

assistance of counsel when trial counsel elicited damaging inadmissible hearsay evidence. We affirm.

¶ 3 Defendant was charged with committing the following offenses: armed habitual criminal, armed violence, possession of a controlled substance with intent to deliver, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon.

¶ 4 At trial, Officer Matthew McGrory testified that he conducted a narcotics surveillance from the second floor of an abandoned two-flat building at 4720 West Huron on February 3, 2010. McGrory positioned himself in a room, with one window facing east and the other facing south, where he could see the entire block of 4700 West Huron. McGrory was assisted by enforcement officers Matthew Bouch and Brian McHale, who were located on the 4700 block of Ohio, approximately a block away from the surveillance location. McGrory testified that around 11:50 a.m. he looked out the window and observed an unknown individual approach co-defendant Brain Elmore¹ and give him an unknown amount of money. Elmore then walked across the street to 4723 West Huron, retrieved a bag, and removed an item from the bag. Elmore then returned to 4720 West Huron, and gave the item to the individual. McGrory believed that he was observing an illegal narcotics transaction. He observed Elmore participate in a total of three separate transactions.

¶ 5 Shortly thereafter, McGrory observed defendant and co-arrestee Antonie Patrick walk toward 4720 West Huron. Defendant was carrying a black and blue fabric bag. Defendant walked to 4709 West Huron, and hid the fabric bag between the front porch and a garbage can. He then removed a black plastic bag from the same area and placed this bag on the east side of the porch, concealing it in the snow. Defendant then returned to 4720 West Huron. On two

¹ Elmore was convicted following a simultaneous but severed bench trial and currently has an appeal pending before this court in case number 1-11-3781.

separate occasions, an unknown person approached defendant and gave him an unknown amount of money. Defendant would then walk to 4709 West Huron, retrieve an item from the plastic bag, and return to 4720 West Huron to deliver the item to the person who paid him. McGrory believed that defendant was conducting illegal narcotics transactions.

¶ 6 On cross-examination, defense counsel asked what Patrick was doing during the transactions, McGrory responded that Antoine Patrick was yelling out "leaf, leaf" to passing vehicles. McGrory testified that "leaf" is a street term for PCP leaf materials.

¶ 7 McGrory testified that while he was observing defendant, he was also observing Elmore. He observed each of the five alleged narcotics transactions involving both men with his binoculars, and admitted that when he was using his binoculars to observe the transactions involving Elmore, he was unable to see what was happening with Armstrong. He testified that he was moving back and forth between the window facing south and the window facing east. After about 25 minutes of observing the men, McGrory radioed Bouch and McHale and gave them physical descriptions of defendant, Elmore, and Patrick. Bouch and McHale immediately drove to 4720 West Huron and detained the three men. McGrory directed Bouch to the side of the front porch at 4709 West Huron, and directed McHale to keep an eye 4723 West Huron. He then broke surveillance and went to 4723 West Huron, where he had observed defendant Elmore retrieving objects, and recovered 23 Ziploc bags of suspected heroin enclosed in one large Ziploc bag.

¶ 8 Officer Matthew Bouch testified that after he detained the three men, McGrory positively identified them as the individuals engaged in the suspected drug transactions. McGrory directed Bouch to where he had seen defendant place the black and blue fabric bag and the black plastic bag. Bouch recovered a Taurus .38 special revolver loaded with four live rounds from the fabric bag. He recovered 39 Ziploc bags, each containing a tinfoil packet of PCP, from the plastic bag.

¶ 9 Officer Brain McHale testified that after arresting the three men, they were transported to the 11th district police station. He performed a custodial search and recovered \$355 from defendant, \$76 from Elmore, and \$79 from Patrick. He also inventoried the 39 tinfoil packets of PCP, the loaded gun, and the 23 Ziploc bags of heroin.

¶ 10 Martinique Rutherford, a forensic scientist with the Illinois State Police, testified that 29 of the 39 tinfoil packets that Officer Bouch recovered tested positive for PCP and weighed 10.2 grams. He estimated that the 39 packets weighed 13.7 grams.

