2012 IL App (2d) 110578-U
No. 2-11-0578
Order filed October 19, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-156
CHRISTOPHER D. ALLEN,	)	Honorable Michael P. Bald,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

Held: (1) Evidence was sufficient to support the defendant's conviction for possession with intent to deliver; (2) argument that trial court erred in not further instructing jury was waived under doctrine of invited error or acquiescence; and (3) defendant's attorney's decision not to request further jury instruction was not ineffective assistance.

¶ 1 Following a jury trial, the defendant, Christopher Allen, was acquitted of resisting a police officer and convicted of possessing between 500 and 2000 grams of cannabis with intent to distribute. He was sentenced to 90 days' imprisonment, probation, and a fine of $1,500. He appeals, arguing that the evidence of his possession of the cannabis was insufficient to support a conviction,

and that the trial court erred (and his attorney was ineffective) in failing to give a supplemental jury instruction regarding the meaning of "possession." For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On June 18, 2009, the defendant was charged with resisting or obstructing a peace officer (720 ILCS 5/31-1 (West 2008)) and possession with intent to deliver between 500 and 2000 grams of cannabis (720 ILCS 550/5(e) (West 2008)). A jury trial on these charges commenced on December 13, 2010. The evidence presented at trial was as follows.

¶ 4 Freeport Police Officer Aaron Haas testified that he was on patrol at about 10:15 p.m. on the evening of May 12, 2009, when he saw a car ahead of him signal to turn left but instead turn right. Haas activated the flashing overhead lights on his marked patrol car and attempted to catch up to the vehicle. The vehicle Haas was following came to a stop in front of 218 East Iroquois. As Haas pulled up behind the vehicle, the driver got out and ran into the opening between 218 East Iroquois and the building next to it, 214 East Iroquois. Haas was located about 20 to 21 feet away from the driver and had his car headlights on and his police spotlight trained on the driver as the driver got out. According to Haas, when the driver looked toward him briefly, Haas recognized him as the defendant, whom he knew from "more than 50" previous contacts. The defendant was wearing white shoes with black markings and was cradling his left arm or hand under his jacket as he ran.

¶ 5 Haas ran after the defendant but lost sight of him as he rounded a corner of 218 East Iroquois. While Haas ran to where he had last seen the defendant, he heard a chain link fence rattle and then saw the defendant running across the playground of a nearby community center. Unable to catch up with the defendant, Haas walked back across the street, trying to keep the defendant in sight, and radioed the information to other officers. Haas and another officer set up a perimeter and searched

the playground but did not find anyone. About five minutes after he had lost contact with the defendant, Haas went to the area where, based on the direction of the defendant's flight and the rattling noise, he believed the defendant had climbed the fence. Near that area, on the west side of 214 East Iroquois, Haas found one white and black Nike men's shoe and three large blue ziplock bags, each containing a good-sized chunk of what appeared to be cannabis. He took pictures of the items on the ground and then collected them.

¶ 6 Haas then went with other police officers to the home of Vernita Allen, the defendant's mother, who lived in 218 East Iroquois. Ms. Allen allowed the police to search her home. Upstairs in the home, the police found a large blue ziplock bag containing traces of a plantlike material. (The contents of this bag were never tested.)

¶ 7 The vehicle was owned by L.C. Allen, the defendant's brother. In it, the police found a cell phone and a letter from three years earlier addressed to the defendant at another address. On June 18, 2009, a little more than a month after the incident, Freeport Police Officer Timothy Weichel saw the defendant in the same vehicle. The defendant was arrested at that point.

¶ 8 Various other witnesses for the State testified to the chain of custody of the suspected cannabis and the three blue ziplock bags that had been found outside. The material from the three bags was weighed at approximately 450 grams per bag. A forensic scientist at the Illinois State Police laboratory tested material from the first two bags and it tested positive for cannabis. He did not test the material in the third bag. At trial, Haas testified that, in his experience with drug-related arrests, this amount of cannabis was not consistent with personal use and was consistent with an intent to distribute.

¶ 9 A different forensic specialist tested the three ziplock bags for fingerprints. He found fingerprints matching the defendant's on the first and third of the bags. He admitted, however, that he could not determine when the defendant had handled the bags.

