

No. 1-12-0741

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 6317
)	
RYAN BAILEY,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was proven guilty beyond a reasonable doubt of possession with intent to deliver more than 5,000 grams of cannabis when officers saw him throw a bundle of cannabis into an open box and 11 bundles from that box, weighing 5,002.9 grams, tested positive for cannabis. Defendant's sentence is not grossly disparate to those received by his codefendants when he was convicted after trial and they were sentenced pursuant to plea agreements.
- ¶ 2 Following a bench trial, defendant Ryan Bailey was found guilty of possession with intent to deliver more than 5,000 grams of cannabis, and sentenced to six years in prison. On appeal, Bailey contends that he was not proven guilty beyond a reasonable doubt because the State failed

to establish his knowledge and possession of the cannabis. He also contends that his sentence is grossly disparate because his codefendants were sentenced to probation. We affirm.

¶ 3

BACKGROUND

¶ 4 Bailey and codefendants, Jason Duda and Brandon Siczko, were indicted following a March 2010 incident during which officers recovered cannabis from 5113 North Lacrosse Street.

¶ 5 At trial, Officer Sterling Terry, a member of the package interdiction team, testified that in March 2010, the team intercepted two packages identified as box 6783 and box 4034, addressed to "Design Group" at 5113 North Lacrosse Street. Terry was present when box 6783 was opened. Fifteen plastic bags containing a crushed green substance, suspect cannabis, were discovered. Fourteen similar bags were discovered inside box 4034. The boxes were repacked with monitoring devices placed inside. These devices would indicate when the boxes were moved or opened. Terry dressed in a "delivery" uniform and drove to 5113 North Lacrosse Street. There, he placed the packages on a dolly and approached the building. When Terry asked Duda if the packages were for him, Duda indicated that they were, signed a delivery log, and took the boxes inside.

¶ 6 Officer Nick Lympers testified consistently with Terry regarding the contents of the boxes. Specifically, Box 6783 contained a cellophane-wrapped Tupperware container which held 15 plastic-wrapped bundles of cannabis. Lympers later provided primary surveillance when the packages were delivered. Around 20 minutes after the delivery, Duda and Siczko left the building and drove away. When they returned, one was carrying large Tupperware containers. Soon Bailey arrived and entered the building. Immediately thereafter, a monitoring device indicated that the boxes were being moved, and within a minute, a device indicated that a box had been opened. Lympers did not see where Bailey went after he entered the building or who opened the box.

¶ 7 The officers waited a few minutes before they entered the building. Once inside, Lymperis saw Bailey sitting on a couch. Bailey tossed a plastic wrapped bundle of cannabis into an open box in front of him. The Tupperware container containing cannabis was on the couch to Bailey's left. After Bailey, Duda and Sieczko were taken into custody, Lymperis located the boxes. Only one, box 6783, had been opened. The 15 items from box 6783 were inventoried.

¶ 8 Sergeant Brad Williams also testified that he saw Bailey throw a bundle of cannabis into a box on the floor. Williams later searched Bailey. This search recovered about 10 grams of cannabis in a plastic bag, a little over \$5,000, and money orders totaling \$6,000. During cross-examination, Williams acknowledged that he did not see Bailey open the package or unload anything, and did not know how the cannabis came to be in Bailey's hand.

¶ 9 Officer Vince Mancini testified that during a conversation with Bailey at the police station, Bailey stated that he opened the box, saw the "pot," and then officers entered the building. During cross-examination, however, Mancini acknowledged that a history of investigation document, written by his partner and prepared in connection with an asset forfeiture case, indicated that Bailey stated that (1) Sieczko showed Bailey two packages that were addressed to Sieczko, (2) Bailey told Sieczko to open the packages, (3) Bailey said it was "f*** great" when he opened the box and saw "pot," and (4) then the police arrived.

¶ 10 The parties stipulated that 11 of the 15 items recovered from box 6783 were analyzed. These 11 items weighed 5,002.9 grams and tested positive for cannabis. The parties also stipulated that the item recovered during the search of Bailey weighed 9.5 grams and tested positive for cannabis.

¶ 11 The defense then recalled Officer Lymperis who testified that after Bailey was informed of his *Miranda* rights, Bailey stated that he did not wish to speak at that time.