¶ 11 The court found defendant guilty of armed habitual criminal, possession of a controlled substance with intent to deliver, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. The court commented that the State presented "a strong case of constructive possession" with respects to both the gun and PCP. Defendant was acquitted of the armed violence charge. After merging the two weapons offenses into the armed habitual criminal offense, the court sentenced defendant to two concurrent terms of six years in prison.

¶ 12 On appeal, defendant challenges the armed habitual criminal and possession of a controlled substance with intent to deliver convictions. He contends that the State failed to introduce sufficient circumstantial evidence to connect him to the plastic bag of PCP or the gun found near 4709 West Huron.

¶ 13 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact determines the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A conviction will only be overturned where the evidence is so improbable,

unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.

Beauchamp, 241 Ill. 2d at 8.

¶ 14 A person commits the offense of being an armed habitual criminal if he “receives, sells, possesses, or transfers any firearm” after having been convicted of at least two triggering offenses. 720 ILCS 5/24–1.7(a) (West 2010). Possession may be proven by showing that the defendant had actual or constructive possession of the weapon. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). To establish constructive possession, the State must prove beyond a reasonable doubt that defendant (1) had knowledge of the presence of the weapon, and (2) exercised immediate and exclusive control over the area where the weapon was found. *Id.* Constructive possession can be proven by circumstantial evidence. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). Mere access by other individuals is insufficient to defeat a charge of constructive possession. *People v. Scott*, 152 Ill. App. 3d 868, 871(1987). Here, defendant does not challenge his status as a felon. Therefore, the issue is whether the trial court properly found him in possession of the gun found near 4709 West Huron.

¶ 15 We conclude the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt for the offense of armed habitual criminal. The evidence revealed that when Officer McGrory first observed defendant he was carrying the black and blue fabric bag that was later determined to contain the gun. Defendant hid the bag shortly after arriving on the scene. It is reasonable to infer that purposefully concealing the bag indicated that defendant was aware of its illicit contents, and wanted to hide the contents from others. Additionally, evidence established that defendant exercised immediate and exclusive control over the area where he hid the bag because McGrory never saw anyone approach or go near the area where defendant concealed the bag. Defendant argues that the evidence was insufficient to convict him because once the bag was hidden, McGrory was unable to view the bag, and it could have been easily

accessible to a number of individuals. However, this argument fails because even if others did have access to the bag, mere access by other individuals is insufficient to defeat a charge of constructive possession. *Scott*, 152 Ill. App. 3d 868, 871. Although defendant notes that McGrory repeatedly lost sight of the bag, this affects only the weight to be accorded his testimony and was an issue for the trier of fact. Thus, we conclude the evidence was sufficient to find that defendant was in constructive possession of the gun, and guilty of the offense of armed habitual criminal.

¶ 16 To find defendant guilty of the offense of possession of a controlled substance with intent to deliver the State must prove the defendant (1) had knowledge of the presence of the narcotics; (2) had possession or control of the narcotics; and (3) intended to deliver the narcotics. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); (720 ILCS 570/402(c)(West 2010). The trier of fact can rely on reasonable inferences to determine knowledge and possession. *People v. Smith*, 191 Ill. 2d 408, 413 (2000). The element of “intent to deliver” is usually proven by circumstantial evidence, and several factors have been considered by Illinois courts as probative of such intent, including: the manner in which the drugs are packaged; the possession of weapons; and the possession of large amounts of cash. *Robinson*, 167 Ill. 2d at 408.

¶ 17 Here, the evidence was sufficient to establish every element of possession of a controlled substance (PCP) with intent to deliver. Shortly after defendant arrived on the scene, defendant retrieved the black plastic bag of PCP from an apparent hiding space, and then proceeded to conceal the bag again by hiding it in the snow. It can be reasonably inferred that defendant's retrieval and the subsequent hiding of the bag indicated defendant's knowledge of its contents. It is clear that defendant maintained control of the PCP because not only did defendant hide the PCP from others, he also returned to the area where the PCP was hidden on two separate

occasions to retrieve items from the bag. Thus, a rational trier of fact could find that defendant possessed the PCP found in the plastic bag.