¶ 10 Finally, the audio-video recording of the traffic stop was played for the jury. Although the DVD of the recording is not contained in the record on appeal, it appears from the witnesses' testimony and the attorneys' comments that the sequence of events on the DVD generally corroborated Haas's account. The comments also suggest that in the recording it was difficult to see the person who got out of the car. However, Haas testified that there was a significant difference between the quality of the recording and his own ability to see the driver of the car, which was better.

¶ 11 After both sides rested, the trial court and the attorneys went over the proposed jury instructions. The great majority of the proposed instructions were uncontroversial. The sole exceptions were the State's two proposed instructions based on number 4.16 of the Illinois pattern jury instructions for criminal trials. The first paragraph of that instruction contrasts actual possession with constructive possession, while the second paragraph defines joint possession:

> "**4.16 Possession**
>
> (1) Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing [either directly or through another person].
>
> (2) If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession." Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (IPI 4.16).

The State tendered each of these paragraphs as separate proposed jury instructions. The defense objected to both of them. Although the trial court initially ruled that the first paragraph of IPI 4.16 could be given, it reconsidered after hearing vigorous argument from the defense, as follows:

> "THE COURT: *** Next is People's Instruction Number 9A. IPI Criminal 4.16 [']possession may be actual or constructive.[']
>
> MR. LEE [Defense counsel]: I object to this one, Judge. I don't think it fits the evidence.
>
> THE COURT: All right, Mr. McClanathan.
>
> MR. MC CLANATHAN [Prosecutor]: Well, Your Honor, it's out of the IPI in regards to—one of the issues is in regards to possession and frankly I don't know how the arguments are going to go one way or another but we had—with the evidence we had in this instance in regards to the allegation was at one point he possessed it and then also there was—it is alleged that he dropped it at one point. I mean I just think the information going toward the possession is instructive and relevant to what we have in front of us.
>
> THE COURT: [First summarizes the evidence regarding the bags of cannabis or plantlike material and the fingerprints.] ***I'm going to give this as indicated here. The [Committee] notes indicate [']give paragraph only when there is an issue as to whether the defendant was in constructive possession.['] Here where it was located after the initial sighting, these were found in an area alongside of a house. I think it is appropriate so I will give instruction 4.16 which is People's Instruction 9A over objection of the defense.
>
> MR. LEE: Could I address that just briefly, Judge?
>
> ***

THE COURT: Yes, you may, go ahead.

MR. LEE: I think actually [*sic*] ends up being a confusing instruction because this really isn't a constructive possession case. We know what that is, a constructive possession case. We frequently see it. You know, there is something in the car under the driver's seat and we understand what's being explained. The case that's been presented to this jury is this individual possessed this item and ran with it. And I don't think the fact that the—he was—it was found ultimately in a different place than him necessarily brings us back to constructive possession. I think we're still talking about literal possession and I really think it is confusing to enter an abstract concept like constructive possession into the facts of this case. I just don't think it fits so I would continue my objection.

THE COURT: All right. Do you want to respond to that, Mr. McClanathan, at all?

MR. MC CLANATHAN: Don't have much response. I do believe that 20 or 14 or 18 seconds or whatever before it is an issue of actual possession at that time. Given the proximity—well, I won't argue other than I previously argued. But I mean I just rest on that. I mean outside of what I previously stated I don't believe that it is unduly confusing based on what we have here in front of us today but I'm not going to rehash that.

THE COURT: Just a moment. And I appreciate what you're saying. I know exactly what you're talking about because you can have it and exert control over it without having actual possession and I appreciate that. Just a moment. Let me read the entire committee note here.

It says to give paragraph 1 only when there is an issue as to whether the defendant was in constructive possession which is not—yeah here. Upon reconsideration of this, I

agree with the defense. Constructive possession is not really an issue here. It is whether there was direct possession and whether the defendant chose to lose the direct possession at a given point or not and there will be arguments in regard to that so after reconsideration I'm going to deny 9B, IPI Criminal 4.16. The argument is well taken so I'm going to sustain the objection to that.

***

Was it 9B? No 9A, 9A excuse me. 9A will be the one that is refused by the Court."

After the defense similarly objected to the State's proposed instruction based on the second paragraph of IPI 4.16, the trial court also refused to give that instruction. No definition of "possession" was included in the instructions ultimately given to the jury.

