearm in another drawer of that dresser. The proximity of the bullets to the marijuana supports the inference that Timothy also knew about the bullets, and the connection between the bullets and the firearm supports the inference Timothy knew about the firearm. Accordingly, we find the evidence sufficient to support the finding that Timothy constructively possessed the large bag of marijuana, the bullets and the firearm. See *Embry*, 20 Ill. 2d 331, 335; *People v. Hill*, 226 Ill. App. 3d 670, 672-73 (1992).

Timothy relies on *People v. Wolski*, 27 Ill. App. 3d 526 (1975), as authority for reversal here. In *Wolski*, police found marijuana in an apartment the defendant shared with his brother. The

defendant testified that he had not stayed at the apartment for three days prior to the search, and many persons had access to the apartment. The appellate court reversed the defendant's conviction for possession of marijuana due to insufficiency of the evidence, holding that "there was no corroborating evidence associating the defendant with the contraband." *Wolski*, 27 Ill. App. 3d at 528-29.

We find *Wolski* distinguishable. In this case, as in *Wolski*, police found contraband in an area the defendant shared with another person. But no evidence in *Wolski*, apart from use of the apartment, connected the defendant to the marijuana. In this case, when the parole agents arrested Timothy in the apartment, he smelled of marijuana, and he had marijuana in his urine. Therefore, corroborating evidence connected Timothy to the contraband. A rational trier of fact could infer that Timothy knew about all of the marijuana in the room where he slept, including the large bag of marijuana in the second dresser. If he knew about all of the marijuana in the room, a rational trier of fact could also infer that he knew about the bullets in the drawer in close proximity with the bag of marijuana, and that he knew about the firearm, with a chamber that accommodated some of the bullets, that police found in a different drawer of the same dresser. Accordingly, considering the evidence in the light most favorable to the prosecution, we find that the prosecution sufficiently proved that Timothy knew about the firearm, the bullets, and the large bag of marijuana, and therefore the evidence supports the convictions for possession of marijuana and for possession of the firearm.

#### Constitutionality of the Armed Habitual Criminal Statute

This court recently decided *People v. Davis*, No. 1-09-1973 (Ill. App. March 31, 2011), a case in which the defendant questioned the constitutionality of the armed habitual criminal statute. In *Davis*, the police found the defendant in possession of guns. He admitted that he had prior

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convictions for two felonies which qualified him as a habitual criminal for purposes of the armed habitual criminal statute. He argued that the statute violated his constitutional right to bear arms. We held that the statute placed a burden on the right to bear arms, and therefore we needed to apply intermediate scrutiny to determine whether the statute violated the constitution. *Davis*, No. 1-09-1973, slip op. at 3. Because we found that the legislature has an interest in protecting the public from the dangers posed by felons in possession of firearms, and the statutory restriction fit proportionately with that interest, we held that the armed habitual criminal statute did not violate the second amendment. *Davis*, No. 1-09-1973, slip op. at 4-5. We see no relevant distinction between this case and *Davis*. Accordingly, we adhere to our holding in *Davis*.

#### UUWF

We cannot review the conviction for UUWF because the trial court did not impose a sentence on that count. See *People v. Ramos*, 339 Ill. App. 3d 891, 906 (2003).

#### CONCLUSION

In this case, because Timothy slept in the room where police found the contraband, and Timothy's urine indicated recent use of some of that contraband, we find that the evidence supports the convictions for possession of more than 30 grams of marijuana and for violation of the armed habitual criminal statute.

Affirmed.