¶ 18 The evidence is also sufficient to prove defendant had intent to deliver the PCP. Although there was no testimony as to whether the amount of PCP recovered was inconsistent with personal consumption, when a small amount of narcotics is recovered, “the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show an intent to deliver.” *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007). The officers recovered 13.7 grams of PCP, packaged in 39 clear Ziploc bags each containing an individual tinfoil packet of PCP. A rational trier of fact could infer that the manner in which the drugs were individually packaged indicates that defendant intended to sell the items. See *People v. Ballard*, 346 Ill. App. 3d 532, 541 (2004) (finding that 41 individually packaged doses of cocaine, in addition to other circumstantial evidence, was sufficient to establish that the drugs were packaged for sale.) In addition to the way the drugs were packaged, defendant arrived on the scene with a loaded gun, and after a custodial search, the police recovered \$355 in cash. These factors were highly probative of defendant's intent to deliver the PCP to others. Thus, the court properly found that defendant both possessed and intended to deliver the PCP.

¶ 19 Defendant also contends that his counsel was ineffective for eliciting inadmissible hearsay evidence which bore directly on an element of the offense and which the trial court specifically relied on in finding Armstrong guilty.

¶ 20 Ineffective-assistance-of-counsel claims are evaluated under the two prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Supreme Court of Illinois in *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective

standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687–94)). Decisions concerning what evidence to present on defendant's behalf ultimately rest with trial counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. It is well established that this type of decision is considered matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *Id.* A defendant must overcome the strong presumption "that the challenged action or inaction resulted from sound trial strategy, rather than incompetence." *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20. Reviewing courts are highly deferential to trial counsel on matters of trial strategy. *People v. Perry*, 224 Ill.2d 312, 344 (2007).

¶ 21 We need not consider whether the allegedly improper statements actually constituted inadmissible hearsay because we find the record reveals that trial counsel's decision to elicit the testimony was a result of reasonable trial strategy. On direct examination, Officer McGrory testified that Armstrong walked onto the block with co-arrestee Patrick. On cross-examination, the following conversation took place:

"Q. What do you recall the third person that was there also arrested for a misdemeanor, I think his name was Antoine Patrick. Does that sound right?

A. Yes

Q. What do you see Antoine Patrick doing during these 5 transactions?

A. Calling out 'leaf, leaf' to passing vehicles. Leaf is a street term for PCP leaf material.

Q. You see him standing out in this area and he's saying stuff?

A. Yes."

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¶ 22 During this exchange, it appears defense counsel's overall strategy was to cast doubt on Officer's McGrory's ability to observe all three individuals at the same time. He apparently introduced this line of questioning to Officer McGrory in an attempt to establish reasonable doubt as to whether he actually observed defendant hide the bag of PCP.

¶ 23 Furthermore, even if defense counsel did improperly elicit hearsay testimony, the court referenced ample properly admitted circumstantial and direct evidence to support defendant's conviction absent Patrick's statement. The allegedly unreasonable strategy of eliciting the line of questioning or error in not moving to strike the testimony only resulted in the admission of a limited statement. The credible testimony of Officer McGrory was enough to establish that defendant constructively possessed the PCP found by Officer Bouch. McGrory observed defendant engage in two separate narcotic transactions, and defendant was found with \$355 dollars on his person after a custodial search. A reasonable trier of fact could find beyond a reasonable doubt that defendant was guilty of possession of a controlled substance with intent to deliver without McGrory's alleged hearsay testimony. Thus, the properly admitted evidence was strong enough that no prejudice resulted from the admission of the limited statement of Patrick yelling "leaf, leaf."

¶ 24 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 25 Affirmed.