¶ 12 The State's closing argument, which was primarily a simple summary of the evidence presented, was directed almost entirely toward the charge of possession with intent to distribute. The defendant's closing addressed both charges. As to the possession with intent charge, the defendant's argument focused primarily on the assertion that the State had not proved that whoever dropped the bags of marijuana had the intent to distribute or sell that marijuana. The defendant noted that the marijuana was not packaged in the smaller bags typically used for distribution. Rather, the sole evidence of intent to distribute was Haas's testimony that the quantity of marijuana (about 30 ounces total, according to the defense attorney) was large enough that it was more consistent with distribution than personal use. As to the charge of resisting a police officer, the defendant argued that the DVD showed that the visibility on the night of the incident was so poor that Haas could not have recognized his own brother, let alone recognized the driver of the car as the defendant. In rebuttal, the State argued that when the evidence was viewed as a whole it was more than sufficient

to show both intent to distribute and Haas's ability to identify the driver of the car, and to support a conviction on both charges.

¶ 13 During the jurors' deliberations, they sent three notes to the judge, the first two of which are not relevant here. The third note read: "Define possession according to the law?" The trial court invited the views of the attorneys as to how it should respond. Defense counsel stated that the Committee Note for IPI 4.16 advised not to offer an instruction defining possession unless either constructive or joint possession was at issue. He also opined that it was "too late in the process to add an instruction" and argued that it would be inappropriate to provide the jury with any guidance on the definition of possession. The State indicated that it was "not sure regarding the timing" and pointed out that the reason no instruction defining possession had been given earlier was because of the defense counsel's objections.

¶ 14 The trial court initially commented that trial judges were urged to give jurors definitions where possible: "if the jury is looking for definitions and definitions are available we are to try to do our best to assist them with that." The trial court then reviewed the various definitions of possession contained in the two paragraphs of IPI 4.16, and also IPI 4.15, which defines voluntary possession (as distinct from unknowing possession). The court determined that neither the definition in IPI 4.15 nor that in the second paragraph of IPI 4.16 were appropriate, but suggested giving the definition contained in the first paragraph of IPI 4.16. Defense counsel strongly objected, arguing that constructive possession (the subject of the first paragraph of IPI 4.16) was not an issue in the case and that providing the jurors with the proposed paragraph would only confuse them and invite them to "make a decision based on misinformation."

¶ 15 The State agreed that the case involved only actual possession, not constructive possession, but pointed out that the jury had asked for guidance. On second thought, the trial court agreed that the case did not involve any issues of constructive possession and so the first paragraph of IPI 4.16 would not be appropriate. It then suggested that it would consult a dictionary to see if it might have a helpful definition of possession. Defense counsel stated that he did not believe that there was any magical definition of possession, and that possession is "what we understand it to be."

¶ 16 The trial court gave the attorneys time to see if they could find any case law. Reconvening, the State had been unable to find any case law and had simply looked at "the IPI." Defense counsel argued vigorously that the first paragraph of IPI 4.16 should not be given, especially as the Committee Note advised not to give that paragraph unless constructive possession were an issue in the case. The trial court described a case it had found suggesting that it would not be appropriate to give IPI 4.16 under the facts of this case. It concluded, "As far as the actual legal definition of possession I think it probably behooves me to indicate that there is not a legal definition just of possession in and of itself" and to tell the jurors to "return to their deliberations." Defense counsel agreed with this approach, saying, "I think that's necessary" and that "I can't think of any other solution." The trial court then called in the jury and told them that "as far as the word possession itself, there is no further instruction within the statutes that is available," that "[i]t means whatever it means to you as far as possessing and having something," and that the court was not able to give further instruction on the question.

¶ 17 The jury found the defendant guilty of possession with intent to distribute and not guilty of the charge of resisting a police officer. The defendant filed a motion for a new trial in which he did not raise any issue relating to the jury instructions. The trial court denied the motion and sentenced

the defendant to 90 days' imprisonment, three years of probation, and a fine of $1,500. The defendant filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendant argues that the evidence was insufficient to support his conviction. He also challenges the trial court's failure to instruct the jury on the definition of "possession," arguing that this amounted both to trial court error and ineffective assistance of counsel. We take each argument in turn.

¶ 20 Sufficiency of the Evidence

¶ 21 The defendant argues that he was not proven guilty of the possession charge beyond a reasonable doubt. His reasoning is that his acquittal on the charge of resisting a police officer must have meant that the jury did not find that the State had proved that he was the driver of the car, who fled from Haas. He argues that the same lack of proof of identity applies to the possession charge as well, fatally undermining it. He points out that, absent Haas' identification of him as the driver, his sole link to the drugs found at the scene were his fingerprints on two of the blue ziplock bags. He asserts that these fingerprints, standing alone, are insufficient to show that he possessed the drugs because there was no proof of how or when the fingerprints got on the bags.