¶ 12 In finding Bailey guilty, the court stated that it gave Mancini's testimony little weight based on Lymperis's testimony that Bailey did not make a statement. The court found Bailey guilty of possession with intent to deliver more than 5,000 grams of cannabis and possession of more than 5,000 grams of cannabis. The court merged these counts for sentencing.

¶ 13 Bailey then filed a motion for acquittal or, in the alternative, for a new trial alleging, *inter alia*, that it was fundamentally unfair to find him guilty of a Class X felony when his more culpable codefendants were "out on probation." The motion requested the court vacate its guilty finding and consider a finding on the lesser-included offense of possession to avoid "grossly disparate" sentences. At a hearing on the motion, the State admitted that codefendants were sentenced to probation pursuant to plea agreements, but argued that this fact did not change Bailey's "standing" in terms of the charges that he faced. The trial court denied the motion, noting that Bailey had been convicted of a non-probationable offense, and sentenced him to six years in prison.

¶ 14 A. CONVICTION

¶ 15 On appeal, Bailey contends that the State failed to prove him guilty beyond a reasonable doubt because the State failed to establish his knowledge and possession of the cannabis. Specifically, Bailey argues that the State failed to establish that he actually possessed the cannabis he was seen throwing because there is no indication as to how he came to hold that cannabis, and absent his actual possession of that bundle, he cannot be held to have constructively possessed the cannabis in the Tupperware. Bailey argues that it is possible that one of his codefendants threw the bundle at him, *i.e.*, he lost a game of "hot potato."

¶ 16 In assessing the sufficiency of the evidence, the relevant inquiry is whether, 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 beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255,

272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (trier of fact's responsibility to determine appropriate weight to afford each witness's testimony, resolve any conflicts or inconsistencies in evidence, and draw reasonable inferences from testimony). A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 17 Bailey was convicted of possession with intent to deliver more than 5,000 grams of cannabis. To sustain a conviction for possession of a controlled substance with intent to deliver, the State must establish that defendant (1) had knowledge of the presence of the drugs, (2) had possession or control of the drugs, and (3) intended to deliver the drugs. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995).

¶ 18 Possession can be actual or constructive. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). Actual possession is established with evidence that the defendant exercised some form of dominion over the contraband, for example, by trying to conceal it or throw it away. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Constructive possession exists where there is an intent and capability to maintain control and dominion over the controlled substance. *McLaurin*, 331 Ill. App. 3d at 502. When contraband is found on a premises rather than on a defendant, constructive possession may be inferred from facts showing that (i) defendant once had physical control with intent to exercise control on his or her own behalf, (ii) defendant has not abandoned the contraband, and (iii) no one else has obtained possession. *McLaurin*, 331 Ill. App. 3d at 502. Evidence establishing constructive possession is often circumstantial. *McLaurin*, 331 Ill. App. 3d at 502.

¶ 19 The element of knowledge is rarely proved directly, rather, it is usually established by circumstantial evidence. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008). Knowledge may be established through a defendant's statements or actions, as well as by surrounding circumstances which support an inference that the defendant knew of the existence of the drugs in the place where they were found. *Bui*, 381 Ill. App. 3d at 419; see also *McLaurin*, 331 Ill. App. 3d at 502 (knowledge often proved by inferences drawn from surrounding circumstances, including defendant's actions, statements, and conduct). Knowledge and possession are questions of fact. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007).

¶ 20 Here, the trial testimony established through Officers Lympers and Williams that as officers entered the building, Bailey threw a bundle of cannabis into an open box on the floor. Thus, the evidence at trial established Bailey's actual possession of the bundle of cannabis in his hand. See *Love*, 404 Ill. App. 3d at 788 (actual possession established when defendant exercised some form of dominion over contraband such as throwing it away). Bailey's constructive possession of the cannabis in the Tupperware was established through his actual possession of the bundle in his hand which he threw into the box as well as the fact that the box was not opened until Bailey arrived with over \$11,000 in cash and money orders. All of these circumstances support a finding that Bailey was in constructive possession of the cannabis in the Tupperware. *McLaurin*, 331 Ill. App. 3d at 502.

¶ 21 Although Bailey correctly argues that no testimony indicated that he knew of the presence of the cannabis before he arrived, codefendants did not open the box until after Bailey arrived, Bailey threw the bundle he was holding into a box when officers entered the building, and Williams's search of Bailey recovered about \$11,000 in cash and money orders. Based on these circumstances, Bailey's knowledge of the cannabis may be inferred. See *McLaurin, infra*, 331 Ill. App. 3d at 502.