¶ 22 In evaluating the sufficiency of the evidence, it is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question 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.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be

drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. This standard applies whether the evidence is direct or circumstantial and whether the verdict is the result of a jury trial or a bench trial. *People v. Cooper,* 194 Ill. 2d 419, 431 (2000).

¶ 23 Here, the defendant's argument is unsuccessful because its initial premise is flawed: the jury's acquittal of him on the charge of resisting an officer does not compel the conclusion that the State failed to prove that the defendant was the driver of the car Haas stopped. Rather, the acquittal could rest on the jury's belief that some other element of the charge was not proven. It is not possible for a court, after the fact, to enter the mind of the jurors and determine why the jury reached the verdict that it did. See *People v. Reed*, 396 Ill. App. 3d 636, 647 (2009) (citing *United States v. Powell*, 469 U.S. 57, 65 (1984)). Perhaps the jury did not understand that fleeing a police stop could be considered resisting—the jury instructions did not define the phrase "knowingly resisted or obstructed," and Haas did not testify that he ever told the defendant to stop. Moreover, the State did not explain, either in its opening or its closing, that fleeing constitutes resistance. It is also possible that the jury improperly decided to exercise lenity on this charge despite believing the defendant to be guilty. In short, we cannot know the basis for the jury's decision to acquit on this charge, and it would be error for us to make assumptions about that basis. *Id*. at 648 (it would be "pure speculation" to try to determine what the jury was thinking). Where, as here, the two verdicts are not necessarily inconsistent, there is no basis for disregarding any portion of the evidence in assessing the sufficiency of the evidence supporting the defendant's conviction for possession with intent. *Id*. at 649.

¶ 24 Thus, we consider all of the evidence in evaluating whether that evidence adequately supported the defendant's conviction. In order to sustain the charge, the State was obliged to prove that the defendant knowingly possessed with the intent to deliver a substance containing cannabis that weighed more than 500 and less than 2000 grams. 720 ILCS 5/550(e) (West 2008). On appeal, the sole element that the defendant challenges is whether the marijuana was shown to have been in his possession. The evidence presented here included, *inter alia*, Haas's identification of the defendant as the person who fled from him at the scene of the stop; Haas's discovery, in a spot near the defendant's path of travel, of the three blue ziplock bags containing almost 1500 grams of cannabis; and the presence of the defendant's fingerprints on two of those bags. This evidence was sufficient to permit a rational jury to convict the defendant of possession with intent to distribute.

¶ 25 Arguments Relating to the Jury Instructions

¶ 26 The defendant next raises two arguments with respect to the jury's note asking for a definition of "possession": that the trial court erred in failing to provide such a definition, and that the defendant's counsel provided ineffective assistance because counsel did not seek to have the jury provided with a supplemental instruction on the meaning of "possession."

¶ 27 The defendant has waived the first argument under the doctrine of invited error, or acquiescence:

> "[A] party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (citing

McMath v. Katholi, 191 Ill. 2d 251, 255 (2000) and *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000)).

Here, defense counsel argued vigorously throughout the trial that no definition of "possession" should be given to the jury. Counsel first argued this position during the jury instruction conference, and succeeded in convincing the trial court to refuse the State's proffered instructions that would have provided some definition of that term. Counsel then argued, in response to the jury's note, that the jury still should not be given any definition of "possession" and instead should be told that possession was whatever they understood it to be, saying that that course of action "was necessary." The trial court adhered to the defense counsel's position in responding to the jury's notes, and thus the defendant cannot complain about its action now. "When a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that the trial court's answer was an abuse of discretion." *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010). (This type of waiver, which occurs through a defendant's affirmative acquiescence, is different than a forfeiture that occurs when a defendant fails to bring an error to the trial court's attention, and is not subject to the plain error doctrine. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011) (citing *People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004))).

¶ 28 The defendant argues that, regardless of the actions of his counsel, the trial court had a duty to respond to and clarify the jury's questions. In support of his argument, the defendant cites *People v. Childs*, 159 Ill. 2d 217, 229 (1994), *People v. Chatman*, 381 Ill. App. 3d 890, 903 (2008), and *People v. Coots*, 2012 IL App (2d) 100592. However, all of these cases are distinguishable. *Childs* did not involve invited error. To the contrary, in *Childs* the trial court had responded *ex parte* to the jury's note (by refusing to answer the jury's question) and the defendant had had no opportunity to

be heard. *Childs*, 159 Ill. 2d at 234 (emphasizing the importance of the defendant's "absolute right" to be participate in formulating a response to a jury's question). Similarly, in *Chatman*, the defendant objected to the trial court's decision to instruct the jury on self-defense. Here, by contrast, the defendant not only participated in the conference regarding the proper course of action after the jury sent out its note, but—far from objecting to an instruction—actually argued for the course of action that the trial court ultimately adopted. In *Coots*—a case where the defendant *had* acquiesced in the trial court's refusal to give a jury further instructions in response to its question about the meaning of a term—this court held that the defendant could not argue that the trial court erred and instead addressed the issue as one of potential ineffective assistance of counsel. *Coots*, 2012 Ill. App (2d) 100592 at ¶ 51. Thus, none of these cases supports the proposition that a defendant can argue trial court error on appeal even though he argued in favor of the trial court's action at trial. Rather, "[i]n a situation like this, where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel." *Bowens*, 407 Ill. App. 3d at 1101.

¶ 29 We therefore turn to the defendant's argument that his counsel was ineffective when he failed to seek (and indeed argued against) the giving of a supplemental instruction defining "possession" after the jury sent out a note requesting such an instruction. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant arguing ineffective assistance of counsel must show not only that his counsel's performance was deficient but that he suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient

performance, there is a reasonable probability that the result of the proceeding would have been different." *Houston*, 226 Ill. 2d at 144. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 30 In evaluating whether a defendant's counsel performed in a deficient manner, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Indeed, so long as counsel has thoroughly investigated the law and facts relevant to the issues in the case, counsel's strategic choices "are virtually unchallengeable." *Id*. at 690.

¶ 31 Here, the defendant argues that his attorney's decision not to ask that a definition of "possession" be given in response to the jury's note was objectively unreasonable, citing *Coots*, in which this court held that a defendant's counsel rendered ineffective assistance when he did not ask that the jury be instructed on the meaning of a term. *Coots*, 2012 IL App (2d) 100592 at ¶ 54. However, in *Coots* the jury's note indicated that they were confused on a complex issue of law—whether the term "deliver" simply meant "give" in the sense of "hand to someone" or required some additional affirmative act—and the case was extremely close. *Id*. at ¶ 53. In this case, however, the case was not especially close and the term at issue ("possession") had no special meaning. "When words in a jury instruction have a commonly understood meaning, the court need not define them with additional instructions." *People v. Sanchez*, 388 Ill. App. 3d 467, 477-78 (2009); see also *Averett*, 237 Ill. 2d at 24 (trial court need not answer a jury question when the jury instructions are "readily understandable and sufficiently explain the relevant law"). Accordingly, where a term such as possession is used in the ordinary sense of the word, the trial court does not

abuse its discretion by determining that no further instruction on the term is necessary, and a defense attorney does not act unreasonably by acquiescing to that determination. *Averett*, 237 Ill. 2d at 25.

¶ 32 Further, it was not unreasonable for the defendant's attorney to conclude that defining "possession" would not be desirable as a matter of trial strategy. The defense strategy was plain: to attack as unreliable Haas's identification of the defendant as the person who ran from the scene, and to argue that, even if the cannabis found in the three blue ziplock bags had been discarded by the defendant, the amount of cannabis in those bags was consistent with personal use, not an intent to distribute. This strategy, which was based upon counsel's assessment of the strength of various pieces of evidence, was not objectively unreasonable. Counsel could reasonably conclude that this strategy would be undermined by shifting the focus to the less-viable issue of whether the defendant "possessed" the bags of cannabis despite discarding them. See, *e.g.*, *People v. Clark*, 406 Ill. App. 3d 622, 631 (2010) (affirming conviction of possession with intent to distribute where defendant discarded bags of heroin as he ran from police). Accordingly, defense counsel's performance, which was based on a reasonable trial strategy, was not deficient. As the first prong of the *Strickland* test was not met, we need not consider whether the defendant was prejudiced by his counsel's actions. *Strickland*, 466 U.S. at 687. We reject the defendant's argument that he received ineffective assistance of counsel because the jury should have been instructed on the definition of "possession."

¶ 33 CONCLUSION

¶ 34 For all of the foregoing reasons, we affirm.

¶ 35 Affirmed.