¶ 22 The mere fact that Bailey was an apparent visitor to the building does not necessarily overcome the inference of Bailey's knowledge and possession of the drugs. The exclusive dominion and control necessary to establish a defendant's constructive possession of a controlled substance is not negated by another person's access to the substance. *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009). When the facts indicate that other people also have a relationship to the contraband which constitutes possession, a defendant is not automatically vindicated, rather all individuals with access share joint possession of the contraband. *Ingram*, 389 Ill. App. 3d at 901. Any other outcome would allow a defendant to escape liability by inviting others to participate in the criminal enterprise. *Ingram*, 389 Ill. App. 3d at 901. Even were this court to accept the assertion that Bailey did not know about the cannabis before he arrived, an assumption that appears to be rebutted by the \$11,000 Bailey brought with him, Bailey is not vindicated; rather, it implies that Bailey and codefendants exercised joint possession of the cannabis. See *Ingram*, 389 Ill. App. 3d at 901.

¶ 23 Ultimately, Bailey essentially asks this court to accept his explanation for the circumstances, that is, he was in the wrong place at the wrong time. He argues that the facts of this case are equally "susceptible to an innocent explanation." But, a trier of fact is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51.

¶ 24 The trial court found the testimony of Lymperis and Williams to be credible and rejected defendant's theory of the case as evidenced by the court's finding of guilt; it is not the function of this court to retry defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, this court reviews the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable

doubt. *Ross*, 229 Ill. 2d at 272. The evidence at trial was not so improbable or unsatisfactory that it created a reasonable doubt as to Bailey's guilt, and consequently, we affirm the conviction. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 25

B. DISPARITY IN SENTENCING

¶ 26 Bailey next contends that his sentence must be reduced because it is grossly disparate from the sentences of probation received by his "more culpable" codefendants. In support of his contention, Bailey has attached certain circuit court records as an appendix to his brief which indicate that codefendants entered pleas of guilty to count three of the indictment, possession of cannabis with intent to deliver more than 500 but not more than 2,000 grams, and were sentenced to 24 months of probation. But, even were this court to take judicial notice of these records, Bailey's claim must fail.

¶ 27 Although similarly situated defendants should not receive grossly disparate sentences, a mere disparity in the sentences, in and of itself, is not sufficient to constitute a violation of fundamental fairness. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). A disparity in sentences will not be disturbed when it is warranted by the difference in the nature and extent of each defendant's participation in the offense (*People v. Caballero*, 179 Ill. 2d 205, 216 (1997)), and may be justified by a defendant's degree of culpability, potential for rehabilitation, or criminal history (*Spriggle*, 358 Ill. App. 3d at 455). In addition, a sentence imposed on a codefendant following the entry of a guilty plea does not provide a valid basis of comparison to a sentence imposed following a trial. *Caballero*, 179 Ill. 2d at 217. A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005).

¶ 28 Bailey was convicted, after trial, of possession with intent to deliver more than 5,000 grams of cannabis, a Class X felony with a sentencing range of between six and 30 years in prison. See 720 ILCS 550/5(g) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). His codefendants, on the other hand, were sentenced to probation after the entry of guilty pleas. Consequently, codefendants' sentences do not provide a valid basis of comparison to defendant's sentence. See *Caballero*, 179 Ill. 2d at 217; see also *People v. Portis*, 147 Ill. App. 3d 917, 926 (1986) (sentences reached as part of plea agreements cannot be basis for comparison with sentences reached following trial). In sentencing Bailey, the trial court correctly did not consider that codefendants were sentenced pursuant to plea agreements; rather, the court noted that Bailey was convicted of a non-probationable Class X felony, and sentenced him to the statutory minimum of six years in prison. This court cannot say that the trial court abused its discretion where it sentenced Bailey to the statutory minimum sentence. See *Patterson*, 217 Ill. 2d at 448.

¶ 29 CONCLUSION

¶ 30 The State met its burden and there is no basis to reverse or reduce Bailey's convictions. For the reasons stated above, the judgment of the Circuit Court of Cook County is affirmed.

¶ 31 Affirmed.